

Washington University Journal of Law & Policy

Volume 24 *Following Marriage*

January 2007

Family Structure, Children, and Law

Vivian E. Hamilton

The College of William & Mary School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Family Law Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 WASH. U. J. L. & POL'Y 9 (2007),
https://openscholarship.wustl.edu/law_journal_law_policy/vol24/iss1/3

This Essay is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

Family Structure, Children, and Law

Vivian E. Hamilton*

INTRODUCTION

The claim that “marriage is good for children” has long helped ground arguments for the institution’s extraordinary state support. But how sound is this empirically based claim and the normative conclusion drawn from it—namely, that marriage merits this extraordinary support? This Essay reviews recent studies in the social sciences and determines that the “marriage effect” on children is difficult to isolate and all too often vastly overstated. Thus the normative conclusion, inextricably linked to its supposed empirical premise, is deeply flawed.

Married couples in the United States enjoy significant economic and social privileges.¹ And the children of marital families reap the benefits of their parents’ privileged status. But approximately half of all children miss out on these benefits, since they are born into or will spend part of their childhoods in non-marital families.² Public policy

* Associate Professor of Law, College of William and Mary, Marshall-Wythe School of Law; J.D., Harvard Law School; B.A., Yale College. My sincerest thanks to Laura Rosenbury, Susan Appleton, and the editors of the *Washington University Journal of Law & Policy* for inviting me to participate in this symposium. Thanks also to John Frankenhoff for his valuable comments on an earlier draft and for his support.

1. See *infra* notes 6–15 and accompanying text.

2. Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income*, FUTURE CHILD., Fall 2005, at 57, 58; see also Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUD. 29, 29 (2000). The shares of children living apart from a parent are even higher among African American and Latino children. *Id.* at 35–36. The percentage of non-marital births to single African American mothers is even higher than the national average. See *id.* at 35. In 2002 68.2% of African American children were born into non-marital families. JOYCE A. MARTIN ET AL., NAT’L CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH & HUMAN SERVS., BIRTHS: FINAL DATA FOR 2002, at 49 tbl.13 (2003).

thus contributes—indirectly but surely—to the inequitable treatment of children based on the marital status of their parents.³

United States law has eliminated most legal impediments faced by children in non-marital families.⁴ As the Supreme Court stated in 1972, “[B]urdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.”⁵ Yet, in significant respects, our public policy is inconsistent with the spirit of this decades-old standard.

The state-supported privileges and other benefits of marriage are difficult to quantify, but they are vast.⁶ Economic perks annually

3. The Massachusetts Supreme Court, considering a challenge under the Massachusetts Constitution to the exclusion of same-sex couples from marriage, observed:

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth’s strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, . . . the fact remains that marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.

Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 956–57 (Mass. 2003).

4. At common law non-marital children held fewer rights than did marital children and held no rights of inheritance from either father or mother. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 278 (2d ed. 1988). Beginning in the late 1960s the Supreme Court considered—and generally invalidated—legal distinctions between non-marital and marital children. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (holding that a state cannot require a non-marital child, as a condition of inheriting via intestate succession from a non-custodial biological father, to demonstrate that his or her parents married after the child’s birth); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (holding that a state cannot grant to marital children a statutory right to paternal support and deny that same right to non-marital children); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 168–70 (1972) (permitting recovery by non-marital child for father’s death under the state worker’s compensation law); *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (holding unconstitutional a state statute denying recovery to non-marital children for the death of the mother). In *Trimble*, Justice Powell, writing for the majority, rejected the argument that a “State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.” 430 U.S. at 769.

5. 406 U.S. at 175. But the Court has not invalidated all differences in treatment between marital and non-marital children. *See, e.g.*, *Lalli v. Lalli*, 439 U.S. 259, 275 (1978) (holding that a state could require a non-marital child, as a condition of inheriting via intestate succession from a non-custodial biological father, to provide a judicial declaration of paternity).

6. *See Anita Bernstein, For and Against Marriage: A Revision*, 102 MICH. L. REV. 129,

include billions of dollars in direct federal payments,⁷ billions of dollars in federal tax benefits,⁸ state benefits that parallel those offered by the federal government,⁹ and billions of dollars in workplace-based benefits (including health and life insurance and pension benefits).¹⁰

Just as real, albeit even more difficult to measure, are the less tangible social benefits that attend civil marriage and benefit marital families.¹¹ It is an “esteemed institution,”¹² and membership in that institution confers “a marker of prestige.”¹³ Research suggests that

148–52 (2003); *see also Goodridge*, 798 N.E.2d at 955–56 (noting that a “marriage license grants valuable property rights” and listing some of the myriad statutory benefits granted legislatively to married couples); *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (listing multiple state-provided rights and benefits contingent upon marital status).

7. *See id.* at 166–69. Professor Bernstein notes, “The United States government subsidizes marriage through transfer payments and other supports that are not means tested. These payments constitute a reward that taxpayers as a group bestow on a class of individuals based solely on these persons’ being, or having been, married.” *Id.* at 167–68. She cites as examples Social Security transfer payments and Medicare. *Id.* at 169.

8. *Id.* at 169–72.

9. *Id.* at 169 n.185; *see also Goodridge*, 798 N.E.2d at 955–56 (noting that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death,” and partially listing state benefits conferred upon marital families).

10. Bernstein, *supra* note 6, at 172–75. Private-sector employment benefits, including health and life insurance, reflect a convention established by state-sponsored marriage. *Id.* at 172. These conventions are sometimes codified in both state and federal laws. *See id.* Federal law, for example, guarantees benefits to workers’ spouses that are underwritten by employers and unmarried workers. *Id.* at 174. Many such benefits are thus an example of what Bernstein terms “secondary effects” that result indirectly from state recognition of marriage. *Id.* at 172. She argues:

To the extent that employers would have chosen not to provide this insurance but feel compelled to follow this convention, spouses receive benefits that they would not receive but for the fact of their state-sponsored marriage. And to the extent that persons covered as spouses rather than employees obtain economic benefit from this coverage, fellow policyholders underwrite this benefit, providing an unexamined and unjustified transfer on the basis of marriage.

Id.

11. In a 1987 decision the United States Supreme Court noted the “other, less tangible benefits” generated by marriage. *Turner v. Safley*, 482 U.S. 78, 96 (1987); *see also Reynolds v. United States*, 98 U.S. 145, 165–66 (1878).

12. *Goodridge*, 798 N.E.2d at 954–55 (discussing the “nature of civil marriage itself” in a decision holding unconstitutional under the Massachusetts Constitution the denial of civil marriage to same-sex couples).

13. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 855 (2004). *See generally* Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 325–35 (2004) (analyzing the “expressive dimension” of

married couples receive more income and support from family and friends than do cohabiting couples.¹⁴ The government's contribution to the social benefits of marriage is less direct. But state recognition and economic privileging of marriage signals that the marital family is the preferred social arrangement. With this in mind, it is notable that some states that afford same-sex couples the material benefits of marriage, withhold from those couples the right to call their relationships "marriage."¹⁵

Part I of this Essay discusses the effect of family structure—state-favored and otherwise—on child well-being.¹⁶ That children growing up with continuously married parents enjoy material well-being and developmental outcomes superior to those of children raised in non-marital families is by now undisputed.¹⁷ Yet social scientists have tried to isolate and measure the causal effects of marriage *itself*, as opposed to those of other correlated factors, on child well-being and have found it difficult to do. Indeed, recent work suggests that advantages enjoyed by children living with married rather than cohabiting parents are almost entirely accounted for by other factors; the most significant are parents' education, race, and ethnicity.¹⁸

While the empirical studies discussed in Part I provide useful information, they leave unanswered important normative questions. To the extent that the state conditions receipt of certain benefits on marital status (rather than, say, on family need or on children's status as children), it must inquire whether its unequal contributions to

marriage and the message sent by associating oneself with the institution).

14. Wendy D. Manning & Susan Brown, *Children's Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & FAM. 345, 346 (2006).

15. Vermont and Connecticut have enacted "civil union" statutes for same-sex couples. See CONN. GEN. STAT. § 46b-38bb (2006); VT. STAT. ANN. tit. 15, § 1204 (2002). These statutes give same-sex couples all the state-provided benefits of marriage except the title "marriage." When the Massachusetts State Senate considered enacting legislation that would permit same-sex couples to form civil unions (but not civil "marriages") and receive all the tangible benefits of marriage, the Massachusetts Supreme Court, in an advisory opinion, stated that not only was it improper to withhold from same-sex couples the tangible benefits of marriage, but to designate their relationships as civil unions as opposed to civil marriages "would deny to same-sex 'spouses' only a status that is specially recognized in society and has significant social and other advantages." *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

16. See *infra* notes 20–59 and accompanying text.

17. See *infra* notes 22–25 and accompanying text.

18. See *infra* note 41 and accompanying text.

children and their families are justified. Part II examines this question and identifies and evaluates the state's interest in privileging marriage.¹⁹ This part first discusses generally the sorts of goals that are legitimate for a modern liberal state to pursue by recognizing and privileging marriage. It then discusses the state's primary interest in marriage. Borrowing from federal constitutional analysis, it concludes that the state's articulated goals may be legitimate, but using marriage as a means of furthering those goals is decidedly less so.

Because of the weaknesses of both empirical and normative arguments for helping children through marital privileging, the Essay concludes that better policy would be to allocate resources to children based on their status as children. Doing so would entail either minimizing or eliminating the allocation of resources to adult individuals based on their marital status.

I. THE EMPIRICAL QUESTION: WHAT IS THE EFFECT OF MARRIAGE AND FAMILY STRUCTURE ON CHILDREN'S WELL-BEING?

Many studies have found correlations between family structure and children's well-being. Most of these have compared children of divorce to children of continuously married parents,²⁰ but there is also enough general data to show that children raised in all kinds of non-marital families (both children of divorce and those born outside marriage) fare less well across a variety of measures than those raised in marital families.²¹ Children in non-marital families, for example,

19. See *infra* notes 60–115 and accompanying text; see also Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 3 n.15 (2000) (noting that the state values marriage, not for its own sake, but rather “instrumentally, for the benefits it brings to the individuals, to the individuals’ children, or to society generally”). In discussing the “state” generally, this essay refers to all state actors—federal, state, and local, as well as the legislative, executive, and judicial branches of government.

20. See, e.g., Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, FUTURE CHILD., Fall 2005, at 75, 77–78.

21. See *id.* at 75–96 (summarizing studies that compare the well-being and outcomes of children of marital families and children of divorced and never-married families); see also Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 852 (2005) (surveying social science literature and

are more likely to be poor than are children in marital families,²² to have relatively more behavioral and emotional problems,²³ and to drop out of high school at a higher rate.²⁴ Academics and policymakers across the political spectrum point to those outcomes to bolster the argument that the state should continue or increase its support of marriage and the marital family.²⁵

Researchers have found it difficult to isolate marriage from other factors that might explain differences in child welfare within families.²⁶ For example, many studies have examined how family

noting that “[i]n virtually every comparison done to date, children in nuclear families fare better on average than other children”); John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1020 (2001) (arguing that social science data support the conclusion that “[m]ost children reared in two-parent households perform better in their socialization, education, and development than their peers reared in single- or no-parent homes”). See generally DAVID POPENOE, *LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY* (1996); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

22. Thomas & Sawhill, *supra* note 2, at 63. Thomas and Sawhill note that:

Child poverty rates vary considerably across races, with children in white families much less likely to be poor than their black and Hispanic counterparts. . . . As a whole, children in lone-parent families are more than four times as likely to be poor as children in married-parent families, while children in cohabiting families are almost three times as likely to be poor as children in married-parent families.

Id.; see also Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247, 1256, 1259 (2000).

23. TAMARA HALLE, *CHILD TRENDS, CHARTING PARENTHOOD: A STATISTICAL PORTRAIT OF FATHERS AND MOTHERS IN AMERICA* 49 (2002).

24. SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 40–46 (1994).

25. See, e.g., William A. Galston, *Causes of Declining Well-Being Among U.S. Children, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE* 290, 294–305 (David M. Estlund & Martha C. Nussbaum eds., 1997); Wade Horn & Isabel V. Sawhill, *Making Room for Daddy: Fathers, Marriage and Welfare Reform*, in *THE NEW WORLD OF WELFARE* 421, 427–29 (Rebecca Blank & Ron Haskins eds., 2001); Daniel T. Lichter et al., *Is Marriage a Panacea? Union Formation Among Economically Disadvantaged Unwed Mothers*, 50 SOC. PROBS. 60, 61 (2003).

26. See, e.g., Lingxin Hao & Guihua Xie, *The Complexity and Endogeneity of Family Structure in Explaining Children's Misbehavior*, 31 SOC. SCI. RES. 1, 1–2 (2001) (“[G]iven the impossibility of experimental designs, it is difficult for researchers to distinguish between the ‘true’ effects of family structure and the effects of unmeasured confounding factors that are correlated with family structure.”); see also Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 879 (2003) (noting that shortcomings of earlier studies include limited samples and a narrow range of independent variables).

structure influences child well-being (these studies have compared children living with cohabiting adults with children living with their biological married parents), but this approach “confounds the effects of marriage [with those] living with two biological parents.”²⁷ And even when studies have demonstrated correlative relationships between family structure and child well-being, they have struggled to convincingly demonstrate a causal relationship.²⁸

Researchers conducting more recent studies have worked harder to demonstrate a marriage effect distinct from the effect of other factors.²⁹ In a number of studies, researchers have refined their methods, noting that “contrasting the well-being of [children] in married and cohabiting stepfamilies is more appropriate because these families share the same basic structure (biological mother and her cohabiting partner).”³⁰ They have included in their analyses additional variables that may explain some of the observed effects of family structure on child well-being.³¹ In one such study, for

27. See Manning & Lamb, *supra* note 26, at 878.

28. See, e.g., Bernstein, *supra* note 6, at 159; Wendy D. Manning & Susan Brown, *Children's Economic Well-Being in Married and Cohabiting Parent Families*, 68 J. MARRIAGE & FAM. 345, 359 (2006); Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889, 893–94 (2005).

29. See, e.g., Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213 (2003). Hofferth and Anderson, for instance, attempted to isolate the effect of marriage on children by comparing investments by fathers living with children and their biological mothers in several different family forms: married biological parents; unmarried biological parents; biological mother married to non-biological stepfather, and biological mother cohabiting with non-biological father figure. *Id.* at 215. Comparing unmarried biological fathers with married biological fathers, the data found no differences in the number of activities per week fathers participated in with their children, or in the number of hours per week the father was around but not actively engaging in activities with their children. *Id.* at 225–26 & 225 tbl.5. But the data showed that married biological fathers spent, on average, one hour more per week with their children than did unmarried biological fathers. *Id.* at 226 tbl.6. Moreover, unmarried biological fathers rated themselves as being less warm toward their children than did married biological fathers. *Id.* Hofferth and Anderson conclude that “children living with an unmarried biological father enjoy less direct engaged time and also experience less warmth than children of a married biological father.” *Id.* at 228. Hofferth and Anderson’s study does not, however, measure children’s material well-being or other outcomes.

30. Manning & Lamb, *supra* note 26, at 880.

31. *Id.* Manning and Lamb’s study included various measures of academic achievement (Peabody Picture Vocabulary Tests, school grades, college expectations); measures of parent characteristics (closeness to parents, parental monitoring of children); measures of socioeconomic status (family income, mother’s education); measures of family stability (number of mother’s marriages, duration of relationships); and sociodemographic and child

example, researchers observed that adolescents living with married rather than cohabiting stepfamilies enjoyed some advantages (although not consistently).³² But they concluded that many of the observed differences in behavioral and academic outcomes could be explained by the covariates in their models (including parenting characteristics, socioeconomic status, family stability, and race and ethnicity).³³

Another recent study bears discussion. Professors Wendy Manning and Susan Brown sought to update and improve upon earlier studies in their 2006 study, which compared the material well-being of children living in married families to those living in cohabiting families.³⁴ Their study drew from the most recent (1999) wave of data from the National Survey of America's Families (NSAF), with a sample size of 34,509 children.³⁵ To better isolate the significance of union status, they compared children who shared the same biological relationship to the adults in the household.³⁶ They contrasted children in married families with two biological parents versus cohabiting families with two biological parents, and children in married step-parent versus cohabiting step-parent families.³⁷ Manning and Brown also considered socio-demographic status. They included parents' age, education, and work hours,³⁸ and specifically

characteristics (race and ethnicity, mother's age, child's age and sex, number of children in household, importance of religion). Manning and Lamb note that, by including fewer independent variables, prior studies failed to "explore potential explanations about why children in cohabiting parent families fare differently than children in other family types, disentangling the effects of family structure from other factors." *Id.* at 879.

32. *Id.* at 885–90.

33. *Id.* at 886, 890.

34. Manning & Brown, *supra* note 28.

35. *See id.* at 349. Manning and Brown note that studies published as recently as 2002 rely on data that is now dated, and that some research using more recent data suffers from other flaws. *Id.* at 346. For instance, analyses using the 1990 Public Use Microdata Sample (PUMS) data reflected that the proportion of children living in cohabiting parent families who experience poverty was 32%. *Id.* at 357. The NSAF data reports that the proportion of children in cohabiting families who experience poverty has declined to 21%. *Id.* The decline has been most significant for white children living with cohabiting parents (from 24% to 11%), but less so for African American children (from 39% to 32%). *Id.* at 357–58. There has been no measurable decline in the proportion of Latino children experiencing poverty, with levels remaining unchanged at 32%. *Id.* at 358.

36. *Id.* at 348.

37. *Id.*

38. *Id.* at 350, 355 tbl.3.

examined (as opposed to merely controlling for, as other studies have done³⁹) racial and ethnic group variation.⁴⁰

Manning and Brown found, as have others,⁴¹ that children living with married biological parents experienced significantly higher levels of material well-being than did children living with cohabiting biological parents.⁴² All children did not benefit equally from marriage, however. White children benefit materially more from their parents' marriage than do either African American or Latino children.⁴³ Indeed, there was little economic advantage of marriage to Latino children at all.⁴⁴

In this analysis, Manning and Brown also found that race, ethnicity, and education accounted for the correlation between family structure and material well-being.⁴⁵ Among the economic well-being measures, parents' education and work hours explained the gap in poverty and high economic risk between white married and cohabiting biological parents.⁴⁶ Slight variation in food and housing insecurity according to marital status remained for white families; however, no similar marital benefit remained for African American and Latino children once parents' education was included in the

39. *Id.* at 346. Manning and Brown distinguish their study from others that failed to explicitly consider the importance of race and ethnicity when assessing cohabitation and child poverty, including Gregory Acs & Sandi Nelson, *Honey, I'm Home. Changes in the Living Arrangements in the Late 1990s*, ASSESSING THE NEW FEDERALISM POLICY BRIEF B-38, The Urban Institute (2001), available at <http://www.urban.org/url.cfm?ID=310310>, and Kurt J. Bauman, *Shifting Family Definitions: The Effect of Cohabitation and Other Nonfamily Household Relationships on Measures of Poverty*, 36 DEMOGRAPHY 315 (1999).

40. *Id.* at 348, 355 tbl.3, 351, 356 tbl.4. The researchers constructed separate models for African American, Latino, and white families. *Id.* at 348. Specifically examining race and ethnicity uncovers significant differences among white, African American, and Latino families in the relationships between family structure and material hardship. *Id.* Manning and Brown note that models that simply control for race and ethnicity mask important racial and ethnic differences in the relationships between family structure and material well-being. *Id.* at 354, 357. Manning and Brown cite another study finding that married white mothers experience less hardship than do white cohabiting mothers, but that African American and Latina married and cohabiting mothers experience similar levels of hardship. *Id.* at 348.

41. *See supra* notes 21–24.

42. *Id.* at 354.

43. *Id.* at 358.

44. *Id.*

45. *Id.* at 354, 358.

46. *Id.* at 357.

researchers' model.⁴⁷ Unobserved processes, such as support given to white marital couples by family members, may help explain why white marital families experience less food and housing insecurity even after parents' education and work hours are taken into consideration.⁴⁸

Overall, Manning and Brown's analysis showed that "the effects of family structure are reduced to nonsignificance with just the inclusion of parent[s'] education"⁴⁹ They concluded that "the

47. *Id.*

48. *See id.* at 346.

49. *Id.* at 354. The researchers note that increased work hours by parents are also associated with reduced poverty, but that child and parent characteristics (race and ethnic group and education) accounted for at least 70% of the difference in the well-being of children in two biological parent cohabiting versus married families. *Id.* A 2003 study examined the relationship between coming from a disadvantaged family background, unwed childbearing, completing high school, and experiencing adult poverty. Lichter et al., *supra* note 25, at 72–73. That study found that:

[O]nly a small portion of the association between having a disadvantaged family background and adult poverty operates through unwed childbearing, and most operates through educational attainment. From a policy standpoint, the implication is that improving educational outcomes for low-income children may be more likely to end intergenerational poverty than reducing unwed childbearing.

Id. at 73.

Another study, though not specifically related to marriage, highlights the importance of parental education (in this case maternal) to children's outcomes. Greg Pogarsky et al., *Developmental Outcomes for Children of Young Mothers*, 68 J. MARRIAGE & FAM. 332, 338–40 (2006). The authors examined the relationship between mothers' age at the onset of childbearing (as well as other mediating factors) and numerous developmental outcomes for children. *Id.* at 332–33. Of the mediating factors studied, it found the most significant to be low maternal educational attainment. *Id.* at 339–40. Low maternal education "statistically predicts unemployment, gang membership, and early childbearing by the boys . . . account[ing] for an average of 20% of the early first-birth effect across these outcomes." *Id.* at 340. The researchers concluded that "[f]ailure to complete formal education, one of the most central developmental tasks of adolescence, can compromise later employment, family formation, socioeconomic attainment, and family well-being." *Id.*

The study did not examine the effect of marriage on children's outcomes but it did examine the effect of changes in caregivers. *Id.* at 336, 340. Of the outcomes measured, caregiver transitions were statistically related only to girls' early childbearing (8% attributable to caregiver transitions). *Id.* at 339. Ineffective parenting predicted boys' drug use (27% attributable to parenting) and unemployment (6%). *Id.* at 339–40. Receipt of public assistance failed to predict any of the negative outcomes measured. *Id.* The study analyzed data from the Rochester Youth Development Study, an ongoing, intergenerational study of the families of 729 individuals who were adolescents enrolled in Rochester Public Schools in 1988. *Id.* at 332.

benefits of marriage may be a result of parents' education and race and ethnic group rather than marriage per se."⁵⁰

Their findings suggest the operation of selection processes⁵¹ whereby marital families are, for example, wealthier and better educated because wealthier, better-educated people are more likely to marry. These selection processes reverse the causal arrow between marriage and child well-being. Thus, the preexisting characteristics of some individuals make them more likely to marry, and their marital families are relatively more successful than are other families. But it is arguably the individuals' characteristics—rather than marriage itself—that are primarily responsible for their families' relative success.⁵²

50. Manning & Brown, *supra* note 28, at 358. For example, Manning and Brown found that for Latino families (who receive little economic benefit from marriage), married and cohabiting parents share similarly low levels of educational attainment. *Id.* White married parents, on the other hand, have much higher levels of education than do white cohabiting parents. *Id.* Thus, they reason:

[T]he gap in the economic well-being of White children living with married and cohabiting parents may partially result from the propensity for Whites with higher education levels to marry. In contrast, the similarity in the economic well-being of Hispanic children living with cohabiting and married parents perhaps reflects the weak association between education and marriage among this group.

Id.

51. See, e.g., Hao & Xie, *supra* note 26, at 6–7 (discussing selection mechanisms). Manning and Brown note that:

[O]ther unobserved processes, such as support from family and kin, decisions about the division of labor, and future security of relationships, also may be important mechanisms. To the extent that cohabiting partners represent potential spouses, policies that encourage movement into marriage may not result in as positive outcomes as observed among married parent families.

Id. at 358.

52. See *id.* at 358; see also Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, FUTURE CHILD., Fall 2005, at 117, 123; Thomas & Sawhill, *supra* note 2, at 57. Edin and Reed note the significantly lower marriage rate among poor men and women compared to the marriage rate of those better-off. Edin & Reed, *supra* at 123, 126–27. Poor men and women are about half as likely to marry as those with incomes equaling or exceeding three times the federal poverty level. See HALLE, *supra* note 23, at 49. And the marriage rates among the poor continue to decline. The marriage rate for poor men declined from 48% to 41% between 1999 and 2000; during the same period, the marriage rate for poor women declined from 37% to 33%. *Id.*

Edin and Reed argue that, although poor men and women highly value marriage, they believe that they are unable to meet the required financial stability and relationship quality necessary to sustain that relationship and avoid divorce. *Id.* at 123, 126–27.

That parents in cohabiting families have disproportionately low education levels supports the notion that selection processes contribute to differences between marital and non-marital families.⁵³ More than 25% of cohabiting mothers and 36% of cohabiting fathers have not earned a high school degree, whereas only 12% of married mothers and 13% of married fathers have less than a high school education.⁵⁴ We might then expect that cohabiting couples will have less income than married couples. Studies confirm this to be true: even assuming complete financial sharing, 23% of cohabiting biological parents experience poverty, compared to 7.6% of married biological parents.⁵⁵

Both poor and more advantaged individuals aspire to marriage and place high symbolic value on it.⁵⁶ But studies suggest that many unmarried individuals believe that it is necessary to be financially established prior to entering into marriage.⁵⁷ Unmarried individuals believe that the proper financial position for marriage requires something approaching a middle-class standard of living.⁵⁸ In one study, more than 74% of couples who aspired to marriage identified their financial situation as a barrier, even though 77% of them were already cohabiting.⁵⁹ Thus they defer marriage until they have reached certain economic goals. In other words, cohabiting couples are (at least in part) less economically well-off than are marital

53. Manning & Brown, *supra* note 28, at 351; Seltzer, *supra* note 22, at 125 (“Children whose parents cohabit are still more likely to be poor than children in married-parent families because of the age, education, and employment differentials between those who cohabit and those who marry.”).

54. Manning & Brown, *supra* note 28, at 351.

55. *Id.* at 352 tbl.1.

56. See Edin & Reed, *supra* note 52, at 119. See generally KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005); Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848 (2004); Kathryn Edin et al., *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 67 J. MARRIAGE & FAM. 1007 (2004).

57. See, e.g., Kathryn Edin, *What Do Low-Income Single Mothers Say About Marriage?*, 47 SOC. PROBS. 112, 117–19 (2000); Christina M. Gibson-Davis et al., *High Hopes, but Even Higher Expectations: The Retreat from Marriage Among Low-Income Couples*, 67 J. MARRIAGE & FAM. 1301, 1307 (2005); Pamela J. Smock et al., “*Everything’s There Except Money*”: *How Money Shapes Decisions to Marry Among Cohabitors*, 67 J. MARRIAGE & FAM. 680, 686–92 (2005).

58. See Gibson-Davis et al., *supra* note 57, at 1307–08.

59. *Id.* at 1307.

couples precisely because they postpone marriage until they are more economically well-off.

Similarly, commentators frequently note that cohabiting relationships are less stable than are marital relationships,⁶⁰ and some suggest that marriage itself causes stability in relationships (with, presumably, better results for children).⁶¹ But research suggests that individuals who cohabit aspire to marry but frequently view problems in their relationships as a barrier to their marriage.⁶² It thus appears that poor relationship quality causes individuals to avoid marriage, and once relationships are strong, the individuals marry.

There is a large literature that concludes that children of marital families enjoy better outcomes⁶³; but once extraneous factors are controlled for, the differences that might be said to be attributed to marriage itself are far from clear. A “marriage effect” indeed exists, but factors other than the supposed “magic bullet” of matrimony seem to explain most of the observed differences in the well-being of children in marital versus non-marital families.

II. THE NORMATIVE QUESTION: SHOULD THE STATE CONTRIBUTE TO MARITAL PRIVILEGING?

Federal and state governments privilege and support marital families. Children’s receipt of certain benefits, then, depends on their parents’ marital status. Unequal treatment of the two classes of child citizens—children of marital families versus children of non-marital families—should prompt this normative question: Do the state interests underlying the privileging of marital families justify providing less public support of some children? This Part begins to examine that question.

60. See Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 *POPULATION STUD.* 29, 33 (2000); Seltzer, *supra* note 22, at 1252.

61. See, e.g., Milton C. Regan, Jr., *Law, Marriage, and Intimate Commitment*, 9 *VA. J. SOC. POL’Y & L.* 116, 146–49 (2001); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 *VA. L. REV.* 1901, 1908–12 (2000).

62. Edin & Reed, *supra* note 52, at 123.

63. See *supra* notes 21–24 and accompanying text.

A. *The State's Interest in Privileging Marriage*

First, it is helpful to discuss the meaning of the “state’s interest in marriage.” Professor Brian Bix has noted that the phrase suggests governmental interest in the marital status of its citizens as an end in itself.⁶⁴ But he points out that it makes more sense to talk about the state’s interest in marriage as “largely instrumental [and reflecting] a belief that having citizens married . . . aids other goals.”⁶⁵ Understanding the state’s interest in marriage, then, requires an examination of the other goals that the state seeks to further through marriage. Those goals are not always easy to discern. At the risk of stating the obvious, it is difficult to ascribe a single intent or will to an institution comprising many individuals. Legislation, moreover, is not always transparent, and the government acts through various agents (legislators, administrators, public officials, and others), each of whom may have distinct views of the state’s goals and their proper roles in achieving them.⁶⁶

Next, it is useful to consider the role of the modern liberal state. Different visions of legitimate state goals exist. One might espouse, for example, a truly liberal view of the proper role of government in which its primary objective is limited to safeguarding an individual’s negative liberty⁶⁷—*freedom from* interference with one’s life, liberty, or property.⁶⁸ This form of liberalism denies that individuals have positive rights that the government must fulfill (for example, the right to adequate housing).⁶⁹

It is possible to take a broader view of the appropriate role of government, charging it with an affirmative obligation to further the

64. Bix, *supra* note 19, at 3.

65. *Id.*

66. *Id.* at 3 n.16; see also Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 107–08 (2003).

67. See, e.g., Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 56–61 (2006).

68. *Id.* at 58.

69. It is not always possible to draw clear distinctions between negative and positive liberty. To the extent that negative liberty is a condition free from obstacles, then “positive liberty, in so far as it embodies a method of clearing obstacles, offers an account of how to obtain a condition of negative liberty.” Ian Harris, *Isaiah Berlin: Two Concepts of Liberty*, in THE POLITICAL CLASSICS 121, 129 (Murray Forsyth & Maurice Keens-Soper eds., 1996).

health, safety, and general welfare of its citizens. This has historically been the understanding of states' proper role with respect to social and domestic relations regulation.⁷⁰ This broader understanding of the state's role finds support in the Constitution⁷¹ and is generally not the subject of controversy.

Some commentators and state actors interpret broad state regulatory power as properly and “necessarily promot[ing] a shared moral vision of the good family life.”⁷² A counterargument is that the majority's vision of the moral or good life ought not be the sole justification for public policy or state action. This view, articulated most strongly and famously by John Stuart Mill,⁷³ was echoed in the Supreme Court's opinion in *Lawrence v. Texas*—“The issue is

70. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (the regulation of domestic relations is “an area that has long been regarded as a virtually exclusive province of the States”); *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (“[T]he state . . . exercis[es] such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public This power, which . . . is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort, and general welfare of the people.”); *In re Burrus*, 136 U.S. 586, 593–94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.”); see also Naomi Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994) (observing that family law has traditionally been an area of state regulation, and discussing various rationales for domestic relations exception to federal diversity jurisdiction); Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law*, 28 IND. L. REV. 273, 278 (1995) (“The major legal debates about marriage took place in the states, which retained primary control over domestic relations.”). But see Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995) (arguing that “family law has emerged in recent years as an important arena of national interest, increasingly governed by national legislation”); Linda Henry Elrod, *Epilogue: Of Families, Federalization, and a Quest for Policy*, 33 FAM. L.Q. 843, 846–47 (1999) (noting that “[t]raditionally, states regulated family law under the Tenth Amendment because the federal government did not By the end of the century, however, Congress had enacted numerous federal statutes to address serious problems that states were either unwilling or unable to resolve.”).

71. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

72. Dailey, *supra* note 70, at 1790; see also *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring) (“The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.”); Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2526 (1994) (“[Family law serves] both as a mechanism for meeting the needs of family members and as a vehicle for expressing our values and aspirations about family life to ourselves and to our children.”).

73. JOHN STUART MILL, ON LIBERTY 80–81 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

whether the majority may use the power of the State to enforce [its] views . . . on the whole society through operation of the criminal law. ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”⁷⁴ At issue in *Lawrence* was a state’s use of criminal penalties to coerce behavior, but the view that bare morality is insufficient to justify state action can be logically extended to states’ use of civil liability (or benefits) to discourage or encourage behavior.

In invalidating certain state regulations that enforce majoritarian moral values against unwilling individuals,⁷⁵ the federal courts have set some limits on the extent to which majority moral values—the majority’s vision of the good or moral life—may ground state action. The precise boundaries of those limits, however, remain murky. The Supreme Court’s discomfort with imposing morality-based rules on individuals does suggest, however, that encouraging morality alone will not constitute a legitimate state interest in marriage nor alone justify continued marital privileging.

What are the primary state interests, then, that justify state recognition and preferential treatment of marital families? A few themes recur,⁷⁶ including: (1) encouraging stable relationships, which benefit both adults and the children in their care;⁷⁷ (2) providing an

74. 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

75. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating Texas statute imposing criminal penalty on homosexual sodomy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating Massachusetts statute that permitted married couples to obtain contraceptives, but prevented their distribution to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating Connecticut statute prohibiting use or provision of contraceptives).

76. Others, of course, would characterize the state’s interests in marriage in slightly different ways. Professor Lynn Wardle, for example, suggests that the public interest in marriage includes the following:

- (1) [S]afe sexual relations;
- (2) responsible procreation;
- (3) optimal child-rearing;
- (4) healthy human development;
- (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers;
- (6) securing the stability and integrity of the basic unit of society;
- (7) fostering civic virtue, democracy, and social order, and
- (8) facilitating interjurisdictional compatibility.

Lynn Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 779–80 (2001).

77. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“Civil marriage anchors an ordered society by encouraging stable relationships over transient ones.”); see also WILLIAM A. GALSTON, *LIBERAL PURPOSES* 283–88 (1991) (arguing that

optimal locus for procreation⁷⁸ and ensuring the economic support and caretaking of both adult and child dependents from private rather than public sources;⁷⁹ and (3) facilitating the efficient distribution of resources and serving as a proxy for deciding when an individual should receive certain benefits from or meet certain obligations toward another.⁸⁰

The next section briefly discusses those articulated interests. It evaluates each of the primary justifications for public or state-supported marriage without limiting its analysis to those aspects of the justifications that are directly aimed at children. If a compelling non-child-related justification for marriage exists, it may be viewed as sufficient to justify state marriage (even if a child-related justification alone could not do so).

B. Evaluating the State's Interest in Marriage

First, those who favor state involvement in marriage have argued that marriage best captures and expresses individuals' commitment to each other.⁸¹ To the extent that norms of commitment and the

marital families are best for children); Regan, Jr., *supra* note 61 (arguing that legal norms should be used to enforce marital commitment); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907–14 (2000) (discussing traditional norms of spousal and parental commitment).

78. See, e.g., *Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws? Before the Subcomm. on the Constitution, Civil Rights and Property Rights*, 108th Cong. 205 (2004) (statement of Sen. John Cornyn) (“[A]s a matter of biology, only the union of a man and a woman can produce children. And as a matter of common sense, confirmed by social science, the union of man and woman is the optimal, most stable foundation for the family and for raising children.”); Wardle, *supra* note 76, at 780–81 (arguing that “society has a profound interest in responsible procreation”, and that [h]eterosexual marriage also appears to provide the best environment into which children can be born”); see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“[I]f appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.”). But see *Goodridge*, 798 N.E.2d at 961 (“[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.”).

79. See Hamilton, *supra* note 13, at 355–68 (discussing the traditional economic and caretaking functions of marriage); see also *Goodridge*, 798 N.E.2d at 954 (“[Marriage] ensures that children and adults are cared for and supported whenever possible from private rather than public funds.”).

80. See *Goodridge*, 798 N.E.2d at 955–56; *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993).

81. See, e.g., Regan, Jr., *supra* note 61, at 123–24 (arguing that marital stability is a

stability that might come with them have been shown to benefit adults and the children in their care, it would appear logical to encourage those norms among all adults. However, to encourage and reward the norm of commitment when made by some adults (for instance, opposite-sex couples who marry) but not others (such as same-sex couples who generally may not marry, unmarried couples who are nonetheless in a committed relationship, or adults living in a committed but non-conjugal or non-sexual relationship) is anything but logical. The case is stronger, moreover, for encouraging and rewarding commitment to children rather than to other adults.⁸²

Second, many commentators have also argued that the marital family is the optimal context for procreation.⁸³ But marital procreation does not stand as an end in itself; instead, it should further other legitimate state goals. To the extent that the state wishes to ensure that children are born into stable families where they will be well provided-for, the argument that marriage is the family form best suited for procreation bleeds into an argument that marriage is the optimal locus for child-rearing (which will be addressed next). Another possible justification for the state's attempt to make marriage the exclusive locus for procreation is its desire to make marriage the exclusive locus for sexual activity itself. But sexual intimacy has been afforded constitutional privacy protections.⁸⁴

Commentators also argue that marriage is the best locus for child-rearing.⁸⁵ Part I examined the empirical research analyzing the superior outcomes enjoyed by children in marital versus non-marital families. Even if there is a "marriage effect" on children, it appears that other factors explain most of the differences in the well-being of children in married versus non-marital families.⁸⁶

substantive good, and that "the state may reasonably attempt to encourage intimate commitment as a valuable human good").

82. See, e.g., Hamilton, *supra* note 13, at 335–45 (discussing the relatively weak interest of the state in the strictly companionate aspect of marriage).

83. See *supra* note 78.

84. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

85. See, e.g., GALSTON, *supra* note 77, at 283–88; Wardle, *supra* note 61, at 779.

86. Among these other factors are the characteristics of the populations more or less likely to marry, and the many support received by marital families. See *supra* notes 51–52 and accompanying text. Indeed, the court in *Goodridge* acknowledged that significant benefits

If the state's underlying goal is maximizing the well-being of children, then it is reasonable to assume that that means maximizing the well-being of *all* children. Thus, even assuming that marriage provides some benefit to the well-being of children, additional state support to and privileging of that family structure guarantees that other children will receive fewer benefits, at least in a relative sense. Privileging marriage might be justified if, as an empirical matter, the return on the state's investment in that institution were sufficiently great to justify the actual cost, and the "cost" of the inherent unfairness. But, as discussed above, the state currently invests heavily—billions of dollars annually—in marriage,⁸⁷ yet the research discussed in Part I suggests that the return on that investment—the increase in family and child well-being that may be attributed to marriage itself—is significantly smaller than is popularly believed.

Finally states have an interest in using marriage as a proxy for the operation of default property, inheritance, and tax rules, and the distribution of other benefits. Doing so certainly eases administrative burdens and costs.⁸⁸ But it can hardly be argued that administrative efficiency in administering these myriad benefits justifies their wholesale denial to other individuals. And it is certainly possible that other systems could be put into place to more equitably distribute benefits in a way that would not overly burden the public fisc.

The state's interests in marriage—or goals with respect to marriage—are thus deeply flawed. But for the sake of argument, let us assume some legitimate interest in marriage. The question that then remains is whether state regulation of marriage is sufficiently related to furthering its goals to be justifiable. This is the type of analysis performed by courts evaluating the constitutionality of certain regulations. But even outside the constitutional context, it is a useful analysis in determining the propriety or legitimacy of state action. A state may have a legitimate interest in the health, safety, or general welfare of its citizenry. But if it enacts rules or regulations that purport to further its interest in a manner that is inequitable or

accrue to the children of marital families. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956–57 (Mass. 2003).

87. See *supra* notes 6–10 and accompanying text.

88. See *Goodridge*, 798 N.E.2d at 954.

ineffective, then the resulting regulation is no more legitimate than if the state had not had a valid interest to begin with. Thus, both aspects of state action—the nature of the state’s interest or goals, as well as the means by which the state seeks to advance those interests—must be examined to determine the legitimacy of state action.

It is reasonable to conclude that state privileging of marriage provides some net positive benefit to marital families’ and children’s well-being.⁸⁹ In that sense, then, state support of marriage is effective, at least to some degree. But, does marital privileging encourage or increase the frequency of marriage? Researchers studying the influence of federal tax and transfer programs on individuals’ decisions to marry have found little or no effect, but in general, “findings are inconclusive.”⁹⁰ If marital privileging is justified in part by arguments that such privileging encourages the formation of marital families, it seems relevant whether it actually has the intended effect. If individuals would marry even without the substantial supports currently provided by the state, then the state’s resources would appear to be currently misallocated. If state support of marriage does not encourage marriage, then the nexus between state regulation and state goals is weakened further. And, as I discuss elsewhere, empirical evidence suggests that new programs to promote marriage, particularly among economically disadvantaged

89. It is of course noteworthy that, despite the tremendous public investment in marriage, researchers have identified other factors as largely accounting for the difference between child well-being in marital versus non-marital families. *See supra* notes 33, 45–52 and accompanying text.

One notable exception to public support or subsidy of marriage may be tax and transfer penalties—recent research shows that many low- or moderate-income households (with annual incomes of less than \$40,000) are penalized upon marriage. Adam Carasso & C. Eugene Steuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, 15 *FUTURE CHILD* 157, 161 (2005). Transfer programs include means-tested programs for which citizens qualify only if their income and assets are below a certain level. The most significant include welfare (Temporary Assistance for Needy Families), food stamps, housing assistance, child care, and Medicaid. *Id.* at 159. Lawmakers have begun trying to reduce marriage penalties, primarily by reducing taxes and reforming welfare. Notably, however, “in 2004, 81 percent of this marriage penalty relief was concentrated on couples earning above \$75,000”. *Id.* at 162–63.

90. *Id.* at 161 (“Some quantitative and ethnographic research suggests that people’s decisions to marry or divorce are governed much more by such considerations as a potential spouse’s suitability as a partner and as a parent, the desire for a fulfilling relationship, and the risk of infidelity, than by the tax and transfer program consequences.”).

individuals, can be expected to have little if any, effect on marriage rates.⁹¹ Moreover, many family groups who wish to (and do) raise children are prohibited from entering legal marriages, even if they desired to do so.

CONCLUSION

It stands to reason that if a public policy has a vastly different effect on two classes of child citizens (who are, in all relevant respects, similarly situated) it needs to meet a high standard of justification. Policies aimed at promoting the marriage effect fall short of such a standard. As discussed above, the magnitude of the marriage effect is notoriously difficult to get a handle on, but notably smaller than previously thought.

Further, the beneficiaries of policies that seek to promote a “marriage effect” are a sub-group—children of marital families—of the larger group of intended beneficiaries—all children. As marital children are helped, the rest of the intended beneficiaries of these policies are neglected. This Essay finds this result insupportable. Family policy should benefit all families, and when the aim is to help children, policies should do so both directly and equitably.

91. See Vivian Hamilton, *Will Marriage Promotion Work?*, 2007 IOWA J. GENDER, RACE & JUST. (forthcoming) (manuscript on file with author); see also *supra* notes 52–57 and accompanying text. Based on research of unmarried individuals’ attitudes toward and beliefs about marriage, and given the sorts of marriage promotion programs currently envisioned and implemented by states, the likelihood of success of such programs is doubtful. Importantly, unmarried poor individuals already aspire to marriage, and they expect that they will marry. See *supra* note 52. Public campaigns to convince them, then, that marriage is valuable are, according to some sociologists, “probably preaching to the choir.” Edin & Reed, *supra* note 52, at 128.