

MARRIAGE, COHABITATION, AND THE WELFARE OF CHILDREN

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I. INTRODUCTION

The divorce rate is high in the United States,¹ and the rate of non-marital cohabitation continues to grow.² More and more children are growing up in nontraditional homes,³ and there is a growing debate about whether children are harmed when raised in a non-marital setting. A related debate involves what steps, if any, can and should be taken to enhance the welfare of those children living in a non-marital home if, indeed, they are suffering opportunity costs by virtue of being raised in such a setting.

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1. See Valarie King, *Stepfamily Formation: Implications for Adolescent Ties to Mothers, Nonresident Fathers, and Stepfathers*, 71 J. MAR. & FAM. 954, 954 (2009) (“[A]lmost half of marriages [are] likely to end in divorce . . .”).

2. Julie E. Artis, *Maternal Cohabitation and Child Well-Being Among Kindergarten Children*, 69 J. MARRIAGE & FAM. 222, 222 (2007) (“One of the most notable changes in family life over the last several decades is the rapid rise of cohabitation.”).

3. Cf. King, *supra* note 1, at 954 (“[O]ne third of births occur[] to unmarried mothers . . .”); Artis, *supra* note 2, at 222 (“Children are more likely than ever before to live in a household with a cohabiting parent.”).

Some commentators suggest that one obvious solution to the alleged problems posed for children raised in non-marital homes is to make divorces more difficult to obtain. Other commentators seem to fear that opening up marriage to same-sex couples will demean the institution—somehow further leading to an increase in the divorce rate or, perhaps, an increase in the number of couples choosing to cohabit rather than marry.⁴ Protestations to the contrary notwithstanding, the empirical data do not suggest that an obvious solution to the possible problems posed by the increasing numbers of children raised in non-marital homes is to make divorces difficult, if not impossible to obtain, and there is no empirical justification for the claim that children are better off when same-sex couples are prohibited from marrying.

This article first addresses why it is more difficult than often realized to establish whether marriage provides the benefits often associated with that institution, and then discusses why some of the indirect benefits of marriage may not be captured by the current studies attempting to gauge the degree to which marriage has beneficial effects. Finally, the article discusses why those arguing in favor of marriage should, in addition, be supporting legal recognition of LGBT (lesbian, gay, bisexual, and transgender) relationships. The article concludes that while the current data are inconclusive, they suggest that there are indirect benefits of marriage and that recognizing same-sex relationships would help the adults in the relationship, their children, and society as a whole.

II. WHAT DOES THE DATA SHOW AND WHAT IMPLICATIONS MIGHT THEY HAVE

Numerous studies suggest that children who are living with both of their married, biological parents tend to do better than other children. While various theories have been proposed to help account for this observed correlation, there simply is no agreement about why this correlation exists. Indeed, commentators cannot even agree about whether marriage itself confers a benefit or, instead, is merely correlated with characteristics that spell success for married couples and their children. Thus, some suggest that marriage itself provides a benefit to children⁵ because

4. Cf. Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "The Tragedy of the Commons,"* 22 *BYU J. PUB. L.* 441, 453 (2008) ("Since it is the absence of marriage as we now know and understand it that is the cause of the deprivation of those couples and children, it hardly seems cautious or prudent or conservative to radically change the very institution—conjugal marriage—which we agree generally provides the very benefits which unmarried, cohabiting couples and their children do not enjoy.").

5. See Susan L. Brown, *Marriage and Child Well-Being: Research and Policy Perspectives*, 72 *J. MARRIAGE & FAM.* 1059, 1061 (2010) ("Proponents of the marriage movement insist that marriage confers a host of benefits to children, adults, and communities, and thus it is in society's interest to promote marriage . . .") (citations omitted).

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married couples are more likely to invest in the relationship and in their children, thereby providing a more stable and nurturing atmosphere.⁶ However, other commentators suggest that marriage does not make people healthier or happier, but instead healthier and happier people are more likely to marry.⁷ If the latter group of theorists is correct, then providing additional incentives to marry may induce more people to tie the knot or, perhaps, refrain from untying it, but would not thereby make those additional married couples or their children happier. Instead, one would simply have reduced the average happiness of marital families by inducing some to marry who would not have done so but for the new incentives.⁸ In contrast, if the former group of theorists is correct, then one might want to promote marriage, assuming that the method employed promotes, rather than undermines family welfare.⁹

Some commentators frankly admit that they cannot tell whether marriage itself produces benefits for children or whether, instead, marriage is simply correlated with other factors that produce those benefits.¹⁰ Their admission is unsurprising, because it is difficult to design a test that would establish the degree to which marriage enhances family welfare.¹¹ Indeed, some imply that it really does not matter whether marriage is merely cor-

6. See W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 884 (2006) (“These studies confirm that marriage matters to how children flourish and to the extent to which their parents are willing to invest in them”); Lynne Marie Kohm, *What's My Place in this World?: A Response to Professor Ellen Waldman's What Do We Tell the Children?*, 35 CAP. U. L. REV. 563, 574 (2006) (“These studies concluded that ‘marriage per se confers advantage in terms of’ how children thrive and the extent to which parents are willing to invest in children.”).

7. See Brown, *supra* note 5, at 1061. Brown notes:

Opponents are more tentative about the benefits of marriage, arguing that much of its apparent advantages are due to selection factors rather than marriage itself. That is, marriage does not really make people happier, healthier, and more financially secure. Instead, happy, healthy, secure individuals are more likely to marry in the first place

Id. (citations omitted).

8. Cf. Gregory Acs, *Can We Promote Child Well-Being by Promoting Marriage?* 69 J. MARRIAGE & FAM. 1326, 1327 (2007) (discussing the “possibility that children in marriage-promoted families may be in lower quality home environments than the average child with married parents today.”).

9. Cf. *id.* at 1335 (“A stable marriage is associated with better behavior than other arrangements, and even an unstable marriage is associated with better behavior than living in single-mother or cohabiting partner families. But the transition to a married parent family is associated with worse behavior.”).

10. Artis, *supra* note 2, at 232-33 (“[W]e cannot disentangle whether observed differences in cohabiting and marital families are the result of a [sic] characteristics correlated with selection into marriage or a benefit of marriage itself”).

11. See Brown, *supra* note 5, at 1064. Brown writes:

The selection perspective holds that it is not family structure per se that influences child well-being but the characteristics of parents that are related to both family structure and [] outcomes. . . . This proposition is difficult to rigorously test because children’s family structure cannot be randomly assigned. Equally difficult to establish, though, is the extent to which the apparent benefits of marriage are causal.

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related with or, instead, produces particular benefits, because in either event the special nature of marriage should be maintained and trumpeted.¹²

A moment's reflection, however, suggests that care must be taken before policies promoting marriage as a general matter are adopted. Whether the focus is on the well-being of the adults in the relationship or on the well-being of the children raised in the household, not all marriages are worth saving. Not only is it false to think that all marriages are equally good for children,¹³ but children are sometimes better off when their parents divorce than when their parents remain together.¹⁴ The same point might be made about the adults in the relationship.¹⁵ Thus, commentators have noted that both children and adults tend to be better off after high-conflict and abusive marriages have ended.¹⁶ Further, children in settings involving such conflict and abuse do not merely suffer ill effects at the time of the dissolution of the marriages; they may have been suffering such effects for years before the parents finally divorce.¹⁷

Yet, claiming that marriage promotion policies should be designed so that they do not promote more physical or emotional abuse does not challenge the underlying assumption that marriage as a general matter promotes welfare; instead, it might merely be thought to provide a justification for including a limited exception to marriage promotion policies so that certain kinds of marriages will not be promoted.¹⁸ Indeed, even states

12. Cf. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligation*, 52 UCLA L. REV. 815, 861 (2005) ("Given the substantial benefits associated with marriage, family law should clearly signal that marital commitment matters and promote reliance on such commitment. Family law should not falsely signal that marriage and cohabitation are equivalent states.").

13. Acs, *supra* note 8, at 1327 ("[R]esearch shows that parental relationship quality affects parenting practices . . . and that children whose parents have high-conflict marriages exhibit lower levels of well-being than those whose parents have low-conflict marriages.") (citations omitted).

14. Elizabeth S. Scott, *Divorce, Children's Welfare, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95, 97 (2001) ("[C]hildren who are exposed to serious conflict in their parents' marriage are better off when conflict is reduced by divorce.").

15. Milton C. Regan, Jr., *The Boundaries of Care: Constructing Community after Divorce*, 31 HOUS. L. REV. 425, 442 (1994) ("Clearly there are occasions when divorce is warranted and all persons involved will be better off if it occurs."); see also Brown, *supra* note 5, at 1061 ("[S]ometimes, marital breakup can be beneficial for children and adults, particularly in cases of high marital conflict or abuse . . .").

16. Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J. L. & FAM. STUD. 279, 307 (2008) ("[R]esearchers 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 . . ."); Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Long-Term Well-Being*, 9 VA. J. SOC. POL'Y & L. 71, 92 (2001) ("Although divorce harms some children, it benefits others. If we make divorce more difficult to obtain, then we are likely to benefit some children in low-discord marriages, but we also are likely to harm some children in high-discord marriages.").

17. See Acs, *supra* note 8, at 1327-28 ("[S]everal researchers examining the effects of divorce on children find that even years before a divorce/separation actually occurs, children and adolescents whose parents eventually divorce fare worse on a host of outcomes and well-being measures than those whose parents remain married . . .") (citations omitted).

18. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 294 (2009). Gustafson notes:

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that have covenant marriage¹⁹ permit divorce for physical abuse,²⁰ so it is not as if recognizing that abusive marriages should not be promoted is inconsistent with a policy that seeks to promote marriage or that seeks to make exiting marriages more difficult.

A much more damning criticism of marriage promotion policies has been offered; namely, marriage itself does not confer a benefit on the parties to the institution. While there is agreement that there is a correlation between marriage and welfare, it matters a great deal for public policy formation whether such a result can be attributed to a greater tendency to marry among individuals who are better off or, instead, to the beneficial effects of marriage itself.

A. Economic Factors

As a general rule, cohabiting couples tend to be less wealthy and have lower levels of educational attainment than do married couples.²¹ But it would hardly be surprising for children to have a tendency to do better when they have access to greater resources. Indeed, some have suggested

There are a number of concerns about marriage promotion that sociological studies clearly highlight. First, domestic violence is a socially prevalent problem, and marriages may make it more difficult for abused partners to leave a relationship. Promoting marriage without addressing domestic violence jeopardizes the physical well-being of women and children.

Id.

19. James C. Musselman, *What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37, 38 (2009) ("In three states, the legislature created a separate form of marriage—termed 'covenant marriage'—a purely elective status available only to different-sex couples and creating stringent requirements for both entry and exit.").

20. See Divorce or separation from bed and board in a covenant marriage; exclusive grounds, LA. REV. STAT. ANN. § 307 (2011) ("Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following: . . . (4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses . . ."); Divorce or Separation, ARK. CODE ANN. § 9-11-808(a) (2011) ("Notwithstanding any other law to the contrary and subsequent to the parties' obtaining authorized counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following: . . . (3) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one (1) of the spouses"); Dissolution of a covenant marriage; grounds, ARIZ. REV. STAT. ANN. § 25-903 (2011). Section 25-903 states:

[I]f a husband and wife have entered into a covenant marriage pursuant to this chapter the court shall not enter a decree of dissolution of marriage pursuant to chapter 3, article 2 of this title unless it finds any of the following: . . . (4) The respondent spouse has physically or sexually abused the spouse seeking the dissolution of marriage, a child, a relative of either spouse permanently living in the matrimonial domicile or has committed domestic violence as defined in [§]13-3601 or emotional abuse.

21. See Artis, *supra* note 2, at 225 ("Cohabiting families have fewer economic resources and lower levels of education than married families . . .") (citations omitted); Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351, 353 (2004) ("Cohabiting families experience greater economic deprivation, on average, than do married two-biological-parent families or stepfamilies, meaning that it is more difficult for cohabiting parents to adequately provide the material goods and services that facilitate healthy child development. . .") (citations omitted).

that monies spent on promoting marriage would be more effectively spent on increasing the available resources for non-marital families.²²

Suppose that one were to compare three groups: children living in a martial home, children living in a home where the adults are cohabiting but not married, and children living in a home with a single parent. It might be that the children fare best in the first category because those families would tend to have more disposable income than the other families.²³ A lack of wealth can have a variety of deleterious effects on families, especially if there is serious concern about the ability to put food on the table or pay the rent or mortgage.²⁴ The mental stress alone would be detrimental, even if one brackets the difficulties associated with having inadequate food or being homeless.²⁵ Thus, it is entirely unsurprising that those studying the effects of marriage would want to control for the role played by wealth when assessing what promotes child welfare, since the issue is not *whether* access to resources plays a role in the promotion of child welfare but *how much* of a role.²⁶

B. Biological Connection?

One tempting explanation for why children raised by their married biological parents do better than children raised in cohabiting families is that the children have a biological connection to both parents in the former families, but do not have such a connection with both parents in many of the latter families. If biology plays an important role,²⁷ then we might ex-

22. Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 188 (2002). Smith notes:

The best policy response to these situations is not to promote marriage but to create well-paying employment opportunities and to establish adequate social services, including child-care, for poor men and poor women. Governments should take an active role in ensuring that their citizens have access to the material resources that they require to achieve a minimally decent standard of living.

Id.

23. See Brown, *supra* note 21, at 353 (“The economic status of cohabitating families with children resembles that of single-mother families because nearly one half of children residing in either type of cohabiting family are poor.”).

24. See *id.* (discussing “food and housing insecurity”).

25. See *id.* (“[E]conomic deprivation also contributes to poor parental psychological well-being, which in turn might undermine effective parenting.”).

26. Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 24 (1995) (“Poverty or low income is the single most critical factor in the lives of single-parent families and the welfare of their children.”).

27. Cf. Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?* 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 3, 9 (2003). Anderlik writes:

For those who adopt this position, legal rules and outcomes are, or ought to be, dictated by biology. Parenthood and the rights and responsibilities associated with parent-child relationships are seen as necessarily grounded in and flowing out of biological relationships. This is an ancient and still highly influential way of thinking about the family. On the one hand, this position may reflect a view that biological connection itself creates a bond between par-

pect that children will also thrive when raised by both of their biological parents in a non-marital setting, especially if there are controls for other factors such as wealth.

Suppose that one compares two groups of cohabiting (i.e., non-marital) couples living with children. One group (Group DB or dual-biological) is composed of couples where each member of the couple has a biological connection to the child in the home. The other group (Group SB or single-biological) is composed of couples where only one member of the couple has a biological connection to the child. Assuming that economic and other demographic factors are held constant,²⁸ one might expect that Group DB children would fare better than would Group SB children.²⁹ However, that has not been the case. Instead, the Group SB children fare as well as the Group DB children,³⁰ which suggests at the very least that biology does not play a dispositive role in promoting child welfare.

There might be a few possible explanations for why children living in cohabiting households seem to fare equally well, whether or not both of the adults are biologically related to those children. It might be that biology is playing little or no role in the promotion of child welfare. Or, it may be that the disadvantages resulting from parents merely cohabiting rather than marrying are sufficiently great as to outweigh any benefits that might be accrued by living with both biological parents.³¹ Indeed, one might expect some marriage promotion theorists to argue that biology affords some benefit, but that the benefit is outweighed by the severe detrimental effect of living with parents who are not married to each other.

Before one concludes that living in a non-marital home is obviously harmful to children, it may be helpful to consider the advantages afforded to children who are raised by their married, biological parents. Some stu-

ent and child so strong that separation is virtually unendurable, so powerful that the biological parent is compelled to subordinate his or her own interests to those of the child.

Id.

28. Some of the demographic factors might include the child's race, age, and number of siblings. See Artis, *supra* note 2, at 229.

29. The study did not discuss whether any of the non-biological parents had adopted the child through second-parent adoption, whereby two unmarried individuals are legally recognized as the parents of the same child. See Lynne Marie Kohm, Megan Lindsey, & William Catoe, *An International Examination of Same-Sex Parent Adoption*, 5 REGENT J. INT'L L. 237, 251 n.98 (2007) ("Second-parent adoption is now defined as '[a]n adoption by an unmarried cohabiting partner of a child's legal parent, not involving the termination of a legal parent's rights; esp., an adoption in which a lesbian, gay man, or unmarried heterosexual person adopts his or her partner's biological or adoptive child.'") (citing BLACK'S LAW DICTIONARY 53-54 (8th ed. 2004)). It is assumed here that most, if not all, of the parents studied had not made use of this legal mechanism.

30. Artis, *supra* note 2, at 229 ("[A]fter controlling for demographic characteristics, children in cohabiting two-biological-parent families do not appear to have better cognitive or psychosocial development outcomes than children in cohabiting stepfamilies.").

31. *Id.* at 232 ("The lack of variation in child outcomes across cohabiting families may stem from similarities noted across cohabitating family types on other important characteristics, including economic resources, maternal depressive symptoms, and parenting practices.").

dies indicate that those advantages are not nearly as great as might originally be supposed. For example, one commentator noted that “there are no clear differences in outcomes for children in cohabiting families and married stepfamilies compared to their counterparts in married two-biological parent families, once factors such as child characteristics, economic factors, stability, depressive symptoms and parenting practices are controlled.”³² The only observable difference was that children in marital homes with their two biological parents tended to have better readings skills,³³ although even that limited conclusion requires more studies for validation. With something as specific as reading skills, one would want to know whether the married parents spent more time reading with their kids.³⁴ While researchers may have tried to control for parenting practices, e.g., by controlling for time spent in the children’s school, parental warmth, or time spent performing activities with the children,³⁵ controlling for those practices would not establish that one had controlled specifically for time spent reading to or with one’s child.

A different way to assess the degree to which the biological connection between both parents and the child plays an important role in the promotion of child welfare is to focus specifically on the differences between children living with their married, biological parents (Group M or married) and children living with their unmarried biological parents (Group U or unmarried). The children in Group M had fewer behavioral and emotional problems than the children in Group U, although those differences disappeared when the economic and parental resources³⁶ of the groups were held constant.³⁷ The only observable difference after those factors had been held constant was that the children living in homes where their parents were not married were less engaged in school, although it is difficult to tell whether that was due to marriage per se or, instead, to yet a different factor that had not been held constant.

32. *Id.*

33. *Id.*

34. *Cf.* Mary Jean Porter, *Read to Me: Project Will Give Books to Mothers of Newborns*, THE COLO. PUEBLO CHIEFTAIN, (Aug. 17, 2010), available at 2010 WLNR 16370116 (“Research also has shown that children whose parents read to them become better readers and perform better in school.”).

35. *See* Artis, *supra* note 2, at 224 (discussing “a wide range of parenting practices, including measures of school involvement, parental warmth, and time spent with children in activities.”).

36. Economic resources were defined in terms of (1) the degree to which the family was above the poverty line, and (2) the education attainment level of the parents. Parental resources were measured in terms of (1) a self-reported psychological well-being measure and (2) a self-reported aggravation in parenting measure. *See* Brown, *supra* note 21, at 356.

37. *See id.* at 364.

C. Marriage in the Blended Family

More and more marriages involve individuals who have children from a previous relationship.³⁸ One test of the value added by marriage involves comparing the welfare of children who are in blended marital families with the welfare of children in blended cohabiting families.³⁹ Some studies indicate that when two adults are living with a child and only one of the adults is biologically related to that child, the child's well-being does not depend upon whether those adults marry.⁴⁰ This result might seem surprising, so some possible explanations might be worth exploring.

The cohabiting partner and the stepparent are similar in certain respects. For example, both may have somewhat ambiguous parenting roles in the blended family, especially if there is a nonresidential parent, e.g., a biological father, who also has a role in the child's life.⁴¹ The child may not trust the residential parent's current partner very much, whether that individual is a marital or cohabiting partner.⁴² Where there is this lack of trust, one might expect similar opportunity costs (i.e., the lost benefits that might have accrued had the relationship between the partner and child been closer and more trusting). If the ambiguousness of the parental role and, perhaps, the lack of trust between the child and the parent's partner are important factors in determining the degree to which the child's welfare is promoted in particular settings, then it might not be surprising that children tend to fare equally well when living in a home with a parent and stepparent as they do living in a home with a parent and cohabiting partner.

There are other more complicated ways to explain the similarity in outcomes for children in stepparent and cohabiting households. Consider, for example, the possibility that the parent may not view the cohabiting partner and the marital partner (i.e., the stepparent) in the same way, since the latter might be viewed as more likely to continue to be a member

38. Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 790 (2003) ("Forty percent of children spend some time with a stepparent before the age of fourteen; and at any one time, roughly fifteen percent of all minor children live in a blended family.").

39. Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 FAM. L.Q. 567, 569 (2007) ("Blended families—that is, families in which only one adult in the home is biologically related to the child . . .").

40. See Brown, *supra* note 21, at 364 ("[R]egardless of whether a parent remarries or forms a cohabiting stepfamily, child outcomes are similar . . ."); but see Artis, *supra* note 2, at 227 ("[C]hildren in cohabiting two biological parent families score significantly lower on cognitive tests than their children in married two-biological-parent families . . .").

41. See Brown, *supra* note 21, at 354 ("Similar to a stepparent, a cohabiting partner often occupies ambiguous family roles characterized by little trust and authority, particularly from the child's standpoint.").

42. *Id.*

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of the family for the foreseeable future.⁴³ When remarried and in a relationship that is envisioned as likely to be long-lasting, the residential parent might act in ways to promote the relationship between the child and the stepparent and, in addition, in ways that reflect the view that it is now less necessary to assure that the nonresidential parent continues to maintain contact with the children.⁴⁴ Such actions might promote the welfare of the child in some cases but undermine the welfare of the child in others.

Suppose that the parent tries to support and solidify the relationship between the child and the stepparent, believing that it is important for the relationship between the child and that long-term partner to be close and healthy. On the one hand, the parent's trying to promote that relationship *might* reduce household tensions, make the household a more enjoyable place to live, etc. Reducing tensions and improving the atmosphere in the household would presumably make the child comparatively better off.

On the other hand, the parent's efforts to promote the relationship between the child and the stepparent might create more tension, because the child might view this as an attempt to displace the nonresidential parent. Ironically, the parent's measures to promote the child's relationship with her partner might undermine the welfare of the child.

Suppose that the focus is not on the actions of the residential parent but instead on the actions of the stepparent, who may well be more invested in the family than might be the parent's cohabiting partner. The stepparent might view the nonresidential parent's visitation with the children with disfavor, as a destabilizing action of the new "nuclear" family,⁴⁵ thus creating tension between the nonresidential parent and the stepparent, which might be communicated to the children. Basically, either the parent or the stepparent might view the nonresidential parent as a potential disruption of the new family. But this fear of disruption or this attempt to undermine the relationship between the child and the nonresidential parent might increase tension and resentment, which could make the child comparatively worse off.

It is not claimed here that the nonresidential parent would, as a general matter, be resented by the parent's marital or non-marital partner. On the contrary, both the cohabiting partner and the stepparent might like the nonresidential parent spending time with the children to free up the spouse's time and attention.⁴⁶ Nonetheless, the presumed greater emotional investment in the family by the stepparent might in some cases, but not others, promote the welfare of the child, depending in part on whether the

43. See King, *supra* note 1, at 965 (suggesting that "mothers are more likely to foster such ties [between child and the mother's partner] in the context of marriage if they view partner commitment as being higher than in a less certain cohabiting relationship . . .").

44. See *id.* at 956.

45. See *id.*

46. See *id.*

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stepparent's acts are viewed as attempting to undermine or replace the nonresidential parent.

Interestingly, the child's relationship with the nonresidential parent does not seem to be impacted by the parent's decision to cohabit with, rather than marry, her residential, adult partner.⁴⁷ However, the parent's relationship with the child seems to be impacted by whether she marries or instead cohabits with a partner, with the parent-child relationship somewhat less positive in the cohabiting household.⁴⁸ Yet, marriage proponents should not be too enthusiastic about this result, since the bond between parent and child is comparable when the parent remarries or remains single.⁴⁹ Thus, remarriage per se may not be strengthening the bond between the parent and her child. Rather, it may be, for example, that the parent tends to be less confident about the relationship with the cohabiting partner than with the new spouse, which might change how that parent acts both towards the nonmarital partner and towards any children in the household.

Basically, there are a variety of foreseeable possible effects of a parent's choosing to cohabit with, rather than marry, her current partner. However, given that the child welfare outcomes are similar regardless of whether the parent chooses to marry or merely live with her current partner, it seems that either these effects are not very important in determining child welfare outcomes or that these effects are canceling each other out, so that some children are better off and some worse off when the parent decides to marry her current partner. Regardless of which picture is more accurate, however, neither provides the ringing endorsement of marriage that proponents suggest is appropriate.

One of the reasons that claims about the benefits of marriage are difficult to assess is that commentators discussing the welfare of children raised by their married, biological parents seem to be ignoring that many marriages involve individuals who have children from a prior marital or nonmarital relationship. But the failure to take these into account skews the results because children in first marriage households fare better than those children in remarriage households; remarriages are less stable and

47. See King, *supra* note 1, at 960 ("Results . . . suggest that the entrance of a stepfather, whether married to the mother or not, does not affect adolescent closeness to, or contact with, nonresident fathers.").

48. See *id.* at 962 ("[T]he adolescent-mother bond may be negatively affected when her cohabitating partner enters the household, but not necessarily when she (re)marries . . .").

49. See *id.* at 963 (discussing a study that "reported similarly good relationships between adolescents and their resident mothers when the mother was remarried or had no new partner."). On the other hand, other kinds of benefits may be accrued when a child is living in a two-parent rather than a single-parent household. See James Pawelski et al, *The Effects of Marriage, Civil Unions, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS, 349, 359 (2010) ("Children's self-esteem has been shown to be higher among adolescents whose mothers (of any sexual orientation) were in a new partnered relationship after divorce, compared with those whose mothers remained single.").

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more conflicted than first marriages,⁵⁰ and marriages including children from prior unions tend to be less stable and more conflicted than marriages that include only shared children.⁵¹ But these results undercut the claim that marriage per se confers the kinds of benefits sometimes claimed.

Yet, too much should not be made of the fact that children do not fare as well in remarriage households. The current debate between marriage proponents and selection theorists is whether marriage itself confers a benefit or whether, instead, the benefits associated with marriage are a byproduct of selection factors. But the disappointing results associated with remarriage seem to undercut the efficacy of both marriage itself and the selection factors, although selection factor theorists would presumably argue that selection factors would make remarriages less likely to be successful, e.g., because those seeking to remarry may be older or may have children from a previous relationship.⁵² Thus, it cannot be said that the current data clearly favor marriage proponents or selection theorists. Instead, these data must be accounted for by both of these competing camps.

Commentators may not agree about what causes what, but they seem to agree that there are a number of factors making the relationships of cohabiting individuals of poorer quality than those of marital couples. Cohabiting couples tend to have more conflict, less communication, less commitment, feel less secure in the relationship, and experience more infidelity.⁵³ King compares marital and non-marital stepfathers, noting, "Cohabiting stepfathers tend to be poorer and less educated than married stepfathers, indicating that they likely bring fewer resources into the family."⁵⁴ King also compares the lives of the mothers in the marital and non-marital households, explaining, "Cohabiting mothers report more depression, less support from their partners, and more unstable relationships than married mothers, suggesting that they gain less from cohabitation than marriage."⁵⁵

Perhaps ironically, some in cohabiting relationships choose not to marry precisely because they hold marriage in such high regard.⁵⁶ When asked how getting married would change their lives, many cohabiting

50. See Brown, *supra* note 5, at 1061.

51. See *id.* at 1061.

52. Jennifer L. McCoy, Comment, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 518 (2005) ("Remarriage often represents the best method for divorced women to achieve economic stability, although age and number of children may diminish their prospects for remarrying.").

53. See Joanna M. Reed, *Not Crossing the Extra Line: How Cohabitators with Children View Their Unions*, 68 J. MARRIAGE & FAM. 1117, 1119 (2006).

54. King, *supra* note 1, at 957.

55. *Id.* at 957.

56. See Reed, *supra* note 53, at 1124 ("The biggest difference cohabiting parents see between cohabitation and marriage is that they view marriage as a lifelong commitment to stay in one relationship and to work through the ups and downs of life together and cohabitation as a situation they may leave when unsatisfied.").

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couples focus on the symbolism rather than on the day-to-day differences, suggesting that they view marriage as a commitment for life.⁵⁷

Some commentators worry that marriage in our divorce-prone society has lost its exalted status.⁵⁸ Yet, many cohabiting couples report that they do not marry precisely because marriage retains its exalted status,⁵⁹ although a separate question is whether this exalted understanding of marriage is in fact preventing couples from marrying,⁶⁰ or, instead, is merely being offered as a kind of rationalization for not marrying. For example, some couples delay marriage because of doubts about the partner's fidelity⁶¹ or doubts about the long-term prospects for the relationship,⁶² and the contracting of the marriage might be prevented by those worries rather than some ideal image of what marriage should be like.⁶³

It is of course true that not all cohabiting relationships are the same. While it has been reported that those in cohabiting relationships "tend to express lower levels of relationship commitment, less relationship satisfaction, and poor quality relations with kin,"⁶⁴ such studies often do not differentiate between cohabiting couples who plan to marry their partners and cohabiting couples who do not have such plans. Those who plan to marry their partners have relationships comparable to those of marital couples.⁶⁵

57. See Reed, *supra* note 53, at 1125 ("Although getting married may not change the routines of their lives much, it would change the way they think about their relationship and what couples would require of one another.").

58. See, e.g., Hon. Maura D. Corrigan, *Judging Marriage: An Experiment in Morals and Conduct*, 4 AVE MARIA L. REV. 385, 387 (2006) (discussing her view that "[t]he once-exalted institution of marriage has been reduced to a social option.").

59. See Reed, *supra* note 53, at 1126:

The difficulties and problems most parent cohabitators experience on a daily basis collide with their ideals about what a marriage should be like and the kind of marriage they want to have. In the face of financial and relationship troubles, uncertainty about a partner, and the greater commitment and more inflexible roles they associate with marriage, cohabitation is an attractive option for parents. It allows them to share some expenses, more convenient parenting, companionship, and an escape route if the relationship sours. It also allows them to live together when their relationships are not up to the standards they have for marriage.

60. See Brown, *supra* note 5, at 1070 ("Yet paradoxically, these lofty aspirations and the attendant high expectations about the prerequisites for marriage ultimately deter many low-income couples from marrying, including those who have a child together.").

61. See Brown, *supra* note 5, at 1071 ("[M]any unwed couples faced substantial gender mistrust in their relationships, which had been marred by infidelity . . ."); Benita Miller, *Fragile Families and the Reproduction of Poverty*, 218 PLI/CRIM 135, 147 (2009) ("[U]nmarried mothers are much more likely to agree with the statement 'men cannot be trusted to be faithful . . .'").

62. Brown, *supra* note 5, at 1070 ("Another prerequisite for marriage is an expectation that the relationship will endure. Couples must resolve doubts about their partner or ongoing sources of relationship conflict before tying the knot.").

63. Cf. Reed, *supra* note 53, at 1126 ("The difficulties and problems most parent cohabitators experience on a daily basis collide with their ideals about what a marriage should be like and the kind of marriage they want to have.").

64. See Teresa Ciabattari, *Cohabitation and Housework: The Effects of Marital Intentions*, 66 J. MARRIAGE & FAM. 118, 118 (2004).

65. *Id.*

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Some of the variation among cohabiting couples may be due to why the couples are living together in the first place. Reed notes, “What used to be shotgun marriages have turned into shotgun cohabitations.”⁶⁶ Ironically, this may mean that some individuals who previously would have married and then divorced⁶⁷ are now cohabiting for a while and then separating, which suggests that our current divorce rates would be even higher were cohabitation viewed less favorably by society.⁶⁸

Many cohabiting couples begin living together because they have or are expecting a child.⁶⁹ However, for many couples, while having a child together may be a reason to share the same household, having a child does not play a similar role with respect to the decision to marry or with respect to the decision to continue cohabiting.⁷⁰ If the relationship does not seem to be working, cohabiting couples tend not to view their having had a child together as a reason to remain in the relationship.⁷¹

None of the current studies establish that marriage has the salutary effects that commentators sometimes ascribe to it. Further, it is difficult to believe that some factors correlated with marriage, e.g., increased wealth, do not play some role in enhancing child welfare. A child who does not get enough to eat or who is homeless would be less likely to flourish, which is one of the reasons that commentators want to hold wealth constant for comparison purposes. Further, the fact that some children in cohabiting stepparent families fare as well as children in married stepparent families suggests that marriage is not the cure-all that some commentators claim. If marriage had the transformative power that some imply, one might expect that children in blended marital families would do better than

66. See Reed, *supra* note 53, at 1128; see also Brown, *supra* note 5, at 1069 (“The propensity to cohabit rather than marry following conception and birth of a child reflects the shift from shotgun marriages to shotgun cohabitations.”).

67. See Naomi Cahn & June Carbone, *Lifting the Floor: Sex, Class, and Education*, 39 U. BALT. L.F. 57, 61 (2008) (“[E]arly marriage and shotgun weddings also correlate with higher divorce rates.”).

68. Commentators note a correlation between the likelihood of marital break-up and “husbands having external motives for getting married.” See Kimberly F. Balsam et al., *Three-Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44 DEVELOPMENTAL PSYCHOLOGY 102, 102-03 (2008). These external motives would presumably include an unplanned pregnancy, although others might view an unplanned pregnancy as a reason to live together but not get married. See *infra* notes 69-71 and accompanying text.

69. See Reed, *supra* note 53, at 1128 (2006) (“[T]he majority of parent cohabitators began living together in response to a pregnancy or birth, rather than as a result of a relationship decision or a gradual process of ‘drift.’”).

70. See *id.*

71. See *id.*

they in fact do.⁷² Biology also does not seem to have an overriding effect.⁷³

D. The Indirect Benefits of Marriage?

Those who insist that marriage is the antidote for the difficulties faced by children have not made their case.⁷⁴ There are a variety of factors other than marriage that seem to have a great effect on child welfare. Yet, those who deny that marriage plays a role also have not made their case, which may be due in part to their failure to address some of the reasons that marriage is thought to benefit couples and their children.

Commentators suggest that marriage helps the adults and children in the family, because the married parties are more likely to invest in the relationship. Perhaps this is because they feel more confident that the relationship will endure and thus they, too, will benefit from that investment.⁷⁵ Brown notes that there is evidence suggesting that “cohabiting parents do not share resources to the same extent that married parents do.”⁷⁶ Such reluctance might be understandable if, for example, the parties did not have confidence that the relationship would last. Indeed, one might expect that the reluctance to share resources might not be limited to financial matters—an individual who did not expect to remain in the relationship for a long period might be reluctant to invest emotionally either in the relationship or in the partner’s child.⁷⁷

What happens when there is a reluctance to invest in a relationship either financially or emotionally? People may act in ways that would protect themselves rather than their partners or, perhaps, the children of partners. Individuals might be less willing to make short-term sacrifices in favor of long-term benefits or less willing to take even moderate risks to achieve long-term (as opposed to short-term) significant benefits. Com-

72. Brown, *supra* note 5, at 1064 (“Marriage per se does not seem to confer advantages for children, as children in married stepfamilies fare worse than do those in two-biological-parent married families, instead appearing similar to those in single-mother families.”).

73. *Id.* (“[B]iological parentage per se does not account for the advantages that children enjoy in two-biological-parent married families; children in two-biological-parent cohabiting families have worse outcomes, on average.”).

74. *See, e.g., id.* at 1070 (“It does not appear that low-income children born to unmarried parents benefit substantially from parental marriage, at least in the short term.”).

75. *See* Esther De Ruijter & Bente Braat, *Co-Working Partners: The Influence of Legal Arrangements*, 22 INT’L J.L. & POL’Y & FAM. 421, 432 (2008) (“Perhaps, married people feel more certain about the continuity of their relationship than cohabitants and, therefore, are more willing to invest in the relation by co-working.”).

76. *See* Brown, *supra* note 21, at 353.

77. *Cf.* Mark Strasser, *Adoption, Best Interests, and the Arkansas Constitution*, 63 ARK. L. REV. 3, 19-20 (2010) (“Were the child legally viewed as the child of both parents, e.g., because the child was formally adopted, it might be that the stepparent or the nonmarital, romantic cohabitant would invest more in the child both financially and emotionally.”).

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mentators have noted a correlation between the likelihood of marital breakdown and the refusal to invest in the relationship.⁷⁸

Commentators suggest that stability is important for children.⁷⁹ Marriage can help increase stability in a number of ways. It has symbolic value,⁸⁰ and the very signal that it sends both to a partner and to the community may enable individuals to make a greater emotional investment in the relationship. Further, individuals may be more willing to make more of a financial investment in the relationship,⁸¹ which might mean that individuals contribute their own dollars to make acquisitions that would promote the good of the family more generally, or it might mean that one individual would be willing to change locations so that a partner can progress professionally, or it might mean that one partner would take on increased obligations in the home so that the other could invest more time and energy in a job.

The difficulty pointed to here is that marriage is theorized to promote family welfare in an indirect way by making it possible for individuals to invest more in their relationships and in their children. But there is a danger that some of the alleged *indirect* benefits of marriage will be lost when studies control for particular factors.

An investigator who wishes to determine the benefits of marriage should control for economic resources, because she would not want to attribute to marriage some of the beneficial effects of wealth.⁸² By the same token, the investigator should hold constant some of the beneficial effects produced by having happy and satisfied parents, because the failure to hold this factor constant might result in the attribution of a benefit to marriage that instead should have been attributed to the adults' positive mental state. But this means that if marriage helps families acquire wealth or be happier,⁸³ then those beneficial effects of marriage might instead be attributed to the families' wealth level or relative emotional state rather than to the marriage.

Suppose that there are two families, one involving cohabiting adults and the other involving married adults. Suppose further that the family incomes are comparable and that the children in each family are thriving,

78. See Balsam et al., *supra* note 68, at 102 (noting correlation between lack of pooling of resources and marital breakdown).

79. Brown, *supra* note 5, at 1066 ("Family stability is as important for child well-being as family structure and has both immediate and long-term benefits for children.").

80. See Reed, *supra* note 53, at 1129 (arguing that "the importance of marriage is now largely symbolic").

81. See *supra* text accompanying note 75.

82. See Balsam et al., *supra* note 68, at 102 (noting correlation between marital breakdown and low income for husbands and wives).

83. Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2001 U. ILL. L. REV. 1, 38 (2001) ("[W]omen in good marital relationships are less likely to be depressed than women in poor relationships . . .").

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at least in part, because of the resources available to them. One might infer that marriage had played no role in promoting the welfare of the children. Suppose, however, that the adults in the marital family were willing to sacrifice for the good of the family, but that the adults in the cohabiting family were not. It might have been that but for the marriage and the sacrifices made by both adults, the total income in the marital family would have been much lower. But that would mean that something possibly important in promoting the welfare of the children would have been lost when assessing whether marriage had promoted the children's welfare, because, *ex hypothesi*, that help had occurred only indirectly by virtue of the sacrifice of one or both of the partners.

By the same token, various commentators have noted that individuals in cohabiting relationships may be more depressed than individuals in marital relationships.⁸⁴ That greater rate of depression might be due, at least in part, to the quality of the existing relationship. For some couples, marriage would not cure the underlying problem—taking part in a marriage ceremony would not increase the trustworthiness of one or both of the partners. However, for other couples, the signaling function of marriage might make the partners trust each other more, and that increased trust might have beneficial effects for both the partners and the children they were raising. Further, the signaling function of marriage might induce the partners to behave in ways that would put family interests over individual interests.

Some of the studies seeking to determine whether marriage benefits children were designed to control for the parents' emotional states. Thus, those comparing a marital and a cohabiting family did not want to compare depressed parents in a cohabiting family with satisfied parents in a marital family, because one would then not know whether the perceived child welfare enhancement was due to the parents being more depressed or, instead, to the parents having married. That point is well taken, but the question at hand is whether the marriage itself might have contributed to the relative emotional well-being of the parties. Were that so, then the indirect benefit provided by marriage would have been lost in the comparison.

The point here is not that marriage guarantees that couples will be wealthier or that they will be less depressed. Rather, the point is merely that some of the studies focusing on whether wealth rather than marriage helps promote child welfare or whether the parents' emotional states rather

84. See Allen V. Horwitz & Helen Raskin White, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 J. MARRIAGE & FAM. 505 (1998); see also Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53 (1995); Kazuo Yamaguchi & Denise B. Kandel, *Dynamic Relationships Between Premarital Cohabitation and Illicit Drug Use: An Event-History Analysis of Role Selection and Role Socialization*, 50 AM. SOC. REV. 530 (1985).

than marriage helps promote child welfare may miss an indirect contribution of marriage to the welfare of children.

Does marriage have this effect on adults so that they feel better about themselves or their relationships, and thereby they are more able to provide for their children? Perhaps. The point here is merely that the studies purporting to establish that marriage provides no or few benefits to children at best establish that (1) marriage alone does not provide the benefits sometimes claimed, and (2) various other factors do play some role in promoting the welfare of children. However, if it is plausible to believe that marriage affords some indirect benefits to families generally or children in particular because marriage helps individuals invest for the long term, or because marriage is not only correlated with but actually helps promote parental well-being, or because marriage helps assure that there is another adult to help perform various parenting functions,⁸⁵ then those studies seeking to determine how marriage per se affects the welfare of children may not be capturing the whole story.

E. The Legal Recognition of Same-Sex Unions

It is simply unclear whether marriage has the positive effects on child welfare that marriage promotion commentators claim. Many of the alleged benefits can be explained in terms of other factors, e.g., family wealth, parents' mental states, etc. However, a separate question is whether marriage can indirectly promote child welfare by helping couples achieve greater wealth or feel better about themselves and their families. If indeed marriage has some positive effect on adults and their children, then a separate question is whether states should recognize same-sex relationships for the sake of the adults in the relationship and for the sake of any children whom they might be raising.

Same-sex couples have proven to be able parents.⁸⁶ Children raised by same-sex couples are flourishing,⁸⁷ which is impressive given that many

85. See Brown, *supra* note 5, at 1063 (“[S]olo parents (typically mothers) who lack a partner to cooperate and consult with about parenting decisions and stressors tend to exert less control and spend less time with their children.”).

86. See Timothy J. Biblarz & Evren Savci, *Lesbian, Gay, Bisexual and Transgender Families*, 72 J. MARRIAGE & FAM. 480, 482 (2010) (“Lesbian DI mothers [i.e., mothers using donor insemination] . . . tended to equal or surpass heterosexual married couples on time spend with children, parenting skill, and warmth and affection”); *Id.* at 487 (discussing the “relative parenting strengths of gay cofathers”).

87. See *Varnum v. Brien*, 763 N.W.2d 862, 874 (Iowa 2009):

Many leading organizations, including the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America, weighed the available research and supported the conclusion that gay and lesbian parents are as effective as heterosexual parents in raising children. For example, the official policy of the American Psychological Association declares, “There is no scientific evidence that parenting effectiveness is

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states do not recognize same-sex unions. At least one question raised by the various studies on marriage is whether same-sex couples and the children whom they are raising would be benefited were same-sex unions recognized in more states.⁸⁸ Insofar as stability is important for families,⁸⁹ it might be noted that same-sex couples who have formally celebrated their relationships tend to stay together longer.⁹⁰ Balsam *et al.* notes, “Same-sex couples not in civil unions were more likely to have ended their relationship than same-sex couples in civil unions or heterosexual married couples.”⁹¹

The claim here is not that the fact that such couples staying together longer establishes that the legal recognition is what causes them to stay together longer. It may be that self-selection is doing the work, just as it is sometimes argued that self-selection is what causes different-sex couples to stay together longer on average when they marry. The point here is merely that if indeed marriage itself contributes to married couples and their children having more stable and satisfying relationships, one would expect that the same benefits would be accrued by same-sex couples and their children were same-sex unions legally recognized. For example, insofar as marriage provides additional incentives for individuals to sacrifice for the good of the whole family, the benefits that might accrue from such sacrifices might materialize whether the adults in the relationship are of the same sex or of different sexes. Insofar as marriage can provide added psychic benefits to the parents, thereby enabling them to be better parents for their children, that would be true whether the parents are of the same sex or of different sexes.

When cohabiting couples discuss why they are putting off marriage, they do not cite as a reason that they refuse to have anything to do with an

related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for children.” Almost every professional group that has studied the issue indicates children are not harmed when raised by same-sex couples, but to the contrary, benefit from them.

Id.

88. See Brown, *supra* note 5, at 1065 (“The political debate about same-sex marriage faces a curious intersection with the marriage promotion debate: if parental marriage is good for children, then why not allow same-sex parents the right to marry? Marriage offers enforceable trust, status, and institutional support that will arguably stabilize same-sex relationships.”).

89. Artis, *supra* note 2, at 225 (“Instability is a hallmark of cohabiting households, in that children in cohabiting households have experienced more transitions in family life than children of those who are married.”).

90. Biblarz & Savci, *supra* note 86, at 490. They note:

Same-sex couples not in civil unions were more likely to have ended their relationships than same-sex couples in civil unions. Other research showed that among cohabiting same-sex couples, those who chose to legalize their relationship or hold a commitment ceremony had been together for a longer period, suggesting a reciprocal association between relationship duration and legal status.

Id. (citations omitted).

91. Balsam *et al.*, *supra* note 68, at 112.

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institution that might be open to same-sex couples as well.⁹² Instead, they cite factors peculiar to their relationship, e.g., that they do not have the financial security to marry or, perhaps, that there are unresolved interpersonal issues that prevent the couple from marrying.

Some commentators argue that same-sex couples should not be permitted to marry because same-sex couples allegedly cannot fulfill the appropriate marital roles.⁹³ Such a position is ironic for a few reasons. First, the success of gay and lesbian parenting undermines the contention that LGBT families are not real families or that LGBT partners cannot provide a setting in which children can or should be raised. Second, one of the reasons articulated by different-sex cohabiting couples for not getting married is that they are uncomfortable adopting the “more inflexible roles they associate with marriage.”⁹⁴ While such views need to be unpacked, since it is unclear whether that inflexibility involves sexual fidelity⁹⁵ or more traditional marriage roles as a general matter,⁹⁶ the stereotypical roles associated with marriage may be part of what is deterring individuals from marrying. If that is so, then implicitly or explicitly suggesting that marriage roles need not be as inflexible as is sometimes thought might promote rather than undermine the institution.

Whether or not societal recognition of the increased flexibility of marital roles would make marriage more attractive, some points remain clear. The successful parenting by LGBT couples undermines the claim that they are not well-suited for at least one of the roles associated with marriage, namely, providing a setting in which children might flourish. That same-sex couples whose relationships are legally recognized tend to remain together longer than same-sex couples whose relationships are not legally recognized at least suggests that same-sex couples are not so dissimilar from different-sex couples, and that it would not be unreasonable to believe that the benefits allegedly produced when different-sex couples marry are also produced when same-sex couples marry. But this point is impor-

92. Cf. Mark Strasser, *State Constitutional Amendments Defining Marriage: On Protections, Restrictions, and Credibility*, 7 FLA. COASTAL L. REV. 365, 368 (2005). Strasser notes:

Just as it is unlikely that fewer different-sex couples would marry merely because same-sex couples were also offered that option, it is also improbable that the divorce rate of different-sex couples would increase if same-sex marriages were recognized. It is unreasonable to assume that different-sex couples would refuse to remain married if same-sex couples were also afforded the opportunity to marry.

Id.

93. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 164 (2010) (“Opponents of same-sex marriage made extensive use of sex-role-based arguments in response to the California Supreme Court’s 2008 decision granting same-sex couples the right to marry.”).

94. Reed, *supra* note 53, at 1126.

95. See *id.* (discussing the “greater commitment” associated with marriage).

96. See *id.* at 1124 (“Several parent cohabitators associate marriage with more traditional family roles.”).

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tant, because the benefits that allegedly result from marriage provide advantages to the adults in the relationship, other family members, and society as a whole.

There simply is no reason to believe that the fact that members of the LGBT community may legally marry in some states is what is causing cohabiting different-sex couples to refrain from marrying. But this suggests that those states refusing to afford legal recognition to same-sex unions are not thereby benefiting different-sex couples (by making it more likely that they will marry or remain married), but are imposing opportunity costs on those same-sex partners who would have married if such unions had been permitted. The same-sex couples themselves, their families, and society as a whole are net losers when such non-recognition policies are in force.

III. CONCLUSION

Marriage is associated with better outcomes for families, although studies do not establish that marriage plays the causal role that some marriage proponents claim. Yet, the inability to establish the causal role of marriage in child welfare promotion is unsurprising, given the hypothesized role that marriage is thought to play. Basically, the claim is that some families are better off than they otherwise would have been had the parents not married. But we of course cannot perform controlled experiments to test the effect that marriage had in those families, and it is more difficult than commonly appreciated to test in other ways the actual effects of marriage.

It is quite sensible to control for factors that appear to have an effect, e.g., wealth and mental states of the parties. But we must be careful not to assume that marriage plays no role when the results of various studies are compatible with marriage having an indirect beneficial effect.

The hypothesized reasons that marriage would promote welfare for some families seem plausible, but these reasons seem equally plausible for same-sex and different-sex couples and their children. Perhaps what is most surprising about the current marriage debates is not the difficulty in establishing whether marriage causes or is merely associated with increased well-being. Rather, it is that those offering rationales for why marriage itself has beneficial effects do not recognize that the cited reasons apply to both same-sex and different-sex couples and that the commentators' refusal to admit this undermines their own credibility and persuasiveness.