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Reviving Marriage: Could We? Should We?

Marsha Garrison*

ABSTRACT

Marriage has become controversial. Some experts argue that marriage is fundamental and foundational. In their view, the decline of marriage lies at the heart of a wide range of social problems; these experts urge state efforts to revive marriage and promote marital commitment. Other experts argue that marriage is merely a label; in their view, the state should not only eschew marriage promotion, but abandon marriage regulation altogether.

Both the pro- and anti-marriage perspectives have attracted adherents among policymakers. In the United States, the Bush administration has recently launched an initiative in support of "healthy marriages" that builds on earlier welfare-reform legislation designed to promote marriage among the poor. In Canada, Parliament has revised both tax and old-age pension rules so that the same standards apply to married and "common-law" partners; the Canadian Law Reform Commission has also recommended comprehensive revision of Canadian law to avoid "problems of coherence" arising from marital status classifications.

Which approach is preferable? This paper analyzes the growing body of social science evidence that bears on marriage regulation and makes policy recommendations based on that evidence. It concludes that both the advocates and opponents of marriage have overstated their claims: the research data demonstrate that classifications based on marriage are sometimes desirable and sometimes not: they show that formal, ceremonial marriage provides public benefits by clearly denoting the intention to assume relational responsibilities; they show that enduring, low-conflict marriage provides larger public benefits through its positive impact on the health, wealth and happiness of spouses and their children; they show that conflicted and short-term marriage does not offer personal benefits to either adult partners or their children. Finally—ironically—the data suggest that government is more likely to effectively promote low-conflict, enduring marriage through policies aimed at curbing the disadvantages associated with nonmarriage and marital dysfunction than it is through policies, like those favored by marriage advocates, that seek to promote marriage directly.

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*Love and marriage, love and
marriage
Go together like a horse and
carriage.¹*

*What societal purposes
could. . . marriage serve in a no-
fault, prenuptial, gender-
egalitarian world? Shouldn't
private lives be left to private
ordering. . . ?²*

INTRODUCTION

Marriage, once linked to love and commitment as routinely as horse to carriage, has become controversial. Some experts argue that the married state is fundamental and foundational. As they see it, “[t]he erosion of marriage during the past four decades. . . lies at the heart of many of the social problems with which the government currently grapples,” and “government policy [thus] should promote. . . healthy marriage.”³ Others see marriage as nothing more than a label, and an old-fashioned label at that. These experts argue that the state should not only eschew marriage promotion, but abandon marriage regulation altogether. Citing declining rates of marriage and marital birth—the very same factors that lead marriage advocates to urge promotion strategies—these commentators argue that tax obligations, government benefits, and even spousal rights and duties should be based on relational facts rather than marital status. They urge “social policies that facilitate maximum economic well-being and emotional flourishing

¹ SAMMY CAHN, LOVE AND MARRIAGE (Maraville Music Corp. 1955).

² Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29, 29–30 (Anita Bernstein ed., 2006).

³ ROBERT E. RECTOR & MELISSA G. PARDUE, HERITAGE FOUND., UNDERSTANDING THE PRESIDENT'S HEALTHY MARRIAGE INITIATIVE *passim* (2004), <http://www.heritage.org/Research/Family/bg1741.cfm>; see also DAVID POPENOE, WAR OVER THE FAMILY *passim* (2005); MILTON J. REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE *passim* (1999); MILTON J. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY *passim* (1993); LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY *passim* (2000); JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES *passim* (2002); Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 *passim* (2003).

for all"⁴ and question whether state-sanctioned marriage should even "survive these reforms as a kinship form."⁵

Both the pro- and anti-marriage perspectives have attracted the attention of policy makers. U.S. policymakers have thus far stressed marriage promotion. Nineteen ninety-six welfare-reform legislation that provided incentives to the states to increase two-parent families and reduce nonmarital childbearing was based on an underlying marriage-promotion policy.⁶ More recently, the Bush administration has launched an initiative designed to support "healthy" marriages by providing funds for marriage-skills education and reducing tax and benefit "penalties" that might deter marriage.⁷ Many of the states have also launched their own marriage-promotion initiatives.⁸

Across the Canadian border, the policy trend has been quite different. The Canadian Parliament has revised both tax and old-age pension rules so that the same standards apply to married and "common-law" partners.⁹ More recently, the Canadian Law Reform Commission has recommended comprehensive legal reform to avoid "problems of coherence" arising from marital status classifications.¹⁰ A number of other nations have adopted one or another feature of the Canadian approach,¹¹ and New Zealand has gone so far as to extend all of the personal rights and obligations that flow from marriage to couples who have been "de facto partners" for three years.¹²

⁴ Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 227 (2003); see also STEPHANIE COONTZ, *THE WAY WE NEVER WERE: FAMILIES AND THE NOSTALGIA TRAP* *passim* (1992); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* *passim* (2004); JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* *passim* (1996); Mary L. Shanley, *Afterword* to JUST MARRIAGE 109 *passim* (Joshua Cohen & Deborah Chasman eds., 2004); Fineman, *supra* note 2, at 57–63.

⁵ Wendy Brown, *After Marriage*, in JUST MARRIAGE 87, 88 (Joshua Cohen & Deborah Chasman eds., 2004).

⁶ The preamble to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104–193, declares that "(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children. (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children." 42 U.S.C. § 601 (2000).

⁷ See U.S. DEPT. HEALTH & HUMAN SERVS., *THE HEALTHY MARRIAGE INITIATIVE*, available at <http://www.acf.hhs.gov/healthymarriage/about/mission.html>.

⁸ See Rick Lyman, *Trying to Strengthen an "I Do" with a More Binding Legal Tie*, N.Y. TIMES, Feb. 15, 2005, at A1, A16 (reporting that "40 states have provided at least some money to provide couples with marriage-related services. . .," and that nine states offer welfare recipients a financial incentive to marry, six train county extension agents to offer marriage-related services, and five reduce the marriage license fee for those who get premarital counseling).

⁹ See LAW REFORM COMM. OF CANADA, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001), at ch. 3, pt. 2, Application, § VII, "The Income Tax Act" at C [hereinafter *BEYOND CONJUGALITY*], available at http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/html/front-e.html.

¹⁰ See *BEYOND CONJUGALITY*, *supra* note 9, at ch. 2, Coherence.

¹¹ See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 817, 817–19 (2005) (describing legal developments).

¹² See Property (Relationships) Amendment Act 2001, No. 5 (N.Z.), <http://gpacts.knowledgebasket.co.nz/gpacts/public/text/2001/an/005.html>; see also Bill Atkin, *The Challenge of Unmarried*

Across nations, the marriage question has typically been debated in terms of morals and values. On one side, the pro-marriage group calls for “a restigmatization of illegitimacy and promiscuity”¹³ and contends that virtually all social ills, including “[t]he drug crisis, the education crisis, the problems of teen pregnancy and juvenile crime” can be traced “to one source: broken families.”¹⁴ On the other, the anti-marriage forces deplore efforts to revitalize marriage not only as “moralistic” and “atavistic,” but as signs of “denial, resistance, displacement, and bad faith. . . .”¹⁵ Although there is a large and growing body of social science research relevant to the marriage debate, advocates on both sides have tended to selectively seize on evidence that supports their point of view or simply to ignore the evidence altogether.¹⁶

This is unfortunate for two reasons. First, the debate over marriage is much too important to leave to the ideologues. State marriage policy has implications for a wide range of important and controversial issues, including same-sex marriage and the legal treatment of cohabitants. State marriage policy may also affect marriage decision making; because the marital unit has long served as a fundamental social building block, policy changes should be undertaken with great care. Second, ideological debate speaks only to the converted and thus obscures common ground. Evidence-based argument, on the other hand, enhances the possibility of meaningful dialogue; this kind of public conversation has the “large advantage of allowing a convergence on particular outcomes by people unable to reach an accord on general principles.”¹⁷ It promotes the development of family policies capable of garnering broad public support and allegiance.¹⁸

In this paper, I attempt to provide a full and neutral review of the social science evidence on the claimed benefits of marriage, the desirability of marital-status classifications, and the feasibility of effective marriage promotion. I do so not as a proponent or opponent of marriage, but as a family law expert committed to a coherent, evidence-based family policy.¹⁹

I conclude that proponents and opponents of marriage are *both right*—and that they are *both wrong*. In contrast to the stark picture painted by the advocates, the data demonstrate that classifications based on marriage are sometimes desirable

Cohabitation—The New Zealand Response, 37 FAM. L. Q. 303 (2003) (detailing legislative reforms that place married and unmarried couples on similar footing in property and succession matters).

¹³ Leon R. Kass, *The End of Courtship* 7 (1997), available at <http://www.boundless.org/2005/articles/a0001161.cfm> (Part 3 of 3).

¹⁴ STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 6 (1997) (quotations omitted).

¹⁵ STACEY, *supra* note 4, at 11, 143.

¹⁶ See *infra* Section III(A).

¹⁷ CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 39–40 (1996).

¹⁸ See generally AMY GUTTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (describing conditions that produce fruitful democratic debate).

¹⁹ I have consistently advocated an “interpretive” approach that aims at coherent, evidence-based family law. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 842–43 (2000); Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 46–47 (1998).

and sometimes not; they show that good marriages provide public benefits, but that bad marriages do not; they show that many of the proposals to promote marriage are more likely to promote the wrong sort of marriage than the right sort. Perhaps most surprisingly, the data shows that state policies aimed at the disadvantages associated with nonmarriage and marital failure—policies that have thus far found far more favor with marriage opponents than advocates—are far more likely to effectively promote marriage than are the marriage promotion initiatives advocates have touted.

Part Two describes the decline of marriage. Part Three considers why policymakers might care: it analyzes the claim that the decline in marriage makes classifications based on marital status unfair and undesirable and describes the range of public benefits that might justify state efforts to revive marriage rates and evaluates their relative importance. It concludes that only low-conflict, enduring marital unions provide demonstrable benefits to adult partners and their children; it also finds that formal, ceremonial marriage offers a certain and efficient method of registering relational intentions that cannot be obtained through informal mechanisms. Part Four evaluates the most popular pro-marriage initiatives in light of these findings.

II. THE DECLINE—AND RESILIENCE—OF MARRIAGE

An important reason why marriage is controversial is that it is in decline. All across the industrialized world, young adults are marrying later²⁰ and increasing numbers may not marry at all.²¹ Those who do marry face a relatively high probability that their relationships will terminate in divorce.²² As a result of these

²⁰ Between 1950 and 2002, the median age at first marriage increased for U.S. men by 4.1 years and for women by 5 years. See U.S. Census Bureau, *Median Age at First Marriage, by Sex: 1890 to the Present* [2006] (Mar. 27, 2007), available at <http://www.census.gov/population/socdemo/hh-fam/ms2.xls>; see also Kathleen Kiernan, *European Perspectives on Union Formation*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 40, 41 tbl.3.1 (Linda J. Waite ed., 2000) (reporting increase in age of first marriage in most European nations); J. Sean Curtin, *Japanese Marriage Trends in 2002: Later Unions and More Divorce Families*, SOC. TRENDS: SERIES NO. 9, 1–2 (2002), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN016635.pdf> (reporting “all time high” in Japanese age at first marriage in 2002).

²¹ Between 1970 and 2002, the proportion of U.S. adults age 40–44 who reported that they had never been married increased among men from 4.9% to 16.7% and among women from 6.3% to 11.5%. See U.S. Census Bureau, *Statistical Abstract: Marriages and Divorces*, available at http://www.census.gov/compendia/statab/past_years.html; see also U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES 2001* 59 tbl.68 [hereinafter *STATISTICAL ABSTRACT*] (showing that, between 1950 and 1996, the U.S. marriage rate declined from 11.1 to 8.8 per 1000 population); *MARRIAGES AND DIVORCES IN THE EU (1960–95)*, available at <http://www.eurohealth.ie/newrep/socio.htm> (showing average decline, between 1960 and 1995, of 24% in marriage rate of fifteen European nations).

²² See RODERICK PHILLIPS, *UNTYING THE KNOT* 200–22 (1991) (comparing U.S. and European divorce rates from mid-nineteenth century through mid-1980s); David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, in *THE FUTURE OF THE FAMILY* 25, 34 fig 2.3 (Daniel P. Moynihan et al. eds., 2004) (showing U.S. divorce rates from 1920–2000); James M. Raymo et al., *Marital Dissolution in Japan: Recent Trends and Patterns*, 11

convergent trends, today's adults spend, on average, a smaller proportion of their adult lives within a marital household than did their ancestors.²³

With the notable exceptions of Asia and southern Europe, marital relationships are in decline not only for adults, but also for children. The proportion of children born outside of marriage has skyrocketed,²⁴ and even children born within marital relationships face increased risk of parental divorce or separation.²⁵ As a result of these convergent trends, children are increasingly likely to live in a single-parent household or a reconstituted household consisting of one parent, that parent's new partner, and perhaps children from the partner's prior relationship; the average amount of time that they spend living with both biological parents has significantly diminished.

With the decline in marriage and marital childbearing has come a marked increase in nonmarital cohabitation. In the United States, the last forty years have produced a ten-fold increase in the number of cohabiting couples,²⁶ and many Western European nations have seen comparable or even larger increases in this household type.²⁷ Increasingly, cohabitation precedes marriage²⁸ and, in the event of divorce, follows it as well.²⁹

Despite these trends, it would be premature to write an obituary for marriage. In the United States, some ninety percent of adults in mid-life have been or are

DEMOGRAPHIC RES. 395-99 (Dec. 2004), available at <http://www.demographic-research.org> (describing the rising Japanese divorce rate).

²³ See STEVE RAWLINGS, HOUSEHOLDS AND FAMILIES 1-2, available at <http://www.census.gov/pulation/www/pop-profile/hhfam.html> (reporting U.S. census data showing that, between 1970 and 2004, the proportion of U.S. households that included a married couple declined from 70.6% to 54%).

²⁴ See Stephanie J. Ventura & Christine Bachrach, *Nonmarital Childbearing in the United States 1940-99*, 48 NAT. VITAL STATISTICS RPT. No. 16, available at http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf (reporting that 33.8% of U.S. births were nonmarital in 2002, compared to 3.8% in 1940); Timothy M. Smeeding et al., *The Challenge of Family System Changes for Research and Policy*, in THE FUTURE OF THE FAMILY 1, 8 fig.1.3 (Daniel P. Moynihan et al. eds., 2004) (showing increases in European nonmarital birth rates between 1960 and 2000).

²⁵ See Ellwood & Jencks, *supra* note 22, at 32-33, figs. 2.1, 2.2.

²⁶ Between 1970 and 2000, the number of U.S. unmarried-cohabitant households rose from 523,000 to 4,880,000. See JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS P20-537, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: POPULATION CHARACTERISTICS 2000, at 2-6 (2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf>.

²⁷ See Kiernan, *supra* note 20, at 50-51 tbl.3.4 (showing increases in premarital cohabitation in two different age cohorts across fourteen European nations).

²⁸ See Kathleen Kiernan, *Unmarried Cohabitation and Parenthood: Here to Stay? European Perspectives*, in THE FUTURE OF THE FAMILY 66, 68-69 & fig.3.1 (Daniel P. Moynihan et al. eds., 2004) (comparing marriage rates in U.S. and ten European nations and concluding that "by the early 1990s cohabitation had eclipsed marriage as the marker for entry into first union in many Western countries.").

²⁹ See M.D. BRAMLETT & W.D. MOSHER, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 20-21 figs.20-23 (2002) (reporting that in 1995 the probability of women cohabitating after marriage was 53% within five years and 70% within ten years).

married;³⁰ demographers estimate that virtually the same number of women in their twenties and thirties will marry at some point.³¹ While the United States is perhaps the most marriage-prone industrialized society today, marriage rates have recently stabilized or increased in a number of European nations, and some experts believe that Europeans are simply marrying later than they did previously.³² It is possible that cohabitation is delaying, but not necessarily replacing, marriage.

The decline of marriage and marital child-bearing is also disproportionately concentrated in less privileged segments of the population. College-educated women were once less likely to marry than others; this is no longer the case³³ and, at least in the United States, these well-educated women are equally or more likely to stay married than they were several decades ago.³⁴ In the United States and, to a lesser extent, some European nations, nonmarital fertility is also concentrated among the poorly educated.³⁵ About a quarter of U.S. women without a high school degree have had children but never married; only about three percent of college-educated women have done so.³⁶ These statistics reflect the fact that “highly educated women are postponing both marriage and childbearing, while

³⁰ See R.M. KREIDER & J.M. FIELDS, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS P70-80, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: FALL 1996, at 17 (2001), available at <http://www.census.gov/prod/2002pubs/p70-80.pdf>.

³¹ See LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY 39-40 (2002); *The Retrenchment of Marriage: Results from Marital Status Life Tables for the United States, 1995*, 27 POP. & DEVELOPMENT REV. 553, 553-63 (2001) (showing that, between 1988 and 1995, the proportion of persons surviving to age fifteen who would ever marry remained fairly steady, at about five out of six of men and seven out of eight of women).

³² See Peter Ford, *In Europe, Marriage Is Back*, CHRISTIAN SCI. MONITOR, Apr. 10, 2002 at P1, S3 (reporting increase in marriage rate in Britain, France, and Germany and quoting a French demographer urging that, “[i]n the end the number of marriages each generation won't change that much. . .”).

³³ See Joshua R. Goldstein & Catherine T. Kenney, *Marriage Delayed or Marriage Forgone? New Cohort Forecasts of First Marriage for U.S. Women*, 66 AM. SOCIOL. REV. 506, 506, 509-10 (2001).

³⁴ See Ellwood & Jencks, *supra* note 22, at 25, 39-40 fig.2.2, 42-43 fig.2.11 (reporting marriage as equally likely); David T. Ellwood & Christopher Jencks, *The Uneven Spread of Single Parent Families: What Do We Know? Where Do We Look for Answers?*, in SOCIAL INEQUALITY 3, 13-14 figs.1.4, 1.5 (Kathryn M. Neckerman ed., 2004) (showing historical data on single motherhood by education level); Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at D7 (reporting unpublished data showing that the ten-year divorce rate for college graduates “has plummeted to just over 16% of those married between 1990 and 1994 from 27% of those married between 1975 and 1979”).

³⁵ See Kathleen Kiernan, *European Perspectives on Nonmarital Childbearing*, in OUT OF WEDLOCK: CAUSES AND CONSEQUENCES OF NONMARITAL FERTILITY 77, 90 tbl.3.5 (Lawrence L. Wu & Barbara Wolfe eds., 2004) (showing higher proportion of nonmarital first births to nongraduates in four of nine European nations).

³⁶ See Ellwood & Jencks, *supra* note 22, at 41-42 fig.2.9; see also Larry Bumpass & H.H. Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 32-34 (2000) (reporting that U.S. college-educated women produce less than 5% of U.S. nonmarital births).

less-educated women are postponing marriage but not childbearing.³⁷ Because of these divergent trends, in the mid-1990s, only ten percent of the children of U.S. college-educated women lived in single-parent households—a percentage that has not increased since 1980—as compared to more than forty percent of children whose mothers lacked a high-school diploma.³⁸

Marital and reproductive behavior also diverges sharply by race and ethnicity. In the United States, the decline of marriage has been much more pronounced among black than white Americans. African-Americans have long had a high rate of marital disruption,³⁹ but they are now much less likely to marry, too. Slightly more than two-thirds of black women born between 1960 and 1964 married by age 40, compared to eighty-seven percent of those born two decades earlier. But while far more white than black women have married by age 40, more black than white women have had children.⁴⁰ Indeed, sixty-eight percent of black children are now born outside of marriage, compared to twenty-eight percent of non-Hispanic white children.⁴¹ White nonmarital births are also concentrated among cohabiting couples, while black nonmarital births instead are concentrated among “visiting” couples who do not share a residence⁴² and who are much less likely than cohabitants to marry after their child’s birth or even to remain a couple.⁴³ As a

³⁷ Ellwood & Jencks, *supra* note 22, at 41; see also K.A. Musick, *Planned and Unplanned Childbearing Among Unmarried Women*, 64 J. MARRIAGE & FAM. 915 (2002) (reporting that education level and socioeconomic status are among the best predictors of nonmarital birth).

³⁸ See Ellwood & Jencks, *supra* note 22, at 36–39 fig.2.7. About 60% of marriages of women without high school degrees and 33% of marriages of college graduates end in separation or divorce. See Kelly Raley & Larry Bumpass, *The Topography of the Divorce Plateau: Levels and Trends in Union Stability in the United States after 1980*, 8 DEMOGRAPHIC RES. 245, 249–56 (2003).

³⁹ See ORLANDO PATTERSON, *RITUALS OF BLOOD* 60–62 (1998) (showing marital disruption rates by ethnicity); WILSON, *supra* note 3, at 114–15 (reporting historical data on African-American marital disruption rates and noting that in earlier periods some unmarried mothers “reported themselves as widows in order to explain why they had a child but not a husband”); Ellwood & Jencks, *supra* note 22, at 42 fig.2.10 (showing marital disruption rates of mothers by ethnicity); Steven P. Martin, *Women’s Education and Family Timing*, in SOC. INEQUALITY 108, figs.2.17, 2.18 (Kathryn M. Neckerman ed., 2004) (showing marriage and birth rates for black women between 1940 and 1995).

⁴⁰ See Ellwood & Jencks, *supra* note 22, at 40–41 fig.2.8 (reporting that, at age 40, 89% of white and 68% of black women are married and 80% of white and 85% of black women have had children).

⁴¹ See U. S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES 2004–05* 60, tbl.71, available at http://www.census.gov/prod/www/statistical-abstract-2001_2005.html (showing that variation by race is even larger for first births; 74% of the first births of non-Hispanic white women are marital, as compared to 23% of first births to black women); ANJANI CHANDRA ET AL., *FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH* fig.5 (2005), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf.

⁴² See Cynthia Osborne, *Marriage Following the Birth of a Child Among Cohabiting and Visiting Parents*, 67 J. MARRIAGE & FAM. 14, 20–21 tbl.1 (2005) (reporting that 64.5% of visiting mothers, 13% of married mothers, and 31% of cohabiting mothers were black while 45% of married, 23% of cohabiting and 8% of visiting mothers were white).

⁴³ See Sara McLanahan, *Fragile Families and the Marriage Agenda* 7, tbl.5 (Bendheim-Thomas Ctr. for Research on Child Wellbeing at Princeton Univ., Working Paper 03–16–FF, 2003), available at http://www.csbs.utah.edu/siciliano_forum/anthologies/2003Forum.pdf (finding that 21%

result of these various trends, black children spend much more time than white children in single-parent families. Indeed, the chance of a black child growing up with both parents was higher during slavery than it is today.⁴⁴

Despite these racial and socioeconomic differences, marriage remains an important life goal for most Americans. Overwhelmingly, young Americans assert that they would be “more economically secure, have more emotional security, a better sex life, and a higher standard of living” if they were married.⁴⁵ They report that they plan to marry themselves and say that a good marriage is an important component of a good life.⁴⁶ This enthusiasm for marriage has not declined. Annual surveys of high school seniors conducted since the late 1970s show virtually identical percentages reporting that “having a good marriage and family life” is extremely important; the proportion of young men reporting that they plan to marry has actually increased.⁴⁷ Support for marriage is high within all ethnic and racial groups,⁴⁸ and those who cohabit seem to be just as enthusiastic as the general population. In a 1994 national survey, more than ninety percent of cohabiting respondents reported that they planned to marry at some point.⁴⁹ Even those who have children outside of marriage report a strong belief in marital relationships. In-hospital surveys of unmarried parents consistently find that a substantial majority of respondents agree with the statement “marriage is better for children;”⁵⁰

of cohabiting couples and 11% of visiting but “romantically involved” couples had married by the time of their child’s third birthday, while 10% of married, 38% of cohabiting, and 51% of “visiting” couples had separated by this birthday); see also Osborne, *supra* note 42, at 21 (reporting that different variables predict marriage for visitors and cohabitants).

⁴⁴ See ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* 110 (rev. ed. 1992).

⁴⁵ See Kelly Raley, *Recent Trends and Differentials in Marriage and Cohabitation*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 19, at 34 (Linda J. Waite ed., 2000) (reporting that most adults age 20–29 say that they would be happier, “more economically secure, have more emotional security, a better sex life, and a higher standard of living if they were married”); Arland Thornton & L. Young-DeMarco, *Four Decades of Trends in Attitudes toward Family Issues in the United States: The 1960s Through the 1990s*, 63 *J. MARRIAGE & FAM.* 1009, 1009 (2001) (concluding that young Americans continue to favor marriage).

⁴⁶ See Thornton & Young-DeMarco, *supra* note 45, at 1018 (stating that about 80% of young women and 78% of young men report that they plan to marry).

⁴⁷ See Thornton & Young-DeMarco, *supra* note 45. See also William G. Axinn & Arland Thornton, *The Transformation in the Meaning of Marriage*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 147, 151–52 tbl.8.1 (Linda J. Waite ed., 2000) (reporting survey data from 1970s–90s on attitudes toward marriage).

⁴⁸ See M. Belinda Tucker, *Marital Values and Expectations in Context*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 166, 177–80 & tbl.9.3 (Linda J. Waite ed., 2000) (reporting marital value means by gender and ethnicity).

⁴⁹ See John D. Cunningham & John K. Antill, *Cohabitation and Marriage: Retrospective and Predictive Comparisons*, 11 *J. SOC. & PERSONAL RELATIONSHIPS* 77, 77 (1994); see also Andrew J. Cherlin, *Toward a New Home Socioeconomics of Union Formation*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 116, 135 (Linda J. Waite ed., 2000) (“The typically short durations [of cohabitation] in the United States, along with expressed preferences for marriage, suggest that marriage is still the goal for most young adults and cohabitation is still seen as an intermediate status.”).

⁵⁰ See GREGORY ACS & HEATHER KOBALL, *URBAN INST., TANF AND THE STATUS OF TEEN MOTHERS UNDER AGE 18* fig.7 (2003) (on file with author) (reporting that over 80% of unmarried mothers and 90% of unmarried fathers agreed with this statement); Kathryn Edin et al., *A Peek Inside*

overwhelmingly, they report that their own chances of marriage are at least even or better.⁵¹ This positive attitude is expressed almost as strongly in interviews conducted several months later, and about half of these parents also indicate that they “might be interested” in a marriage-promotion program.⁵² Although these young parents rarely do marry each other,⁵³ their enthusiasm for the married state remains strong.

III. DOES THE DECLINE OF MARRIAGE MATTER?

Why should policymakers care about the decline of marriage? After all, household organization has changed dramatically in other ways that elicit barely a murmur. As compared to a century ago, relatively few households employ servants, particularly resident servants. The likelihood that a household will be multi-generational has also declined, along with typical household size.

One reason policymakers might care is because marital status has been used to determine eligibility for a wide range of state-determined obligations and benefits. If marriage no longer signals a meaningful difference between households, policymakers would want to rethink these classificatory schemes. Policymakers should also care if marriage were associated with various public benefits that would be reduced when marriage declines. Unsurprisingly, these dual concerns lie behind the arguments of both those who advocate marriage promotion and those who favor marriage demotion. Part A of this section will address the classification issues, and Part B will examine the question of public benefits.

A. *Is Marriage Relevant to Legitimate Legislative Goals?*

1. *Is Cohabitation the Equivalent of Marriage?*

Some commentators have argued that the decline of marriage signals its growing irrelevance. For example, the Canadian Law Reform Commission contends that unmarried cohabitants “may have many of the characteristics of economic and emotional interdependency” that characterize marital relationships

the Black Box: What Marriage Means for Poor Unmarried Parents, 66 J. MARRIAGE & FAM. 1007, 1010 (reporting that two-thirds of surveyed new unmarried mothers and three-quarters of new unmarried fathers agreed with this statement).

⁵¹ See ACS & KOBALL, *supra* note 50, at 17 (reporting that a majority said their chances of marriage were “good or almost certain”); Christina Gibson et al., *High Hopes But Even Higher Expectations: The Retreat from Marriage among Low-Income Couples*, 67 J. MARRIAGE & FAM. 1301, 1306 (2003) (reporting that, in a nationally representative survey, 79% of unmarried mothers and 84% of unmarried fathers living together at child’s birth say that there is at least a “good or certain” chance that they will marry); see also KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 131 (2005) (reporting that 70% of surveyed poor unmarried mothers “clearly want to marry” and 26% “are making marriage plans now”).

⁵² See ACS & KOBALL, *supra* note 50, at 17; McLanahan, *supra* note 43, at 7.

⁵³ See McLanahan, *supra* note 43, at 7, tbl.5.

and that marital-status classifications thus cannot provide a fair method of sorting among couples:⁵⁴ it argues that, “when legislatures “use[] terms like ‘spouse’ as a proxy for identifying the kinds of close personal relationships between adults to which such laws apply, problems of coherence arise.”⁵⁵

The Law Reform Commission’s claim hints at the possibility that declining marriage rates and rising levels of cohabitation evidence no more than a shift in marital norms: demographers who count marriages can record only those formally registered with the state, but informal marriage—one recognized as a marriage by the community and the couple but not formally registered—undoubtedly antedates formal marriage by many thousands of years and, in some societies, it still represents the rule instead of the exception. In New Zealand and Australia, for example, formal marriage is “culturally alien” to the native Aborigine and Maori populations, who typically enter into informal marital unions;⁵⁶ scholars have also reported a high incidence of informal marriage in Latin America.⁵⁷ It is possible that the rise of cohabitation and decline of formal marriage represent nothing more than a shift in marriage behavior, in which informal marital unions like those prevalent among these native and rural populations have become the norm in modern, industrialized society.

The research evidence does not support this supposition, however. Instead, it demonstrates that cohabitants and married couples differ markedly on a wide variety of dimensions.⁵⁸

First, for most couples, cohabitation is brief and transitional. In the United States, approximately sixty percent of all cohabitants and seventy percent of those in a first premarital cohabitation marry within five years.⁵⁹ More tellingly, only about ten percent of cohabitants who do not marry are still together five years later.⁶⁰ By contrast, eighty percent of first marriages survive at least five years and

⁵⁴ BEYOND CONJUGALITY, *supra* note 9, at ch. 3, Part I *Methodology*, Sec. 4.

⁵⁵ *Id.*; see also AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.02 comment A (2002) [hereinafter ALI PRINCIPLES] (arguing that “the absence of formal marriage may have little or no bearing on the character of the parties’ domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.”).

⁵⁶ See Ken Dempsey & David de Vaus, *Who Cohabits in 2001? The Significance of Age, Gender, Religion and Ethnicity*, 40 *AUS. J. SOC.* 157, 170 (2004).

⁵⁷ See Teresa Castro Martin, *Consensual Unions in Latin America: Persistence of a Dual Nuptiality System*, 33 *J. COMP. FAM. STUD.* 35, 35 (2002) (noting that in some places the rate of informal “consensual marriage” exceeds traditional marital rates, especially for young couples).

⁵⁸ I have reviewed this evidence in greater detail in Garrison, *supra* note 11, at 839–48. See also *Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: PERSPECTIVES ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF FAMILY DISSOLUTION (Robin H. Wilson ed., 2006).

⁵⁹ See BRAMLETT & MOSHER, *supra* note 29, at 12, tbl. 9. However, the likelihood that cohabitation will lead to marriage is declining. See Larry L. Bumpass, *The Changing Significance of Marriage in the United States*, in THE CHANGING FAMILY IN COMPARATIVE PERSPECTIVE: ASIA AND THE UNITED STATES 63, 71 (K.O. Mason et al. eds., 1998).

⁶⁰ See Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 *ANN. REV. SOC.* 1, 3 (2000) (summarizing research); see also BRAMLETT & MOSHER, *supra* note 29, at 22, tbl.15 (reporting that 49% of first premarital cohabitations are disrupted within five years).

two-thirds survive for at least ten years.⁶¹ Cohabitation thus tends to be a comparatively short-lived state that, for most couples, represents only a brief way-station on the road to marriage or separation. Indeed, the median duration of cohabitation in the United States now appears to be less than 1.5 years.⁶²

Second, cohabitants do not typically adopt the relational norms associated with marriage. Cohabitants are much less likely than married couples to have children, demonstrate sexual fidelity, pool their resources, experience security or feel unconflicted in their relationships.⁶³ They are more likely than married couples to value independence and less likely to value commitment or express commitment toward their partners.⁶⁴

These contrasting behaviors and attitudes reflect the fact that, at least in the United States, cohabitation is usually seen, not as a substitute for being married, but for being single. More than ninety percent of U.S. cohabiting respondents report that they plan to marry at some point,⁶⁵ and about three-quarters of cohabitants report the belief that they will eventually marry their current partner.⁶⁶ But cohabitants do not report that their relationships are *already* marital. In a U.S. cohabitant survey conducted during the late 1980s, only ten percent of respondents reported that cohabitation was a "substitute for marriage," while sixty-one percent said that it was a precursor to or "trial" period for assessing marital compatibility, and twenty-nine percent described it as a form of co-residential dating.⁶⁷ Two recent U.S. surveys suggest that today's cohabitants are even less marriage-minded than those in this earlier generation: in a small survey of New York City cohabitants, respondents overwhelmingly reported finances, convenience, and housing needs as the reasons for their decisions to cohabit;⁶⁸ in a larger Midwestern survey, *none* of the cohabitant interviewees indicated that cohabitation represented a marital commitment. As one cohabitant put it, the decision to cohabit meant that: "I wasn't ready. . . to get like, I mean, that close to somebody and I mean I lived with her but we still had our freedom we still let each other do what we wanted to do so I had my space and she had her space."⁶⁹ Unsurprisingly, the

⁶¹ BRAMLETT & MOSHER, *supra* note 29, at 17–18 tbl.21.

⁶² See Patrick Heuveline & Jeffrey M. Timberlake, *The Role of Cohabitation in Family Formation: The United States in Comparative Perspective*, 66 J. MARRIAGE & FAM. 1214, 1223 tbl.2 (2004). Nor is the average duration of U.S. cohabitation increasing. See Cherlin, *supra* note 49, at 135 (summarizing evidence).

⁶³ See Garrison, *supra* note 11, at 840–41 (summarizing evidence).

⁶⁴ See *id.* at 841–43 (summarizing evidence).

⁶⁵ See Cunningham & Antill, *supra* note 49, at 77; see also Cherlin, *supra* note 49, at 135.

⁶⁶ Although the percentage of cohabitants who report the belief that they will eventually marry their current partner has declined, about three-quarters say that they will do so. Cf. Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 673 (1996); Wendy D. Manning & Pamela J. Smock, *First Comes Cohabitation, Then Comes Marriage*, 23 J. FAM. ISSUES 1065, 1973 tbl.1 (2002).

⁶⁷ See CASPER & BIANCHI, *supra* note 31, at 59 tbl.2.5.

⁶⁸ See Sharon Sassler, *The Process of Entering into Cohabiting Unions*, 66 J. MARRIAGE & FAM. 491, 498–501 (2004).

⁶⁹ Wendy Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 999 (2005).

researchers concluded that “[t]he process of deciding to cohabit . . . appears to differ in important ways from processes determining entry into marriage.”⁷⁰

Even the arrival of a child does not appear to alter the feeling that cohabitation is fundamentally different from marriage. The U.S. Fragile Family Study, which sponsored in-depth interviews of a nationally representative group of unmarried parents, found that interviewees sharply distinguished marriage from their current living arrangements. The researchers report that “most of these cohabiting pairs espouse a strong *individualistic ethic*. . . in which personal happiness and fulfillment hold the highest value.”⁷¹ They offer two quotes from cohabitants that

illustrate this ethos particularly well, and describe how sharply cohabitation differs from marriage. The first tells us, “Most people feel like with their boyfriend or girlfriend, when they get into an argument they can just leave. Most of them feel like, OK, when you’re married you can’t just walk away and leave like that.” The second says, “With me and Victor, we have a commitment. But he can still decide this is not working for [him]. But if you go as far as getting *married*, there you need to know you’re really *with* the person.”⁷²

The interviewees overwhelmingly reported the desire to marry and plans to do so.⁷³ But they did not think that marriage was only a piece of paper. Far from it, they saw marriage as a fundamental shift in commitment and relational values.

Although most of the research evidence comes from the United States, reports from Canada, the Pacific, and Western Europe, show similar patterns. Here, too, cohabitation tends to be a comparatively short-lived state that is much less likely than marriage to produce children or to induce resource pooling. It does not demonstrate rejection of formal marriage, as many cohabitants report that they are likely to ultimately marry their partners.⁷⁴

Obviously, cohabitation sometimes represents informal marriage; it always has and probably always will. It is possible that the recent extraordinary increase in cohabitation has produced either a significant overall increase in informal marriage or a significant increase within certain nations or population groups. We lack definitive evidence on these points, and the data show significant cross-national variation not only in the likelihood of cohabitation, but also in its duration, association with childbearing, and likelihood of terminating in marriage. Indeed, surveying the data, demographers have enumerated six or seven different cohabitational “types,” ranging from a substitute for being single—that type that seems most prevalent in the United States—to a stage in the marriage process, to

⁷⁰ *Id.* at 1000.

⁷¹ Edin et al., *supra* note 50, at 1011 (emphasis in original).

⁷² *Id.*

⁷³ *See id.* and sources cited *supra* notes 50–51.

⁷⁴ *See* Garrison, *supra* note 11, at 845 (reviewing research).

informal marriage.⁷⁵ In a few countries, it appears that a nontrivial percentage of cohabitants do choose long-term cohabitation as a marriage substitute.⁷⁶

2. *When Should the State Treat Married and Unmarried Couples Differently?*

If cohabitation means many things and rarely means marriage, legislators should not simply assimilate cohabitation to marriage. There will sometimes be instances in which it is appropriate to classify unmarried and married couples in the same way, but each statutory regime must be considered separately, in terms of its individual purposes.

a. Some Easy Examples: Domestic Violence, Inheritance, and Divorce Entitlements

Consider laws dealing with domestic violence. The Canadian Law Reform Commission urges that a domestic violence law limited to married couples “would lack coherence since exploitation of vulnerable people in relationships does not occur exclusively in marriages.”⁷⁷ The Law Reform Commission is surely right: domestic violence is actually far more common among cohabitants than married couples.⁷⁸ Given that domestic violence laws aim to protect the vulnerable, they should apply to all forms of relational violence, marital and nonmarital. It would be illogical, indeed discriminatory, to provide remedies to one group that are unavailable to the other.

Now consider intestacy laws, which invariably grant a large share, or even all, of an intestate decedent’s estate to his or her surviving spouse. The reason these laws grant surviving spouses a large share of the decedent’s assets is because

⁷⁵ See Heuveline & Timberlake, *supra* note 62, at 1216–18; Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT’L J. L. POL’Y & FAM. 1 (2001); see also Anne Barlow & Grace James, *Regulating Marriage and Cohabitation in 21st Century Britain*, 67 MOD. L. REV. 143, 157–61 (2004) (quoting British cohabitants describing the range of reasons for cohabitation).

⁷⁶ For example, in France, half of children living with cohabiting parents do so for at least 9.43 years and only 23.8% of cohabiting relationships involving children terminate in marriage. Demographers Parick Heuveline & Jeffrey Timberlake conclude that a “substantial minority of French parents thus seem to choose long-term cohabitation as an alternative to marriage.” They also conclude that, in most surveyed nations, cohabitation typically represents a prelude to or stage in the marriage process instead of an alternative to marriage. See Heuveline & Timberlake, *supra* note 62, at 1225–26, tbl.3.

⁷⁷ BEYOND CONJUGALITY, *supra* note 9, ch. 2, at *Coherence*.

⁷⁸ See, e.g., WAITE & GALLAGHER, *supra* note 3, at 155 (noting that in a national survey, cohabiting respondents were more than three times as likely as married respondents to say that arguments involved hitting, shoving, or throwing things); Sonia Miner Salari & Bret M. Baldwin, *Verbal, Physical, and Injurious Aggression Among Intimate Couples Over Time*, 23 J. FAM. ISSUES 523, 535–36 tbl.1 (2002) (finding that 24% of cohabiting and 7.3% of married couples reported one of two most serious forms of physical aggression); Todd K. Shackelford, *Cohabitation, Marriage and Murder*, 27 AGGRESSIVE BEHAVIOR 284, 284 (2001) (reporting Canadian & U.S. studies showing that women in cohabiting relationships are about nine times more likely than married women to be killed by a partner).

inheritance laws function as default distribution schemes for individuals who fail to execute wills directing distribution of their estates. Legislatures thus design these schemes to express the distributional preferences of typical decedents,⁷⁹ and changes in intestacy law tend to follow survey evidence on those preferences. Contemporary survey evidence shows that spouses overwhelmingly want to leave all, or the lion's share, of their estates to the surviving husband or wife;⁸⁰ only if the evidence demonstrated that cohabitants have the same feelings about their partners would we want to rewrite intestacy law, which aim at expressing typical distributional preferences.

We lack a definitive survey of cohabitants' views, but the short-lived and uncommitted character of cohabiting relationships suggests that the typical cohabitant would *not* want a share of his estate to go automatically to the individual he "wasn't ready... to get... that close to..."⁸¹ Although some cohabitants undoubtedly do want to leave a portion of their assets to a surviving partner, the law already protects these individuals by offering them the option of executing a will. Thus, as current intestacy law likely captures the preferences of most married and cohabiting couples and provides an easy method for individualized "fixing" of classificatory mistakes, there is no reason for abandoning it.

Essentially the same analysis is applicable to marriage and divorce law entitlements. Marital obligation has traditionally been thought to derive from the voluntary assumption of marital roles, rights, and obligations. Divorce law protects spouses when they rely on the marital commitment and make investments in the relationship.⁸² Exploratory relationships in which both partners feel that "they can just leave"⁸³ whenever they choose to do so thus do not create the same contractual or equitable interests as public, legally binding marital vows. Moreover, in most jurisdictions, cohabitants are also free to contract with respect to their rights and obligations. And those cohabitants who wish to obtain the rights and entitlements of married couples can do so simply by getting married. Like intestacy law, current marriage and divorce law appears to express the expectations and preferences of most married and cohabiting couples; it also provides easy methods by which individual couples can correct classificatory mistakes.

b. Harder Cases: Taxation and Public Benefits

The use of marital status as a determinant of tax burdens and public benefits poses far more complex regulatory problems. These problems are both equitable and practical: if cohabitation has many meanings, it is difficult to devise

⁷⁹ See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 75 (6th ed. 2000).

⁸⁰ See *id.* at 74–75 (describing survey evidence and its impact on law reform).

⁸¹ Manning & Smock, *supra* note 69, at 999.

⁸² I have dealt with divorce entitlements in considerably more detail in Garrison, *supra* note 11.

⁸³ See Garrison, *supra* note 11, at 822–26, 829–36 (analyzing sources of marital obligation and critiquing arguments in favor of extending marital obligation to unmarried cohabitants).

classificatory schemes that correctly classify the full range of cohabitational relationships. Given the increased social acceptability of cohabitation, couples may also cohabit instead of marrying as a means of evading tax burdens and gaining public benefits.

In looking at the problems raised by marital-status classifications, it is important to keep in mind that these schemes do not usually aim to either privilege or penalize marital relationships. Instead, marital-status classifications typically derive from the assumption that a married couple represents an economic unit in which the income of one spouse is fully available to the other. This assumption flows from legal and social norms: marriage partners have legal support obligations to each other;⁸⁴ both the marriage ceremony and widely accepted notions of spousal unity tend to foster a marital income-pooling ethic.⁸⁵ Thus, even those spouses who view some assets—inheritances, for example, or premarital savings—as “mine” instead of “ours,” rarely divide the monthly bills and split them as roommates would. Instead, they pool earnings to provide for their combined living expenses or pay expenses based on income.⁸⁶ Government officials thus tend to assume that married couples enjoy mutual access to benefits based on their combined incomes, and the evidence suggests that this is not an unreasonable assumption.

Mutual access to shared goods, like the family home, also produces significant economic benefits; indeed, the U.S. government calculates that the income necessary to get above the poverty line is about fifty percent less for a two-person family than for two single-person households.⁸⁷ Because a married-couple household requires less income to maintain the same living standard as two single-person households, there is considerable logic—and equity—in benefit and tax rates that treat two married individuals differently than two single individuals with the same combined incomes.⁸⁸

⁸⁴ See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 250–58 (2d ed. 1987).

⁸⁵ For analyses of social norms impact on marriage behavior see Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256, 259–62 (F.H. Buckley ed. 1999); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1288–92 (1998).

⁸⁶ See Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 533 tbl.2 (2003) (finding that 17% of U.S. married and 46% of U.S. cohabiting couples report keeping their money separate); R.S. Oropesa et al., *Income Allocation in Marital and Cohabiting Unions: The Case of Mainland Puerto Ricans*, 65 J. MARRIAGE & FAM. 910, 919 (2003) (finding that married Puerto Rican men pooled income more often than cohabiting men); Anne E. Winkler, *Economic Decision-Making by Cohabitors: Findings Regarding Income Pooling*, 29 APP. ECON. 1079, 1079 (1997) (finding that most cohabitants, particularly those without children and in short-term relationships, do not pool their incomes).

⁸⁷ See STATISTICAL ABSTRACT, *supra* note 21, at 453, tbl.685.

⁸⁸ See *Mapes v. United States*, 576 F.2d 896, 897–98 (Ct. Cl. 1978) (holding that legislature has at least a national basis for treating dual income married couples differently from unmarried individuals with similar income); see also *Druker v. Comm'r*, 697 F.2d 46, 51 (2d Cir. 1982) (affirming the holding of *Mapes*).

Of course, expense sharing—which appears to be the typical pattern among cohabitants—also provides living-standard benefits. Although expense sharing cannot produce the same level of living-standard benefit as income pooling, except when incomes are equal and all expenses are shared, the benefits of expense-sharing are nonetheless real and substantial; that is why young adults who are starting out often seek roommates. Tax and public-benefit authorities rarely bother with the advantages derived from expense sharing on the view that these advantages derive from income-management strategy, like the decision to save instead of buy or to buy a less expensive brand instead of a more expensive one, and not income. The impact of such strategies is variable and hard to measure; it also seems unfair to tax such socially desirable behavior.⁸⁹ But the advantages can be substantial and, in some situations, they will approach those achieved through income pooling.

Cohabitation complicates the equities involved in distinguishing income-pooling from income-management in two ways. First, some cohabitants, particularly those who have entered into informal marriages, do pool their incomes.⁹⁰ In these cases, lumping the cohabitants in with the roommates instead of formally married couples is inaccurate and potentially unfair. The evidence just reviewed suggests that this is not a major problem in the United States, as cohabitation is typically brief and does not usually induce income pooling.⁹¹ Classificatory schemes that distinguish between cohabitants and married couples thus are not markedly over- or under-inclusive in relation to the goal of equitable tax and benefit determination. Moreover, cohabiting couples who want to obtain tax and other benefits that would be available to a married couple are free to marry and do so.

Second—and more importantly—treating cohabitants like roommates instead of married couples provides opportunities to evade tax and public-benefit eligibility requirements. Imagine Ann and Bill, equal earners about to marry, who discover that one of them will lose a government pension benefit once they say “I do.” When cohabitation was socially unacceptable in polite society, Ann and Bill might have sighed over this income loss, but would not likely have changed their marriage plans.⁹² Today, however, Ann and Bill are probably living together already; they also know that they can continue to do so without stigma or even a raised eyebrow. To the extent that money influences decisions—and both economists and common sense tell us that it often does—some couples like Ann and Bill will elect not to marry in order to preserve dollars that they would lose to government authorities through marriage.

⁸⁹ Cf. Kurt J. Bauman, *Shifting Family Definitions: The Effect of Cohabitation and Other Nonfamily Household Relationships on Measures of Poverty*, 36 *DEMOGRAPHY* 315, 322 (1999) (reporting that income of a cohabitant was significantly less likely to alleviate material hardship than income of a spouse).

⁹⁰ See sources cited *supra* note 86.

⁹¹ See sources cited *supra* notes 59–62 and 86.

⁹² See, e.g., Tom Philpott, *U.S. Not Liable For \$43,000 Overpayment to Ex-Wife; Disability Pay Begins*, Apr. 6, 2000, <http://www.fra.org/mil-up/milup-archive/04-06-00-milup.html> (describing case in which military spouse hid remarriage to continue receiving benefits).

The demographic data suggest that the number of U.S. rule-evaders is still small: as we saw earlier, ninety percent of U.S. cohabiting unions terminate in marriage or separation within five years.⁹³ But the possibility of tax and eligibility-criteria evasion through nonmarriage contributes to the perception that the rules are unfair, and perceived unfairness tends to weaken compliance with legal norms.⁹⁴ Over time, evasive behavior could also accelerate and contribute to the decline of formal marriage.

This analysis suggests that policy makers are caught on the horns of a dilemma. Because cohabitation typically does not produce the same income-pooling benefits as marriage, a policy based on the assumption of income-pooling by cohabitants is counterfactual and might produce serious inequity; the range of cohabitational relationships and lack of any clear status-change indicators also pose difficult rule-making and enforcement problems. But because cohabitation may substitute for formal marriage as a means of obtaining tax and eligibility benefits, policies that distinguish cohabitation from marriage invite evasion and contribute to the decline of formal marriage if those policies attach significant financial benefits to nonmarriage.

Complicating matters further, policies that discourage marriage in some cases may encourage it in others. For example, until recently, the U.S. tax system strongly discouraged marriage when a couple earned relatively similar incomes. But when the couple had dissimilar incomes, the system provided married couples with a tax advantage and thus had an encouraging effect.⁹⁵

How should policy makers respond to these difficulties? Does marriage provide enough public benefits to justify an across-the-board elimination of marriage "penalties"? To justify targeted penalty-elimination initiatives? Before we could confidently answer these questions, we would want to know, for each tax and benefit program, both the likelihood and direct costs of rule-evasion through non-marriage as well as the direct costs of rules that counter the evasion risk. We would also want to know the indirect costs—in individual happiness and welfare, equity, and weakened marital norms—of each approach.

In thinking about the costs and benefits of any classification that promotes or penalizes marriage, legislators should undertake a similar calculus. They should consider the direct costs of statutory evasion and of strategies to eliminate it. They should also consider the larger social costs of public policies that encourage and discourage marriage: If marriage provides important public benefits, they should be reluctant to discourage the married state. If marriage provides no benefits or—worse—creates detriments, they should not.

⁹³ See sources cited *supra* note 60.

⁹⁴ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 178 (1990) (concluding, based on extensive empirical research, that "people . . . evaluate laws and the decisions of legal authorities in normative terms, obeying the law if it is legitimate and moral and accepting decisions if they are fairly arrived at"); Tom Tyler & Robyn M. Dawes, *Fairness in Groups*, in *PSYCHOLOGICAL PERSPECTIVES ON JUSTICE* 87, 89–90 (Barbara A. Mellers & Jonathan Barron eds., 1993) (summarizing research).

⁹⁵ Recent changes in tax rates have virtually eliminated the income-tax marriage penalty except for high-income couples. See Dustin Stamper, *Bush Signs Tax Break Extension Bill*, 105 *TAX. NOTES* 146, 146 (2004).

B. Does Marriage Confer Public Benefits?

1. The Debate Among Family Law Experts

Does marriage provide public benefits? In the legal scholarship, no consensus has developed. Some family law experts have urged that marriage offers psychological and ontological benefits derived from its capacity to induce a state of “belonging” that buffers the anomie of postmodern life.⁹⁶ Others have urged that because marriage “implies a reasonably well-understood set of commitments,” it serves as an efficient method of “signaling” intentions, both to one’s spouse and the community.⁹⁷ Yet, others have argued that because marriage is a formal union buttressed by law and social norms, it offers the most reliable means of “ensuring financial security for dependent family members.”⁹⁸

Legal scholars do not all agree that marriage provides public benefits, however. Martha Fineman, for example, argues that the “metanarrative of romantic sexual affiliation has deflected or absorbed concern for nonhorizontal intimate connections, particularly the one between parent and child;” she contends that the “the target of state policies should be the caretaker-dependent tie, not that between sexual affiliates.”⁹⁹ Other marriage critics argue that marriage, like race, is discriminatory in that “marital status functions to elevate some individuals, and subordinate others, based on their membership in groups that they did not choose to join.”¹⁰⁰ Yet others contend that, while “the state has a role in protecting and promoting . . . relational interests,” all intimate adult relationships—sexual and nonsexual—“create unique vulnerabilities” that require “protect[ion] wherever and with whomever they arise;”¹⁰¹ they argue that the law should move toward a “general-purpose civil union aimed explicitly at protecting and supporting intimate caregiving units of all types.”¹⁰² Some critics go so far as to argue that “the law’s

⁹⁶ See Milton C. Regan, Jr., *Postmodern Family Law: Toward a New Model of Status*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 157, 167 (David Popenoe et al. eds., 1996); Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 31–42; see also Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH L. REV. 129, 200–07 (2003).

⁹⁷ Michael J. Trebilcock, *Marriage as a Signal*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 245, 250 (F.H. Buckley ed., 1999) (arguing that willingness to marry signals the undertaking of a long-term, exclusive relational commitment); see also Posner, *supra* note 85, at 259–62.

⁹⁸ Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 229; see also Scott, *supra* note 85, at 1958; Scott & Scott, *supra* note 85, at 1288–92.

⁹⁹ Martha Albertson Fineman, *Why Marriage?*, in JUST MARRIAGE, at 46, 49–50 (Joshua Cohen & Deborah Chasman eds., 2004); see also FINEMAN, *supra* note 4, at 239–40 (arguing that society places value on autonomy at the expense of the young, elderly, and infirm).

¹⁰⁰ Bernstein, *supra* note 96, at 134.

¹⁰¹ Brenda Crossman, *Beyond Marriage*, in JUST MARRIAGE 93, 97–98 (Joshua Cohen & Deborah Chasman eds., 2004).

¹⁰² Tamara Metz, *Why We Should Disestablish Marriage*, in JUST MARRIAGE, at 99, 104 (Joshua Cohen & Deborah Chasman eds., 2004); see also BEYOND CONJUGALITY, *supra* note 9, at ch.2,

[very] recognition of marriage mandates or facilitates behaviors that cause social losses."¹⁰³

Much of the legal scholarship is highly conclusory. For example, the Canadian Law Reform Commission, arguing that the law should move "beyond conjugality" toward a "comprehensive" approach that incorporates "not just the situation of spouses and common-law partners, but also the needs of persons in non-conjugal relationships, including caregiver relationships," offers no evidence for this grand proposition except the number of disabled Canadians and a statistical breakdown of their living arrangements.¹⁰⁴ Indeed, some of the paeons for and against marriage offer no evidence whatsoever.¹⁰⁵ Because it is not evidence-based, the scholarship also tends to be highly abstract: marriage proponents posit emotional and informational gains from marriage, but fail to specify the nature, size, or quality of these advantages; marriage opponents posit social detriments from state recognition of marriage, but are equally vague on just how these harms are produced.

Legal scholars' failure to offer evidence does not mean that it is unavailable. The decline of marriage and marital childbearing has spurred an intensive social-science research effort aimed at investigating the very same issues raised by marriage advocates and critics. This research effort has not resolved all questions about the benefits and costs of marriage; for example, it cannot yet explain the decline in marriage across the industrialized world. But it does offer data bearing on most of the questions raised by marriage's critics and advocates. It is time to incorporate these data into the debate over marriage classifications and policies.

2. *Does the Married State Benefit Those Who Marry?*

The research evidence unequivocally shows health and happiness benefits associated with marriage. Researcher after researcher has reported that married individuals typically live longer and less disabled lives than the unmarried; husbands and wives get more sleep, eat more regular meals, and visit the doctor more regularly; they abuse addictive substances and engage in risky behaviors less frequently.¹⁰⁶ On average, married individuals rate their happiness, mental health,

Coherence; Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. L. & SOC. POL'Y & L. 307, 307 (2004).

¹⁰³ Bernstein, *supra* note 96, at 141.

¹⁰⁴ BEYOND CONJUGALITY, *supra* note 9, at ch. 1.

¹⁰⁵ For example, Professor Regan argues that only a "well-defined social institution such as [formal] marriage can evoke personal identification with the impersonal value of intimate commitment" and allow "individuals [to] orient themselves within a distinct cultural narrative in which self-realization is linked with intimate attachment." Milton C. Regan, Jr., *Between Justice and Commitment*, in JUST MARRIAGE 67, 72 (Joshua Cohen & Deborah Chasman eds., 2004). The American Law Institute instead urges that the end of cohabitation "poses the same social and legal issues as does the dissolution of a marriage." ALI PRINCIPLES, *supra* note 55, at 6.01 comment A (discussing scope of legal obligations of domestic partners). Neither offers any evidence in support of their claims.

¹⁰⁶ See WAITE & GALLAGHER, *supra* note 3, at 47-64 (summarizing research); Ross Stolzenberg & Linda J. Waite, *Effects of Marriage, Divorce, and Widowhood on Health*, in WORK,

and sexual experience more highly than unmarried individuals.¹⁰⁷ They experience less domestic violence and greater physical security.¹⁰⁸ Although an unfortunately large proportion of the marriage research comes from the United States, cross-national surveys show that marriage is associated with higher levels of subjective well-being across the industrialized and even non-industrialized world.¹⁰⁹

Married individuals also do better economically than their unmarried counterparts. Even after controlling for age, married men earn more than either

FAMILY, HEALTH, AND WELL-BEING 361, 363–64, 367–70 (Suzanne Bianchi et al. eds., 2005) (same); Amy Mehraban Pienta et al., *Health Consequences of Marriage for the Retirement Years*, 21 J. FAM. ISSUES 559, 570 (2000). However, the evidence is conflicting on whether the married rate their health more highly than the unmarried. See Linda J. Waite, *Trends in Men's and Women's Well-Being in Marriage*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION at 368, 375–79 (Linda J. Waite ed., 2000); Zheng Wu et al., *"In Sickness and in Health": Does Cohabitation Count?*, 24 J. FAM. ISSUES 811, 811–12 (2003).

¹⁰⁷ Russell P.D. Burton, *Global Integrative Meaning as a Mediating Factor in the Relationship Between Social Roles and Psychological Distress*, 39 J. HEALTH & SOC. BEHAVIOR 201, 201 (1998); Kathleen A. Lamb et al., *Union Formation and Depression: Selection and Relationship Effects*, 65 J. MARRIAGE & FAM. 953, 960–61 (2003); Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 68–69 tbl.1.4 (1995). But see Ross Stolzenberg & Linda J. Waite, *How Do Family and Work Affect Health and Well-Being?: Marriage, Divorce, and Paid Employment*, in WORK, FAMILY, HEALTH, AND WELL-BEING 368, 374–75 tbl.19.2 (Suzanne Bianchi, Lynne M. Casper, & Rosalind B. King, eds., 2005); Susan L. Brown et al., *The Significance of Nonmarital Cohabitation: Marital Status and Mental Health Benefits among Middle-Aged and Older Adults*, 60 B. J. GERONTOLOGY S21 (2005) (finding that male, but not female, cohabitants reported significantly higher depression scores than married men and women after controlling for sociodemographic variables); Susan L. Brown, *Moving from Cohabitation to Marriage: Effects on Relationship Quality*, 33 J. SOC. SCI. RES. 1 (2004); Kaisla Joutsenniemi et al., *Living Arrangements and Mental Health in Finland*, 60 J. EPIDEMIOLOGY & COMMUNITY HEALTH 468, 468 (2006) (finding that adults living alone or with a non-partner were twice as likely as cohabitants and married individuals to have depressive or anxiety disorder; cohabitants and married individuals did not differ).

¹⁰⁸ See sources cited *supra* note 78; Waite, *supra* note 106, at 381–82 tbl.19.6 (finding that cohabitants with no plans to marry are “substantially and significantly” more likely than married or engaged couples to report violence).

¹⁰⁹ See Ed Diener et al., *Similarity of the Relations Between Marital Status and Subjective Well-Being Across Cultures*, 31 J. CROSS-CULTURAL PSYCHOL. 419, 419 (2000) (finding, based on a 42-nation survey, that the positive relationship between marital status and subjective well-being did not differ by gender and was “very similar” across the world); Steven Stack & J. Ross Eshleman, *Marital Status and Happiness; A 17-Nation Study*, 60 J. MARRIAGE & FAM. 527, 534 (1998) (finding that “married persons have a significantly higher level of happiness than persons who are not married. . . independent of. . . control variables including ones for sociodemographic conditions and national character.”). Although cohabitants had a higher level of happiness than single persons, their happiness level was still “less than one quarter of [that] of married persons.” *Id.* at 531; see also Ping Qin et al., *Suicide Risk in Relation to Socioeconomic, Demographic, Psychiatric, and Familial Factors: A National Register-Based Study of All Suicides in Denmark, 1981–1997*, 160 AM. J. PSYCHIATRY 765, 767 (2003) (reporting significantly higher risk of suicide among single and cohabiting Danes, despite widespread acceptance of cohabitation in Denmark). But see Anke C. Zimmermann & Richard A. Easterlin, *Happily Ever After? Cohabitation, Marriage, Divorce, and Happiness in Germany*, 32 POP. & DEV. REV. 511, 520 (2006) (finding that life satisfaction of individuals in intact marriages remained significantly higher than it was before marriage, but that life satisfaction two or more years after marriage and life satisfaction in cohabiting unions prior to marriage was not significantly different).

single men or cohabitants,¹¹⁰ and they are less likely to lose their earnings through gambling.¹¹¹ Married couples also have a higher savings rate and thus accrue greater wealth than the unmarried.¹¹²

However, despite the consistent association between marriage and health, wealth, and happiness, the research also shows that these benefits are concentrated in certain types of marriages. First, remarriage appears to confer much smaller benefits than first marriage.¹¹³ Indeed, sociologist Steven Nock found that, while first marriage was associated with significant gains in men's annual income, weeks worked, and occupational prestige, remarriage was actually correlated with *negative* economic consequences: men who remarried worked less, earned less, and had less prestigious occupations than they did before their remarriages.¹¹⁴

Second, the various health and well-being benefits associated with marriage are not uniformly experienced even across first marriages. Violent marriages are obviously dangerous marriages, and even verbal marital conflict appears to be unhealthy, particularly for women.¹¹⁵ Researchers have thus consistently charted

¹¹⁰ "[T]he general consensus in the literature is that controlling for other observable characteristics, married men are simply more productive than unmarried men." Jeffrey S. Gray & Michel J. Vanderhart, *On the Determination of Wages: Does Marriage Matter?*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION*, at 356 (Linda J. Waite ed., 2000). Married men also tend to work longer hours and to choose higher-paying jobs and professions. See WAITE & GALLAGHER, *supra* note 3, at 99–105; cf. Valerie K. Oppenheimer, *Cohabiting and Marriage During Young Men's Career-Development Process*, 40 *DEMOGRAPHY* 127, 127 (2003) (noting that cohabitation is an adaptive strategy for men during a period of career immaturity). The male "marriage premium" has declined, however, for reasons that are poorly understood. See Philip N. Cohen, *Cohabitation and the Declining Marriage Premium for Men*, 29 *WORK & OCCUPATIONS* 346, 358–59 (2002).

¹¹¹ See J.W. Welte et al., *Gambling Participation and Pathology in the United States—A Sociodemographic Analysis Using Classification Trees*, 29 *ADDICTIVE BEHAVIORS* 983, 986 (2004) (finding that the most frequent gamblers were divorced, widowed, or cohabiting men).

¹¹² See Joseph Lupton & James P. Smith, *Marriage, Assets, and Savings*, in *MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES* 129, 134–36 (Shoshana Grossbard-Schechtman ed., 2003); Janet Wilmoth, *Does Marital History Matter? Marital Status and Wealth Outcomes Among Preretirement Adults*, 64 *J. MARRIAGE & FAM.* 254, 261 (2002); Jay L. Zagorsky, *Marriage and Divorce's Impact on Wealth*, 41 *J. SOC.* 406, 409 (2005).

¹¹³ See Kristi Williams & Debra Umberson, *Marital Status Stability, Marital Transitions, and Health: A Life Course Perspective*, *J. HEALTH & SOC. BEHAV.* 17–18 (2000), available at <http://www.src.uchicago.edu/prc/pdfs/willia01.pdf> (finding that remarriage in mid-life or later was associated with adverse health effects); cf. Patricia M. Eng et al., *Effects of Marital Transitions on Changes in Dietary and Other Health Behaviours in U.S. Male Health Professionals*, 59 *J. EPIDEMIOLOGY & COMMUNITY HEALTH* 56, 60 (2005) (finding that relative to men who stayed married over four years, divorce and the death of a spouse were associated with less healthful behavior and that remarriage was associated with dietary improvement, but less exercise).

¹¹⁴ See STEVEN L. NOCK, *MARRIAGE IN MEN'S LIVES* 66–68 (1998).

¹¹⁵ See Kristina Orth-Gomer et al., *Marital Stress Worsens Prognosis in Women With Coronary Heart Disease*, 284 *JAMA* 3008 (2000) (finding that among married and cohabiting women, relationship stress was associated with a 2.9-fold increased risk of recurrent coronary events after adjustment for confounding variables, and that work stress did not significantly predict recurrent coronary events).

negative health effects associated with marital discord and stress.¹¹⁶ Accordingly, the health and well-being benefits associated with marriage make a case only for low-conflict marriage.

Third, some of the psychological and health benefits associated with the married state may well result from the retreat from marriage described in Part Two. Divorce removes conflicted marriages from the marital pool. The decline of “shot-gun” marriages entered to avoid an illegitimate birth also appears to have reduced the pool of unstable, unhappy relationships,¹¹⁷ and the rise of cohabitation may have further reduced the number of conflicted marriages by eliminating them before marriage takes place. The psychic benefits associated with marriage thus might decline were vigorous marriage-promotion policies to succeed in attracting significant numbers of these high-conflict couples back into the marital fold.

Finally, some of the benefits associated with marriage derive from “selection” effects. To the extent that those who marry are wealthier—or happier, or healthier—before marriage, they should maintain these advantages after marriage.¹¹⁸ The jury is still out on the extent to which the marriage “premium” derives from preexisting characteristics or the married state. But economic theory predicts, and empirical research has confirmed, a higher marriage rate among employed, high-income men.¹¹⁹ Preexisting characteristics thus explain away some significant part of the marital advantage.

Selection effects do not account for all of the benefits associated with marriage, however. Researchers who have controlled for obvious confounding

¹¹⁶ See J.K. Kiecolt-Glaser & T.L. Newton, *Marriage and Health: His and Hers*, 127 PSYCHOL. BULL. 472, 491–93 (2001) (finding that unhappy marriages have negative physical-health consequences); Debra Umberson et al., *You Make Me Sick: Marital Quality and Health Over the Life Course* 21–22 (U. Tex. at Austin Population Research Ctr., Working Paper Series, Paper No. 03–04–05, 2005), available at http://www.prc.utexas.edu/working_papers/wp_pdf/03-04-05.pdf (reviewing evidence); see also Catherine E. Ross et al., *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 J. MARRIAGE & FAM. 129, 139 (1995) (finding that individuals with unhappy relationships have higher distress levels than people without partners).

¹¹⁷ See FRANK FURSTENBERG, JR. ET AL., *ADOLESCENT MOTHERS IN LATER LIFE* 30–33 (1987) (reporting that marriages contracted during the 1960s to legitimate a child were highly likely to end in divorce).

¹¹⁸ See Donna K. Ginther & Madeline Zavodny, *Is the Male Marriage Premium Due to Selection? The Effect of Shotgun Weddings on the Return to Marriage*, 14 J. POPULATION ECON. 313, 313 (2001) (reporting that “at most 10% of the estimated marriage premium [in men’s wages] is due to selection”); Hyoun K. Kim & Patrick C. McHenry, *The Relationship Between Marriage and Psychological Well-Being—A Longitudinal Analysis*, 23 J. FAM. ISSUES 885, 885 (2002) (finding that the data “confirmed the strong effects of marital status on psychological well-being,” indicated that “the transition to cohabiting did not have the same beneficial effects as marriage for psychological well-being,” and produced “weak and inconsistent” evidence of selection effects); see, e.g., Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women’s Economic Well-Being*, 64 AM. SOC. REV. 794, 809 (1999) (reporting that “the economic benefits of marriage are large, even above and beyond the characteristics of those who marry”).

¹¹⁹ See SHOSHANA GROSSBARD-SHECHTMAN, *ON THE ECONOMICS OF MARRIAGE: A THEORY OF MARRIAGE, LABOR, AND DIVORCE* 66–67 (1993) (summarizing studies); Ellwood & Jencks, *supra* note 34, at 44–46 (summarizing studies); Pamela J. Smock et al., “*Everything’s There Except Money*”: *How Money Shapes Decisions to Marry Among Cohabitants*, 67 J. MARRIAGE & FAM. 680, 682–83 tbl.1 (2005) (listing studies).

factors like age and education continue to report marital advantages.¹²⁰ Longitudinal studies have also demonstrated marital impacts. These studies show that those who were happy when married are less happy when divorced.¹²¹ And at least for men, marriage brings a “sharp reduction in social evenings at bars or taverns,” and “an enormous increase” in involvement with relatives and church-related activities.¹²² Married men give more time to relatives and less to friends and acquaintances.¹²³ At least their first marriages are associated with measurable positive changes in annual income, weeks worked, and occupational prestige.¹²⁴ Their loss of a spouse is associated with less healthy behaviors.¹²⁵ Researchers thus almost universally agree that some, as yet undetermined, fraction of the marital advantage is real, although they also agree that it is concentrated in stable, low-conflict relationships.

Why would marriage produce health, wealth, and happiness benefits? Obviously, marriage provides companionship and social support, factors that themselves are consistently associated with health and happiness.¹²⁶ However, cohabitation also provides companionship and social support. The consistent advantages associated with marriage provide evidence for the claim that marriage is a more felicitous state than cohabitation, but they do not clearly show the mechanisms by which these benefits are produced. Some sociologists, like the legal scholars who favor marriage, posit benefits flowing from public commitment and the behavioral expectations induced by legal and social norms;¹²⁷ some also

¹²⁰ See generally Nadine F. Marks, *Flying Solo at Mid-Life: Gender, Marital Status, and Psychological Well-Being* 10–11 (Univ. of Wis. Ctr. for Demography & Ecology, Working Paper No. 95-03), available at <http://www.ssc.wisc.edu/cde/cdewp/95-03.pdf> (reviewing research on selection effects' impact on happiness levels).

¹²¹ See Nadine F. Marks & James D. Lambert, *Marital Status Continuity and Change Among Young and Midlife Adults: Longitudinal Effects on Psychological Well-Being*, 19 J. FAM. ISSUES 652, 659–60 (1998); cf. Allan V. Horowitz et al., *Becoming Married and Mental Health: A Longitudinal Study of a Cohort of Young Adults*, 58 J. MARRIAGE & FAM. 652, 896 (1998).

¹²² NOCK, *supra* note 114, at 94–95.

¹²³ *Id.* at 120. Fulfillment of these behavioral expectations appears to be associated with marital stability. See Kristen R. Heimdal, *Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 528 (2003) (reporting that both Swedish and U.S. married couples who had been divorced were more likely to keep their money separate).

¹²⁴ See NOCK, *supra* note 114, at 82 (summarizing findings); see also Jeffrey S. Gray, *On the Determination of Wages: Does Marriage Matter?*, in *THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION* 356, 363 (Linda J. Waite ed., 2000) (finding that men's marital wage premium was significantly and negatively correlated with wife's employment and later divorce). *But see* Audrey Light, *Gender Differences in the Marriage and Cohabitation Income Premium*, 41 DEMOGRAPHY 263 (2004) (finding that men's needs-adjusted income levels remained unchanged both when they cohabited and when they married).

¹²⁵ See sources cited *supra* note 121.

¹²⁶ See Farouk Mookadam & Heather M. Arthur, *Social Support and Its Relationship to Morbidity and Mortality After Acute Myocardial Infarction*, 164 ARCH. INTERNAL MED. 1514 (2004) (finding that low social support was significant risk factor for morbidity and mortality one year after heart attack); Sheldon Cohen et al., *Social Ties and Susceptibility to the Common Cold*, 277 JAMA 1940, 1940 (1997) (finding link between incidence of the common cold and level of social support).

¹²⁷ See NOCK, *supra* note 114, at 11–42; Cherlin, *supra* note 49, at 136–37.

theorize that marriage signifies “that the partners have successfully fulfilled their adult social roles.”¹²⁸ These theories of how the marital advantage develops are difficult to empirically prove, and demographer Kathleen Kiernan has alternatively suggested that the marital advantage may instead derive from “stronger and more committed partnerships being selected into marriage.”¹²⁹ Kiernan argues that the stability and other advantages associated with marriage will simply disappear if cohabiting couples increasingly eschew marriage.¹³⁰ On this view, cohabitation would absorb the marital success stories and thereafter become a more successful relationship model itself.

The fact that remarriage is not associated with the same benefits as first marriage provides some support for Kiernan’s theory. Were the benefits of marriage derived primarily from public commitments and behavioral expectations, we would anticipate that remarriage—which entails the same commitments and expectations—would produce equivalent advantages. It is possible, of course, that a prior marital failure may inhibit commitment and sharing expectations; there is evidence to support this supposition, too.¹³¹ The bottom line is that we simply do not know how the marital advantage is produced. We thus cannot say whether Kiernan is right or wrong in asserting that the benefits associated with marriage are simply artifacts, and not the product of commitment, social norms, or other aspects of marital status.

Assuming that commitment and social norms do play a significant role in producing the marital advantage, is it also far from obvious that law is needed to preserve these benefits. No social scientist has compared formal and informal marriage; we thus cannot say whether the psychic and economic benefits associated with marriage would be lost or significantly diminished if marriage were to become a private status unregulated by the state. It is logical to suppose that entry into a public legal status that confers binding obligations and mandates formal exit procedures represents a different, more carefully considered, and more secure experience than entry into an informal relationship; certainly, any number of theorists has supposed—across a broad range of legal categories—that this is so.¹³² But we lack the data to *prove* that formal marital obligations alter individual experience, and many logical suppositions about the sources of greater health and happiness ultimately prove to be unfounded.¹³³

¹²⁸ Cherlin, *supra* note 49, at 137; *see also* NOCK, *supra* note 114, at 26–27.

¹²⁹ Kiernan, *supra* note 28, at 91.

¹³⁰ *Id.*

¹³¹ For example, remarried couples are less likely to pool their resources. *See* sources cited *supra* note 86.

¹³² *See generally* Symposium, *Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996) (arguing that the justification for centralized law should begin with the identification of a failure in the structure of social norms); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000) (discussing social norms that regulate civil acts).

¹³³ *See, e.g.*, Gina Kolata, *Big Study Finds No Clear Benefit of Calcium Pills*, N.Y. TIMES, Feb. 16, 2006, at A1; Gina Kolata, *Low-Fat Diet Does Not Cut Health Risks*, N.Y. TIMES, Feb. 8, 2006, at A1.

On balance, then, the social science evidence supports the claim that marriage provides individual benefits that, in the aggregate, enhance the public good. But the evidence does not offer a strong case for the promotion of marriage *per se*: marriage can be harmful as well as helpful; remarriage does not appear to confer the same benefits as first marriage; and some obvious marriage promotion strategies—for example, marriage incentives that produce more “shotgun” marriages—could easily increase the number of weak marriages and thus work more harm than good. Perhaps most importantly, because we do not know exactly how the advantages associated with marriage are produced, we do not know whether, or to what extent, legal support for formal marriage is necessary to preserve them.

3. Does Marriage Benefit Children?

Although the adult benefits associated with marriage seem to support marital conflict-reduction more than they do marriage promotion, the social science evidence shows that marriage benefits children, too. Children born to married parents experience much greater stability than children born to unmarried parents; indeed, cross-national research shows that, in most countries, children born to cohabiting parents are two to four times more likely to see their parents separate than are children of parents married at the time of birth.¹³⁴ Because of the greater stability that marriage provides, marital children are exposed to many fewer financial,¹³⁵ physical,¹³⁶ and educational risks.¹³⁷ Unsurprisingly, lower risks

¹³⁴ See Patrick Heuveline et al., *Shifting Childrearing to Single Mothers: Results from 17 Western Countries*, 29 POP. & DEV. REV. 47, 56–57 (2003); see also Gunnar Andersson, *Children's Experience of Family Disruption and Family Formation: Evidence from 16 FFS Countries*, 7 DEMOGRAPHIC RES. 343, 353 tbl.5 (2002) (finding that about 78% of children born to cohabiting and 35% of children born to married parents will spend time in a single-parent family before age fifteen); Bumpass & Lu, *supra* note 36, at 38 tbl.6 (finding that children born to married parents spend 84% of their childhood in two-parent families; children born to cohabiting parents “may spend about a quarter of their childhood years with a single parent, a quarter with a cohabiting parent, and less than half with married parents”); Kiernan, *supra* note 28, at 84 fig.3.6 (showing survey data from ten countries); Cynthia Osborne et al., *Instability in Fragile Families: The Role of Race-Ethnicity, Economics, and Relationship Quality* 9 tbl.2 (Bowling Green St. Univ., Working Paper 2005-02, 2005), available at <http://www.bgsu.edu/organizations/cfdr/research/pdf/2005/2005-02.pdf> (reporting that in a nationally representative U.S. sample, 40% of children born to cohabiting parents and 10% of children born to married parents experienced their parents' separation within three years of birth).

¹³⁵ See CASPER & BIANCHI, *supra* note 31, at 111–12 fig.4.3 (reporting, in 1998, a 6.9% poverty rate for married-parent households and a 38.7% rate for single-mother households). Noncustodial divorced and never-married parents are also less likely to pass on wealth to their adult children. See Frank F. Furstenberg, Jr. et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319, 319 (1995); Nadine F. Marks, *Midlife Marital Status Differences in Social Support Relationships with Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 5, 5 (1995).

¹³⁶ Rates of physical and sexual abuse are much higher when children live with an adult stepparent or cohabitant. See Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: PERSPECTIVES ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF FAMILY DISSOLUTION 90, 90 (Robin H. Wilson ed., 2006) (reviewing evidence).

produce higher levels of well-being.¹³⁸ There is also evidence that the advantages conferred by marital childbearing and rearing transcend the specific benefits associated with residential and economic stability. For example, married fathers appear to be more involved and spend more time with their children than unmarried fathers; if parental separation occurs, they see their children more often and pay child support more regularly.¹³⁹

The advantages of marriage appear to extend into a child's adulthood, and even to his or her children. Researchers have documented a strong link between growing up in a single-parent household and adult income, health, and emotional stability.¹⁴⁰ A number of studies have also found that both men and women who experience a single-parent household as children are more likely, as adults, to experience marital discord and to divorce or separate.¹⁴¹ Indeed, researchers have reported that even grandparental divorce is significantly associated with less education, more marital discord, more divorce, and greater tension in early parent-child relationships.¹⁴²

Marriage is associated with advantages to children at all income and education levels. The experts have found that,

Even among the poor, material hardships were substantially lower among married couple families with children than among other families with children, including those with at least two potential earners. . . . [A]mong

¹³⁷ See SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 39–63 (1994) (reviewing evidence); Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, in *THE FUTURE OF THE FAMILY* 116, 120–22 (Daniel P. Moynihan et al. eds., 2004) (reviewing evidence).

¹³⁸ See Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 *J. MARRIAGE & FAM.* 191, 193 (2005); Sigle-Rushton & McLanahan, *supra* note 137, at 122–25 (summarizing studies).

¹³⁹ See CASPER & BIANCHI, *supra* note 31, at 46 (reporting that children whose parents never married see their fathers less frequently after parental separation); Marcy Carlson et al., *Unmarried But Not Absent: Fathers' Involvement With Children After a Nonmarital Birth* (Center Res. Child Wellbeing, Working Paper 2005–07) (finding that parents' relationship status at child's birth is key predictor of paternal involvement); Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 *SOC. FORCES* 269, 279–286 (1996) (finding that married fathers were more likely to pay child support); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 *J. MARRIAGE & FAM.* 213, 223–24 (2003) (finding that unmarried fathers were significantly less involved with their children than married fathers); see also Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 *J. MARRIAGE & FAM.* 351 (2004) (reporting that children living in cohabiting-parent families experienced worse outcomes, on average, than those residing with married-parent families; among children age 6–11, economic and parental resources attenuated these differences, but resources did not make a difference among adolescents age 12–17).

¹⁴⁰ See Sigle-Rushton & McLanahan, *supra* note 137, at 124–26.

¹⁴¹ See PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 106–17 (1997) (summarizing studies); Amato & Cheadle, *supra* note 138, at 192–93 (same); see also Kiernan, *supra* note 20, at 55 tbl.3.8; Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 *J. FAM. ISSUES* 86, 86–87 (2004).

¹⁴² See Amato & Cheadle, *supra* note 138, at 195–98.

families with the same income-to-needs ratios, those in married couple families experienced significantly less hardship. The marriage impacts were quite large, generally higher than the effects of education.¹⁴³

The marital advantage also appears to hold across national and cultural boundaries. Even in Scandinavia, which has the longest experience with cohabitation as a mainstream family form, demographers continue to find that marital childbearing is associated with much greater childhood stability,¹⁴⁴ smaller risks to youthful and adult well-being,¹⁴⁵ and lower rates of divorce and nonmarital childbearing.¹⁴⁶ For example, in Sweden, where state policies “tend to view cohabitation as equal to marriage, and many of the regulations of marriage are applied to cohabiting relationships,”¹⁴⁷ cohabiting parents are more than four times as likely as married parents to separate before their first child turns five.¹⁴⁸ And despite an extraordinarily high level of public assistance to single parents—assistance that produces a child poverty rate of less than three percent¹⁴⁹—single parenthood remains a serious risk factor for children. The most compelling study, which analyzed almost a million cases and took account of possibly confounding factors such as socioeconomic status and parental mental health, found that

¹⁴³ Robert I. Lerman, Impacts of Marital Status and Parental Presence on the Material Hardship of Families with Children 20–21, 25 (July 2002), available at <http://aspe.hhs.gov/hsp/marriage-well-being03/hardship.pdf>.

¹⁴⁴ See An-Magritt Jensen & Sten-Erik Clausen, *Children and Family Dissolution in Norway: The Impact of Consensual Unions*, 10 CHILDHOOD 65, 65 (2003) (finding that children of cohabiting parents run a much higher risk of dissolution compared to children in marital unions and that “this risk is not diminishing as cohabitation becomes more widespread”); Kiernan, *supra* note 28, at 84 fig.3.6 (showing that 6% of Swedish marital unions and 25% of nonmarital unions dissolve within five years after the birth of a first child).

¹⁴⁵ See Kyrre Breivik & Dan Olweus, *Children of Divorce in a Scandinavian Welfare State: Are They Less Affected than U.S. Children?*, 47 SCANDINAVIAN J. PSYCH. 61 *passim* (2006) (concluding based on a study of 4,000 twelve to fifteen year old Norwegian children, that the negative associations between parental divorce and adverse child outcomes were generally very similar in Norway and the United States in spite of the great differences in family policy and welfare benefits for single mothers); Helen Hansagi et al., *Parental Divorce: Psychosocial Well-Being, Mental Health and Mortality During Youth and Young Adulthood: A Longitudinal Study of Swedish Conscripts*, 10 EUR. J. PUB. HEALTH 86, 86 (2000) (reporting that in a group of Swedish conscripts, several indicators of low levels of well-being and mental illness, including alcoholism, were significantly correlated with parental divorce even after adjustment for antecedents and other factors); Jan O. Jonsson & Michael Gahler, *Family Dissolution, Family Reconstitution, and Children's Educational Careers: Recent Evidence for Sweden*, 34 DEMOGRAPHY 277, 287 (1997) (finding that, even after controlling for all independent variables, children of divorced and separated parents and children living in reconstituted families have low school-continuation propensities compared to children living with both biological parents); see also Taru H. Makikyro et al., *Hospital-Treated Psychiatric Disorders in Adults with a Single-Parent and Two-Parent Family Background: A 28-Year Follow-Up of the 1966 Northern Finland Cohort*, 37 FAM. PROCESS 335, 336–37 (1998).

¹⁴⁶ See Kathleen Kiernan, *Redrawing the Boundaries of Marriage*, 66 J. MARRIAGE & FAM. 980, 983 (2004).

¹⁴⁷ Heimdal & Houseknecht, *supra* note 86, at 527.

¹⁴⁸ See Kiernan, *supra* note 28, at 84 fig.3.6.

¹⁴⁹ See A LEAGUE TABLE OF CHILD POVERTY IN RICH NATIONS 4, fig.1 (2000) [hereinafter UNICEF], available at <http://www.unicef-icdc.org/publications/pdf/repcard1e.pdf>.

Swedish children in single-parent households showed significantly increased risks of all adverse outcomes analyzed, including “psychiatric disease, suicide or suicide attempt, injury, and addiction.”¹⁵⁰

However, just as the adult benefits associated with marriage are concentrated in low-conflict, enduring relationships, so are the advantages of marriage to children. Although children living in high-conflict marriages may still reap economic advantages from doing so, researchers have found that the continuation of a high-conflict marriage is *negatively* associated with children’s health and happiness, just as it is for adults; indeed, longitudinal surveys show that “parents’ marital unhappiness and discord have a broad negative impact on virtually every dimension of offspring well-being.”¹⁵¹ Moreover, although “[p]arental divorce also appears to have negative consequences for offspring, . . . these are not as pervasive as the effects of parents’ marital quality.”¹⁵² It thus appears that parental divorce actually “benefits children in certain ways if it removes them from a discordant parental household. . . . If divorce were limited only to high-conflict marriages, then divorce would generally be in children’s best interest.”¹⁵³

Again mirroring the research on adults, remarriage to a stepparent also fails to confer the same advantages as a continuing marriage between the child’s parents. Children living in step-families tend to score lower than children living in intact families on tests of emotional and social well-being. Stepparents tend to be less warm, less involved, and less active in children’s lives than are biological parents in intact, marital households.¹⁵⁴

Not only are the advantages of marital child rearing concentrated in low-conflict, enduring relationships, but—once again mirroring the research on adult marriage partners—selection effects explain away a large portion of the marital advantage:

Having a child while single is three times as common for the poor as for the affluent. Half of poor women who give birth while unmarried

¹⁵⁰ Gunilla Ringback Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289, 289 (2003).

¹⁵¹ AMATO & BOOTH, *supra* note 141, at 219.

¹⁵² *Id.* at 219.

¹⁵³ *Id.* at 220. Longitudinal research also shows that many of the psychological symptoms that follow divorce also predate it. See John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment*, 43 FAM. CT. REV. 97, 97–108 (2005) (reviewing studies); Joan B. Kelly, *Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, 963 *passim* (2000) (reviewing studies).

¹⁵⁴ See McLANAHAN & SANDEFUR, *supra* note 137, at 39–63; Hofferth & Anderson, *supra* note 139, at 222 (finding that stepfathers spent less time and were less involved with children than married biological fathers); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 877–78, 890 (2003) (reporting that neither cohabitation nor marriage to a nonparent is associated with uniform advantage in behavior or academic success among teenagers living in single-mother families); Susan D. Stewart, *How the Birth of a Child Affects Involvement with Stepchildren*, 67 J. MARRIAGE & FAM. 461, 462 (2005) (summarizing research). Living with an unrelated adult may also pose risks to children. See Wilson, *supra* note 136, at 92.

have no high school diploma at the time, and nearly a third have not worked at all in the last year. . . . And the situations of the men that father their children are not much better. More than four in ten poor men who have a child outside of marriage have already been to prison or jail by the time the baby is born; nearly half lack a high school diploma, and a quarter have no job. . . . [A]lmost half of them earned less than \$10,000 in the year before the birth.¹⁵⁵

These patterns may be less pronounced in Western Europe,¹⁵⁶ but in the United States some commentators have urged that reproductive behavior now diverges along class lines: educated young adults with good prospects continue to link childbearing with marriage, while the poor, ill-educated, and troubled do not. And even within Western Europe the available data suggests that “unmarried parenthood may be more closely associated with impoverishment than empowerment.”¹⁵⁷

Unmarried parents also tend to report many more relational stresses than their married counterparts. Parents who are unmarried when their child is born are more likely than married parents to have children by another partner.¹⁵⁸ Their children are much more likely to be unplanned.¹⁵⁹ They report higher levels of conflict and

¹⁵⁵ EDIN & KEFALAS, *supra* note 51, at 2; *see also* GREGORY ACS & SANDY NELSON, URBAN INST., SHOULD WE GET MARRIED IN THE MORNING? A PROFILE OF COHABITING COUPLES WITH CHILDREN 12, tbl.2 (2004), available at http://www.urban.org/UploadedPDF/310962_DP04-01.pdf (finding that cohabiting unmarried parents were significantly less likely to work, to be high school dropouts, and to be under age 25 than married parents); Lerman, *supra* note 143, at 12 (finding that 70% of married, two-parent families, 54% of cohabiting two-parent families, and 48% of single-parent families had an adult with more education than a high school diploma); Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well Being*, 58 J. MARRIAGE & FAM. 998, 1000 (1996) (finding that unmarried fathers earned about half of what married fathers earned in 1990); Musick, *supra* note 37, at 915 (reporting that level of education and socioeconomic status are significant predictors of nonmarital birth); Osborne et al., *supra* note 134, at 7 (finding that, in a nationally representative sample, married parents reported almost twice the annual income of cohabitants and that less than 20% of married fathers and almost two-fifths of cohabiting fathers had less than a high school diploma).

¹⁵⁶ In Western Europe, nonmarital birth is not concentrated among the very young, and births within cohabiting unions are far more common. *See* Larry L. Wu et al., *Historical and Life Course Trajectories of Nonmarital Childbearing*, in *OUT OF WEDLOCK: CAUSES AND CONSEQUENCES OF NONMARITAL FERTILITY* 3–28 (Lawrence L. Wu & Barbara Wolfe eds., 2004); Kiernan, *supra* note 35, at 77–108.

¹⁵⁷ Kiernan, *supra* note 28, at 90 (reporting that in the U.K. and Sweden “women who become mothers in a cohabiting union are more likely to have partners who are either unemployed or in partly skilled or unskilled occupations” and that French unmarried parents “still tend to be disproportionately from lower socioeconomic groups”).

¹⁵⁸ *See* McLanahan, *supra* note 43, at 6.

¹⁵⁹ *See* THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 31–32 tbl.2.2 (Sarah S. Brown & Leon Eisenberg eds., 1995) (concluding that 88% of never-married, 68.5% of previously-married, and 40% of married women's pregnancies are unplanned); Wendy D. Manning, *Childbearing in Cohabiting Unions: Racial and Ethnic Differences*, 33 FAM. PLANNING PERSPECTIVES 217, 221 tbl.5 (2001) (reporting that 18% of married, 44% of cohabiting, and 61% of single, noncohabiting women said that their first birth was unintended).

distrust, more problems with drugs and alcohol, more physical and mental health problems,¹⁶⁰ and more domestic violence.¹⁶¹ Indeed, the evidence shows that many unwed parents fail to marry precisely because their relationships are highly problematic.¹⁶²

As with adults, the socioeconomic and relational attributes of those who marry explain many, but not all, of the advantages marriage appears to offer to children.¹⁶³ In the United States, the nationally representative Fragile Families Study has shown that, even after controlling for the “mother’s characteristics, parents’ fertility history, the couple’s economic characteristics, and relationship quality, . . . [p]arents who are cohabiting at their child’s birth still have over twice the odds of separation as compared to parents who are married. . . .”¹⁶⁴ Married fathers in intact families appear to spend more time with their children; after separation, they see their children more frequently and pay child support more

¹⁶⁰ See Michelle DeKlyen et al., *The Mental Health of Parents with Infants: Do Marriage, Cohabitation and Romantic Status Matter?*, 96 AM. J. PUB. HEALTH 1836, 1837–41 tbls.1 to 3 (2006) (finding that unmarried parents report higher levels of mental health and behavior problems than married parents, and unmarried parents whose relationships ended prior to the birth report more impairment than other groups of unmarried parents).

¹⁶¹ See McLanahan, *supra* note 43, at 56, 11 & tbl.1 (reporting that unmarried fathers were twice as likely as married ones to have a physical or psychological problem that interfered with their ability to find or keep a job, and several times more likely to abuse drugs or alcohol; more than 25% of unmarried and less than 10% of married fathers were unemployed when their child was born); Osborne et al., *supra* note 134, at 13 (stating that cohabiting mothers reported significantly higher levels of disagreement with father in month prior to child’s birth).

¹⁶² See EDIN & KEFALAS, *supra* note 51, at 81. Edin & Keflas report that about a third of unmarried mothers interviewed blamed crime for the break-up of their relationship and that:

[m]ore than a third blamed their partner’s alcoholism or drug addiction. Four in ten say their relationship broke down because their child’s father couldn’t manage to stay faithful. An even higher proportion—nearly half—say that they could no longer take the chronic abuse they suffered at his hands. Taken together fully two-thirds of the mothers say they’ve had a relationship disintegrate for one or more of these reasons, and about half have encountered these problems with more than one man.

Id.; see also Maureen R. Waller & Sara McLanahan, “His” and “Her” Marriage Expectations: Determinants and Consequences, 67 J. MARRIAGE & FAM. 53, 62–64 (2005) (reporting that, in a nationally representative sample of unmarried parents, both marriage and staying together during the first eighteen months after child’s birth were significantly associated with father’s education, mother’s age, and couple’s joint expectations about their relationship; couples were twice as likely to stay together and more than seven times more likely to marry if both partners were “optimistic” about future marriage at the time their child was born, and optimism was strongly related to reported conflict, gender distrust, and shared activities).

¹⁶³ See ACS & NELSON, *supra* note 155, at 17–19 (reporting that about two-thirds of the marital advantage in child poverty and half the advantage in parental mental health was due to observable differences between cohabiting and married individuals); see also ARIEL HALPERN, POVERTY AMONG CHILDREN BORN OUTSIDE OF MARRIAGE: PRELIMINARY FINDINGS FROM THE NATIONAL SURVEY OF AMERICA’S FAMILIES 7–8, available at http://www.wkkf.org/Pubs/Devolution/UI_Poverty_among_children_born_outside_of_marriage_00331_02596.pdf (finding that young children born to married parents were just as likely to live in poverty as nonmarital counterparts).

¹⁶⁴ Osborne et al., *supra* note 134, at 12–13; see also Sigle-Rushton & McLanahan, *supra* note 137, at 126–30 (analyzing selection effects and finding that they “do not account for all the differences in children, families, and subsequent outcomes”).

regularly than unmarried fathers.¹⁶⁵ There is also evidence that, even after controlling for observable characteristics like education, academic test scores, and premarital pregnancy, marriage contributes significantly to living standards, “not only relative to single parents living alone but also compared to mothers in cohabiting relationships or single parents living with other adult relatives.”¹⁶⁶

We do not know how these benefits associated with marriage are produced. Nor, given nonmarital parents’ typically high levels of conflict and distrust, can we assume that these benefits could be obtained were such parents to marry. Indeed, it seems probable that the marriage of high-conflict cohabitants would simply increase the number of high-conflict marriages—marriages that are *not* advantageous to children—and, in many cases, substitute marital for nonmarital separation.

The likelihood of this result is enhanced by the fact that the very same characteristics that predict nonmarriage also predict marital instability. Divorce is more than twice as common among couples living below the poverty line as it is in the general population,¹⁶⁷ and elevated divorce rates are also significantly associated with youth, educational disadvantage, unemployment, violence, conflict, and infidelity.¹⁶⁸

The fact that marriage by itself is incapable of curing, or even dramatically curbing, the problems associated with nonmarital childbearing does not mean that marriage is irrelevant to children’s well-being. Indeed, the fact that the less advantaged increasingly choose to bear children outside marriage “may be differentially harming children from less advantaged backgrounds and reinforcing inequalities in other domains.”¹⁶⁹ But to provide lasting benefits to children, state policy must succeed not just in encouraging parents to marry, but also to marry

¹⁶⁵ See sources *supra* note 139.

¹⁶⁶ Lerman, *supra* note 143, at 32.

¹⁶⁷ See U.S. BUREAU OF THE CENSUS, STUDIES IN HOUSEHOLD AND FAMILY FORMATION: WHEN HOUSEHOLDS CONTINUE, DISCONTINUE, AND FORM 18–21 (Current Pop. Rpt. Series P–23 No. 180, 1992); see also WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 154–55 (1993) (summarizing research on relationship between socioeconomic class and divorce rates); Zimmerman & Easterlin, *supra* note 109, at 515 (finding that those whose marriages break up have lower average socioeconomic status).

¹⁶⁸ See BRAMLETT & MOSHER, *supra* note 29, at 18 (reporting 48% ten-year dissolution risk for U.S. brides under eighteen and 24% risk for brides over twenty-five); E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE: DIVORCE RECONSIDERED 34–35 (2002) (reporting that one quarter of the sample of divorced wives cited alcoholism, physical abuse, or extramarital sex and one-third cited financial problems as factors contributing to the decision to divorce); ROSE M. KREIDER, NUMBER, TIMING AND DURATION OF MARRIAGES AND DIVORCES: 2001 8–10 tbls.5–6 (Current Pop. Rpt. 70–97, 2005) (reporting median age at first divorce of thirty-two in 2001); Raley & Bumpass, *supra* note 38, at 205 (reporting that roughly 60% of marriages of women without high school degrees and 33% of marriages of women with college degrees end in separation or divorce); Zimmerman & Easterlin, *supra* note 109, at 518–19 (finding that those who divorce have personality traits that might adversely affect likelihood of an enduring union).

¹⁶⁹ Will Marshall & Isabel V. Sawhill, *Progressive Family Policy in the Twenty-First Century*, in THE FUTURE OF THE FAMILY 198, 202 (Daniel P. Moynihan et al. eds., 2004) (quoting David Ellwood & Christopher Jencks, The Growing Difference in Family Structure: What Do We Know? Where Do We Look for Answers? (2001) (unpublished paper)).

well and stay married. Because the chances of such a sequence are dramatically reduced when couples are immature and their relationships troubled by infidelity, violence, substance abuse, and the stresses associated with poverty, a marriage-promotion policy could not accomplish much for children unless it focused on the linked goals of encouraging healthy marriages with good prospects of long-term success and discouraging childbearing outside of such relationships.

4. *Does Marital Formality Provide Public Benefits?*

We have seen that stable, low-conflict marriage is associated with significant benefits to adults and far more dramatic benefits to children. We do not know whether informal, marriage-like unions are capable of producing the same advantages. For both adults and their children, it is logical to suppose that a public commitment that entails binding legal obligations and necessitates formal exit procedures would be experienced differently than an informal relationship; indeed, unmarried mothers themselves suggest that the ceremonial aspects of marriage are important and meaningful to them.¹⁷⁰ But long-term, low-conflict cohabitation is sufficiently rare that we lack the data to establish how it compares with formal marriage. We thus cannot say for sure that formal registration is an important source of measurable benefit to either adults or children.

Formal registration does provide significant evidentiary benefits, however, benefits that are often overlooked in the debate over marriage. Formal marriage not only signals intention to a partner, friends, and family, it also signals intention to the state, and it accomplishes both of these signaling functions prospectively, efficiently, and unequivocally. After a couple marries, there is no question about what sort of relationship they intend. No litigation will be necessary to determine their relational status. No decision-maker will be required to sift through heaps of self-serving testimony about promises made and understandings reached. One partner cannot surprise the other by bringing a fraudulent claim, nor can one partner surprise the other by trying to evade a just claim.

Informal marriage lacks all of these merits. It must be proven and thus offers only a retrospective status. Gaining that status will almost invariably necessitate costly and time-consuming litigation.

These basic disadvantages are compounded by the evidentiary problems inherent in fact-based determination of marital status. Marital intent is subjective; when not publicly expressed, it is extraordinarily hard to prove. This basic difficulty is exacerbated by the range of meanings associated with cohabitation¹⁷¹ and the fact that cohabitants often do not agree about the nature of their relationship. Researchers have found that, in twenty to forty percent of cohabiting relationships, partners express different views on whether they plan to marry each other.¹⁷² Moreover, in one survey, about a third of the time, only one partner felt

¹⁷⁰ See EDIN & KEFALAS, *supra* note 51; at 115–17; Edin et al., *supra* note 50, at 1009.

¹⁷¹ See Heuveline & Timberlake, *supra* note 62, at 1215–18.

¹⁷² See Susan L. Brown, *Union Transitions Among Cohabitors: The Significance of Relationship Assessment and Expectations*, 62 J. MARRIAGE & FAM. 833, 838–89 (2000) (reporting

that the couple spent a lot of time together, and in forty percent of the cases, one partner but not the other reported a high degree of happiness with the relationship.¹⁷³

Given the lack of uniformity in cohabitants' understandings and behaviors, the mere fact of living together provides little evidence of what their relationship means. One partner might fully believe that the relationship is committed; the other might fully believe the reverse. A break-up can only enhance such disagreement, setting the stage for disappointed expectations and resulting litigation. These difficulties are bad enough when both cohabitants are able to testify at a hearing; they are even worse when the issue of marital understanding is tested in a proceeding brought after one partner dies.

These various evidentiary problems have fueled the movement away from the common law marriage doctrine. At one time, nearly two-thirds of the states recognized common law marriage; by 2002, only twelve jurisdictions did so,¹⁷⁴ and two of the twelve had adopted strict limitations on its establishment.¹⁷⁵ This decline reflects the sad fact that post-hoc, litigation-based determination of marital commitment often "leads to fraud and uncertainty in the most important of human relationships."¹⁷⁶ The evidentiary problems posed by the common law marriage doctrine were minimized when nonmarital cohabitation was rare; they are magnified in an era, like this one, in which cohabitation is extraordinarily common and extremely variable in its meaning.

In Part A, we saw that informal marriage, in which a couple make private marital commitments but forgo the marriage vows that publicly signal those commitments, pose serious classification problems for policymakers attempting to fashion fair and fraud-resistant rules for determining public benefits and burdens. Because cohabitation only rarely implies an informal marriage, policy makers cannot—or should not—assume either marital commitments or the sharing ethic associated with those commitments from the fact of cohabitation; to do so risks the imposition of unfair burdens on cohabitants who have consciously elected not to marry in order to preserve their autonomy and independence. But when there are burdens associated with marital status, the availability of informal marriage provides a means of fraudulently avoiding those burdens.

Because of the uncertainty, cost, evidentiary, and rule-evasion problems inherent in informal marriage, policymakers have reason to encourage formal

about 20%); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 923 (1991) (same); Sharon Sassler & James McNally, *Cohabiting Couple's Economic Circumstances and Union Transitions: A Re-Examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553, 568 (2004) (finding 42%).

¹⁷³ See Brown, *supra* note 172, at 838.

¹⁷⁴ See HARRY E. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 87 (5th ed. 2003).

¹⁷⁵ See TEX. FAM. CODE § 2.402 (1997) (requiring affirmation of a common law marriage in "declaration form"); UTAH CODE ANN. § 30-1-4.5(2) (1953) (requiring establishment of a common law marriage within one year of its dissolution).

¹⁷⁶ CLARK, *supra* note 84, at 59; see also Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 732-51 (1996).

marriage even if informal unions are capable of providing the same emotional and economic benefits to adults and children. Informal marriage cannot clearly, efficiently, and prospectively alter a couple's status in accordance with their intentions; formal marriage can and does. Informal marriage creates undesirable opportunities for fraud and rule evasion; formal marriage does not.

IV. CAN GOVERNMENT EFFECTIVELY PROMOTE GOOD MARRIAGES?

A. Aims and Achievement

We have seen that formal marriage provides procedural benefits that derive from its notarial function: the marriage ceremony provides a clear, certain, and efficient method of signaling marital intention and effecting a change in relational status. We have also seen that low-conflict, enduring marriage is associated with significant health, wealth, and happiness benefits for adult marriage partners and, to an even greater extent, their children.

These various benefits provide a plausible basis for government efforts to promote formal marriage. After all, governments routinely promote beneficial behaviors. In the United States, the federal government regularly exhorts its citizens to eat their vegetables and to exercise more often and more vigorously. It warns them against smoking and taxes them if they continue to light up.

There is no constitutional barrier that would preclude similar governmental efforts to promote the public benefits associated with successful, formal marriages. The U.S. Supreme Court has already approved statutory schemes, like those considered in Part Three, that tax or reward marital decisions.¹⁷⁷ These schemes typically were not designed to either promote or discourage marriage, but regulatory regimes with that aim certainly could be designed and put in place.

In recent years, marriage advocates have urged a diverse array of marriage-promotion initiatives. Some focus on divorce reform. Some focus on public education. Some aim to increase the marriage rate either through direct incentives or the elimination of marriage "penalties" like those considered in Part Three. Some strive for marital-conflict reduction, and some seek to reduce nonmarital births, particularly among teenage mothers.

The evidence reviewed in Part Three offers one means of evaluating these varied proposals. This evidence shows that formal marriage offers *procedural* advantages over informal marriage in each and every case; it also shows that marriage—both formal and informal—is associated with significant *personal* benefits only in the context of an enduring, low-conflict relationship. These findings support governmental efforts to channel marital intentions into formal relationships, but they do not support governmental efforts to promote marriage

¹⁷⁷ See *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (upholding a provision of the Social Security Act and noting that the Act was "not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby"); see also *Mapes v. United States*, 576 F.2d 896, 897–98 (Ct. Cl. 1978) (upholding income tax "marriage penalty"); *Druker v. Comm'r*, 697 F.2d 46, 51 (2d Cir. 1982) (same).

per se. Indeed, for high-conflict relationships, the data suggest that government policy should aim at discouraging marriage and facilitating divorce. Because only low-conflict, enduring relationships offer significant personal benefits to adult partners and their children, only initiatives aimed at promoting this narrow category of marriages are justifiable. Those that aim to promote marriage more broadly should be resisted.

While the research data enable us to reject those marriage-promotion strategies that aim at inappropriate goals, they cannot tell us whether an initiative with the right goals is worth pursuing. Policy-makers must also take account of practical constraints— cost, efficacy, noncompliance, secondary effects, gaps in our understanding of the behavior to be regulated—in determining whether a particular initiative is worthwhile.

In the case of marriage promotion, these invariable difficulties in effectively translating aim into achievement are magnified by several factors.

First, the behavioral patterns that marriage-promotion initiatives seek to alter seem to be deeply rooted within the conditions of modern life.¹⁷⁸ We saw in Part Two that the decline of marriage is a world-wide phenomenon that cuts across geographic and cultural boundaries. Behavior so embedded in the economic and social fabric is relatively resistant to changes in law and government policy. As sociologist William Goode put it:

[T]he family is so intertwined with other social structures that it is not possible to transform it without reversing a multitude of other trends in modern social life. . . . I know of no great civilization that at the height of its power and material splendor ever changed its grand onward movement, except by dissolution and military defeat. Certainly none ever did so by conscious social planning.¹⁷⁹

Law and policy can, in Goode's words, "have an effect at the margins." Thus "those who are not totally determined to divorce are influenced by restrictive laws and administrative hurdles that make divorce more difficult. . . [and] legal and administrative restrictions create formidable barriers for the poor."¹⁸⁰ But designing programs capable of achieving significant marginal effects is not easy.

These already very large difficulties are magnified by the fact that we lack both an understanding of the behaviors marriage promotion would seek to reverse and proven strategies for altering those behaviors. Both the trends against stable marriage and marital childbearing are poorly understood. So are the means by which individuals produce successful marriages. Thus, unsurprisingly, we do not have proven methods of transforming unsuccessful relationships into successful ones or reversing the larger social patterns.

¹⁷⁸ See Part II *supra*.

¹⁷⁹ GOODE, *supra* note 167, at 318.

¹⁸⁰ *Id.* at 323.

The last, but by no means the least, difficulty in devising effective policies is the fact that marital failure and nonmarriage are both consistently associated with disadvantage. In the United States, nonmarital birth and divorce are strongly linked with poverty, a poor education, unemployment, and relational violence.¹⁸¹ None of these circumstances promote high-quality relationships or relational skills, and it is not obvious that marriage promotion which ignores these risk factors can succeed.

In sum, a successful marriage-promotion initiative must strike a delicate and difficult balance: because only low-conflict marriage produces benefit, the initiative must promote harmonious marriages and childbearing within such relationships, and it must do so without also encouraging highly conflicted marriages or childbearing within these relationships. But human behavior is never easy to alter and, in the case of marriage promotion, we cannot yet explain either the individual behaviors that determine family formation or the worldwide trend against stable marriage; we also lack proven strategies for altering those behaviors and trends. Adding to these difficulties, both marital conflict and nonmarital childbearing are strongly associated with other serious life problems—difficulties that may significantly contribute to relational choice and dysfunction—and which no initiative aimed solely at marriage promotion can cure.

This assessment suggests that any and all marriage-promotion initiatives, however well intended, will confront daunting difficulties in translating aim into achievement. Skepticism about the success of such initiatives is warranted and appropriate.

B. What, If Any, Marriage-Promotion Initiatives Are Worthwhile?

Given the difficulties with which marriage-promotion efforts must contend, are there any marriage-promotion initiatives which seem likely to produce significant net benefits at reasonable cost? This section critically evaluates some of the more popular marriage-promotion initiatives.

1. Divorce Reform

Divorce-reform initiatives have been urged by many marriage-promotion advocates. Such initiatives would be supported by the research data if—and only if—they have the capacity to retard divorce in low-conflict relationships without hindering it in high-conflict relationships. This is not an easy balance to strike, and an initial question is whether there are enough low-conflict divorces to make such an effort worthwhile.

While more research would be useful, the available data suggest that low-conflict divorce is actually quite common. Amato and Booth, whose longitudinal research was important in establishing that divorce produces advantages for children in the context of a high-conflict marriage, found that less than a third of parental divorces they studied involve highly conflicted relationships; “only 28%

¹⁸¹ See *supra* notes 155–162.

of parents who divorced during the study reported any sort of spousal physical abuse prior to divorce, [only] 30% reported more than two serious quarrels in the last month, and [only] 23% reported that they disagreed 'often' or 'very often' with their spouses."¹⁸² Given these data, initiatives targeted at the low-conflict divorce population appear to be warranted.

However, the most popular divorce-reduction initiatives do not, in fact, target low-conflict marriages. Instead, they focus on "slow[ing]the rush to divorce" and "restor[ing] some power to the spouse who wants to keep the marriage together" through the introduction of lengthier divorce waiting periods or the restriction of "no-fault" divorce to cases in which the spouses agree.¹⁸³ Linda Waite and Maggie Gallagher make fairly representative claims on behalf of enhanced waiting periods; they argue that such periods would "give some weight to the marriage vow," provide spouses with "a chance to fully consider counseling and reconciliation before becoming entangled in new relationships," and grant spouses who are reluctant to divorce "a 'breathing spell' in which to emotionally recover before facing the extensive and complicated legal decision that divorce entails."¹⁸⁴

These claims ignore the fact that all marriages are not equally worth saving. Nor is it at all obvious that waiting periods would either reduce spousal conflict or even provide the "breathing period" that Waite and Gallagher contemplate. Lack of a divorce decree will not deter spouses who want to hastily enter new relationships from doing so, and a waiting period cannot insulate a reluctant spouse from contemplating the realities of divorce; those realities present themselves upon marital breakdown and separation whether or not a final divorce decree is immediately available. Reforms that would confine no-fault divorce to cases of spousal agreement have the capacity to resolve none of these problems; indeed, the lack of an agreement might well be an indicator of a high-conflict relationship.

In evaluating the merits of no-fault reform initiatives, it is also important to keep in mind that the evidence fails to show that such reforms would have a significant impact even on the overall divorce rate. The introduction of no-fault divorce was associated with a short-term increase in divorce rates, but there is no consensus among experts that it has had any longer term effect.¹⁸⁵ Nor did

¹⁸² AMATO & BOOTH, *supra* note 141, at 220; *see also* HETHERINGTON & KELLY, *supra* note 168, at 34 (reporting that about a third of sample of divorced wives cited lack of shared interests and unfair division of domestic labor as major sources of marital dissatisfaction and that a quarter cited alcoholism, physical abuse, or extramarital sex).

¹⁸³ *See* WAITE & GALLAGHER, *supra* note 3, at 195–96; *see also* Michael J. McManus, *Why Is It in the Government's Interest to Save Marriages?*, WebMemo #80, Feb. 25, 2002, *available at* <http://www.heritage.org/Research/Family/WM80.cfm>.

¹⁸⁴ WAITE & GALLAGHER, *supra* note 3, at 196.

¹⁸⁵ *See also* Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results*, 96 AM. ECON. REV. 1802, 1802 (2006), *available at* [http://bpp.wharton.upenn.edu/jwolfers/Papers/Divorce\(AER\).pdf](http://bpp.wharton.upenn.edu/jwolfers/Papers/Divorce(AER).pdf). *Compare* Ira Ellman & Sharon Lohr, *Dissolving the Relationship Between Divorce Rates and Divorce Laws*, 18 INT'L J. ECON. 341, 341 (1998), and Norval Glenn, *Further Discussion of the Effects of No-Fault Divorce on Divorce Rates*, 59 J. MARRIAGE & FAM. 800, 801 (1999) (finding that no-fault divorce laws do not increase the divorce rate) *with* Douglas W. Allen, *The Impact of Legal Reforms on Marriage and Divorce*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 191, 191 (Antony W. Dnes & Robert Rowthorn eds.,

universal fault rules stem the century-long rise in divorce that preceded the no-fault era.¹⁸⁶ Perhaps most tellingly, there is still a handful of states—Mississippi, New York, Tennessee¹⁸⁷—that continue to require mutual consent as the precondition to a no-fault divorce in at least some cases. Yet Tennessee has one of the highest divorce rates in the nation,¹⁸⁸ and the divorce rates of both Mississippi and New York are quite comparable to those of neighboring states with mutual-consent requirements.¹⁸⁹ Of course, it is possible that divorce rates in Mississippi, New York, and Tennessee would be even higher if they lacked restrictive divorce rules. But there is no evidence that this is so. Instead, it seems likely that restrictive rules simply do not make a difference.

The capacity of restrictive divorce rules to alter divorce rates is also impeded by the possibility of spousal collusion. Indeed, a major reason for the introduction of no-fault divorce grounds during the 1960s was research showing that spouses often colluded to manufacture grounds for divorce.¹⁹⁰ The collusion factor is a prime reason why proposals to restore fault divorce rarely go beyond a lengthier waiting period or a consent requirement; there would be no point. As long as a state retains fault grounds that permit divorce without a wait, spouses who agree about the desirability of a divorce can easily avoid waiting periods by colluding to manufacture fault grounds.

The fact that divorce rates in Mississippi, New York, and Tennessee are not lower than divorce rates in states with unilateral no-fault divorce also suggests that cases in which one spouse wants a divorce and the other wants to resist it are rare, too rare to have any impact on the divorce statistics. It is easy to understand why this would be so: what is the point of preserving a marriage that one's spouse is determined to leave? Indeed, given the increased social acceptability of cohabitation, the spouse who wants a divorce and is unable to get one will probably decide to end his or her marriage in fact, if not in law. And in those few cases in which one spouse does want to resist a divorce, mutual-consent rules may simply exacerbate conflict and increase litigation costs.

In sum, no-fault divorce reforms are unsupported by the research evidence and should be resisted: such reforms are poorly calibrated to deter divorce in low-

2002), and Rogers et al., *Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No*, 61 J. MARRIAGE & FAM. 803, 804 (1999) (finding that no-fault divorce laws did increase the divorce rate).

¹⁸⁶ See RODERICK PHILLIPS, *UNTYING THE KNOT* 200–13 (1991) (comparing U.S. and European divorce rates from mid-nineteenth century through mid-1980s).

¹⁸⁷ See MISS. CODE ANN. § 93-5-2 (1976) (requiring agreement on custody and financial issues or agreement to adjudicate those issues as condition of irreconcilable-differences divorce); N.Y. DOM. REL. L. § 170 (6) (McKinney 2003) (requiring one-year separation pursuant to written spousal agreement as condition of no-fault divorce); TENN. CODE § 36-4-103 (1996) (requiring a written spousal agreement making adequate provisions for children as a precondition to divorce based on irreconcilable differences).

¹⁸⁸ See STATISTICAL ABSTRACT, *supra* note 21, at 88 tbl.118 (showing Tennessee divorce rate of 6.5 per 1000 and only five states with higher rates).

¹⁸⁹ See *id.*

¹⁹⁰ Collusion was widespread throughout the fault era. See KRAUSE ET AL., *supra* note 174, at 536 (summarizing data and citing studies).

conflict relationships and have the potential to enhance and prolong marital stress in high-conflict relationships. The problem of spousal collusion also greatly diminishes the capacity of divorce grounds, even if differently formulated, to separate marriages worth preserving from those that should be terminated. Spouses who agree can evade the formal requirements, and the law is powerless to prevent them from doing so.

2. *Marriage Incentives and Penalties*

a. *Creating Marriage Incentives*

Although no marriage advocates have argued in favor of universal marriage incentives, inducements targeted at the poor have figured prominently in the marriage-promotion agenda. Federal welfare reforms adopted in 1996 encouraged the states to adopt such measures and, in 2005, nine states offered financial marriage-inducements to welfare recipients.¹⁹¹ It is easy to see why marriage-promotion efforts might target the poor; they have the lowest rate of marriage and the highest rate of nonmarital birth. Given these statistics, incentive programs targeted at the poor would be appropriate if they had the capacity to effectively promote low-conflict, long-term relationships.

However, none of the available evidence suggests that incentive programs do have this capacity. The first problem with inducement programs is that they encourage marriage *per se* and thus are not calibrated to foster enduring, low-conflict partnerships. Making matters worse, the research reports suggest that the poor single mothers who are targeted by these initiatives disproportionately have low-quality relationships. As we saw in Part Four, low-income unmarried mothers typically report that they have not married their children's fathers because of serious relationship problems such as violence, addiction, criminal misbehavior, and chronic conflict,¹⁹² problems that are strongly associated with both relationship failure and poor outcomes for children.¹⁹³

The case of Angela Whitiker, a former welfare recipient profiled in the New York Times, illustrates these problems. Whitiker had her first child at fifteen, dropped out of the tenth grade, and a decade later "landed aimless and on public assistance with five children by nearly as many men."¹⁹⁴ Whitiker did marry during this decade, but the relationship did not last and brought no apparent benefit to her or her children. Another decade later, however, Whitiker had finished nursing school as vice president of her class and with academic awards. She had passed her state licensing exam and was gainfully employed. And she had done so after

¹⁹¹ See Lyman, *supra* note 8, at A16 (reporting that nine states offered welfare recipients financial incentives to marry).

¹⁹² See *supra* notes 160–162.

¹⁹³ See *supra* notes 150–152, 167–168. The research data also shows that marriage to a stepparent does not confer the same emotional benefits to children as does marriage to a parent. See *supra* note 153.

¹⁹⁴ See Isabel Wilkerson, *Angela Whitiker's Climb*, N.Y. TIMES, June 12, 2005, at A1, A22–24.

encouragement by the man who ultimately became her second husband—a man who was not only college-educated, but also employed, stable, and extremely supportive of both Whitiker and her children. Commenting on Whitiker’s story, Professor Sara McLanahan, director of the Fragile Families Study cited frequently in this article, argued that: “A good relationship is part of the story. But it can’t be any relationship. . . . This case underscores that it must be a healthy relationship.”¹⁹⁵

McLanahan urged that “[t]he liberals are wrong because they’re too dismissive of marriage.”¹⁹⁶ But she also stressed that, for marriage to confer benefits, “[i]t can’t be [with] any man.”¹⁹⁷ Marriage-incentive initiatives that ignore this fairly obvious basic cannot achieve useful results and should be avoided. Marriage-inducement programs do ignore this basic and thus should be abandoned.

b. Eliminating Marriage Penalties

Many marriage advocates have urged elimination of so-called marriage “penalties” that give cohabitants favorable treatment under various tax and public benefit programs. The aim of these measures is not to entice couples into marriage, but to avoid deterring them from entering into formal marriages. Penalty-reduction initiatives thus do not present the same problems posed by marriage-inducement programs. Indeed, the procedural benefits associated with formal marriage lend support to such initiatives.

However, as we saw in Part Three, the elimination of marriage penalties presents complex regulatory problems because the rules that result in a marriage penalty in one case often produce a marriage “reward” in other cases. Moreover, the rules that produce these penalties and rewards rely on the assumption that a married couple represents an economic unit in which the income of one spouse is fully available to the other; the evidence suggests that this assumption is fully warranted for marriage partners, but not for cohabitants, whose relationships tend to be brief and relatively uncommitted. Equity, in particular the principle that like cases should receive like treatment, thus tends to support the marital-status rules that sometimes give rise to marriage penalties. But the social acceptability of cohabitation creates opportunities for rule evasion, and evasion creates different equity problems. Rule evasion also has the effect of substituting informal for formal marriage, resulting in a loss of the procedural benefits that flow from formal marital relationships.

Finding the right balance between these competing considerations is no simple matter, and the cost of eliminating marriage penalties can be very high. The various pension systems administered by the U.S. government offer an instructive

¹⁹⁵ Isabel Wilkerson, *A Success Story That’s Hard to Duplicate*, N.Y. TIMES, June 12, 2005, at A24.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*; see also HETHERINGTON & KELLY, *supra* note 168, at 251 (concluding that “most important potentially protective factor [against divorce] is the selection of a mate”).

example of the problems. All of these systems penalize remarriage,¹⁹⁸ but over time each system has dramatically reduced the impact of such penalties by exempting remarriages that take place after a specified age, typically fifty-five or sixty; later marriages produce no benefit penalty.¹⁹⁹ The theory here is simply that when remarriage takes place relatively late in life, both partners will often be living on fixed incomes and “[t]he prospect of one partner losing financial benefits as a result of the marriage is a real disincentive” that is not operable at younger ages when one or both spouses are employed and the benefit entitlement is far-off and unrealized.²⁰⁰ The available evidence supports this theory,²⁰¹ the current approach thus appears to represent a well-calibrated response to the evasion problem.

However, within some federal pension systems—particularly Social Security, the largest and most important—the evasion cure has created a serious equity problem. The way Social Security is structured, a retirement-age spouse obtains either a “primary benefit” based on his own work history or a “spouse” benefit equal to fifty percent of the primary wage-earner’s retirement benefits or a combined benefit; a widow(er) receives one hundred percent of the deceased wage-earner’s benefit if it exceeds his own.²⁰² Thus if Ann and Bill were entitled to \$1500 as a married couple, representing \$1000 in primary benefits and \$500 in spouse benefits, Ann would be entitled to \$1000 in benefits after Bill’s death. If Ann remarries Charles—who is also entitled to \$1000 in primary benefits—after Bill’s death, she and Charles would retain \$2000 in benefits. The current system thus eliminates any incentive to commit fraud through non-marriage, but the cost is substantial disparity in the benefits paid to intact-marriage and second-marriage couples with identical earnings records. This equity problem is compounded by the fact that spousal benefits are unaffected by the wage-earner’s own Social Security contributions.

At one time, it was thought that spousal benefits would fade away as more and more women, the almost exclusive recipients of these benefits, had their own earnings records on which to obtain a primary award. But:

¹⁹⁸ See *Hearing on H.R. 1108, H.R. 2095, H.R. 2222, and H.R. 3731 Before the H. Subcomm. on Benefits of the H. Comm. on Veterans’ Affairs*, 107th Cong. (2002) [hereinafter: Bilirakis] (statement of Rep. Michael Bilirakis), available at <http://veterans.house.gov/hearings/schedule107/apr02/4-11-02/mbilirak.htm> (showing remarriage penalty rules by program).

¹⁹⁹ See *id.* and 42 U.S.C. § 416(h)(1)(A)(i) (2006); 42 U.S.C. §§ 402(e)(1)(A), 402(e)(3), 402(f)(1)(A), 402(f)(4) (2006) (Social Security); 38 U.S.C. §§ 103(d)(2)(B), 1311 and 101(b) (2006) (Veteran’s Benefits).

²⁰⁰ Bilirakis, *supra* note 198 (noting legal disincentives to marry among persons aged fifty-five and older).

²⁰¹ See Michael J. Brien et al., *Widows Waiting to Wed? (Re)Marriage and Economic Incentives in Social Security Widow Benefits* 24–25 (Off. Res. Evaluation Stat., Working Paper No. 89, 2001), available at <http://www.ssa.gov/policy/docs/workingpapers/wp89.pdf> (finding that the age-sixty remarriage rule affects the timing of marriage and has the most influence on women who are very close to age sixty).

²⁰² Social Security Amendments of 1961, Pub. L. No. 87-64, § 104, 75 Stat. 131 (1961); Social Security Amendments of 1972, Pub. L. No. 92-603, § 102, 86 Stat. 1329 (1972). Benefits for young widows caring for children have remained constant at 75% since 1939. See 42 U.S.C. § 402(g)(2) (2004).

[N]umerous amendments, combined with the growth in Social Security coverage, made it increasingly easy for women to qualify for spouse benefits. The dramatic improvement in basic benefits and in the widow's entitlement as a percentage of the primary insurance amount substantially raised the value of such secondary benefits. Although more women qualify for retirement benefits, the present retired-worker formula, together with women's wage and work patterns, often keeps those benefits below wife or widow entitlements. . . . Over twenty percent of the women currently receiving retired-worker benefits also receive secondary spouse benefits, compared to fifteen percent at the end of 1966 and less than ten percent at the end of 1956.²⁰³

Spouse benefits are thus expected to remain an important part of Social Security for a long time to come, despite the fact that “[b]ehind the many spouse-benefit amendments lay no clear scheme or consistent rationale.”²⁰⁴

The only possible equity fixes that do not restore evasion-through-nonmarriage incentives are schemes that would ensure women primary-benefit amounts comparable to those of men. One could do this by raising the minimum Social Security payment, utilizing a “community property” approach that treats a married wage-earner’s pension contributions as the property of both spouses, introducing a “homemaker’s disregard” that ignores gaps in earnings records occasioned by child care and homemaking, or through some combination of these approaches.²⁰⁵ All of these options would cost money. None would resolve all of the equity issues. For example, today’s system, in which widows typically retain about two-thirds of total Social Security benefits, insures that widows who do not remarry avoid a marked living standard loss. Systems that phase out the survivor’s benefit by ensuring that most couples have relatively equal Social Security benefits would protect widows against living-standard loss much less well.

I have gone into Social Security at such length for three reasons: it is a large and important entitlement; it admirably demonstrates the complexity and high cost of designing entitlement rules that both avoid the Scylla of evasion and the Charybdis of inequity; finally—perhaps most importantly—it demonstrates the need to target costly penalty-elimination policies narrowly and at populations where the public interest in marital unions is highest.

²⁰³ Peter W. Martin, *Social Security Benefits for Spouses*, (2005) <http://www.law.cornell.edu/sosec/spring01/readings/spouses.htm> (last visited Mar. 23, 2008). In 2002, 61% of women aged sixty-two or older who received social security benefits collected values based on their husbands’ work histories. 54% of this group collected spousal benefits because their own work histories did not qualify them for social security benefits, and 46% collected spousal benefits because their own work histories produced smaller benefit values. See SOC. SEC. ADMIN., OFFICE OF RESEARCH, EVALUATION, & STATISTICS, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2003, at 5.25 tbl.5.A14, G.8–G.9 (2004).

²⁰⁴ Martin, *supra* note 203, at § II.

²⁰⁵ See *id.* at § VII.

Does marriage provide enough public benefits to justify Social Security's penalty-elimination policy? To conclusively answer this question, we would need to know both the likelihood and direct costs of rule evasion through non-marriage, as well as the direct costs of rules that counter the evasion risk. We would also need to know the indirect costs—in individual welfare, equity, and weakened marital norms—of each approach. In the case of Social Security, we can only guess at most of these variables. The data do enable us to say that Social Security's targeted evasion strategy, which has focused exclusively and successfully on the population presenting the highest evasion risk, is preferable to a broader and most costly strategy. But it remains unclear whether the targeted strategy produces sufficient benefits to justify its cost.

Although we lack the data to reach a firm conclusion about the ultimate merits of the Social Security penalty-reduction scheme, it also seems unlikely that Social Security is the program in which marriage-penalty elimination will produce the greatest public benefits. Allegiance to marital norms is probably higher among elderly couples than their younger counterparts. The elderly also have a relatively low poverty rate²⁰⁶ and thus may be less susceptible to financial motivators than are poorer segments of the population. Moreover, elderly couples seldom bear or raise children, and benefits to children represent one of the most important justifications for marriage promotion.

These various considerations suggest that Social Security is a less desirable target for penalty-elimination efforts than, for example, the Earned Income Tax Credit (EITC). The EITC is the primary tax benefit for poor families, who have the lowest marriage rate and highest rate of nonmarital birth. Because of their straightened circumstances, there is reason to believe that the poor are more susceptible to financial disincentives than the general population; many young unmarried couples also say that lack of financial stability is an important factor in their failure to marry.²⁰⁷

Under current EITC rules, a low-income mother can obtain as much as \$4000 in tax credits for herself and her children if she remains unmarried.²⁰⁸ But if she marries, she loses a significant portion of those credits even if she marries a man who also qualifies for the credit. Although revisions to the tax code adopted in 2001 reduced the EITC marriage penalty, they by no means eliminated it. One pair of commentators calculates that the same low-income woman who lost \$2500 in credits after marrying before 2001 continued to lose \$1900 after 2001.²⁰⁹ The poverty threshold for a three-person family is less than \$16,000;²¹⁰ at this income level, \$1900 might well sway some marriage decisions.

²⁰⁶ See STATISTICAL ABSTRACT, *supra* note 21, at 453 tbl.686.

²⁰⁷ See EDIN & KEFALAS, *supra* note 51, at 111–17; Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 855–56 (2004); Smock et al., *supra* note 119, at 692–93.

²⁰⁸ See Will Marshall & Isabel V. Sawhill, *Progressive Family Policy in the Twenty-First Century*, in THE FUTURE OF THE FAMILY 198, 215 (Daniel P. Moynihan et al. eds., 2004).

²⁰⁹ See *id.*

²¹⁰ See U.S. BUREAU OF THE CENSUS, POVERTY THRESHOLDS 2004, <http://www.census.gov/hhes/www/poverty/threshld/thresh04.html> (\$15,067).

In contrast to the divorce-reform and financial-incentive strategies advocated by marriage-promotion advocates, we cannot simply dismiss initiatives aimed at eliminating marriage penalties: Rule-evasion that substitutes informal for formal marriage produces certain procedural costs. To the extent that formal marriage promotes marital commitment and stability, rule-evasion may also contribute to the decline of enduring, high-quality marriage. Both of these concerns support the elimination of marriage penalties. However, marriage-penalty elimination is not cost-free, and the available data are not adequate to effectively compare the costs of elimination with its benefits. We can safely say that narrowly targeted initiatives are better than broad ones; the evidence also suggests that initiatives targeted at poor parents and would-be parents are more likely to yield positive net benefits than are those targeted at the elderly. But far more research will be necessary before definitive conclusions can be reached.

3. Public Education: General and Targeted

Most marriage-promotion advocates have urged public information campaigns designed to extol the benefits of marriage, and the Bush administration has included such campaigns within its Healthy Marriage Initiative. Advocates justify this strategy as an appropriate public health intervention; if government exhorts the public to stop smoking and start exercising because these activities promote health, they urge, should it not also exhort the public to enter into healthy marriages?

However, although advocates of public information campaigns rely on a public health model, the results of various public health initiatives do not suggest that campaigns directed at the general public will bear much fruit. Public health campaigns that seek to alter behavior have been markedly less successful than those that focus on the environment in which disease flourishes, and campaigns that target simple behaviors have been more successful than those that target complex behaviors.²¹¹ Educational initiatives also seem to work best when coupled with other incentives—criminal liability, taxes, use restrictions—as they have been in campaigns against smoking, drunk driving, and nonuse of seatbelts. Finally, it is far from clear how government could couple a pro-marriage message with an inducement that did not promote undesirable marriages as well as healthy ones.

The opinion-poll evidence also suggests that education about the benefits of marriage is not needed. As we saw in Part Two, these polls show high regard for marriage and widespread appreciation of its benefits.²¹² If the public already appreciates the benefits of a successful marriage, public education would seem to be unnecessary.

a. Targeted Campaigns:

²¹¹ See generally INST. OF MED. COMM. FOR STUDY OF FUTURE OF PUB. HEALTH, DIV. OF HEALTH CARE SERVS., *THE FUTURE OF PUBLIC HEALTH* 112–13 (1988); F. DOUGLAS SCUTCHFIELD & WILLIAM KECK, *PRINCIPLES OF PUBLIC HEALTH PRACTICE* (2002).

²¹² See *supra* notes 45–52.

Targeted educational campaigns hold considerably more promise than campaigns aimed at the general public. For example, public surveys show that most members of the public are not aware that low-conflict marriage tends to serve children better than a divorce,²¹³ and even divorcing parents are frequently “unaware that children who grow up with only one parent are more likely to have problems.”²¹⁴ It would not be difficult to inform parents who file for divorce of the facts and encourage them to act on them:

Although maintaining an unhappy but low conflict marriage entails a degree of sacrifice from spouses, this situation may not be as onerous as some might think. Most adults live more than two-thirds of their lives without children in the household. Spending one-third of one’s life living in a marriage that is less than satisfactory in order to benefit children—children that parents elected to bring into the world—is not an unreasonable expectation. This idea is especially compelling, given that many people who divorce and remarry find that their second marriage is no happier than their first. Furthermore, such an arrangement provides an important benefit for parents that helps to balance the cost: parents—especially fathers—are able to maintain continuous relations with coresident children. Given the pain experienced by most noncustodial parents following separation from their children, this should be an incentive to invest extra effort in the marital relationship.²¹⁵

A limited educational initiative of this type would not be costly; about half of U.S. counties already offer or mandate attendance at educational programs for divorcing parents.²¹⁶ These programs could easily be expanded to provide conflict assessment, information on the harms associated with parental conflict, and encouragement to both preserve low-conflict relationships and to minimize conflict when divorce occurs. We do not know how many parents would act on what they learned, but parents often do make sacrifices in their children’s interests, and existing divorce-education programs, despite typically short durations, have shown

²¹³ See, e.g., Walter Kirn, *Should You Stay Together for the Kids?*, TIME, Sept. 25, 2000, at 74 (asking in a 2000 survey if “children are better off in an unhappy marriage in which parents stay together mainly for the kids or a divorce in which the parents are more happy?,” 66% said children were better off with a divorce, 23% said an unhappy marriage, and 11% said they were not sure).

²¹⁴ MCLANAHAN & SANDEFUR, *supra* note 137, at 144.

²¹⁵ AMATO & BOOTH, *supra* note 141, at 238.

²¹⁶ See Robing J. Geelhoed et al., *Status of Court-Connected Programs for Children Whose Parents Are Separating or Divorcing*, 39 FAM. CT. REV. 393, 393 (2001); see also Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 222 (1999) (reporting that, in 1998, eleven states mandated attendance at parent-education programs).

considerable promise in reducing post-divorce litigation and increasing positive parental interactions.²¹⁷

Parents' inclination to act in their children's interest also suggests that targeted public information campaigns designed to educate young adults about the risks of nonmarital childbearing are worth trying. Although nonmarital birth is strongly associated with childhood instability and a wide range of associated disadvantages,²¹⁸ the young men and women who decide to put parenting before marriage may be ignorant of these disadvantages. High school sex education programs could forcefully make these disadvantages clear; because sex education programs are virtually universal, such a targeted campaign would also be extremely cheap.

Of course, the provision of accurate information about the sequelae of nonmarital birth does not insure that young adults will make rational choices based on that information. Teenagers often exhibit poor judgment about risk, and public health experts agree that "the main threats to adolescents' health are . . . the health-risk behaviors and choices they make."²¹⁹ But given the extremely low cost of such an initiative, even a very small impact would be positive. There is also some evidence suggesting that teens do heed information about unpleasant consequences; for example, some studies suggest that strict child support enforcement can reduce nonmarital childbearing.²²⁰

In sum, we cannot expect miracles from targeted public education campaigns, but their low cost and lack of obvious negative side effects suggests that such programs are worth trying, testing, and refining.

4. Reducing Marital Conflict

²¹⁷ See Jack Arbuthnot et al., *Patterns of Relitigation Following Divorce Education*, 35 FAM. & CONCILIATION CTS. REV. 269, 274 (1997) (finding that, 2.25 years after divorce, parents who attended a parent-education program had significantly lower rates of relitigation than a control group); CTR. FOR DIVORCE EDUC., OVERVIEW OF CHILDREN IN THE MIDDLE OUTCOME STUDIES, available at <http://www.divorce-education.com/research.htm> (reviewing research).

²¹⁸ See *supra* Part III. B. 3.

²¹⁹ Michael D. Resnick et al., *Protecting Adolescents from Harm: Findings from the National Longitudinal Study on Adolescent Health*, 278 JAMA 823, 823 (1997); see also MARSHA GARRISON & CARL E. SCHNEIDER, THE LAW OF BIOETHICS: INDIVIDUAL AUTONOMY AND SOCIAL REGULATION 580-84 (2002) (describing evidence on adolescent risk-taking behavior).

²²⁰ See ROBERT D. PLOTNICK ET AL., THE IMPACT OF CHILD SUPPORT ENFORCEMENT POLICY ON NONMARITAL CHILDBEARING 18, 31, tbl.3 (2005), available at <http://www.economics.ucr.edu/seminars/spring05/ped/5-4-05Robert%20Plotnick.pdf> (finding a significant association between state child support policies and nonmarital birth, with larger effects for adolescent women); Robert D. Plotnick et al., *Better Child Support Enforcement: Can It Reduce Teenage Premarital Childbearing?*, 25 J. FAM. ISSUES 634, 634 (2004) (reporting that during the early 1980s, teens living in states with higher rates of paternity establishment were less likely to become unwed mothers).

As data on the divide between high- and low-conflict marriages has mounted, increasing numbers of marriage-promotion advocates have called for government programs aimed at improving conflict-management skills and reducing marital tensions. Heeding this call, the Bush administration has undertaken a “Healthy Marriage Initiative” that provides federal funds for demonstration projects involving relationship skills training and mentoring; a number of states have taken similar steps.²²¹ Certainly, the goals of these initiatives are supported by the research data; the question is whether they are capable of producing significant effects.

There are relationship-skills programs that have shown promising results. A recent meta-analysis of all program reviews that met rigorous experimental-design criteria found that:

[M]arriage and relationship programs provide benefits for the couples they serve. Average effect sizes of .68 for relationship satisfaction and .26 for relationship communication indicate that in these programs evaluated, the couples that received treatment made significant gains in satisfaction when compared to couples that did not receive the treatment.²²²

However, the researchers who conducted the evaluation caution that all but seven of the studies included in the analysis assessed outcomes *only* at the beginning and end of the studied intervention, without any follow-up. Among the handful of studies that did conduct later assessments, the median follow-up period was only 2.5 months.²²³ We thus lack evidence that these programs have the capacity to effect long-term relationship improvements.

Nor have any of the “successful” programs been tested in the disadvantaged populations that are most at risk of poor quality relationships,²²⁴ and low-income couples pose a number of special challenges for conflict-reduction programs. Researchers have also found that economic hardship is associated with relationship conflict²²⁵ and, in addition to these economic stresses, that:

[t]he prevalence of traumatic experiences such as childhood sexual abuse may be higher among disadvantaged individuals and may make it harder to form healthy adult relationships. . . . [L]ow-income couples often

²²¹ See *supra* notes 7–8.

²²² JANE REARDON-ANDERSON ET AL., SYSTEMATIC REVIEW OF THE IMPACT OF MARRIAGE AND RELATIONSHIP PROGRAMS 23 (2005), available at http://www.urban.org/UploadedPDF/411142_impact_marriage.pdf; see also M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, in 15 FUTURE OF CHILDREN 139, 141–44 (2005).

²²³ See REARDON-ANDERSON ET AL., *supra* note 222, at 15, 23.

²²⁴ See *id.* at 23–24; Dion, *supra* note 222 at 142, 144.

²²⁵ See Patricia Clark-Nicolas & Bernadette Gray-Little, *Effect of Economic Resources on Marital Quality in African-American Married Couples*, 53 J. MARRIAGE & FAM. 645, 653 (1991); Rand D. Conger et al., *Linking Economic Hardship to Marital Quality and Stability*, 52 J. MARRIAGE & FAM. 643, 643 (1990); Smock et al., *supra* note 119, at 680.

struggle with issues related to having children by multiple partners. . . . Experts who work with low-income families [also] tend to find conventional teaching methods, such as lectures and didactic instruction, inappropriate for the literacy levels and learning styles prevalent among lower income populations.²²⁶

The administration's Healthy Marriage Initiative is funding pilot programs with low-income couples, but until program evaluations have been completed, we cannot determine whether the relationship-skills programs that have shown promise in middle-class populations can achieve equivalent results in disadvantaged groups.²²⁷

There is also evidence that marriage counseling can produce harm as well as good. Some studies have found that a significant percentage of couples who enter marital therapy, perhaps as many as a quarter, are actually worse off afterward than they were when they started; post-therapy divorce rates also remain very high.²²⁸

In sum, relationship-skills programs certainly seem worth trying and testing. Until careful evaluations show significant results, however, these programs are not worth a major investment of public funds. We simply do not know if they will work.

5. *Reducing Nonmarital Births*

Just about every marriage-promotion advocate has urged initiatives to reduce nonmarital births, particularly among teenage parents who are at high risk of multiple out-of-wedlock pregnancies. The research evidence supports these initiatives just as it does relationship-skills programs. Although the data show that those who have nonmarital children typically fail to marry because of low-quality relationships, most of these parents eventually do marry; if they could be persuaded to delay childbearing until they have found the right relationship, or at the very least until they are more economically secure themselves, the evidence suggests that both children and parents would be better off. Nonmarital birth also produces large public costs. In the United States, more than eighty percent of unmarried teen mothers receive public benefits of some type, even after welfare reforms designed to discourage out-of-wedlock childbearing.²²⁹ Most other industrialized nations do more than the United States to reduce poverty among single-parent families,²³⁰ but this largesse necessitates large public transfers. In addition to these immediate monetary outlays, the disadvantages suffered by

²²⁶ Dion, *supra* note 222, at 144–45.

²²⁷ See *id.* at 147–50 (describing the federal program and projected evaluations).

²²⁸ See Susan Gilbert, *Married With Problems? Therapy May Not Help*, N.Y. TIMES, Apr. 19, 2005, at F1, F6 (reporting research findings showing that, two years after ending marriage counseling, 25% of couples were worse off and, four years after counseling, 83% were divorced).

²²⁹ See ACS & KOBALL, *supra* note 50, at 4.

²³⁰ See UNICEF, *supra* note 149, at fig.1.

nonmarital children may produce long-term costs in terms of adult success and productivity.²³¹

However, although the evidence supporting initiatives to discourage early nonmarital childbearing is strong enough that even opponents of marriage promotion typically favor programs to reduce teen pregnancy, we know very little about how to effectively design such programs. While the U.S. teen pregnancy and birth rate did decline markedly during the 1990s, the United States still has the highest teen pregnancy rate in the developed world, a rate twice that of Great Britain and ten times that of the Netherlands.²³² Although we know that the decline in teen births reflects less sex and more contraceptive use, it also remains unclear why these shifts occurred. Nor has this inexplicable success produced a drop in the overall nonmarital birth rate; women in their early twenties have increased their nonmarital childbearing as teenagers have reduced theirs.²³³

Much of the debate has focused on sex education, more particularly “abstinence-only” education versus “abstinence-plus” education. The jury is still out on the merits of both approaches. The effectiveness of abstinence-only programs is completely unproven; a well-designed federal evaluation of abstinence-only programs is underway, but not yet complete.²³⁴ A few abstinence-plus programs have shown reductions in age at sexual initiation, but reports of longer-term results are rare and reports of nonmarital birth reduction are lacking.²³⁵

The life circumstances that tend to promote nonmarital birth also suggest that sex education alone will prove unable to produce significant, long-term results. Nonmarital and teenage birth is highly correlated not just with socioeconomic and educational disadvantage, but also with instability, trauma, and lack of motivation.

²³¹ See SAUL D. HOFFMAN, NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, BY THE NUMBERS: THE PUBLIC COSTS OF TEEN CHILD BEARING 14–16 (2006), available at http://www.teenpregnancy.org/g/costs/pdf/report/BTN_National_Report.pdf.

²³² See DOUGLAS KIRBY, NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, EMERGING ANSWERS: RESEARCH FINDINGS ON PROGRAMS TO REDUCE TEENAGE PREGNANCY 2 (2001), available at <http://www.teenpregnancy.org/resources/data/pdf/emerswsum.pdf>; PLANNED PARENTHOOD FEDERATION OF AM., REDUCING TEENAGE PREGNANCY, 1–3 (2000), available at <http://www.plannedparenthood.org/library/TEEN-PREGNANCY/Reducing.html>.

²³³ See Joyce A. Martin et al., NAT'L CTR. HEALTH STAT., BIRTHS: FINAL DATA FOR 2000 9 fig.3 (2002) (noting that the nonmarital birthrate in the United States for teenage mothers ages fifteen to nineteen decreased from 1995 to 2000, while the nonmarital birthrate among women aged twenty to twenty-four increased during the same period); see also Isabel V. Sawhill, *Teenage Sex, Pregnancy, and Nonmarital Births*, 23 GENDER ISSUES 48, 52–53 figs.5–6 (2006) (indicating that in the United States, the percent of nonmarital births to teenage mothers decreased from 49% in 1995 to 28% in 2000).

²³⁴ See MATHEMATICA POLICY RESEARCH, INC., FIRST-YEAR IMPACTS OF FOUR TITLE V, SECTION 510 ABSTINENCE EDUCATION PROGRAMS (2005), available at <http://www.mathematica-mpr.com/publications/PDFs/firstyearabstinence.pdf>. Interim results do show that the program participation was associated with heightened perceptions of risks involved in teen sex and pregnancy; there is some evidence that program participation also increased expectations of abstinence. See *id.* at 6.

²³⁵ See JENNIFER MANLOVE ET AL., NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, NOT YET: PROGRAMS TO DELAY FIRST SEX AMONG TEENS 5–7 (2004), available at <http://www.teenpregnancy.org/works/pdf/NotYet.pdf> (noting that while some of the included groups do show reductions, the effects are limited and short term).

In one study of unmarried teen mothers, thirteen percent of the weighted sample had been raped, forty-seven percent had been in a controlling or abusive relationship, and twenty-four percent had no life plans; only sixty-one percent lived with either parent, and most had recently moved.²³⁶ Young unmarried fathers are just as likely to have deeply troubled lives.²³⁷ And both young unmarried fathers and young unmarried mothers tend to live in worlds where early childbearing is common and successful marriage rare. In one study, almost seventy percent of teen mothers had close friends or teen siblings who were already parents or pregnant.²³⁸ Many of these young women “are so deeply engaged in a high-risk lifestyle that they simply aren’t thinking about where their actions might lead. Depression and despondency spawned by difficult life situations sometimes stop them from caring whether they become pregnant or not.”²³⁹

Nor are young unmarried mothers necessarily interested in postponing pregnancy. In interviews, they describe marriage “as a luxury” and children as “a necessity, an absolutely essential part of a young woman’s life, the chief source of identity and meaning [and] . . . an opportunity to prove one’s worth”²⁴⁰ A sizable minority thus report that they actually sought pregnancy, and many others report that they did not care about avoiding it.²⁴¹ Studies of the psychological determinants of teenage pregnancy and childbearing also suggest that some adolescents may have more ambivalence or preconscious motivation toward childbearing than is detected in surveys using retrospective questions on pregnancy intention.²⁴²

Many young unmarried fathers also seem to be motivated toward or indifferent about parenthood. In one survey, fully half of the young women interviewed reported that their baby’s father had wanted them to conceive, and women who reported that their partners had wanted them to get pregnant were nearly fifteen times as likely as others to have intended the pregnancy.²⁴³ Surveys of the fathers themselves report somewhat less enthusiasm for paternity, but a

²³⁶ See JENNIFER J. FROST & SELENE OSLAK, ALAN GUTTMACHER INST., *TEENAGERS’ PREGNANCY INTENTIONS AND DECISIONS: A STUDY OF YOUNG WOMEN IN CALIFORNIA CHOOSING TO GIVE BIRTH 9–10* tbl.2 (1999), available at http://www.guttmacher.org/pubs/or_teens_preg_survey.pdf. Lack of life plans was a highly significant correlate of pregnancy intentions. *Id.* at 13 tbl.4.

²³⁷ Robert F. Anda et al., *Adverse Childhood Experiences and Risk of Paternity in Teen Pregnancy*, 100 *OBSTETRICS & GYNECOLOGY* 37, 41 (2002) (finding that each reported adverse childhood experience was significantly associated with teen paternity risk); see also *BEST INTENTIONS*, *supra* note 159, at 75–76.

²³⁸ FROST & OSLAK, *supra* note 236, at 9.

²³⁹ EDIN & KEFALAS, *supra* note 51, at 39.

²⁴⁰ *Id.* at 6.

²⁴¹ See *id.* at 37, 237 tbl.5 (reporting that 17.2% of respondents intended to become pregnant, 37.7% did not, and 45.7% were “in between”); FROST & OSLAK, *supra* note 236, at 9 (reporting that 32% of respondents had intended to become pregnant, 25% had not cared and 43% had not intended to become pregnant); Wendy D. Manning, *Childbearing in Cohabiting Unions: Racial and Ethnic Differences*, 33 *FAM. PLAN. PERSP.* 217, 221 (2001) (reporting that 44% of cohabiting and 61% of single, noncohabiting women said that their first birth was unintended).

²⁴² See FROST & OSLAK, *supra* note 236, at 6 (citing studies).

²⁴³ *Id.* at 12–13; see also EDIN & KEFALAS, *supra* note 51, at 30–37 (describing cases in which the father encouraged the mother to become pregnant).

sizable number report that they were happy upon learning of the mother's pregnancy, and many pregnancies seem to represent an event that is "unplanned but not accidental."²⁴⁴

Because many, if not the majority, of nonmarital pregnancies appear to result from intention or indifference, it seems unlikely that either sex education programs promoting abstinence or those promoting contraceptives are capable, on their own, of achieving a major reduction in youthful nonmarital births. Sex education cannot alter the attitudes and high-risk lifestyle that are so frequently associated with early nonmarital pregnancy. Moreover, both young unmarried fathers and mothers typically have access to contraceptives, but fail to use them.²⁴⁵

Given the life circumstances of young, unmarried parents, it should not surprise us that one of the most successful teen pregnancy prevention programs reported so far is not only "long-term, intensive, and expensive," but includes components dealing with:

- (1) family life and sex education, (2) individual academic assessment, tutoring, help with homework, preparation for standardized exams, and assistance with college entrance, (3) work-related activities, including a job club, stipends, individual bank accounts, employment, and career awareness, (4) self-expression through the arts, (5) sports activities, and (6) comprehensive health care, including mental health and reproductive health services and contraception.²⁴⁶

This program "is the first and only study to date that includes random assignment, multiple sites, and a large sample size and that found a positive impact on sexual and contraceptive behavior, pregnancy, and births among girls for as long as three years."²⁴⁷ And even this admirable, intensive, and expensive program failed to make a difference in boys' risk-taking activities.

Certainly, pregnancy-prevention programs are worth trying, testing, and refining. Further research is warranted and desirable. However, we do not yet know whether such programs will prove capable of significant results.

6. A Summary

Reviewing these often-urged marriage-promotion initiatives, we can reject some outright: Both divorce law revision and financial incentives apply too

²⁴⁴ See Timothy J. Nelson, *Low-Income Fathers*, 30 ANN. REV. SOC. 427, 432-33 (2004) (reviewing studies).

²⁴⁵ See EDIN & KEFALAS, *supra* note 51, at 37-46; FROST & OSTLAK, *supra* note 236, at 14 tbl.5 (reporting that 80% of respondents had used contraceptives at some point and 66.5% had received contraceptive services from a clinic or doctor, but 63% reported that they had used no contraceptive method during month when pregnancy occurred).

²⁴⁶ KIRBY, *supra* note 232, at 15.

²⁴⁷ *Id.* at 15-16.

broadly; they cannot effectively promote well-functioning, enduring marriages, and only those marriages. General public-education campaigns advertising the virtues of a happy marriage seem unnecessary and meaningless; Americans almost universally want such marriages, and those who do not have them surely need more than exhortation to achieve the right results. Other proposed initiatives are supported by the data, but we lack evidence that they can achieve significant results. These initiatives—targeted public-information campaigns (aimed at low-conflict couples contemplating divorce and teenagers at risk for early nonmarital pregnancies), relationship-skills training, nonmarital and teen pregnancy prevention—would be worthwhile if we could find strategies that work. But much more research is necessary before large-scale funding is warranted.

C. The Missing Marriage-Promotion Initiative: Prevention

Across our review of proposed marriage initiatives, we have seen that the various forms of disadvantage associated with nonmarriage and marital failure impede our capacity to successfully promote happy and enduring marital partnerships. Virtually every form of disadvantage—economic, educational, psychological, social, and even geographical—appears to increase the risk of nonmarital childbearing and unsuccessful partnering,²⁴⁸ and each form of disadvantage magnifies the difficulty of altering the behaviors that lead to nonmarriage and marital failure.

This should not surprise us; the same disadvantages are strongly associated with other indicators of family dysfunction. For example, child maltreatment is highly concentrated among disadvantaged families: a U.S. national incidence study found that children from families with annual incomes below \$15,000 were sixty times more likely to die from maltreatment and twenty-two times more likely to be seriously harmed by it than were children from families with annual incomes above \$30,000.²⁴⁹ Single and adolescent parenting, substance abuse, mental health problems, adult family violence, and lack of social supports are all highly correlated with child maltreatment;²⁵⁰ these various maltreatment-risk factors are also highly correlated with each other and with low socioeconomic status.²⁵¹

Because the risk factors that predict one form of family dysfunction tend to predict other forms of family dysfunction, these risks also tend to be geographically concentrated in poor neighborhoods. Thus, a British Columbia researcher charted, between poor western Vancouver and wealthy eastern

²⁴⁸ See *supra* Part III. B. 3.

²⁴⁹ See A.J. SEDLAK & D.D. BROADHURST, DEPT. OF HEALTH & HUMAN SERVICES, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 5–51 (1996). Extreme poverty also tends to be associated with more extreme abuse and neglect. See COMM. BEHAV. & SOC. SCIENCES & EDUC., LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS 19 (1993) (summarizing studies).

²⁵⁰ Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL'Y & L. 590, 613–15 (2005) (summarizing research).

²⁵¹ *Id.* at 615 (summarizing research); see also CHILDREN IN POVERTY: CHILD DEVELOPMENT AND PUBLIC POLICY 23–156 (Aletha C. Huston ed., Cambridge Univ. Press 1991) (summarizing research on links between poverty, parental dysfunction, and poor child outcomes).

Vancouver, a six-fold difference in income to basic needs, a five-fold difference in the proportion of children under twelve living with a single parent, a ten-fold difference in adult education levels and access to child care, a nine-fold difference in neighborhood crime, a fifty-fold difference in children's language and cognitive development, a seventeen-fold difference in children's social development, and an eighty-three-fold difference in child neglect.²⁵² This geographic risk concentration may also enhance the impact of individual risk factors.²⁵³

Although international comparisons are risky because of programmatic and definitional differences, comparative data suggest that the United States is at the bottom of the charts on many measures of family functioning. The United States has long had the highest divorce rate in the industrialized world and, despite the fact that a number of nations now have nonmarital birth rates equal to or higher than that of the U.S., the proportion of U.S. children who live with a single parent continues to top the cross-national charts.²⁵⁴ But it is not only family break-up in which the United States leads the pack. U.S. childhood mortality rates are among the highest in the industrialized world,²⁵⁵ and a recent U.N. survey found that, among twenty-six industrialized nations, children raised in the United States, Mexico, and Portugal had the greatest chances of dying from neglect or other forms of mistreatment. Indeed, the calculated death rate in the U.S. (twenty-four per million) was twelve times higher than that of countries with the lowest rates and three to four times that of countries with average records.²⁵⁶

Because the United States has a very high level of income inequality and a very low level of support for families, socioeconomic factors appear to play an unusually large role in producing these high levels of family break-up and dysfunction. For example, various Scandinavian countries have nonmarital birth rates exceeding that of the United States; roughly a third of U.S. births are nonmarital, as compared to about half of all births in Norway, Sweden, and Denmark, and almost two-thirds in Iceland.²⁵⁷ But these nations have *lower* rates of single parenthood. Indeed, the proportion of children who are being raised by

²⁵² See Ruth Annis, "Think Locally, Act Globally" Revisited: Finding Better Ways to Protect Children and Youth in B.C. 25, Address at the British Columbia Provincial Court Judges Association Conference (Nov. 21, 2002), available at <http://www.cecw-cepb.ca/DocsEng/RuthAnnisSpeechToBCPCJA.pdf>.

²⁵³ See Anne R. Pebley & Narayan Sastry, *Neighborhoods, Poverty, and Children's Well-Being*, in SOCIAL INEQUALITY 119, 138-39 (Kathryn M. Neckerman ed., 2004) (reviewing literature).

²⁵⁴ See Smeeding et al., *supra* note 24, at 7-8 & figs.1.2 & 1.3 (comparing ten industrialized nations).

²⁵⁵ See SUZANNE M. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, INJURY AND CHILD ABUSE 299, 301 (1994), available at <http://www.cdc.gov/reproductivehealth/Products&Pubs/DatatoAction/pdf/Chlt4.pdf>.

²⁵⁶ See UNICEF, A LEAGUE TABLE OF CHILD DEATHS BY INJURY IN RICH NATIONS 3-5, 8 (2001), available at <http://www.unicef-icdc.org/publications/pdf/repcard2e.pdf>.

²⁵⁷ See M. V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage? Evidence from Scandinavia and the Netherlands* (2004), available at <http://www.iglss.org/media/files/briefing.pdf> (discussion paper prepared for the Council on Contemporary Families and for the Institute for Gay and Lesbian Strategic Studies).

married parents is close to the proportion in the United States²⁵⁸ for the simple reason that most nonmarital children are born to cohabiting couples, and a fairly large proportion of these couples ultimately marry.²⁵⁹ The Scandinavian countries also have comparatively low maltreatment and foster-care rates; the United States, where about fifteen percent of children live in poverty,²⁶⁰ has 75 per 10,000 children in state care, while Norway, with about four percent of children living in poverty, has a placement rate approximately half that level.²⁶¹

Three crucial points emerge from these data: First, nonmarriage and relational failure are often symptoms, as well as causes, of emotional and economic stress. Second, the underlying stresses that promote nonmarriage and relationship failure also promote a host of other, arguably far more serious, deficits in family functioning. Third, reductions in the stresses associated with deficits in family functioning should be associated with reductions in those deficits. Fourth, economic stress probably plays a larger-than-typical role in promoting nonmarriage and relationship failure in the United States because economic stress is more profound and common here than elsewhere.

Marriage promotion represents, at bottom, a public health campaign, and marriage-promotion advocates often rely on public health analogies and metaphors. However, the fact that none of the marriage-promotion initiatives we have considered address the disadvantages with which nonmarital childbearing and relationship failure are associated suggests that marriage-promotion advocates have failed to grasp the public health field's most important insight: an ounce of prevention is worth a pound of cure.

The field of public health emerged during the nineteenth century along with knowledge about the vectors by which disease was transmitted. Experts in this new field aimed to promote health by altering disease-inducing conditions: they concentrated on populations instead of individuals, and they offered prevention programs instead of treatment. The preventive approach pioneered by the public health movement is now an established and important part of government's response to physical illness. No longer do we wait for symptoms; instead, government officials try to alter the conditions that promote those symptoms.²⁶²

A preventive approach to marriage-promotion would aim to reduce the personal and socioeconomic deficits associated with relationship failure instead of curing the failure itself. The fact that we know many of the risk factors—and do

²⁵⁸ In 2000, 72% of U.S., 75% of Dutch, almost two-thirds of Swedish, and 61% of Norwegian families with children were headed by married couples. See Badgett, *supra* note 257, at 4.

²⁵⁹ In Sweden, 70% of cohabitants marry after the birth of their first child, most of them within five years. In the Netherlands, although 30% of children are born outside of marriage, only twenty-one of children under one live with unmarried parents; and by age five, only eleven live with unmarried parents. *Id.* at 4.

²⁶⁰ See STATISTICAL ABSTRACT, *supra* note 21, at 452 tbl.684 (reporting poverty levels during 1980 to 1999).

²⁶¹ See STATISTICS NORWAY, http://www.ssb.no/barneverng_en/tab-2004-08-25-06-en.html (reporting 31,905 children in care in 2000).

²⁶² See INST. OF MEDICINE, *supra* note 211, at 107 (synthesizing public health history, data, and policy recommendations); SCUTCHFIELD & KECK, *supra* note 211, at 28–35.

not know how to successfully “treat” those who marry badly or not at all—suggests that a preventive approach is highly desirable. Because nonmarriage and relationship failure are associated with other types of family dysfunction, this type of marriage-promotion effort might also have the capacity to produce a broad array of benefits within a wide variety of families.²⁶³

Thus, just as marriage advocates are right in emphasizing marriage as a positive influence on adults and children, marriage opponents are also right in emphasizing social policies that facilitate economic and emotional flourishing for all. Indeed, in the United States, it is not obvious that government can effectively promote marriage without such policies.²⁶⁴ These policies do not have the capacity to bring back the world in which marriage and marital child-bearing were almost universal. But they may have the capacity to make a difference at the margins. Certainly, they have the capacity to confer a broad array of other personal and public benefits.

V. CONCLUSION

Marriage and marital childbearing are in decline for reasons that are poorly understood. Cohabitation sometimes represents informal marriage, but far more frequently serves as a substitute for being single or a stage in the process of deciding whether to make a marital commitment. Cohabitation thus is not the equivalent of marriage, and many marital-status classifications appropriately divide the married from the unmarried. However, because marital decision making may be affected by (dis)incentives produced by these classifications, policymakers face difficult choices in deciding whether, and to what extent, they should revise statutory classifications to avoid marriage disincentives.

The research evidence shows that marriage is associated with economic and emotional benefits to both adult partners and their children, but it also shows that the emotional and health benefits associated with marriage are produced only in low-conflict, well-functioning relationships. Marriage also provides important public benefits through its notarial function; ceremonial marriage clearly denotes the intention to form a durable union and to assume marital roles and responsibilities, while cohabitation has a range of meanings and often has different meanings even for the cohabiting pair.

²⁶³ For example, high-quality, intensive pre-school education is significantly associated not only with long-term educational and social advantages, but also with a lower rate of child maltreatment and teen pregnancy. See U.S. DEPT. OF HEALTH & HUMAN SERVS., EVALUATING HEAD START: A RECOMMENDED FRAMEWORK FOR STUDYING THE IMPACT OF THE HEAD START PROGRAM 15–17 (1999); KIRBY, *supra* note 232, at 5; Arthur J. Reynolds & D. L. Robertson, *School-Based Early Intervention and Later Child Maltreatment in the Chicago Longitudinal Study*, 74 CHILD DEVELOPMENT 3, 20 (2003); Arthur J. Reynolds et al., *School-Based Early Intervention and Child Well-Being in the Chicago Longitudinal Study*, 82 CHILD WELFARE 633, 652 (2003).

²⁶⁴ *But cf.* Pamela J. Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. MARRIAGE & FAM. 966, 968 (2004) (concluding that the research “data are powerful in suggesting that economic disadvantage inhibits marriage”).

The evidence thus suggests that the state should avoid classificatory schemes that penalize formal marriage unless there is evidence showing that the costs of such avoidance exceed the expected gains. The evidence also supports some marriage-promotion initiatives, in particular low-cost public education aimed at preserving low-conflict marriages and deterring nonmarital childbearing. These initiatives appear to be cost-effective, and they seem extremely unlikely to do harm.

In the United States, marriage-promotion initiatives should also be coupled with policies aimed at reducing the social disadvantages strongly associated with nonmarital birth and relationship failure. The research data shows that the same conditions which promote nonmarriage and marital failure also promote an enormous array of problems in family functioning and outcomes. Indeed, because of the strong and consistent association between disadvantage and relationship failure, it is not obvious that the state can effectively promote marriage without such policies.

