

2012

Legal Regulation of Twenty-First-Century Families

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Recommended Citation

Marsha Garrison & Elizabeth S. Scott, *Legal Regulation of Twenty-First-Century Families*, MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES, MARSHA GARRISON & ELIZABETH S. SCOTT, Eds., CAMBRIDGE UNIVERSITY PRESS (2012).

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Marriage

AT THE CROSSROADS

Law, Policy, and the Brave New World
of Twenty-First-Century Families

Edited by Marsha Garrison & Elizabeth S. Scott



CAMBRIDGE

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CT **Introduction**

Today, marriage is at a crossroads. Across the industrialized world, young adults are marrying later and increasing numbers may not marry at all. And married couples, for several decades now, have faced a relatively high probability that their relationships will terminate in divorce. These changes have affected children as well as adults. The proportion of children born outside of marriage has grown dramatically, and children born within marriage face an increased risk of parental divorce or separation. Moreover, marriage itself has changed in important ways, from a lifelong institutional union to a companionate relationship, the strength and duration of which is determined by the individual preferences of the parties. Public attitudes toward these trends are generally accepting; a majority of Americans in a recent survey were positive or neutral about couples (including gay couples) living together and having and raising children outside of marriage.

Interestingly, as traditional marriage has declined, the movement to extend the right to marry to same-sex couples has acquired substantial momentum and become an important focus for advocates in the gay and lesbian community. A number of nations and several American states have legalized same-sex marriage; others have created an alternate status that confers some or all of the rights and obligations of marriage. This issue has generated controversy. Those who favor extending marriage to same-sex couples see marriage as a core social status, access to which is an essential aspect of full membership in society. Social conservatives who favor an alternate status – or no status at all – agree that marriage is a core social institution, but argue that extending access to same-sex couples will irreparably weaken marriage. At the same time, some gay and lesbian advocates argue that marriage is a gendered and outmoded institution and that the gay community should not make the right to marry a key political goal.

Controversy has also surrounded the decline of opposite-sex marriage. Some commentators have argued that the decline of marriage is a troubling social problem,

while others see the trend as nothing more than a sign of the growing irrelevance of an obsolete institution. Some who see a problem view the changes as evidence of moral decline, while others focus on the relative instability of nonmarital cohabitation as compared to marriage (and of remarriage as compared to first marriage). Family stability is associated with a range of benefits to children and instability with a range of risks. And both the risk of parental breakup and the number of different family arrangements that children experience as they grow to adulthood has skyrocketed. Moreover, particularly in the United States, a growing class divide in marriage and family life may exacerbate socioeconomic disadvantage. Less educated and lower-income individuals are far more likely to have children outside of marriage than those who have more education and higher incomes. Indeed, as Sara McLanahan and Irv Garfinkel suggest in this volume, *Murphy Brown*, the target of condemnation by Vice President Quale in the 1980s, is a myth; only very small percentage of college-educated professional women have children outside of marriage.

While the association between marriage and relational stability is clear, whether marriage itself contributes to that stability has been less obvious. It could be that couples who do not marry have preexisting characteristics that would produce relational instability whether or not their relationships are formalized through marriage. And even if marriage plays a causal role in promoting family stability, it is not obvious how policy makers should respond. Should government actively promote marriage and marital childbearing? Or should government extend the public benefits and private rights that now accompany marital status to couples that have not married?

No consensus has yet emerged about the appropriate legal and policy response to these important changes in family structure. Policy makers in the United States, both at the national and state levels, thus far have tended to favor retaining the traditional pro-marriage approach, offering benefits and privileges to married couples that are not available to other families. Other marriage promotion policies have been

avored as well. The 1996 federal 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. More recently, the George W. Bush administration launched an initiative designed to support “healthy” marriages through relationship-skills education and the reduction of tax and benefit “penalties” that might deter marriage. Many states have also launched their own marriage-promotion initiatives. Outside the United States, however, marriage promotion has been much more controversial, and policy makers have sometimes rejected laws that treat marriage more favorably than other family relationships. For example, the Canadian Parliament has revised both tax and old-age pension laws so that the same standards apply to married and “common-law” partners. Canada is far from unique. Several nations have extended some or all of the entitlements available to divorcing marriage partners to one or more groups of unmarried couples: Some countries have established an alternate status available to same-sex couples, heterosexual couples, or both, through registration. Others schemes are conscriptive; the couple’s rights and obligations at separation are determined retrospectively through fact-based analysis. For example, New Zealand has extended *all* of the personal rights and obligations of marriage to couples who have been “de facto partners” for three years.

This volume, authored by social scientists and family law scholars, explores alternative policy paths forward at this critical juncture. Debates about marriage and family policy have often been ideological and political; the volume captures the complexity of the debates through contributions by authors with widely varying perspectives. But the book also aims to inform the debates by situating them within an interdisciplinary framework grounded in social science research. This approach reflects our belief that, although family policy is – and should be – influenced by social and political values, it should also be shaped by empirical evidence. Over the past generation, social scientists have produced a large body of research that has contributed in important ways to our understanding of family formation and functioning. Family law and policy informed by this research evidence (some

produced by contributors to this volume) can more effectively support families in fulfilling their important functions of caring for children and other dependents. Empirically grounded analysis also offers a neutral lens that, by enhancing understanding, may sometimes even produce consensus across ideological divides.

Part I of this volume offers historical background on marriage and its regulation, as well as demographic and cross-national perspectives on changes in marriage and in family structure. In chapter 1, legal scholars June Carbone and Naomi Cahn explore “blue” (liberal, egalitarian) and “red” (traditional, culturally conservative) patterns of family formation and dissolution to inform and enrich our understanding of recent trends, including the growing class divide in marriage behavior in the United States. They identify the cultural and demographic roots of these divergent patterns and chart their comparative advantages and policy implications. Sociologist Arland Thornton (Chapter 2) analyzes the impact on family life in the developing world of “developmental idealism,” namely the Western European insistence that consent, equality, and freedom are fundamental human rights. He describes a pattern of resistance, modification, and hybridization across a range of cultures and offers some predictions as to how these cultural clashes will develop and be resolved in the future. In Chapter 3, Margaret Brinig, an economist and legal scholar, describes the economic model of marriage and uses it to explore changes in the allocation of household labor in marital and nonmarital households. Using data from several waves of the National Survey of Families and Households, she charts shifts in household labor patterns and relates them to the economic model of marriage. Rebecca Probert, a legal historian and legal scholar from the United Kingdom, in Chapter 4 describes current demographic and legal trends in the United Kingdom and continental Europe, focusing specifically on cohabitation, marriage, and divorce. She describes both variation within Europe and the ways in which the general European pattern differs from that evident in the United States. In Chapter 5, Katherine Franke, a legal scholar, offers an historical perspective on today’s same-sex marriage movement by comparing the experience of African-American freedmen

who first obtained the right to marry in the immediate post–Civil War era. She asks why the right to marry, rather than employment rights, educational opportunity, or political participation, emerged for both groups as the preeminent vehicle for gaining equality and dignity, and suggests, based on the experience of the freedmen, how marriage rights can also constrain freedom.

Part II focuses on research by contributors (mostly social scientists) on family change and the public's response to that change. Several chapters in this part examine the impact of marriage and other family forms on adult partners and their children, illuminating the economic, social, and psychological links between family form and the well-being of family members. Paul R. Amato (Chapter 6) explores the evolution of marriage, describing three types of marriage that can be observed in contemporary society: traditional institutional marriage, companionate marriage, and individualistic marriage. He then compares the three types and finds companionate marriage to be associated with greater marital satisfaction and stability than the others. Robert E. Emery, Erin Horn, and Christopher Beam in Chapter 7 investigate whether the association between marriage and various health and happiness benefits results from marital status or from individual characteristics by comparing the marital histories and experiences with clinical depression of fraternal and identical twins who share childhood experience and some or all of their genes. They report that their data support the proposition that the marital benefit is not an artifact of selection. In Chapter 8, using data from the Fragile Families and Child Well-Being Study, a major longitudinal research project in the United States, Sara McLanahan and Irwin Garfinkel examine the causes and consequences of increased rates of cohabitation and nonmarital birth; they also offer policy recommendations, ranging from reduced incarceration to tax strategies, to increase the likelihood that children will grow up in stable families and to minimize the harms associated with instability if it cannot be avoided. Finally, in Chapter 9, Ira Mark Ellman and Sanford L. Braver – a legal scholar and a psychologist, respectively -- probe public attitudes toward family change and family obligations. They present survey evidence on public attitudes

toward marriage as reflected in decisions about post-separation support and property division. They report that marriage plays a role in public attitudes toward these obligations, but not a determinative role.

Part III focuses on important contemporary policy debates, with several authors probing the legal implications of the recent changes in marriage and family life. In Chapter 10, Judith Stacey, a sociologist, draws on her ethnographic research on families around the world to illustrate that a wide range of relationships can fulfill the important child-rearing and social support functions of families. She argues that formal, state-sanctioned marriage inappropriately privileges some families over others, and proposes abolishing marriage as a legal status. Suzanne B. Goldberg (Chapter 11) and Carl E. Schneider (Chapter 12), both legal scholars, explore the debate over extending the right to marry to same-sex couples. Goldberg probes the arguments advanced by gay advocates for and against making the right to marry a high political priority. She endorses the view that marriage rights are important for their tangible benefits and as a powerful statement of social equality. But Goldberg rejects the contemporary relevance of the claim that allowing access to marriage for gay couples has the potential to transform marriage, suggesting that modern legal marriage is already based on equality norms. Schneider describes the declining role of morality in public discourse about marriage and family and analyzes the implications of this rhetorical shift on the debate over same-sex marriage. He considers whether same-sex marriage would serve the classic marital socializing function for gays and lesbians, as some gay advocates have argued, and how it would affect that function for heterosexuals. In contrast to Stacey, in Chapter 13, Shahar Lifshitz, a legal scholar, argues against the abolition of formal marriage (what he calls the “private-neutral” approach), but also rejects the “public-channeling” approach that favors continuing to make marriage the only means of formalizing an intimate relationship. Instead, Lifshitz proposes a “pluralist” approach under which the state would make available to couples in intimate partnerships a range of legal-status options. This approach, Lifshitz argues, is the best means of protecting the key

values of pluralism and autonomy and accommodating the important public and private interests at stake in designing family-status institutions.

The book concludes with two comments. In Chapter 14, sociologist Andrew Cherlin summarizes and reflects on the various contributions to this volume. We follow Cherlin's comment in Chapter 15 with an analysis of the evidence provided by the contributors, probing the policy implications and offering some tentative recommendations.

A generation from now, marriage and childbearing may seem quite different than they do today. Will marriage be less or more important as a family form? Will lawmakers have increased or reduced government support for marriage? Will couples who cannot marry today have gained access to marriage? Will formal marriage alternatives have expanded? Will some or all of those who do not marry be treated like those who do marry? The interdisciplinary approach offered by this volume provides tools to analyze and, hopefully, assist in resolving these policy questions about marriage at a critical juncture.

CT **Legal Regulation of Twenty-First-Century Families**

Marsha Garrison and Elizabeth Scott

A primary theme of this volume is that recent sweeping changes in marriage and family life present important challenges for family law. Half a century ago, both law and deeply entrenched social norms prescribed marriage as the only acceptable family form. Marriage was exclusively heterosexual, and both marital roles and entitlements were based on spousal gender. As the various contributors to this volume have explained, much has changed. Across most of the industrialized world, the proportion of families based on marriage has declined substantially. Increasingly, couples choose to live together before marriage or as an alternative to marriage. A 2011 survey found that barely 50 percent of American adults were married – a record low (Pew 2011). A growing number of children are born to unmarried mothers, who often live in informal unions with their children’s fathers. As a result of higher divorce rates and the dissolution of nonmarital families, many more children live in a succession of households involving a single parent, that parent’s new partner, and, sometimes, the children of the partner or of the parent and the new partner. Same-sex couples also form families and raise children today in a way that was uncommon fifty years ago and, increasingly, these couples have been successful in advocating for legal recognition of their unions.

Several contributors describe how the institution of marriage itself has changed dramatically over the past half-century. Differentiated social roles for husband and wife are no longer prescribed in the way that they once were, and the law has taken a strong stand in support of gender equality (Goldberg, Chapter 11). The new equality norm is associated with increasing equality in spousal earnings and a somewhat more egalitarian apportionment of household work (Brinig, Chapter 3).

Moreover, the meaning of marriage has evolved from a role-based, “institutional” model to one based on companionship or, more recently, individual personal fulfillment (Amato, Chapter 6). Under modern divorce law, spouses have unprecedented freedom to leave unhappy marriages, and public opinion increasingly favors such freedom (Schneider, Chapter 12).

Attitudes toward family and familial obligation have also changed. Today, most adults, particularly young adults, are either neutral or positive toward nonmarital and same-sex couples, with or without children. For example, in a recent U.S. poll, a majority of respondents expressed positive or neutral views toward a diverse range of family arrangements, disapproving only of single women having children without a partner (Pew [2010](#)). Reflecting this attitude change, many individuals would be willing to extend “spousal” support and grant a property-division entitlement to at least some unmarried partners; marital status played a role in the thinking of the adult Americans polled by Ellman and Braver (Chapter 9), but not a determinative role.

This account of family change seems straightforward, but on closer inspection, the trends are complex in ways that pose important challenges for legal policy.

First, the general trends mask class-based variation in family-formation behavior. In the United States, Russia, and most of Western Europe, nonmarital birth is associated with lower educational attainment and “a pattern of disadvantage” ([Perelli-Harris et al. 2010](#)). This variation is particularly striking in the United States, where nonmarital birth and marriage behavior are now highly correlated with race and class, creating the possibility that variation in family-formation norms reinforces the already large disadvantages of minority status and poverty.

Second, the trend away from marriage masks continuing public support for marriage. Indeed, as both Cherlin (Chapter 14) and McLanahan and Garfinkel (Chapter 8) explain, the decline of marriage seems to be attributable, at least in part,

to the fact that marriage is increasingly idealized as a marker of success. The high priority advocates for gay and lesbian rights have placed on access to civil marriage also suggests that marriage remains a core social institution. As Goldberg (Chapter 11) and Franke (Chapter 5) point out, the strong emphasis on this goal is controversial in the gay and lesbian community, and yet it has absorbed the attention of many advocates.

A The Policy Challenges

The various shifts in public opinion and behavior that the contributors to this volume recount pose important questions for policy makers, questions that continue to provoke profound disagreement. Some commentators long for a return to traditional marriage (Blankenhorn 2007), while others have welcomed the decline of what they view as an outdated institution (Fineman 2001; Polikoff 2008). Representing the latter group, Stacey (Chapter 10) points to the variety of nonmarital families as evidence that many family types can satisfy the needs of their adult and child members. She argues that traditional family law has unfairly privileged marriage by granting public and private rights based on marital status; the solution, in her view, is for the state to abolish marriage as a legal category.

On one level, few would disagree with Stacey's conclusion that the trend toward family diversity is to be applauded; the trend represents a decline in stigmatization of and discrimination against nontraditional relationships and families. A reduction in social prejudice is valuable in its own right. So is the increase in freedom and autonomy that it supports. Lifschitz (Chapter 13) discusses these advantages of family diversity, but argues, in contrast to Stacey, that the state can best support pluralism by making available a variety of family-status options that supplement marriage instead of replacing it. Cherlin (Chapter 14) also sounds a cautionary note, pointing out that, because marriage remains an important life goal for a large segment of the population, it is possible that abolishing marriage would restrict choice rather than expand it.

This debate over the desirability of access to marriage as a legal status is also evident in the literature on same-sex marriage. As Goldberg and Franke observe, the gay and lesbian community has been divided on the importance of marriage as a political goal. Some share Stacey's sense that marriage is a regressive, gendered institution that harms other families and cannot meet the needs of same-sex couples. Others see access to marriage as an essential aspect of full membership in society.

The question of how the state can best support diverse, autonomous choices about family life is not an easy one. It is complicated by two other concerns.

First, cohabitation is, everywhere, less stable than marriage and, as several contributors to this volume make clear, unstable relationships are associated with a variety of risks to children. If marriage plays a *causal* role in promoting stable relationships and reducing child welfare risks, policy makers should be wary of adopting legal rules that deter or disadvantage marriage. This issue is particularly salient where, as in the United States, marriage is strongly associated with race and class; family law and policy should not further worsen the prospects of children who are already disadvantaged. Whether marriage offers unique benefits that other relational forms cannot is also important to the debate over same-sex marriage. If marriage provides benefits (beyond those conferred by government) that informal relationships cannot match, then the case for making marriage available to all citizens is enhanced. At the same time, it is important to recognize that many couples will not marry and many children will be born into nonmarital families. Thus, a critical policy issue is how the law can best support the full spectrum of children and their families.

Second, marital status has long served as the basis for a variety of legislative assumptions about relational expectations and equities. Rules governing spousal inheritance rights and the division of property and support on divorce, for example, assume that spouses are an integrated economic unit with understandings and expectations about the sharing of property and continuing support (Scott & Scott 1998); the law does not make these assumptions about nonmarital cohabitants. Increased family diversity raises the challenge that formal marriage may no longer

serve as an accurate marker of expectations and equity. But if this is the case, another means of accurately and fairly classifying couples – in divorce law, probate law, and across a wide range of obligations and entitlements – may be needed.

In sum, the decline of formal marriage poses two different challenges to policy makers. Family law and policy should aim to reduce risks to adult and child well-being. Legal rules dealing with both public status and private rights should also seek to accurately classify couples to ensure that relational expectations and equities are met.

A premise of this interdisciplinary volume is that empirical research on marriage and family relationships can, and should, inform policy making. Within this framework, the contributors offer a range of thoughtful views on the future status of legal marriage and how the law can best support children and adults in nonmarital families. The views that we offer in this comment are grounded in this empirical perspective. To preview our conclusions, the social science evidence is persuasive that stable, low-conflict marriage offers benefits to family members ([Amato 2005](#); [Emery 1999](#)); thus we favor retaining the special status of marriage and argue that its historic harms can be (and to some extent have been) ameliorated through policies of gender equality and nondiscriminatory access. But not all marriages are beneficial, and efforts to promote marriage (or deter divorce) are potentially both ineffective and harmful. Moreover, many couples will continue to live together in informal unions – a reality that poses other challenges for lawmakers. On questions about the conditions under which informal relationships generate rights and obligations, we are not in agreement. But we are in agreement that the public has an important interest in ensuring that parents in all families can meet their children’s needs, and we explore some policies that could further this goal.

A Does Marriage Matter?

Some commentators have argued that the decline of marriage signals its growing irrelevance. For example, the American Law Institute (ALI) (which does not favor

the abolition of marriage) has argued 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” (ALI 2002). This and similar claims hint at the possibility that declining marriage rates and the increase in cohabitation may evidence no more than a shift in family-formation norms in which informal unions that share all, or most, of the characteristics of marital relationships are replacing formal marriages.

However, the research evidence does not support the supposition that marriage and cohabitation typically are equivalent in terms of relational expectations. First, cohabiting relationships are varied in ways that make classification very difficult; demographers have identified six or seven different cohabitation “types,” ranging from a casual affiliation, to a stage in the marriage process, to informal “common-law” marriage (Heuveline & Timberlake 2004; Kiernan 2001). Although some cohabiting couples share a marriage-like bond, cohabitation often signals a lack of readiness for or interest in marriage, not marital intentions. The diversity of cohabiting relationships also ensures that cohabiting couples have varied understandings about important aspects of their relationships, including the level of commitment and economic interdependency (Brown 2000; Sassler & McNally 2004; Scott 2004). In short, the fact that two people are cohabiting does little to reveal their understandings and relational expectations (Nock 1995).

In contrast to cohabitation, marriage typically is grounded in a set of clear expectations, the most important of which are commitment and sharing; these expectations underlie many legislative classifications. Married couples overwhelmingly report that they share economic resources and that such sharing is a product of love, trust, and commitment (Blumstein & Schwartz 1983; Pahl 1989; Stocks et al. 2010). Cohabitants are much less likely to express commitment toward or support for their partners (Nock 1995; Stanley 2004); across a wide range of nations, they are more likely to split expenses instead of pooling their resources (Hamplova & Le Bourdais 2009; Knudsen & Wærness 2009; Lingstadt et al. 2011;

Vogler et al. 2006). Indeed, surveyed cohabitants often describe the advantages of cohabitation as a function of noncommitment (Coast 2009; McRae 1993). These patterns persist even in Scandinavia (Heimdal & Houseknecht 2003; Lingstadt et al. 2011), where there are few economic incentives to marry and cohabitation is “widely accepted as a way of living together, even when there are children” (Wiik et al. 2009: 466). That many cohabitants do not view their unions as the equivalent of marriage is also suggested by the fact that the vast majority of cohabitants also report that they plan to marry a current or future partner. Even in Sweden, survey data shows that the majority of cohabitants expect to marry within the next five years (Bernhardt 2004), and most people still do marry at some point (Andersson & Philipov 2002).

In sum, policy makers cannot assume that cohabitation and marriage are substitutes, with similar expectations of commitment and sharing. To be sure, marriage no longer serves as well as it once did as a means of ascertaining expectations and equities; some cohabiting unions are marriage-like and some marriages are based on little more than formality. Moreover, in some areas of regulation – domestic violence comes immediately to mind – marital status is clearly not an appropriate classification device. In other instances, as we discuss later, a more nuanced scheme may be required.

B The Marital Advantage: Correlation or Causation?

As Emery, Horn, and Beam (Chapter 7) explain, formal marriage has long been associated with a range of benefits to adult partners. Researchers have found that married individuals typically live longer and healthier lives than their unmarried counterparts (Wilson & Osborne 2005) and that they do better economically (Ellwood & Jenks 2004; Grossbard-Schechtman 1993). Marriage is also associated with advantages for children. First, marriage tends to be far more stable than cohabitation, and relational instability is associated with financial, physical, and educational risks during childhood and extending into adulthood (Cherlin 2009; McLanahan & Beck 2010; McLanahan & Garfinkel, Chapter 8). Growing up in a

single-parent household is negatively, and significantly, correlated with adult income, health, and emotional stability (Amato 2005; Sigle-Rushton & McLanahan 2004). Men and women who experience a single-parent households as children are more likely, as adults, to experience marital discord and to divorce or separate (Amato & Cheadle 2005; Hetherington & Elmore 2004). There is also evidence that the advantages conferred by marital childbearing and rearing extend beyond the specific benefits associated with residential and economic stability: 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 (Brown 2004; Carlson et al. 2005; Hofferth & Anderson 2003).

This is not to say that marriage is invariably correlated with benefits. First, the marital advantage appears to be concentrated in low-conflict relationships. The continuation of a high-conflict marriage is *negatively* associated with health and happiness for both adults and children (Emery 1999). Indeed, longitudinal surveys show that “parents’ marital unhappiness and discord have a broad negative impact on virtually every dimension of offspring well-being” (Amato & Booth 1997:219). Second, remarriage does not seem to confer the same advantage as a first marriage either for adults (Nock 1999:66–82) or children. Children living in step-families, for example, tend to score lower on tests of emotional and social well-being than children living with both parents in intact families (Brown 2004; Hofferth 2006).

Finally, a large portion of the marital advantage is explained by “selection effects.” As both Cahn and Carbone (Chapter 1) and McLanahan and Garfinkel (Chapter 8) explain, married couples tend to be older, better educated, and better off than cohabiting couples. At least in the United States, cohabiting couples also have more physical, mental health, and substance abuse problems than married couples (DeKleyn 2005; McLanahan 2004); moreover, a large number (40 percent) of U.S. unmarried fathers have been incarcerated at some point (McLanahan & Garfinkel). Thus, to a significant extent, the advantages associated with marriage can be explained by partner characteristics that precede family formation; indeed, it is

possible that instead of *producing* advantages, marriage results from them. A key question for policy makers is thus whether, and to what extent, marital status *itself* affects the well-being of adult partners and their children. If it does not, then the decline of formal marriage presents no particular cause for concern (although it may still give rise to classification problems).

A number of the contributors to this volume shed light on this controversial and important question. First, Emery, Horn, and Beam's twin study (Chapter 7) supports the view that marital status matters. The novel design that Emery and his colleagues employed enabled them to largely eliminate both nature and nurture as potentially confounding variables for their identical-twin subjects. That marriage was associated with some advantages (less depression and some differences in general health) in this research sample provides evidence that marriage itself promotes partner well-being.

The various contributors who tackled the problem of determining whether marriage benefits children did not have the advantage of such an optimal sample. However, they show that marital relationships are more stable than nonmarital cohabitation even after controlling for a wide range of demographic variables, and their conclusions on this point have been replicated in numerous other research reports ([Crawford et al. 2011](#); [Osborne et al. 2004](#); [Sigle-Rushton & McLanahan 2004](#)).

The persistence of the marital advantage across national and cultural boundaries also suggests that it does not derive solely from selection effects. In Scandinavia, which has the longest experience with cohabitation as a mainstream family form, demographers continue to find that marital childbearing is associated with greater childhood stability, smaller risks to youthful and adult well-being, and lower rates of divorce and nonmarital childbearing among children. 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" ([Heimdahl & Houseknecht 2003](#):527), cohabiting parents are still more than four

times as likely as married parents to separate before their first child turns five (Kiernan 2000). And despite a high level of public assistance to single parents – assistance that produces a child poverty rate of less than 5 percent – single parenthood remains a risk factor for children even after controlling for a wide range of demographic variables (Breivik & Olweus 2006; Garrison 2008b; Weithoft 2003).

Separating advantages produced by marriage from selection effects is difficult, and a large portion of the marital advantage can be explained by partner characteristics, economic factors, and other variables; the more that researchers are able to control for these other explanatory variables, the more the marital advantage diminishes (Crawford 2011; Emery, Horn, and Beam, Chapter 7). However, the evidence to date supports the claim that marriage itself potentially generates some benefits for adults and children.

B How Is the Marital Advantage Produced?

Why is marriage associated with personal benefits? Could family policies improve the likelihood of these advantages in nonmarital relationships? Again, some of the contributors to this volume offer useful data on these important questions.

First, it seems likely that the stability associated with marriage is key. Family dissolution typically is associated with reductions in both income and parental attention. It also sets the stage for new relationships. As McLanahan and Garfinkel (Chapter 8) argue, these transitions are often emotionally disruptive, distracting, and stressful for both parents and children – and they can undermine familial bonds that are important to healthy child development. A mother is likely to be less focused on parenting her children from earlier unions when she is building a relationship with a new partner – and perhaps with his children and, ultimately, with children born to the new union. In these circumstances, parents may be less attentive to their children's needs at the very time the children themselves are dealing with stressful new family relationships. Moreover, when either parent finds a new partner or spouse, the child's relationship with his nonresidential parent often becomes attenuated – a serious loss

for many children (Cherlin, Chapter 14). In sum, the instability of relationships in serial families pose stressful challenges and demanding adjustments for both parents and children, and it is not surprising that children's welfare often is negatively affected.

So, if marital stability is a key source of the marital advantage, how and why does marriage tend to produce more stable relationships? Most experts have concluded that the public commitments associated with marriage play an important role. The decision by a couple to enter formal marriage represents an agreement to undertake a commitment that involves (relatively) well-defined responsibilities to one another and to any children the couple may have; the registration of such a commitment is likely a more secure foundation for a stable union than the tentative step of cohabiting (Scott 2007). Indeed, as Ellman and Braver point out, often it is not obvious when cohabitation begins. By contrast, in exchanging marital vows, a couple "agrees to be subject to a complex set of behavioral expectations defining the roles of spouse and parent, expectations that will restrict their freedom and guide their behavior in the relationship" (Scott 2000:1907). Of course, the social norms regulating marriage and the role expectations attached to marital status are weaker today in an era of more individualistic marriages and readily available divorce (Amato, Chapter 6). Nonetheless, these norms and expectations continue to inhibit opportunities to participate in other sexual relationships and to prescribe behavior that likely reinforces relational stability, commitment, and mutual interdependency (Scott 2000).

Cohabitation often does not produce these attitudes. In the Fragile Family Study described by McLanahan and Garfinkel, "most of the ... cohabiting pairs espouse[d] a strong *individualistic* ethic ... in which personal happiness and fulfillment hold the highest value" (Edin et al. 2004:1011). The researchers offer two quotes from cohabitants that "illustrate this ethos particularly well, and describe how sharply cohabitation differs from marriage":

EXT 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” (Edin et al. 2004).

Of course, the sense that marriage is a commitment from which spouses “can’t just walk away” has declined. Many married couples get divorced and, in recent years, “individualistic” marriage, in which the marriage partners hold views much like those of the Fragile Family Study cohabitants, have become much more common. Indeed, Amato (Chapter 6) reports that fully 28.5 percent of American marriages were individualistic in the year 2000. Unsurprisingly, spouses in individualistic marriages (both in 1980 and in 2000) were most likely to think that their relationships were in trouble, to think about divorce, and the least likely to report a high level of happiness in their relationship.

In sum, the marital advantage appears to stem, in large part, from commitment, sharing, and the greater stability that these attitudes promote. Despite the rise of individualistic marriage, these advantages appear to persist, but they are far weaker today than in earlier generations.

B Why Has Formal Marriage Declined?

Marriage is a malleable and inclusive institution; it can accommodate individualistic marriages along with companionate and traditional, institutional marriages. So why has marriage declined?

One reason seems to be a shift in the meaning of marriage. Cherlin, for example, has urged that marriage “has evolved from a marker of conformity to a marker of prestige” (Cherlin 2004:855). Survey and interview data support this

claim. As one interviewee put it, “Marriage is something you earn....If [she] graduates and [I] graduate, you can start working and we can afford [a wedding] and that’s when you get married. It’s not just cause we have a child and all of a sudden we need to go out and do it” (Kefalas et al. 2011). Of course, the fact that there has been an attitudinal shift toward marriage does not explain why this is so.

One set of explanations relies on economic factors. As Brinig (Chapter 3) explains, Professor Gary Becker’s path-breaking economic model of marriage posits benefits from marital role specialization; it thus predicts that factors diminishing the incentive to specialize – for example, a convergence in male and female wages – will produce diminished gains from marriage and a lower marriage rate (Becker 1981). Economic models also emphasize the importance of sex ratios; if women are in relatively short supply, the models predict a higher marriage rate, and if men are in short supply, they predict a lower marriage rate (Ellwood & Jenks 2004; Grossbard-Schechtman 1993).

Empirical researchers have charted many of the correlations predicted by economic theory (Ellwood & Jenks 2004; Smock et al. 2005), and the class divide in marriage behavior described by contributors to this volume supports the importance of economic factors as an explanatory variable. College-educated Americans – the only group whose economic prospects have improved during the past few decades – have continued to bear children within marital relationships during the same period in which the nonmarital birth rate has skyrocketed (Cahn and Carbone 2010). The college-educated group is also the only population sector in which male wages have not stagnated. Most researchers have thus concluded that the increase in nonmarital families is, in part, a product of a decline in the availability of good, working-class jobs for men (Wilson 2002; McLanahan and Garfinkel, Chapter 8). This conclusion is supported by research finding that many individuals in nonmarital families view marriage as a union in which husbands are wage earners who can care for their families.

The racial divide in marriage behavior in the United States also supports the importance of economic factors, as Richard Banks explains in his important recent book (2011). African Americans have the lowest marriage rate of all U.S. ethnic groups. The gap between male and female earnings is also lower for black Americans than any other group; indeed, on average, black women earn almost 95 percent of what black men earn (Banks 2011:42–43). Banks observes that black women face a shortage of available men at all educational levels and that college-educated black women face a particularly acute shortage.

Economic factors alone cannot explain the magnitude of the recent decline in marriage, however. Researchers who measured the impact of changing economic conditions on the marriage rate in the United States between 1986 and 1997 found that wage and employment shifts explained only about one third of the decline during that period (Lichter 2002). Further, the retreat from marriage in the United States also continued throughout the 1990s, despite dramatic increases in economic growth.

At least as important as an explanation for the decline of marriage are changing social norms that began with the sexual revolution of the 1960s; because of these changes, couples can freely choose between marriage and cohabitation without fear of social sanctions. This was not always true. In the 1950s, and even later, couples who chose to live together, and particularly to have children together outside of marriage, could expect to confront disapproval in most communities. Strong social norms prescribed marriage as the only socially acceptable setting for intimacy and raising children (Scott, 2000). Not surprisingly, most couples seeking an intimate relationship chose marriage. These social norms have now been largely abandoned in the developed world (Thornton, Chapter 1), a shift that has surely contributed to the increased numbers of nonmarital families – and to the decline in marriage.

The importance of social influence is apparent in the fascinating case of Quebec, where the marriage rate is about half, and the nonmarital cohabitation rate about double, that of the other Canadian provinces (Lachapelle 2007; Laplante 2006). A half-century ago, Quebec's marriage rate was higher than the Canadian norm (Le

[Bourdais & Marcil-Gratton 1996](#)). Although economic conditions undoubtedly explain some of this shift – Quebec’s already high unemployment rate rose steeply during the same period that the marriage rate began to decline sharply – most demographers have concluded that the more important factor is hostility by Francophone, predominantly Catholic, Canadians to the conservative attitudes of the Catholic Church. Evidence for this claim comes from two facts: the Quebecois marriage rate is much lower than that of neighboring provinces with comparable unemployment figures, and Francophones have a higher cohabitation rate than Anglophone Canadians no matter where they live in Canada ([Lachappelle 2007](#)).

The case of Quebec is particularly intriguing because non-Catholic, Anglophone Canadians who live in Quebec also have a higher cohabitation rate than Anglophones who live in the other provinces ([Lachappelle 2007](#)). This could result from economic factors, or from a “bandwagon effect” in which majority Francophone sentiment influences minority Anglophone attitudes.

Quebec may be somewhat unusual in that hostility toward marriage rather than acceptance of cohabitation seems to have driven changes in family formation – but the dynamic interaction between changing attitudes and behavior is not unusual. Bandwagon effects generally influence public opinion, and, over time, public attitudes play an important role in shaping private attitudes and behavior ([Coleman 1998](#); [Kuran 1995](#)). Those without strong views on a subject may be swayed by perceptions about the views and behavior of others, and “[e]ach new person on [an] ... upward bandwagon induces additional people to climb on” ([Marsh 1984](#)). In this way, dramatic attitudinal and behavioral changes can occur in a relatively brief period. For example, in the early 1960s, 80 percent of the public agreed that “a couple should stay together” for the sake of the children. By the 1980s, agreement with this statement had dropped to 50 percent ([Axinn & Thornton 2000](#)).

The recent decline in marriage thus can be attributed, at least in part, to a dynamic process through which more favorable public attitudes toward cohabitation as an alternative to marriage have encouraged couples to cohabit, which in turn has

increased the acceptability of cohabitation and influenced more couples to choose cohabitation over marriage in a self-reinforcing pattern.

A The Role of Law in Supporting Twenty-First-Century Families

So, how should the law respond to the growing diversity of modern families?

As a preliminary matter, it is useful to note the general goals of contemporary family law and policy and the principles we think should animate the legal regulation of families in the twenty-first century. The primary goal is to ensure that the needs of dependent members of society, particularly children, are met. Society has an important interest in the healthy development of children, who will be the next generation of adult citizens. Society also has an interest in ensuring that families meet the needs of their dependent adult members; if families perform these important functions adequately, the burden on government (and on taxpayers) is reduced. In regard to adults, public policy should also support and respect personal autonomy and choice in intimate relationships; it should thus avoid discrimination against particular types of families and acknowledge the legitimacy of a diverse range of family types. Finally, the law should protect family members from harm, including harms associated with detrimental reliance on relational obligations and commitments.

B Should the State Eliminate or Expand Access to Legal Marriage?

A key question raised by this book is the future status of legal marriage. In addressing this issue, we think it important to note that the most prominent argument against marriage today is different from the concerns that animated marriage critics a generation ago. Beginning in the 1970s, this earlier generation of opponents challenged marriage as a hierarchical institution that oppressed and subordinated women (Fineman 1995; Olson 1983; Olson 1984). Although this critique has not disappeared, it is not the primary objection of most marriage critics today (Stacey,

Chapter 10). In part, as Goldberg (Chapter 11) explains, this may be attributable to law reforms that have systematically abolished differential legal treatment of husbands and wives.

Today's hostility to legal marriage is typically grounded in the claim that a "special" status for marriage is harmful to other families – and that all families should be treated with the same respect under the law. This critique stems, in part, from the law's long-standing exclusion of gays and lesbians from marriage. It also has roots in traditional family law's harsh treatment of nonmarital families. Until the 1960s, "illegitimate" children of unmarried mothers were ineligible for a range of legal benefits (including inheritance rights) enjoyed by children whose parents were married (*Levy v. Louisiana* 1968). Cohabiting adults were deemed to be in immoral, "meretricious" relationships – outside of the law's protection; in some jurisdictions, even their contracts were unenforceable (*Marvin v. Marvin* 1975; *Hewitt v. Hewitt* 1979). The law thus reflected and reinforced the social stigma attached to nonmarital relationships and birth. Marriage critics point to this history of discrimination and urge that any continued differential legal treatment of marital and nonmarital families undermines the legitimacy of nonmarital families.

Although differences in the legal treatment of marital and nonmarital families require careful scrutiny and justification, we think the evidence shows that this critique is misguided. First, in recent years, constitutional and statutory reforms have abolished overtly discriminatory policies toward nonmarital children and relationships. Second, public attitudes have changed dramatically, and survey evidence suggests little or no stigmatization of nonmarital families today (Pew 2010). Third, as McLanahan and Garfinkel point out (Chapter 8), differential treatment of marriage results in penalties for married couples as well as benefits – and marriage also carries obligations as well as rights. Finally, the evidence shows that cohabitation does not typically entail the same type of sharing and commitment as marriage; differential treatment of marriage and cohabitation thus often reflects the different expectations and behaviors of married and unmarried couples.

Our conclusion that differential treatment of marriage and cohabitation is warranted does not, of course, apply to same-sex couples who cannot marry. But the answer, in our view, is to make marriage available to all couples seeking to register their commitment, not to eliminate marriage. Public attitudes toward marriage are positive, and a majority of adults continue to marry. At least in the United States, even those who are unmarried typically express the hope to marry at some point in their lives.

With the abolition of overtly discriminatory policies toward nonmarital families and the adoption of policies making marriage available to same-sex couples, marriage becomes an option that all couples are free to choose. Over time, marriage critics' concern that the law's "special" treatment of marriage harms other families may diminish in response to legal reforms and to changing social attitudes, just as concerns about gender hierarchy have faded.

Indeed, today's positive public attitudes toward marriage may be attributable, at least in part, to the fact that both marriage and marriage law have evolved to reflect changing social values. These changes are reflected in the gender-equality reforms noted earlier, in the availability of no-fault divorce, and (indirectly) in legal changes ending discrimination against nonmarital families. In this evolution, law and social norms have interacted in a dynamic process and, we think, this is as it should be. As legal marriage must be responsive to changing social values, or it will become a moribund institution inconsistent with current goals for intimate and family life. Today, lawmakers are challenged to extend marriage to same-sex couples – a group that historically has been excluded. Responding positively to this challenge represents the type of adaptation and evolution through which the institution of marriage has retained its robustness as a family form.

We thus believe that civil marriage should be opened to same-sex couples and that it should continue to be available to all couples who want to register their commitment. As Lifshitz suggests (chapter 13), the state's nondiscriminatory stance

and commitment to pluralism could be underscored by offering a menu of status options in addition to informal cohabitation.

B Should the State Continue to Grant Benefits and Impose Burdens Based on Marital Status?

This is a hard question given the importance of avoiding discrimination toward nonmarital families. Government programs that aim to benefit children should not (and generally do not) discriminate among families on the basis of marital status. But spouses receive benefits not available to cohabitants, including inheritance rights, estate tax advantages, Social Security survivor benefits, and a testimonial privilege, among others. It is well accepted that this package of benefits (and obligations) has both tangible and expressive value as a signal of the social importance of marriage.

We think rules distinguishing marriage from cohabitation, and at least some of the benefits that accompany the formal status, can be justified on several grounds. First, as Lifschitz suggests, the special legal status of marriage can be justified as a *quid pro quo* for the couple's agreement to formally undertake marital obligations such as mutual support and sharing. Although these duties are seldom enforced during marriage (except occasionally under the necessities doctrine), they are embodied in divorce law rules that regulate spousal support and property distribution; they also underlie many of the classifications that distinguish marriage from cohabitation (Scott & Scott 1998; Scott 2006).

Second, encouraging committed couples to marry may be desirable to the extent that marriage reinforces commitment and relational stability. Today, as McLanahan and Garfinkel point out, some committed couples may be deterred from marrying because they will lose government benefits.

Third, classification schemes that impose marital status, without consent, on couples who do not have marital understandings needlessly reduce individual

autonomy. As we have pointed out, many couples cohabit *because* cohabitation does not entail marital obligations (Garrison 2005; Scott 2007). Moreover, under current law, intimate partners can designate one another as will beneficiaries, enter into contracts, take joint title to property, and otherwise individualize their expectations.

Finally, marriage performs an important notarial function in that it clearly signals both a couple's commitments and expectations. Given the range of cohabiting relationships, factually distinguishing marriage-like informal unions from casual affiliations that do not warrant special legal treatment may be difficult and costly; indeed, differences in the wording of questions have been shown to affect self-reports of cohabitation status among cohabiting couples and couples with nonmarital children, and even classification by researchers (Knab 2005). "Common-law" marriage – which relied on a private marital agreement and public "holding out" as a married couple instead of a marriage ceremony – has been abolished in most states precisely because of the difficulty of separating spurious from genuine marital claims. It is thus desirable for committed couples to formally marry so that their expectations can be recognized without expensive, time-consuming, and potentially inaccurate fact finding (Garrison 2008b).

This is not to say that the law should never make some form of relief available to cohabitants who do not register marital intentions or individualize their expectations through a contract or other means. The question is when and how. The rapid rise of cohabitation has produced a wide variety of schemes. Some jurisdictions grant relief based on the couple's informal agreement(s) (United States), while others focus on compensating for disadvantage arising from the relationship (Ireland). A third group treat unmarried couples as married for some or all purposes, based on one or more relational facts (e.g., the duration of cohabitation or having a common child) (Australia, Canada, New Zealand, Scotland).

The lack of consensus on when and how to grant relief to cohabitants who have not formalized their relational intentions reflects different balances among competing policy goals and variation in background factual assumptions. We expect

that it may be some time before consensus on the right approach emerges. Indeed, this is an issue on which we are not in agreement ourselves.

Scott favors an approach under which cohabitants would assume marriage-like financial obligations based on the birth of a common child or a period (perhaps five years) of cohabitation, with the possibility of opting out. In her view, the state's interest in promoting family stability and ensuring that parents provide financially for their children justifies imposing obligations on partners when a couple has a common child from the law's current neutral stance toward cohabitants. Optimally, the birth of a child will motivate the couple to consider making a formal commitment to one another. Indeed, assigning marital obligations when a couple has a child together may encourage them to marry, if the reluctance of either was attributable to a desire to avoid financial responsibility. But even if they do not marry, the birth of a child should signal to parents that they now have obligations toward one another that they were free to reject previously. The child's financial security is likely to be interwoven with that of both parents, and if they separate, that security is not likely to be achieved through child support alone. As Ellman and Braver (2011) report, public opinion now favors imposing partner support obligations on unmarried parents.

Scott also views the imposition of marital obligations on long-term cohabitants (couples who have lived together five years or more) as justified. In her view, these couples (a group representing a small percentage of cohabiting couples) are more likely than other cohabitants to be in marriage-like relationships and may often have an implicit understanding about financial sharing or support – or the more sophisticated partner may allow the other to believe that they do. A default rule creating marital financial obligations after an extended period of cohabitation would put the burden on the reluctant party to disclose his preference to avoid mutual obligations and persuade the partner to opt out by contract. This approach would avoid misunderstandings by vulnerable partners while preserving the freedom of couples who want to avoid mutual financial obligations (Scott 2006).

Garrison favors an approach, like that recently adopted in Ireland, which focuses on disadvantage flowing from the relationship as a basis for relief. In her view, the evidence fails to support the assumption that either the birth of a child or relational duration create marital expectations: even in Scandinavia, the birth of a child is not significantly correlated with the seriousness of a cohabiting relationship (Wiik et al. 2009), and cohabiting couples are significantly less likely than married couples to pool resources even after the duration of the relationship, the presence of children, and other socioeconomic variables are taken into account (Lyngstadt et al. 2011). The imposition of marital status based on relationship duration or parenthood thus creates serious risks of misclassification and reintroduces all the problems with fraud and uncertainty that have led states which formerly permitted fact-based, “common-law” marriage to abandon the doctrine. The fact that cohabitants often fail to agree about the nature of their relationship enhances these risks. Garrison is skeptical that the stability and other welfare benefits associated with marriage can be obtained when a couple fails to make formal, public commitments. And she fears that schemes which impose marital status retrospectively without such formal commitments may accelerate nonmarital parenting both through bandwagon effects and by signaling that formal marriage does not matter. Given that targeted legislation focused directly on remedying relationship-induced disadvantage can prevent unjust enrichment, she sees no reason to risk such negative effects (Garrison 2005, 2007, 2008a, 2008b).

Although we have not reached consensus on how the state should regulate nonmarital cohabitants who have not registered their intentions, we agree that the state should encourage couples with marital intentions to formally marry. We also agree that the state should facilitate marriage by providing an efficient, inexpensive registration process and streamlining the process through which individuals’ legal status is changed.

B Should the State Promote Marriage?

If it makes sense to support the registration of marital intentions, should the government also promote formal marriage?

In recent years, marriage advocates have urged a diverse array of marriage-promotion initiatives (Blankenhorn [2007](#); Waite & Gallagher 2000). Some focus on divorce reform while others promote public education. Some proposals aim to increase the marriage rate either through direct incentives or the elimination of marriage “penalties” like those described by McLanahan and Garfinkel. Advocates have also advanced initiatives that aim to reduce marital conflict or reduce nonmarital births, particularly among teenage mothers. Although these initiatives have not attracted much attention outside the United States, the George W. Bush administration funded a number of marriage-promotion programs, and state governments have funded others.

In our view, the evidence does not support governmental efforts to advance marriage per se. Because only low-conflict, enduring relationships offer significant benefits to adult partners and their children, only programs or reforms aimed at promoting this narrow category of marriages are justifiable. Those that aim to encourage marriage more broadly should be resisted. Indeed, for high-conflict relationships, the data suggest that government policy should aim to discourage marriage and facilitate divorce (Amato 2005; Emery 1999).

Several marriage-promotion initiatives – including divorce reform, marriage “incentives,” and public information campaigns extolling the benefits of marriage – clearly fail this test. The revival of fault grounds and other restrictions on access to divorce have the potential to enhance and prolong marital stress in high-conflict relationships. Moreover, the problem of spousal collusion – a fact of life that played an important role in legal reforms eliminating the necessity of establishing fault as a precondition to divorce – also greatly undermines the ability of courts 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. Marriage incentives are a bad idea for similar reasons. Incentive programs that encourage marriage per se are not calibrated to foster enduring, low-conflict partnerships. This problem is particularly acute if incentives are targeted at poor people, who have the lowest marriage rate. Low-income unmarried mothers often report that they have not married their children's fathers because of serious relationship problems such as violence, addiction, criminal misbehavior, and chronic conflict (Edin & Kefalas 2007), problems that are strongly associated with both relationship failure and poor outcomes for children (Sigle-Rushton & McLanahan 2004). There is no reason to encourage marriage in the context of such relationships. Even public information campaigns that extol the benefits of marriage sweep too broadly; it is far from clear how government could deliver a pro-marriage message without promoting undesirable marriages as well as healthy ones. The opinion-poll evidence also suggests that education about the benefits of marriage is not needed. These surveys find positive attitudes about marriage and widespread appreciation of its benefits.

Some marriage-promotion strategies do have appropriate goals. For example, conflict reduction and relationship skills programs, also included in the Bush administration's Healthy Marriage Initiative, aim at promoting relational stability and quality. These programs, and similar projects aimed at encouraging parental cooperation before and after separation, may benefit participants. Programs seeking to reduce teenage pregnancy (almost invariably nonmarital) and to encourage young women to postpone childbearing until they have completed their educations are also appropriate and potentially among the most beneficial initiatives. By providing counseling and access to contraceptives, these programs may assist in reducing the substantial social costs of adolescent childbearing—for mothers, children and society.

It is notable that these initiatives with appropriate goals do not entail marriage promotion per se. Instead, they focus directly on problems with which the decline of

marriage is associated. In our view, this is the approach that policy makers should follow, although further research is needed to evaluate the efficacy of particular programs.

Equally desirable, in our view, are programs that focus directly on the disadvantages with which nonmarital birth and relational failure are correlated. The research described by contributors to this volume indicates that many forms of disadvantage – economic, educational, and psychological – are correlated with increased risk of nonmarital childbearing, unsuccessful partnering, and deficiencies in parenting that undermine child well-being. The data also suggest that the underlying stresses which promote relational dysfunction and instability also contribute to other, arguably far more serious, deficits in family functioning. Single and adolescent parenting, substance abuse, mental health problems, adult family violence, child maltreatment, lack of social support, and low socioeconomic status are all highly correlated (Garrison 2008b; Huston 2003). In short, relational dysfunction and instability are often symptoms, as well as causes, of emotional and economic stresses that should be addressed directly.

Government policies that reduce the disadvantages associated with poverty thus offer the possibility of providing a range of benefits to children and their parents (Currie 2006). For example, high-quality, intensive preschool education is significantly associated not only with long-term educational and social advantages to the children who attend such programs, but also with a lower rate of child maltreatment and teen pregnancy within the educated group (Garfinkel & McLanahan, Chapter 8). These programs also free parents to seek employment and thus increase their family's economic well-being. In our view, such programs should play a central role in any government policy aimed at reducing family instability.

Programs that focus on improving the job prospects of adults who lack a college education are also important. As we have seen, this is the group that has experienced the most family instability and the most economic stress. Reversing this negative economic trend could play a valuable role in reversing the trend toward

family instability as well ensuring that families' basic economic needs are met. In the United States, changes in sentencing policy could also play a valuable role. As McLanahan and Garfinkel point out (Chapter 8), the extraordinarily high incarceration rate of young black men not only disrupts their lives and prospects of productive employment, but reduces the likelihood that they will become responsible parents and husbands.

Many factors contribute to the challenges faced by unmarried parents and their children – and government cannot solve every problem. But the relatively greater stability of nonmarital families in Europe, particularly in Scandinavia, where nonmarital birth rates are as high as or higher than those in the United States, suggests that government policies aimed at ensuring that families can adequately provide for their children – educationally, emotionally, and economically – will promote family stability and child well-being in a range of dimensions.

We are also persuaded by McLanahan and Garfinkel that, for the most part, programs available to all children will best advance the welfare of children in nonmarital families. Some services should, of course, target those most in need. But eligibility for programs that support parents and children should not be contingent on nonmarital status; a clear lesson of the research, in our view, is that discouraging parents from marrying is counterproductive as a policy matter. Beyond this, programs for which all children and families are eligible are likely to enjoy broader public and political support. The experience with the Individuals with Disabilities Education Act – a federal law creating an entitlement to special education services for children – demonstrates that middle-class families constitute a powerful interest group in support of social and educational programs (Pasachoff [2011](#)).

A Conclusion

As lawmakers consider how to respond to family change at this critical juncture, we think that the evidence supports some policy directions: Although fewer couples choose to marry, marriage continues to be an important goal for many individuals

and to offer social and personal benefits; thus, we favor retaining marriage as a special legal status, but one that is available to all couples ready to undertake marital commitment. We also favor a pluralistic regime that respects the freedom of adults to make choices about their intimate relationships and which generally is not inclined to impose nonconsensual marital obligations on cohabitants. Although children in nonmarital families are disadvantaged relative to children in marital families in ways that are likely to increase in the future without intervention, neither high-conflict marriage nor remarriage to a new partner is associated with benefits to children; we thus do not support initiatives to promote marriage per se. Instead, we favor policy reforms directed toward supporting the growing number of fragile families – and all families. Educational, employment and public health programs that contribute to the ability of unmarried parents to raise their children in a stable, nurturing family setting will benefit these families and the rest of society as well.

A References

- Amato, P.R.** (2005). The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation. *Future of Children* **15**, 75–96.
- Amato, P.R.** and **Cheadle, J.** (2005). The Long Reach of Divorce: Divorce and Child Well-Being across Three Generations. *Journal of Marriage and Family*, **67**, 191–206.
- American Law Institute (2002). *Principles of the Law of Family Dissolution*. American Law Institute.
- Andersson, G.** and **Philipov, D.** (2002). Life-Table Representations of Family Dynamics in Sweden, Hungary, and 14 Other FFS Countries: A Project of Descriptions of Demographic Behavior. *Demographic Research*, **7**, 67–144.
- Axinn, W.G.** and **Thornton, A.** (2000). The Transformation in the Meaning of Marriage. In **Waite, L.J.** (Ed.), *The Ties That Bind: Perspectives on Marriage and Cohabitation*. New York, NY: Aldine de Gruyter.
- Banks, R.R.** (2011). *Is Marriage for White People? How the African American Marriage Decline Affects Everyone*. New York, NY: Dutton.

- Becker, G.** (1981). *A Treatise on the Family*. Cambridge, MA: Harvard University Press.
- Bernhardt, E.** (2004). *Cohabitation or Marriage? Preferred Living Arrangements in Sweden*. Austrian Institute for Family Studies.
- Blankenhorn, D.** (2007). *The Future of Marriage*. Encounter Books.
- Blumstein, P.** and **Schwartz, P.** (1983). *American Couples: Work, Money, Sex*. New York: Wm. Morrow & Co.
- Breivik, K.** and **Olweus, D.** (2006). Adolescents' Adjustment in Four Post-Divorce Family Structures. *Divorce and Remarriage*, **44**, 99–124.
- Brown, S.L.** (2000). Union Transitions among Cohabitors: The Significance of Relationship Assessment and Expectations. *Journal of Marriage and Family*, **62**, 833–46.
- Brown, S.L.** (2004). Family Structure and Child Well-Being. *Journal of Marriage and Family*, **66**, 351–67.
- Brown, S.L.** and **Booth, A.** (1996). Cohabitation versus Marriage: A Comparison of Relationship Quality. *Journal of Marriage and Family*, **58**, 668–78.
- Cahn, N.** and **Carbone, J.** (2010). *Red Families v. Blue Families*. Oxford: Oxford University Press.
- Carlson, M., McLanahan, S., and Brooks-Gunn, J.** (2005), *Unmarried But Not Absent: Fathers' Involvement with Children after a Nonmarital Birth*. CRCW working paper 2005–07.
- Cherlin, A.J.** (2009). *The Marriage-Go-Round: The State of Marriage and the Family Today*. New York: Alfred A. Knopf.
- Coast, E.** (2009). Currently Cohabiting: Relationship Attitudes and Intentions. In **J. Stillwell** et al. (Eds.), *Fertility, Living Arrangements, Care and Mobility*. Dordrecht: Springer.
- Coleman, J.S.** (1998). *Foundations of Social Theory*. Cambridge, MA: Harvard University Press.
- Crawford, C.** (2011). *Cohabitation, Marriage, Relationship Stability and Child Outcomes: An Update*. London: Institute for Fiscal Studies. Retrieved from <http://www.ifs.org.uk/comms/comm120.pdf>

- Currie, J.** (2006). *The Invisible Safety Net: Protecting the Nation's Poor Children and Families*. Princeton, NJ: Princeton University Press.
- DeKlyen, M.** et al. (2006). The Mental Health of Parents with Infants: Do Marriage, Cohabitation and Romantic Status Matter? *American Journal of Public Health*, **96**, 1836–41.
- Edin, K.** and **Kefalas, M.** (2005). *Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage*. Berkeley: University of California Press.
- Edin K., Kefalas, M., and Reed, J.**(2004). A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents. *Journal of Marriage and Family*, **66**, 1007–14.
- Ellman, I.** and **Braver, S.** (2011). Lay Intuitions about Family Obligations: The Case of Alimony. Working Paper Series, Arizona State University. Retrieved from <http://ssrn.com/abstract=1737146>
- Ellman, I.** et al. (2010). *Family Law: Cases, Texts, Problems*. LexisNexis.
- Ellwood, D.T.** and **Jencks, C.** (2004). The Uneven Spread of Single-Parent Families: What Do We Know? Where Do We Look for the Answers? In **Neckerman, K. M.** (Ed.), *Social Inequality*. New York: Russell Sage Foundation.
- Emery, R.E.** (1999). *Marriage, Divorce, and Children's Adjustment*. Thousand Oaks, CA: Sage Publications.
- Fineman, M.A.** (1995). *The Neutered Mother, the Sexual Families and other Twentieth Century Tragedies*. New York: Routledge.
- Fineman, M.A.** (2001). Why Marriage? *Virginia Journal of Social Policy & the Law*, **9**, 239–71.
- Garrison, M.** (2005). Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation. *UCLA Law Review*, **52**, 815–97.
- Garrison, M.** (2007). The Decline of Formal Marriage: Inevitable or Reversible? *Family Law Quarterly*, **41**, 491–520.
- Garrison, M.** (2008a). Nonmarital Cohabitation: Social Revolution and Legal Regulation. *Family Law Quarterly*, **42**, 309–31.

- Garrison, M.** (2008b). Reviving Marriage: Could We? Should We? *Journal of Law and Family Studies*, **10**, 279–335.
- Grossbard-Shechtman, S.** (1993). *On the Economics of Marriage: A Theory of Marriage, Labor, and Divorce*. Boulder, CO: Westview Press.
- Hamplova, D.** and **LeBourdais, C.** (2009). One Pot or Two Pot Strategies? Income Pooling in Married and Unmarried Households in Comparative Perspective. *Journal of Comparative Family Studies*, **40**, 355–85.
- Heimdal, K.R.** and **Houseknecht, S.K.** (2003). Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States. *Journal of Marriage & Family*, **65**, 525–38.
- Hetherington, E.M.** and **Elmore, A.E.** (2004). The Intergenerational Transmission of Couple Instability. In **Chase-Landsdale, P.L.** et al. (Eds.), *Human Development across Lives and Generations: The Potential for Change*. Cambridge: Cambridge University Press.
- Heuveline, P.** and **Timberlake, J.M.** (2004). The Role of Cohabitation in Family Formation: The United States in Comparative Perspective. *Journal of Marriage and Family* **61**, 1214–30.
- Hofferth, S.L.** (2006). Residential Father Family Type and Child Well-Being: Investment versus Selection. *Demography*, **43**, 53–77.
- Hofferth, S.L.** and **Anderson, K.G.** (2003). Are All Dads Equal? Biology versus Marriage as a Basis for Paternal Investment. *Journal of Marriage and Family*, **65**, 213–32.
- Huston, A.C.** et al. (2003). *New Hope for Families and Children: Five-Year Results of a Program to Reduce Poverty and Reform Welfare*. New York: MDRC.
- Kieman, K.** (2001). The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe. *International Journal of Law, Policy and the Family*, **15**, 1–21.
- Kiernan, K.** (2000). European Perspectives on Union Formation. In **Waite, L.** (Ed.), *The Ties That Bind*. New York: Aldine de Gruyter.
- Knab, J.** (2005). Cohabitation: Sharpening a Fuzzy Concept. Princeton Center for Center for Research on Child Wellbeing Working Paper # 04–05-FF.

- Knudsen, K.** and **Wærness, K.** (2009). Shared or Separate? Money Management and Changing Norms of Gender Equality among Norwegian Couples. *Community, Work & Family*, **12**, 39–55.
- Kuran, T.** (1995). *Private Truths, Public Lies: The Social Consequences of Preference Falsification*. Cambridge, MA: Harvard University Press.
- Lachapelle, R.** (2007). The High Prevalence of Cohabitation among Franco-phones: Some Implications for Exogamous Couples. Canadian Population Society Annual Meeting.
- Laplante, B.** (2006). The Rise of Cohabitation in Quebec: Power of Religion and Power Over Religion. *Canadian Journal of Sociology*, **31**, 1–24.
- Lawrence v. Texas*, **539** U.S. 558 (2003).
- LeBourdais, C.** and **Marcil-Gratton, N.** (1996). Family Transformations Across the Canadian/American Border: When the Laggard Becomes the Leader. *Journal of Comparative Family Studies*, **28**, 415–36.
- Levy v. Louisiana*, **391** U.S. 68 (1968).
- Lichter, D.T.** (2002). Economic Restructuring and the Retreat from Marriage. *Social Science Research*, **31**, 230–56.
- Lyngstad, T.H., Noack, T., and Tufte, P.A.** (2011). Pooling of Economic Resources: A Comparison of Norwegian Married and Cohabiting Couples. *European Sociological Review*, **27**, 624–35.
- Marsh, C.** (1984). Back on the Bandwagon: The Effect of Opinion Polls on Public Opinion. *British Journal of Political Science*, **15**, 51–74.
- Marvin v. Marvin*, **557** P.2d 106 (1976).
- McLanahan, S.** (2004). Diverging Destinies: How Children Are Faring Under the Second Demographic Transition. *Demography*, **41**, 607–27.
- McLanahan, S.** and **Beck, A.N.** (2010). Parental Relationships in Fragile Families. *Fragile Families*, **20**, 17–37.
- McRae, S.** (1993). *Cohabiting Mothers*, London: Policy Studies Institute.

- Nock, S.** (1995). A Comparison of Marriages and Cohabiting Relationships. *Journal of Family Issues*, **16**, 53–76.
- Nock, S.** (1999). *Marriage in Men's Lives*. Oxford: Oxford University Press.
- Olson, F.** (1983) The Family and the Market: A Study of Ideology and Legal Reform. *Harvard Law Review*, **96**, 1497-1578.
- Olson, F.** (1984). The Politics of Family Law. *Law and Inequality*, **2**, 1–21.
- Osborne, C.** et al. (2004). *Instability in Fragile Families: The Role of Race-Ethnicity, Economics, and Relationship Quality*. CRCW Working Paper 2004–17FF.
- Pahl, J.** (1989). *Money and Marriage*. New York: Palgrave MacMillan.
- Pasachoff, E.** (2011). Special Education, Poverty, and the Limits of Private Enforcement. *Notre Dame Law Review*, **85**, 1413-1492.
- Perelli-Harris, B.** et al. (2009). How Does Childbearing Change the Meaning of Cohabitation? A Study of Nine European Countries. Paper presented at the Population Association of America meetings, Detroit, MI, April 30 to May 2.
- Perelli-Harris, B.** et al. (2010). The Educational Gradient of Nonmarital Childbearing in Europe. *Population and Development Review*, **36**, 775-801.
- Pew Research Center (2010). *The Decline of Marriage and Rise of New Families*. Retrieved from <http://pewresearch.org/pubs/1802/decline-marriage-rise-new-families>
- Pew Research Center (2011). *Barely Half of U.S. Adults are Married – A New Low*. Retrieved from <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/?src=prc-headline>
- Polikoff, N.** (2008). *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law*. Boston: Beacon Press.
- Sassler, S.** and **McNally, J.** (2004). Cohabiting Couple's Economic Circumstances and Union Transitions: A Re-Examination Using Multiple Imputation Techniques. *Social Science Research*, **32**, 553–78.
- Scott, E.S.** (2000). Social Norms and the Legal Regulation of Marriage. *Virginia Law Review*, **86**, 1901–70.

- Scott, E.S.** (2004). Marriage, Cohabitation and Collective Responsibility for Dependency. *The University of Chicago Legal Forum* 225–64.
- Scott, E.S.** (2006). Domestic Partnerships, Implied Contracts, and Law Reform. In **Wilson, R.F.** (Ed.), *Reconceiving the Family* 331–349. New York: Cambridge University Press.
- Scott, E.S.** (2007). A World without Marriage. *Family Law Quarterly*, **41**, 537–566.
- Scott, E.S.** and **Scott, R.E.** (1998). Marriage as Relational Contract. *Virginia Law Review*, **84**, 1225-1332
- Sigle-Rushton, W.** and **McLanahan, S.** (2004). Father Absence and Child Well-Being: A Critical Review. In **Moynihan, D. P., Smeeding, T., and Rainwater, L.** (Eds.), *The Future of the Family* pp. 116-158. New York: Russell Sage Foundation.
- Smock, P.J.** et al. (2005). “Everything’s There Except Money”: How Money Shapes Decisions to Marry Among Cohabitators. *Journal of Marriage and Family*, **67**, 680–96.
- Stanley, S.M.** et al. (2004). Interpersonal Commitment and Premarital or Nonmarital Cohabitation. *Journal of Family Issues*, **25**, 496–519.
- Stocks, J.** et al. (Eds.) (2007). *Modern Couples: Sharing Money, Sharing Life*. Houndsmill Basingstoke: Palgrave.
- Vogler, C., Brockmann, M., and Wiggins, R.D.** (2006). Intimate Relationships and Changing Patterns of Money Management at the Beginning of the Twenty-First Century. *British Journal of Sociology*, **57**, 455–82.
- Waite, L.J.** and **Gallagher, M.** (2000). *The Case for Marriage: Why Married People are Happier, Healthier, and Better Off Financially*. New York: Broadway Publishers.
- Weitoft, G.R.** et al. (2003). Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study. *Lancet*, **361**, 289–95.
- Wiik, K.A., Bernhardt, E.M., and Noack, T.** (2009). A Study of Commitment and Relationship Quality in Sweden and Norway. *Journal of Marriage and Family*, **71**, 465–77.

Wilson, C.M. and Oswald, A.J. (2005). How Does Marriage Affect Physical and Psychological Health? A Survey of the Longitudinal Evidence, IZA Bonn Discussion Paper No. 1619.

Wilson, J.Q. (2002). *The Marriage Problem: How Our Culture Has Weakened Families*. New York: HarperCollins.