

BRINGING UP BABY: ADOPTION, MARRIAGE, AND THE BEST INTERESTS OF THE CHILD

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INTRODUCTION

Who should care for children when their biological parents cannot? This is a question of potentially explosive dimensions under the proposals considered in this journal as to who the first (and hopefully last) legal parents will be for newborn children. Some of these proposals would potentially place droves of children in the state's care for placement with better, more ideal parents. This paper asks who these parents should be.

We will argue that children would be best served by placement with married parents and, barring this, that they should be placed with a single parent; as a final resort, a child should be placed with an unmarried, cohabiting couple for adoption by both of them. As we have been charged to do, we have taken an exclusively child-centered approach, drawing on an enormous body of social science on family structure and child well-being. The social science is clear: on average, children do best in a married home, compared to the alternatives, and for this reason adoption laws and regulations should clearly favor married parents. The social science is less clear on the advantage that a single parent might have compared to cohabiting parents; here, we think the science suggests that a single parent might offer more stability and safety to a child than a cohabiting couple. So we also argue for a weak preference for a single parent over a cohabiting couple when it comes to placing children in an adoptive home.

This paper first examines the current legal climate surrounding adoption and demonstrates that the question of optimal placement is an important one, not only to the proposals considered here, but to current adoption schemes in the United States. A significant number of states bar consideration of a prospective adopter's marital or non-marital status, laws that we believe miss an important opportunity to maximize the best interests of each child being placed. Part II then demonstrates that children

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are significantly more likely to thrive if they are raised in a home headed by two married parents. After presenting the results of an extensive literature review, we take a critical look at the quality of these studies and the extent to which they can assist us in isolating the impact of living in a marital home on a child's well-being. These studies confirm that marriage matters to how children flourish and to the extent to which their parents are willing to invest in them; they also suggest that living in a cohabiting household is fraught with risk for children. Part III then proposes model legislation to institute these preferences. We endorse a strong preference that gives first consideration to married couples and a weak preference for single parents compared to cohabiting couples. Part IV considers and ultimately rejects a number of concerns that may be raised by legislating a preference for placement with married couples.

I. MODERN ADOPTION LAW

Currently, 127,000 children are adopted every year,¹ a number we would expect to surge if proposals explored in this symposium are adopted and instituted. Roughly 2.5 percent of children under eighteen, or 1.6 million children, live with adoptive parents.² 78 percent of these, or 1.24 million children, are living with two married adoptive parents; 15.2 percent, or 243,000 children, live in single-mother households, while 3.2 percent, or 51,200 children, live in single-father households; and 3.6 percent, or 57,600 children, live with a single parent and the parent's live-in partner.³ Among those children adopted through foster care, one-third are adopted by a single parent.⁴ Additionally, single parents "[a]s a group . . . tend[] to adopt 'special needs' children who were older, minority, and/or handicapped children."⁵

¹ Nat'l Adoption Info. Clearinghouse, *How Many Children Were Adopted in 2000 and 2001?* (2004), at http://naic.acf.hhs.gov/pubs/s_adoptedhighlights.pdf (last visited Feb. 8, 2006).

² Nat'l Adoption Info. Clearinghouse, *Single Parent Adoption: What You Need to Know* (1994) [hereinafter *Single Parent Adoption*], at http://naic.acf.hhs.gov/pubs/f_single/index.pdf (last visited Feb. 8, 2006).

³ Joshua K. Baker & William C. Duncan, *Marital Preferences in Adopted Law: A 50 State Review* (iMAPP Pol'y Brief, Feb. 4, 2005), available at <http://www.marriedebate.com/pdf/iMAPPmarriage.adoption.pdf>; see also *Single Parent Adoption*, *supra* note 2, at 4 ("Adoption agencies have found that single fathers can be the best placement for boys who need strong role models and guidance in an accepting, loving environment.").

⁴ See *Adoption Statistics: Single Parents*, at <http://statistics.adoption.com/information/adoption-statistics-single-parents.html> (last visited Feb. 8, 2006) (citing Department of Health and Human Services statistics).

⁵ *Id.*

States are entrusted with the care and safe placement of children for adoption.⁶ Licensing rules, regulations, and standards all emphasize that the state's paramount duty is to the child rather than to prospective parents.⁷ Every state employs a "best interest of the child" standard to govern adoption.⁸ A child's overall well-being takes precedence over other placement factors considered by adoption agencies.⁹

The primary concerns in the placement process consist of the appropriateness of a placement of a particular child, the suitability of prospective parents, and the suitability of specific prospective parents to adopt a specific child.¹⁰ In North Carolina, for example, agencies consider twenty-seven factors in evaluating a placement, including motivation, emotional stability, financial stability, religion, and the general environment and attitudes towards the adoption process before making a recommendation.¹¹

⁶ We are primarily concerned here with the criteria for adoption used by public and private adoption agencies, where the child is brought together, as a trusted asset of the state, with a prospective parent. Private adoptions and international adoptions are not encompassed by our proposal because these adoption processes are negotiated privately and presented to agencies as *fait accompli*. Neither are stepparent adoptions, the most common form of adoption, encompassed by our proposal since stepparent adoptions raise special concerns about respecting the choice of the existing parent about who should parent her child. Recognizing this, most states waive certain requirements in stepparent adoptions, such as the need for a home study. *See* JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE 3–10 (2004); *see, e.g.*, FLA. STAT. ANN. § 63.122(5) (1984) (providing that no investigation of stepparent adoptions is required); *see also In re Adoption No. 90072022/CAD*, 590 A.2d 1094 (Md. Ct. Spec. App. 1991) (waiving a waiting period for a stepparent adoption because it was unduly burdensome where both biological parents consented to the adoption on the eve of a stepfather's marriage to the custodial mother, the child supported the adoption, and the home study was favorable).

Same-sex couples are also outside the scope of this proposal because the social science data, on which we rely, tells us very little about the importance of marriage to the parenting of same-sex couples. Because same-sex couples are able to marry only in Massachusetts, moreover, the ability of a specific same-sex couple to parent a specific child available for placement necessarily must be made without reference to the adults' marital status.

⁷ *See* HOLLINGER ET AL., *supra* note 6, at 7–19 (noting that in Tennessee, for example, "[t]he primary consideration in adoptive placements shall be the welfare of the child rather than the needs of the adoptive parents," and in Colorado, an agency "shall protect the child from placement which would be detrimental to his well-being").

⁸ Baker & Duncan, *supra* note 3, at 1.

⁹ *See* HOLLINGER ET AL., *supra* note 6, at 7–19; *see also* FLA. ADMIN. CODE ANN. r. 65C-16.005(k) (2004) (discussing the role in placement of the prospective parent's employment status outside the home and providing that "the needs of the child must be given priority over the employment situation of the parent."); Child Welfare League of Am., CWLA Standards, Providing Information to Adoptive Parents, §§ 4.12–4.15 (1988) (outlining reasons and information to be provided to adoptive parents and noting that Georgia requires consideration of "racial, cultural, ethnic, and religious heritage" yet mandates that a child's best interest be given priority).

¹⁰ HOLLINGER ET AL., *supra* note 6, at 3–4.

¹¹ 10A N.C. ADMIN. CODE 70H.0108(b) (West 1986).

A long and checkered past surrounds the criteria for placement of children with prospective adoptive couples.¹² At one time, agencies attempted to assure that every aspect of a prospective placement was ideal, which included the goal of matching a child to prospective parents in terms of physical appearance, intellectual capacity, and other factors. In that era, if the placement did not meet this exacting standard, many agencies would not pursue it, believing it was better to leave the child in the system rather than place him or her in a non-ideal home.¹³ For instance, if a single person applied for a child in 1970, he or she would have, unfortunately, been turned down — it just was not done.¹⁴ Over the last twenty years, single parent adoptions have become the “fastest growing trend” in the adoption industry.¹⁵ As Professor Joan Hollinger notes in her treatise, “[d]espite the efforts of some culturally conservative and church-affiliated agencies to perpetuate traditional standards for determining parental ‘suitability,’ most agencies and adoption attorneys now believe that is inappropriate to categorically exclude any group of people from consideration as adoptive parents.”¹⁶

Although the use of criteria in placement has a checkered past,¹⁷ agencies continue to consider various factors in deciding among prospective adoptive families, including where the couple lives, the couple’s age, and whether they have children of their own or other adoptive children.¹⁸ Age restrictions upon prospective adoptive parents are also common in many states. The provisions generally set a mandatory

¹² Adoption practices reflect the individual policies of hundreds of public and private adoption agencies. *See, e.g.*, ELAINE L. WALKER, *LOVING JOURNEYS: GUIDE TO ADOPTION* 247–69 (1992) (listing factors influencing placement for 370 American infant adoption programs). Private agencies place roughly half of the healthy infants adopted in the United States. *See* ELLEN PAUL, *ADOPTION CHOICES: A GUIDEBOOK TO NATIONAL AND INTERNATIONAL ADOPTION RESOURCES* 298 (1991).

¹³ HOLLINGER ET AL., *supra* note 6, at 3–39.

¹⁴ Single Parent Adoption, *supra* note 2, at 1.

¹⁵ *Id.*

¹⁶ HOLLINGER ET AL., *supra* note 6, at 3–54. *See, e.g.*, *In re Adoption of Charles B.*, 552 N.E.2d 884 (Ohio 1990) (permitting a male homosexual to adopt an eight-year-old adoptee with special needs); *In re Dependency of G.C.B.*, 870 P.2d 1037 (Wash. Ct. App. 1994) (ruling that a birth mother whose parental rights were properly terminated by court order lacks standing to object to state agency’s selection of a gay couple as prospective adoptive parents for a child she relinquished).

¹⁷ *See* R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 *YALE L.J.* 875, 896 n.81 (1998) (advocating the elimination of state-imposed barriers to transracial adoption); *see also* Jay M. Zitter, Annotation, *Race as Factor in Adoption Proceedings*, 34 *A.L.R.* 4th 169 (1984).

¹⁸ *See, e.g.*, FLA. ADMIN. CODE ANN. r. 65C-16.005 (2004) (specifying the criteria for considering an application for adoption, including the ability to adopt siblings, child’s choice, commitment to racial and ethnic heritage of the child, child-rearing experience, marital status, residence, income, housing and neighborhood, health, presence of other children, work status outside the home, status as state employees in the placement agency, and good moral character).

minimum age¹⁹ and may require a minimum age difference between the adoptive parent and child.²⁰ Such provisions have, as a general rule, been held constitutional.²¹

The weight given to such criteria varies from jurisdiction to jurisdiction. For instance, a number of states today provide that a child should be placed with individuals belonging to the same religion as the child “when practicable.”²² Others specify that numerous criteria are important, with none taking precedence over another.²³ Yet other states provide that a specific placement will be in a child’s “best interest” if and only if certain criteria are met.²⁴

Some adoption criteria have been jettisoned with time. This is largely what has occurred with the emphasis placed upon marriage.²⁵ Traditionally, a placement with a married couple was preferred since the support of two individuals is presumably better than one individual.²⁶ Today, only Utah has a clear preference for marriage in its adoption laws.²⁷ In contrast, other states take a neutral stance. For example, Florida

¹⁹ See, e.g., N.J. STAT. ANN. § 9:3-43 (2005); WASH. REV. CODE ANN. § 26.33.140 (2005).

²⁰ See, e.g., N.J. STAT. ANN. § 9:3-43 (setting a minimum age of eighteen and a ten year age difference requirement).

²¹ See, e.g., *Petitions of Goldman*, 121 N.E.2d 843 (Mass. 1954); *In re Efrain C.*, 314 N.Y.S.2d 255 (N.Y. Fam. Ct. 1970) (concluding that a state does not constitutionally deny equal protection to a child where the adoption statute that provides for religious matching of adoptive parents and the adoptive child “when practicable” is construed to require matching only if such placement will neither preclude nor substantially delay the adoption); see also Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 335 (2006) (noting that “[u]nder the view of adoption . . . as [a] mere privilege[], legislation denying standing on the basis of marital status is not constitutionally suspect.”). In contrast, statutes that preclude adoption of children are unconstitutional. See, e.g., *Drummond v. Fulton County Dep’t of Family & Children’s Servs.*, 547 F.2d 835 (5th Cir. 1977) (concluding that a state statute or policy precluding the adoption by a white family of any child having mixed black and white parentage cannot be countenanced under United States Constitution).

²² HOLLINGER ET AL., *supra* note 6, at 3–42.

²³ See, e.g., FLA. ADMIN. CODE ANN. r. 65C-16.005 (2004) (specifying a number of criteria to be considered in approving an application for adoption, which are “not listed in any order of priority”).

²⁴ See, e.g., UTAH CODE ANN. § 78-30-9 (2005) (stating that “[t]he Legislature specifically finds that it is not in a child’s best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.”).

²⁵ See David B. Harrison, *Marital Status of Prospective Adopting Parents as Factor in Adoption Proceedings*, 2 A.L.R. 4th 555 (1980) (documenting numerous cases of adoption denials involving unmarried prospective adopters, especially in the 1960s and 1970s).

²⁶ See *infra* notes 35–44 and accompanying text.

²⁷ See *supra* note 24; see also Baker & Duncan, *supra* note 3, at 1–2; Storrow, *supra* note 21, at 334–35 (arguing that marital status continues to act in the adoption context today as “a measure of parental fitness” so that in multiple jurisdictions single persons and unmarried couples “may adopt only where a willing married couple is lacking”). As Professor Storrow observes, the marital status of prospective adopters matters to the adoption process in other

amended its law in 2003 to make marriage simply one of many factors to consider when evaluating a potential adoption.²⁸ Just as marital status continues to matter in some states today, so may the unmarried status of two adults who want to adopt jointly. Some states forbid joint adoption by unmarried couples, whether of the same sex or opposite sex.²⁹ On the other hand, a growing number of jurisdictions

ways as well. For instance, a prospective adopter's spouse must join the applicant's petition to adopt or consent to the adoption. *Id.* at 335; *see, e.g.*, CAL. FAM. CODE § 8603 (West 2004) ("A married person, not lawfully separated from the person's spouse, may not adopt a child without the consent of the spouse, provided that the spouse is capable of giving that consent."); COLO. REV. STAT. § 19-5-202 (2004) ("A person having a living spouse from whom he is not legally separated shall petition jointly with such spouse, unless such spouse is the natural parent of the child to be adopted or has previously adopted the child.").

²⁸ Florida law states that "[t]he department and its designees will accept applications to adopt from married couples and from single adults. Couples married less than two years must be given particularly careful evaluation." FLA. ADMIN. CODE ANN. r. 65C-16.005(e) (2004) (considering, in addition to marital status, factors such as "[t]he child's choice," "the willingness of the adoptive family to adopt" a child's siblings, the applicant's commitment to "educate the child regarding his or her racial and ethnic heritage," "[t]he family's child rearing experience," residence in Florida, the family's income, resources, and current health status, and whether there are other children in the family). *See also In re M.M.D.*, 662 A.2d 837, 859 (D.C. 1995) (construing D.C. CODE §§ 16-302, 305, 312(a) (1981) and holding that "adoption petitions by unmarried couples shall be granted or rejected on case-by-case basis in the best interests of prospective adoptee (on the assumption that all other statutory requirements are met).").

²⁹ UTAH CODE ANN. § 78-30-9(3)(a) (2002). *See generally* Nat'l Gay & Lesbian Task Force, Second-Parent Adoption in the U.S., *available at* <http://www.thetaskforce.org/downloads/secondparentadoptionmap.pdf> (last visited Jan. 13, 2006) [hereinafter Second-Parent Map] (indicating that Colorado, Nebraska, Wisconsin, and Ohio also prohibit second parent adoptions). *See also In re Adoption of D.J.L.*, 16 S.W.3d 263 (Ark. 2000) (affirming a trial court order denying an adoption petition where the prospective adopters' abstract contained no information as to, among other things, the prospective adoptive parents' marital status, and where the prospective adopters cited no authority for the proposition that two unmarried adults should have ability to adopt); *In re Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996) (concluding that because a proposed adoption would terminate the child's relationship to its natural parent, children of a cohabiting same-sex couple were not available for adoption where the biological parents did not intend to relinquish their parental rights); *Adoption of Meaux*, 417 So. 2d 522 (La. Ct. App. 1982) (affirming the rejection of an application for adoption by a non-married couple in Louisiana); *In re Adams*, 473 N.W.2d 712 (Mich. Ct. App. 1990) (concluding that it is inconsistent with the purpose and scope of the state's adoption statutes to allow two unmarried persons to jointly adopt a child); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002) (denying a second parent adoption since under Nebraska law, the legal parents' parental rights must be terminated or the child relinquished in order for the child to be eligible for adoption); Op. Att'y Gen. Mich. No. 7160 (2004) (finding that the Michigan Adoption Code provides that adoption shall be by a person or a married couple and that same-sex couples cannot adopt a child together). *See generally* Storrow, *supra* note 21, at 335 (documenting that in most jurisdictions, "unmarried couples are considered singles, and . . . are not permitted to adopt jointly.").

permit second parent adoption, a mechanism used to permit an individual “to adopt his or her partner’s children.”³⁰

The history of the treatment of marital status is inextricably entwined with the historical treatment of single individuals who want to adopt, as well as the treatment of same-sex couples. States sensibly eliminated absolute bars to adoption by single parents for a number of reasons. Single parents may be preferred in some cases when a child may be better placed in the care of a single individual who may be better suited to provide the specific care needed.³¹ In other cases, single parents may have the capacity to be outstanding parents, and there is no reason to refuse them this opportunity if they want to assume the responsibility.³² A number of states now explicitly provide by statute that “[n]o rule or regulation of . . . any agency shall

³⁰ See CAL. FAM. CODE § 9000(f) (2004) (permitting second parent adoptions by registered domestic partners); CONN. GEN. STAT. § 45a-724(3) (2004) (authorizing second parent adoption); CONN. GEN. STAT. §§ 45a-724(a)(2–3), 45a-731(5–7); VT. STAT. ANN. tit. 15A, § 1-102(b) (2004) (allowing adoption by a parent’s partner under “best interest of the child” standard); *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995) (concluding that unmarried, same-sex cohabitants have standing to jointly petition for adoption of a child who is the natural or adoptive offspring of one of them under a statute allowing adoption when either adopter is related to the child by blood or marriage); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (concluding that Massachusetts’s adoption statute did not preclude joint adoption by two unmarried women of the biological child of one of them); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (holding that lesbian and unmarried heterosexual partners have standing to become adoptive parents); *In re Adoption of Carl*, 709 N.Y.S.2d 905 (N.Y. Fam. Ct. 2000) (finding that a child’s adoption by a couple who cohabited for twenty-four years, would be in the child’s best interests where the child had been placed in their foster care five days after his birth, the child was very attached to both cohabitants and members of their extended families, and the male cohabitant acted as the child’s father and the child saw him as his father); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002) (remanding for an evidentiary hearing the adoption petitions of two same-sex couples who were already raising children of one parent together, to determine whether the adoption without termination of the parent’s rights was in the best interests of the children); Storrow, *supra* note 21, at 340 (noting that second-parent adoptions have been used by lesbian and gay couples who cannot marry outside Massachusetts to achieve the functional equivalent of a stepparent adoption). See generally Second-Parent Map, *supra* note 29 (indicating that trial court or appellate court decisions allowing second-parent adoption have occurred in Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington).

³¹ Second parent adoption would presumably not be available in the cases contemplated in this symposium since neither prospective adopter has a genetic or legal tie to the child being adopted. See HOLLINGER ET AL., *supra* note 6, at 3–50.

³² See, e.g., *A v. M.*, 180 A.2d 541 (N.J., Middlesex County Ct. 1962) (determining in a preliminary hearing that despite the death of the plaintiff’s husband after an infant had been placed in her care, she was potentially fit to adopt and to provide a suitable home for the child, although the court acknowledged that it was safer for a child to start with two guardians since this undoubtedly provides greater protection for the future).

prevent an adoption by a single person solely because such person is single.”³³ Alabama, Alaska, Arizona, Hawaii, Idaho, Montana, Maryland, New Jersey, New York, Kentucky, and the District of Columbia have taken this approach.³⁴

The early cases testing the constitutionality and wisdom of such bars do provide, however, an important glimpse into the value of a two-parent home. For instance, in *In re Adoption of Hamilton*,³⁵ the Washington Supreme Court affirmed the denial of an adoption petition by an unmarried woman who sought to adopt two children who had been abandoned by their respective parents. Each child lived briefly with her, but were subsequently placed in the temporary custody of other couples whose petitions to adopt the trial court granted.³⁶ In the trial court’s view, adoption of the children by the two married couples would mean that “they would each be reared by and through the joint efforts of a father and mother; whereas if adopted by appellant, such rearing would be by an unmarried lady with such assistance as might be rendered by her brother, who was handicapped by physical infirmity.”³⁷ On

³³ ALA. CODE § 26-10A-5 (1975).

³⁴ ALA. CODE § 26-10A-5(2) (1992) (“No rule or regulation of the Department of Human Resources or any agency shall prevent an adoption by a single person solely because such person is single”); ALASKA STAT. § 25.23.020(a) (2004) (“The following persons may adopt: . . . (2) an unmarried adult”); ARIZ. REV. STAT. § 8-103 (1999) (“Any adult resident of this state, whether married, unmarried or legally separated is eligible to qualify to adopt children.”); HAW. REV. STAT. § 578-1 (“Any proper adult person, not married, . . . may petition the family court . . . for leave to adopt”); D.C. CODE § 16-302 (2001) (“Any person may petition the court for a decree of adoption.”); IDAHO CODE § 16-1501 (“Any minor child may be adopted by any adult person residing in and having residence in Idaho”); KY. REV. STAT. ANN. § 199.470(1) (LexisNexis 1998) (“Any person who is eighteen (18) years of age and who is a resident of this state or who has resided in this state for twelve (12) months next before filing may file a petition for leave to adopt a child in the Circuit Court of the county in which the petitioner resides.”); MD. CODE ANN., FAM. LAW § 5-3A-29(a) (LexisNexis 2004) (“Any adult may petition a court for an adoption”); MONT. CODE ANN. § 42-1-106 (2005) (permitting adoption by unmarried individuals who are at least eighteen years of age); N.H. REV. STAT. § 170-B:4 (2005) (providing that an unmarried adult may adopt); N.J. ADMIN. CODE § 10:121A-1.7(b) (“No certified adoption agency shall discriminate with regard to the provision of any adoption-related services on the basis of . . . marital status . . . with regard to the selection of adoptive parents for any child.”); 18 N.Y. COMP. CODES R. REGS. tit. 18, § 421.16 (2000) (“Agencies must not establish policies which place single . . . applicants, [legally separated applicants], . . . or widowed applicants, at a disadvantage.”).

Jurisdictions that permit unmarried individuals to adopt sometimes still weigh marital status. *See, e.g.*, D.C. CODE § 16-302 (2001) (“If the marital status of the petitioner changes after the time of filing the petition and before the time the decree of adoption is final, the petition must be amended accordingly.”); N.J. ADMIN. CODE § 10:121A-1.7(b) (providing that marital status “may be considered . . . in determining whether the best interests of a child would be served by a particular placement”).

³⁵ 246 P.2d 849 (Wash. 1952).

³⁶ *Id.* at 850.

³⁷ *Id.*

review, the state supreme court concluded that the trial court did not act in an arbitrary or capricious manner. Other courts have also stressed the value of a second pair of hands.³⁸

Other cases contesting adoption denials stress the instability in the child's life that may arise in the absence of the adoptive parent's marriage. Thus, in *In re M.F.*,³⁹ the Missouri Court of Appeals considered competing adoption petitions filed by a child's aunt and by non-relatives who had been married for ten years and who had a strong, stable, and loving marital relationship.⁴⁰ The aunt, who had successfully raised a son who was in college at the time of the petition, was divorced but engaged to a man still married to another woman at the time of the trial.⁴¹ Significantly, the fiancé did not join in the aunt's adoption petition, and his absence or presence in the home was unclear.⁴² The court concluded that in determining the best interests of the child, the evidence weighed in favor of the non-relatives.⁴³

Because stability is so important for children, it is a primary focus of modern adoption criteria in some states. For instance, Florida provides that the home study of the child and adoptive applicants prior to the child's placement is designed "to select families who will be able to meet the physical, emotional, social, educational and financial needs of a child, while *safeguarding the child from further loss and separation from primary caretakers.*"⁴⁴

II. THE IMPORTANCE OF A MARITAL HOME FOR A CHILD'S WELL-BEING

A large body of social scientific literature indicates that children are significantly more likely to thrive if they are raised in a home headed by married parents.

³⁸ See, e.g., *In re L.B.T.*, 318 N.W.2d 200 (Iowa 1982) (concluding that the adoptive parents of a child's older brother and sister were properly granted the adoption, rather than a single woman who cared for the child for first twenty-eight months of the child's life, where it was important that the child have the advantage of both a father and mother); *A. v. M.*, 180 A.2d 541 (N.J., Middlesex County Ct. 1962) (favoring a single guardian with a large, close knit family over natural parents with no such family support); *In re Adoption of Kelley*, 541 P.2d 1304 (Or. Ct. App. 1975) (awarding custody to grandparents who offered a two-parent home over a great aunt who offered single parent home).

³⁹ 1 S.W.3d 524 (Mo. Ct. App. 1999).

⁴⁰ *Id.* at 533.

⁴¹ *Id.*

⁴² *Id.* at 533-34.

⁴³ *Id.* at 534; see also *In re Adoption of M.C.D.*, 42 P.3d 873 (Okla. Civ. App. 2001) (concluding that the trial court erred in allowing a divorced couple to jointly adopt the wife's niece since only married couples may adopt, and the adoption would be contrary to the legislature's intent that children be placed in stable, permanent, and loving families).

⁴⁴ FLA. ADMIN. CODE ANN. r. 65C-16.005(2) (2004) (emphasis added). See also CONN. GEN. STAT. § 45a-727a (2004) (finding that "[t]he best interests of a child are promoted when the child is part of a loving, supportive and stable family, whether that family is a nuclear, extended, split, blended, single parent, adoptive or foster family.").

For instance, a recent literature review on the effects of family structure from Child Trends, a leading nonpartisan research institute that studies child welfare, noted that the “research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage.”⁴⁵ Other recent reviews of the literature on child well-being have come to similar conclusions.⁴⁶ More specifically, research looking at psychological, criminal, educational, sexual, and child neglect and abuse outcomes consistently shows that children reared in average, intact married homes do better than children reared in average, single-parent homes.⁴⁷

A. *The Evidence of Improved Outcomes*

Compared to children in married-parent families, children in single-parent families are about twice as likely to experience serious emotional or behavioral problems.⁴⁸ In a recent summary of the literature on emotional outcomes, Paul Amato writes:

[C]ompared with children who grow up in stable, two-parent families, children born outside marriage reach adulthood with less education, earn less income, have lower occupational status, are more likely to be idle (that is, not employed and not in school), are more likely to have a nonmarital birth (among daughters), have more troubled marriages, experience higher rates of divorce, and report more symptoms of depression.⁴⁹

For example, a recent study of the entire Swedish population of children found that children raised in single-parent homes were twice as likely as children in two-parent families to attempt suicide, suffer from substance abuse, or suffer from depression.⁵⁰ Compared to teens living in married families, an American study found that adolescents living in single-mother families were almost twice as likely to try marijuana,

⁴⁵ Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* 6 (Child Trends Research Brief, June 2002), available at <http://www.childtrends.org/Files/MarriageRB602.pdf>.

⁴⁶ See, e.g., W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 32–33 (2005) [hereinafter WILCOX ET AL.]; Mary Parke, *Who Are “Fragile Families” and What Do We Know About Them?* 2 (Ctr. for Law & Soc. Pol’y Brief No. 4, Jan. 2004).

⁴⁷ WILCOX ET AL., *supra* note 46, at 32–33.

⁴⁸ See *id.* at 27–28. See generally E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2002).

⁴⁹ Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD. 75, 78 (2005).

⁵⁰ See Gunilla Ringback Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289 (2003).

and adolescents living in single-father families were almost three times as likely to try marijuana.⁵¹ Research also indicates that adolescents who grow up in single-parent families are significantly more likely to engage in delinquent behavior compared to adolescents in intact, married families.⁵² In fact, one study found that boys raised in single-parent families were about twice as likely to commit a crime that leads to incarceration by the time they reach their early thirties.⁵³ All of these studies control for factors such as parental income and education, which could otherwise confound the association between family structure and child mental and behavioral outcomes.

Similar patterns can be seen in adolescent outcomes related to educational and sexual behavior. One study found that teenagers who grow up in single-parent homes are significantly more likely to have problems in school — measured by reports of getting along with a teacher, paying attention in school, getting along with fellow students, and completing homework.⁵⁴ This study also found that teenagers from single-parent families are 46 percent more likely to have low grade point averages, compared to adolescents from intact, married families.⁵⁵ Other research shows that children are significantly less likely to graduate from high school if they grow up in a single-parent family compared to children from two-parent families. For instance, sociologists Sara McLanahan and Gary Sandefur found that 29 percent of children in single-parent families dropped out of high school, compared to 13 percent of children from intact, two-parent families.⁵⁶ Their research also indicates that adolescent girls are significantly more likely to experience a teenage pregnancy if they grow up in a single-parent family. They found that 11 percent of daughters with continuously married parents had a teen birth, compared to 27 percent of daughters born to a single mother.⁵⁷ Other research comes to similar conclusions, showing a strong relationship between growing up in a single-parent family and both teenage pregnancy and sexual promiscuity.⁵⁸ Once again, all of this research controls for major socioeconomic factors,

⁵¹ See Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Adolescence*, 52 J. MARRIAGE & FAM. 171, 176 (1990).

⁵² See, e.g., Chris Coughlin & Samuel Vuchinich, *Family Experience in Preadolescence and the Development of Male Delinquency*, 58 J. MARRIAGE & FAM. 491, 498 (1996); cf. Robert J. Sampson & John H. Laub, *Urban Poverty and the Family Context of Delinquency: A New Look at Structure and Process in a Classic Study*, 65 CHILD DEV. 523, 538–39 (1994).

⁵³ Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 387, 389 (2004).

⁵⁴ Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 881, 885–86 (2003).

⁵⁵ *Id.* at 886.

⁵⁶ SARA MCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* 41 (1994).

⁵⁷ *Id.* at 53.

⁵⁸ Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 CHILD DEV. 801, 811 (2003).

such as education, race, and income, that might otherwise distort the relationship between family structure and child outcomes.

Social scientific research indicates that children are significantly more likely to be neglected or abused if they are reared in a single-parent family, compared to an intact, married family.⁵⁹ With respect to neglect, studies find that children in single-parent homes are more likely to be left unattended, to receive insufficient parental oversight, and to be undernourished, compared to children in two-parent families.⁶⁰ Even after controlling for factors that increase the risk of abuse, studies indicate that children are also more likely to be physically and sexually abused if they are raised in a single-parent family. For instance, one study found that 7 percent of children living with a single-parent were sexually abused, compared to 4 percent of children living in a married home headed by biological parents.⁶¹

The voluminous literature on family structure suggests a clear conclusion: children raised in intact, married families do significantly better on a range of social, behavioral, and emotional outcomes than children raised in single-parent families.

B. Understanding the Impact of Marriage on Children

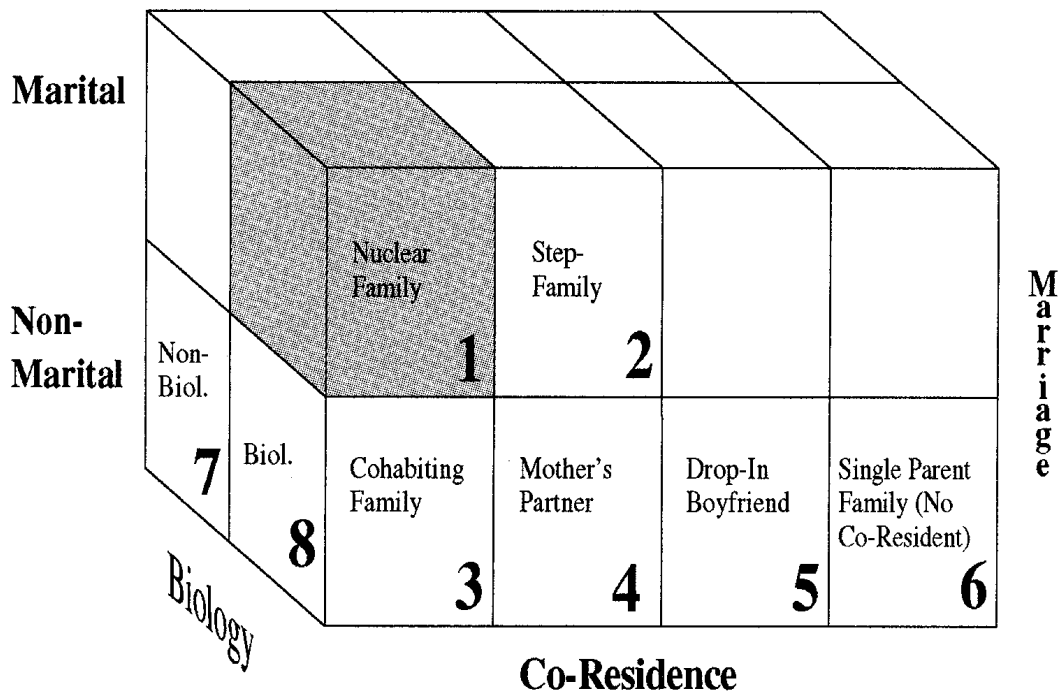
Because marital and non-marital families differ in numerous ways,⁶² it is easy to attribute these findings to structural differences between the families that have nothing to do with marriage. As Figure 1 illustrates, these families may differ in terms of biological relatedness of the parents and children, or in the advantages that an extra pair of hands provides. This is a real possibility when the basis for the comparison is children in single parent households. Yet emerging research suggests that something more than biology is operating here.

⁵⁹ WILCOX ET AL., *supra* note 46, at 31–32.

⁶⁰ See Amato, *supra* note 49, at 83–84; see also David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 FUTURE OF CHILDREN 31, 48 (1994); Andrea J. Sedlak & Diane D. Broadhurst, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect*, at <http://necanch.acf.hhs.gov/pubs/statsinfo/nis3.cfm> (last visited Feb. 8, 2006).

⁶¹ See *id.*; see also Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251 (2001) [hereinafter Wilson, *Children at Risk*] (documenting evidence of sexual abuse); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the American Law Institute's Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (forthcoming 2006).

⁶² See Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 852, 860 (2005) (charting differences in income, education levels, co-residence, mobility, and social support, among other differences).

Figure 1⁶³

1. Positive Outcomes for Children Are Not Just Due to Biology

Research on adopted families headed by a married couple is more embryonic than research on intact, married families. Nevertheless, the research to date indicates that children raised in adopted two-parent homes do better than children raised in single-parent, biologically related homes. One study of adolescent teens found that adopted children scored higher than children in single-parent families on academic performance and were also less likely to be depressed, delinquent, or using alcohol, compared to children from single-parent families.⁶⁴ Another study found that adopted children were less likely to repeat a grade, compared to children in intact, married families and children in single-parent families.⁶⁵ Still other research indicates that adopted children in married households do about as well as children

⁶³ *Id.* at 880.

⁶⁴ PETER L. BENSON, ANU R. SHARMA & EUGENE C. ROEHLKEPARTAIN, *GROWING UP ADOPTED: A PORTRAIT OF ADOLESCENTS AND THEIR FAMILIES* (1994), available at <http://www.search-institute.org/archives/gua.htm> (last visited Mar. 10, 2006).

⁶⁵ See Nicholas Zill, *Adopted Children in the United States: A Profile Based on a National Survey of Child Health* 108, available at http://www.childtrends.org/Files/85-15_Adopted_Children.pdf (last visited Mar. 29, 2006).

in biological, married households.⁶⁶ The differences in outcomes between single-parent families and adoptive, married families in these studies indicate the value of a two-parent home. If biology alone accounted for the advantages children in intact, married families have, we would expect adoptive children to do worse than biological children in single-parent families. But, clearly, family structure trumps biological relatedness, if this literature on adoptive children is any indication.

Of course, studies of outcomes for children by family type suffer from a limitation: poorer outcomes for children in stepparent or single-parent families, compared to children in intact, adoptive, or biological families, may be the result of factors not measured by the analyses to date. For instance, it could be that unmeasured genetic factors, such as a predisposition to depression, play a hidden role in explaining associations between family structure and children's emotional welfare. This problem of causation is significantly reduced in studies of investment by the parents in their children. Unlike outcome studies, which focus on how children fare in different types of families, investment studies look directly at how differences in family structure are linked to differences in parental investments in children.⁶⁷

Scholars have examined parental investments in children precisely to isolate the role of biology versus marriage. For instance, Hofferth and Anderson compared investments by residential fathers in children in four different types of families: the nuclear family (married, biological parents), the cohabiting family (unmarried, biological parents), the stepfamily (married parents, one of whom is a nonbiological parent), and unmarried parents, one of whom is a nonbiological parent (mother cohabits with live-in partner).⁶⁸ The study included data from 2,531 children and their parents and examined father's weekly hours engaged with the child;⁶⁹ weekly hours available to the child when the father was around but not actively participating;⁷⁰ fathering motivation; number of activities the father participated in with the child in the past month;⁷¹

⁶⁶ Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 463 (2002).

⁶⁷ See Robin Fretwell Wilson, *A Review of From Partners to Parents: The Second Revolution in Family Law by June Carbone*, 35 FAM. L.Q. 833, 839 (2002).

⁶⁸ Sandra Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Involvement*, 65 J. MARRIAGE & FAM. 213, 218 (2003) (using the 1997 Child Development Supplement to the Panel Study of Income Dynamics).

⁶⁹ This figure was obtained using a time diary of the child's activities as answered by the child or the child's mother, including the question, "Who was doing the activity with [the] child?" *Id.* at 219. The diary captured one weekday and one weekend day. Figures for the weekday (multiplied by five) were added to the figure for the weekend day (multiplied by two) to arrive at a weekly figure. *Id.* at 220.

⁷⁰ This was also accomplished using the time diary with the additional question, "Who else was there but not directly involved in the activity?" *Id.* at 219.

⁷¹ The researchers analyzed thirteen activities:

[G]oing to the store; washing or folding clothes; doing dishes; cleaning house; preparing food; looking at books or reading stories; doing arts and crafts; talking

and “warmth” toward the child, as reported by fathers themselves.⁷² Hofferth and Anderson found that married biological fathers were more involved and affectionate than cohabiting biological fathers, and that married stepfathers were more involved and affectionate than cohabiting stepfathers. Hofferth and Anderson concluded “that marriage per se confers advantage in terms of father involvement above and beyond the characteristics of the fathers themselves.”⁷³ Thus, their work suggests that marriage, above and beyond biological relatedness of the parent, is indeed associated with higher levels of parental investment.

2. Explaining the Marriage Advantage

What accounts for the marriage advantage when it comes to child well-being and parental investments? A large body of research provides a range of explanations for the association between family structure and child well-being, but here we focus on three primary explanations: social networks, the social and emotional support and monitoring of a co-parent, and parental quality.

a. Two are generally better than one

First, children raised by married parents typically have access to two sets of kin, social, and professional networks, while children raised by single parents typically have access only to one set of these networks.⁷⁴ Consequently, children raised by two parents, as opposed to one parent, are more likely to draw on the material and emotional support of two sets of grandparents, as well as the professional contacts

about the family; working on homework; building or repairing something; playing computer or video games; playing a board game, card game, or puzzle; and playing sports or outdoor activities.

Id. at 220. These questions were only asked with respect to children three years and older, with the result that the sample sizes are lowest for this variable.

⁷² The study measured warmth by the father’s responses to six items: “how often in the past month the father hugged each child, expressed his love, spent time with child, joked or played with child, talked with child, and told child he appreciated what he or she did.” *Id.* (citation omitted).

⁷³ *Id.* at 230. Importantly, these differences persisted even after socio-economic status was stripped away. Thus, differences attributable to family form add to and compound the wealth and educational advantages also experienced by children in marital households. See Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 11 (2000) (noting that “children already disadvantaged in terms of parental income and education are relatively more likely to experience” a cohabitational setting, and “on average, cohabiting households tend to be less well-off financially than married-couple households.”).

⁷⁴ See MCLANAHAN & SANDEFUR, *supra* note 56, at 3–4, 116–33.

of a father and a mother.⁷⁵ Second, parents generally offer one another support and monitoring when they are engaged in co-parenting. So, a father can step in and relieve his wife if he sees that she is exhausted after a long day. Similarly, if a wife sees her husband getting angry as he disciplines his children, she can ask him to step back and let her take control of the situation. Thus, two parents can work together to improve the quality of their mutual parenting.⁷⁶ Finally, in large part because married parents receive more emotional and social support for the work that they do as parents from one another and from kin and friends, they are more affectionate and involved with their children. They are also less likely to resort to abusive behavior.⁷⁷ Not surprisingly, children report higher quality relationships with married parents than they do with single parents.⁷⁸

Considering these two strands of research together, what becomes clear is this: Children appear most likely to thrive socially, emotionally, and educationally when they are reared in an intact or adoptive family headed by a married couple. When it comes to adoption, married couples should be preferred to singles.

b. Two tethered by marriage are generally better than two who are not

But what about cohabiting couples? Might an adoptive family headed by a cohabiting couple do as well as a married couple? The research to date, though less developed than the research on the effects of single-parenthood, suggests that the answer to this question is no. The growing literature on cohabitation and child well-being suggests that children reared in the average cohabiting household are less likely to thrive, compared to children in the average married household.⁷⁹ Specifically, children in cohabiting households are more likely to suffer from behavioral, emotional, and educational problems, as well as child abuse, compared to children in married households.

Research on the behavioral and emotional welfare of children suggests clear differences between cohabiting families and marital families. For instance, one study found that adolescents from cohabiting families were significantly more likely to engage in delinquent behavior, compared to married families.⁸⁰ Another study found

⁷⁵ See *id.*; see also Paul Roberts, *I Can't Give You Anything But Love: Would Poor Couples with Children Be Better Off Economically If They Married?* 5 (Ctr. for Law & Soc. Pol'y Brief No. 5, Aug. 2004).

⁷⁶ MCLANAHAN & SANDEFUR, *supra* note 56, at 135–36 (showing harm to parents in a divided house).

⁷⁷ See *infra* note 87 and accompanying text.

⁷⁸ WILCOX ET AL., *supra* note 46.

⁷⁹ See generally Parke, *supra* note 46 (noting financial dysfunction of unmarried parents).

⁸⁰ Manning & Lamb, *supra* note 54, at 886.

that teenage children in cohabiting families were significantly more likely to experience emotional and behavioral problems, compared to children in intact, married families.⁸¹ Other research also indicates that children in cohabiting families are more likely to experience behavioral problems and to be delinquent than their peers from married families.⁸² These studies control for the potentially confounding influence of a range of socioeconomic factors.⁸³

Children in cohabiting families are also more likely to experience academic difficulties. Compared to children in married families, they are significantly more likely to be suspended, be expelled, or have problems in school, such as difficulties in their relationships with peers and teachers.⁸⁴ For instance, they are 122 percent more likely to be suspended or expelled from schools.⁸⁵ They are also 90 percent more likely to have a low grade point average compared to their peers from married families.⁸⁶ In addition to controlling for a range of socioeconomic factors, this research also controls for measures of parent-child relationship quality and still finds that children in cohabiting families do measurably worse in school than children in married families.⁸⁷ In other words, these are strong findings, robust even after including a range of social, economic, and relationship controls, that help explain the association between family structure and negative child outcomes.

Children in cohabiting families are also at higher risk of being sexually and physically abused, compared to children in intact married families.⁸⁸ Indeed, one recent Missouri study found that preschool children living in cohabiting households were nearly fifty times as likely to be killed compared to children residing in intact, married families.⁸⁹

⁸¹ Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351, 357–58 (2004).

⁸² See, e.g., Sandi Nelson, Rebecca L. Clark & Gregory Acs, *Beyond the Two-Parent Family: How Teenagers Fare in Cohabiting Couple and Blended Families*, NAT'L SURV. AM.'S FAMS. (Urb. Inst./Assessing the New Federalism, Washington, D.C.), May 2001, available at http://www.urba.org/UploadedPDF/anf_b31.pdf.

⁸³ See, e.g., Brown, *supra* note 80, at 355.

⁸⁴ Manning & Lamb, *supra* note 54, at 886.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Wilson, *Children at Risk*, *supra* note 61, at 262–77; Robin Fretwell Wilson, *Fractured Families, Fragile Children: The Sexual Vulnerability of Girls in the Aftermath of Divorce*, 14 CHILD & FAM. L.Q. 1 (2002) [hereinafter Wilson, *Fractured Families*].

⁸⁹ See Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 PEDIATRICS 687, 687 (2005).

c. Poorer outcomes in cohabiting families are not an artifact of biological relatedness

Of course, one of the reasons that children in cohabiting families may fare markedly worse than children in married families is that these children are often not biologically related to one of the cohabiting parents, typically the father.⁹⁰ As Figure One graphically illustrates, children in cohabiting families may have no biological relationship with one parent, whereas children in married families usually, but not always, have a biological relationship with both parents. Consequently, the association between cohabitation and negative child outcomes may be an artifact of differences in biological relatedness rather than marital status. This would be a fair supposition but for the findings of new, tightly constructed studies examining just this question.

Consider the 2003 study by Manning and Lamb that compared children in married stepfamilies with children in cohabiting stepfamilies.⁹¹ In both families, the children were unrelated to one parent.⁹² This study found that children in cohabiting stepfamilies are significantly more likely to engage in delinquent acts, compared to children in married stepfamilies.⁹³ The relationship between delinquency and marital status of the parents remained even after controls were added for the socioeconomic status of the parents, the quality of the parent-child relationship, and family instability, such as the number of the mother's previous partners.⁹⁴ Similarly, as Hofferth and Anderson show, married stepfathers are more engaged with their children than cohabiting stepfathers.⁹⁵ Thus, these studies suggest that children are still better off in families headed by a married couple even when they are not biologically related to one of those parents.

d. What children generally lose in cohabiting households

Why are cohabiting families generally more problematic for children than married families? Cohabitation is not institutionalized to the same degree as marriage. Consequently, there are fewer norms to provide direction and order to the relationship, compared to marriage.⁹⁶ This affects the couple in a number of ways. First,

⁹⁰ Hofferth & Anderson, *supra* note 67, at 213; *see also* Manning & Lamb, *supra* note 54, at 876.

⁹¹ Manning & Lamb, *supra* note 54, at 886.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Hofferth & Anderson, *supra* note 67, at 213.

⁹⁶ Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 74 (1995) (“[C]ohabitation is an incomplete institution. No matter how widespread the practice, nonmarital unions are not yet governed by strong consensual norms or formal laws.”).

cohabitation does not have the same normative association with lifelong commitment and sexual fidelity as does marriage. Not surprisingly, cohabiting couples report lower levels of commitment and sexual fidelity compared to married couples.⁹⁷ Second, cohabiting partners often disagree about their view of the relationship: some view it as a prelude to marriage, others as an alternative to marriage, others as an economically convenient form of dating, and still others as a way to test for compatibility.⁹⁸ The lack of commitment and confusion about the status and direction of their relationship means that cohabiting mothers are also more likely to suffer from depression, and cohabiting couples are less likely to receive material and social support from their parents and other relatives, compared to married couples.⁹⁹

The lack of normative commitment, relationship clarity, and social support for cohabitation also helps explain why cohabiting relationships are significantly less stable than married relationships. One study found that a child born to a married couple had a 15 percent risk that her parents would break up in her first five years of life; a child born to a cohabiting couple had a 50 percent risk that her parents would break up in the first five years of her life.¹⁰⁰

In fact, more than a third of children born into cohabiting unions will see their parents break up before age sixteen.¹⁰¹ Children in cohabiting households often

⁹⁷ Renata Forste and Koray Tanfer, *Sexual Exclusivity Among Dating, Cohabiting and Married Women*, 58 J. MARRIAGE & FAM. 33–47 (1996); Nock, *supra* note 95, at 65, 72–73.

⁹⁸ See Wendy D. Manning & Pamela J. Smock, *First Comes Cohabitation and Then Comes Marriage?*, 23 J. FAM ISSUES 1065, 1065–87 (2002); see also WILCOX ET AL., *supra* note 46.

⁹⁹ See DAVID POPENOE & BARBARA DAFOE WHITEHEAD, NAT'L MARRIAGE PROJECT, *SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE: A COMPREHENSIVE REVIEW OF RECENT RESEARCH* 6 (2d ed. 2002), available at <http://marriage.rutgers.edu/Publications/swlt2.pdf>; Brown, *supra* note 80; Robert I. Lerman, *Impacts of Marital Status and Parental Presence on the Material Hardship of Families with Children* (July 2002), available at http://www.urban.org/UploadedPDF/410538_MaterialHardship.pdf.

¹⁰⁰ Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 94 (2004); see also Wendy D. Manning, Pamela J. Smock & Debarum Majumdar, *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RES. & POL'Y REV. 135 (2004).

¹⁰¹ Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 37 (2000) (reporting that 34 percent of children will experience the parents' break-up); see also U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1998*, at 59 tbl.65 (1998) (reporting that 59.1 percent of all women aged thirty-five to thirty-nine have had one husband or cohabiting partner, 21.6 percent have had two, 8.6 percent have had three, and 3.6 percent have had four or more); Larry L. Bumpass et al., *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, 32 DEMOGRAPHY 425, 431 (1995) [hereinafter Bumpass et al., *The Changing Character of Stepfamilies*].

“undergo multiple subsequent family transitions before reaching [the] age [of] 18,”¹⁰² as their biological parent moves into and out of successive relationships.¹⁰³ These children will spend “a quarter of their childhood years with a single-parent, a quarter with a cohabiting parent, and less than half with married parents.”¹⁰⁴ In contrast, children born to married parents will spend 84 percent of their childhood in an intact, two-parent household.¹⁰⁵

Demographers now predict that most children who are born into or ever live in a cohabiting family “will experience a change in family structure within a few years.”¹⁰⁶ This is consistent across countries and cultures. In most countries, “children born to cohabiting parents are two to four times more likely to see their parents separate than are children of parents married at the time of birth.”¹⁰⁷ In the United Kingdom, for instance, 8 percent of married couples split up within five years of having a child, while more than half of all cohabitants (52 percent) do so.¹⁰⁸ Cohabiting couples also report significantly lower levels of relationship happiness and higher levels of domestic violence and conflict, compared to married couples.¹⁰⁹

All of these factors help to explain why families headed by cohabiting couples are riskier for children than families headed by married couples. Maternal depression, for instance, is associated with poor mothering.¹¹⁰ Family instability is strongly associated with behavioral, academic, and emotional problems among children.¹¹¹

¹⁰² Bumpass et al., *The Changing Character of Stepfamilies*, *supra* note 100, at 432.

¹⁰³ Bumpass & Lu, *supra* note 100, at 38.

¹⁰⁴ *See id.* at 33.

¹⁰⁵ *Id.* (reporting that children born to married parents will spend 84 percent of their childhood with married parents, while children born to single mothers will spend 37 percent of their childhood with married parents and children born to cohabitating mothers will spend 46 percent of their childhood with married parents).

¹⁰⁶ Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitation Obligations*, 52 UCLA L. REV. 815, 861 n.186 (2005) (citing Deborah Roempke Graefe & Daniel T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation, Marriage, and Single Motherhood*, 36 DEMOGRAPHY 205 (1999)).

¹⁰⁷ *Id.* (quoting Patrick Heuveline et al., *Shifting Childrearing to Single Mothers: Results from 17 Western Countries*, 29 POPULATION & DEV. REV. 47, 57 (2003)).

¹⁰⁸ *Id.* (citing Kathleen Kiernan, *Cohabitation in Western Europe*, 96 POPULATION TRENDS 25, 31 (1999)).

¹⁰⁹ *See* Scott M. Stanley, Sarah W. Whitton & Howard J. Markman, *Maybe I Do: Interpersonal Commitment Levels and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496, 512 (2004). *See generally* Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668 (1996); Jon E. Stets & Murray A. Straus, *The Marriage License as Hitting License: A Comparison of Assaults in Dating, Cohabiting and Married Couples*, 4 J. FAM. VIOLENCE 161 (1989).

¹¹⁰ *See* Susan B. Campbell, Jeffrey F. Cohn & Teri Meyers, *Depression in First-Time Mothers: Mother-Infant Interaction and Depression Chronicity*, 31 DEVELOPMENTAL PSYCHOL. 349 (1995).

¹¹¹ *See generally* Manning & Lamb, *supra* note 54.

Children are less likely to thrive when they do not have the full support of both sets of kin, especially grandparents.¹¹² And lower levels of parental relationship quality, not to mention the presence of domestic violence, translate into lower quality parenting.¹¹³ Thus, for these and other reasons, children in cohabiting families, compared to children in married families, are more likely to be delinquent, struggle in school, and suffer from depression. In sum, our review of the literature strongly suggests that children who are put up for adoption will, on average, do best in a married adoptive family, rather than a single-parent or cohabiting family.¹¹⁴

But is there any reason to prefer single parents to cohabiting couples? Here, we think the social scientific evidence is less clear. The studies on cohabitation and child well-being have just begun, and some suggest that children in cohabiting families do just as well as children in single-parent families, whereas other studies indicate that they do worse than children in single-parent families.¹¹⁵ But what is clear in the research, as indicated above, is that cohabiting couples tend to be very unstable. This instability is bad for children, both because it prevents them from building and maintaining a stable emotional bond with one or more caregivers, and because it can place them directly in harm's way.¹¹⁶

Specifically, children who experience high levels of instability are much more likely to be neglected and physically or sexually abused, for at least three reasons. First, these children tend to seek out attention and emotional support from unrelated adults, which makes them more vulnerable to sexual predators.¹¹⁷ Second, family

¹¹² See MCLANAHAN & SANDEFUR, *supra* note 56, at 73–75; GLENN H. ELDER, JR., & RAND D. CONGER, *CHILDREN OF THE LAND: ADVERSITY AND SUCCESS IN RURAL AMERICA* 127–50 (2000).

¹¹³ See generally PAUL AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997).

¹¹⁴ Paul Amato summarizes the literature on family structure in this way:

Research clearly demonstrates that children growing up with two continuously married parents are less likely than other children to experience a wide range of cognitive, emotional, and social problems, not only during childhood, but also in adulthood . . . This distinction is even stronger if we focus on children growing up with two *happily married* biological parents.

Amato, *supra* note 49, at 89. Given that children in adoptive married families do about as well as — and occasionally better than — children in intact, biological families, his conclusion suggests that married couples also would have an edge when it comes to adoptive children.

¹¹⁵ See generally Brown, *supra* note 80; Manning & Lamb, *supra* note 54; Nelson, Clark & Acs, *supra* note 81.

¹¹⁶ See WILCOX ET AL., *supra* note 46; Manning & Lamb, *supra* note 54.

¹¹⁷ See Wilson, *Fractured Families*, *supra* note 87, at 8 (citing studies showing that sexual predators select victims “based on the child’s vulnerability, with vulnerability ‘defined both in terms of children’s status (for example living in a divorced home or being young) and in terms of emotional or psychological state (for example a needy child, a depressed or unhappy child)’”).

instability often brings unrelated adults, especially males, into the household who are more likely to physically or sexually abuse the children.¹¹⁸ Finally, and most importantly, their primary caregiver is often distracted (romantically or otherwise) by the loss of a partner, a breakup with a partner, or the search for a new partner.¹¹⁹ Not surprisingly, studies suggest that children are significantly more likely to be abused or neglected in a household headed by a cohabiting couple than a household headed by a single parent. For instance, the Missouri study of child mortality found that preschool children in cohabiting households were significantly more likely to die of an inflicted injury than children in single parent households.¹²⁰ So, primarily because single parents offer the opportunity to bond with one stable caregiver, we endorse a weak preference for single parents compared to cohabiting parents.

III. MODEL LEGISLATION

We recognize that some criteria for placement that have been traditionally used are simply distrusted now and that this spotty history has led to the reliance on case-by-case, fact-specific decision making in the placement process. Nonetheless, we believe that a decision to recognize marriage as a predominant influencing factor on a child's well-being is not a perpetuation of stereotypes but rather a decision grounded in sound social science.

As noted in Part I, there has been a movement toward maximizing the best interests of each individual child. The best way to achieve this goal is to establish a framework that maximizes and facilitates the chances of this outcome. The existence of criteria that maximize the best interests of a child does not diminish the importance or influence of an individual determination. Neither does it extinguish the ability to make individual, context-specific decisions.

We have no desire to roll back the clock to the time when agencies treated certain criteria as "must-haves." In this regard, we do not intend to make the perfect the enemy of the good. Adoption criteria can differ in the weight given to them in the placement decision, ranging from simply constituting one of many factors influencing the decision about what placement serves a child's best interests to acting as the decisive factor. Just as many states provide that a lack of money should not preclude a special needs adoption, we believe this preference for married couples can be constructed with sufficient flexibility that single or unmarried adults who want to take a child into their homes but are single or not married, will be able to do so. This will be especially true if the number of children available for placement soars,

¹¹⁸ See Wilson, *Children at Risk*, *supra* note 61, at 266–72 (discussing more than thirty studies finding that stepdaughters are at greater risk of sexual abuse than daughters raised in intact families and concomitantly that stepfathers represent a greater proportion of abusers than their incidence in the general population would suggest).

¹¹⁹ See generally Brown & Booth, *supra* note 108; Manning & Lamb, *supra* note 54; Smock & Manning, *supra* note 99. See also Smock, *supra* note 72.

¹²⁰ Schnitzer & Ewigman, *supra* note 88.

as we would predict under proposals considered in this symposium. Nevertheless, we believe that legislation and agency policies should indicate that the preferred placement is foremost with a married couple, then with a single parent, and finally with a cohabiting couple.

In terms of the weight to be given to the importance of marriage, we see four possibilities:

1. The best interests of the child could be paramount,¹²¹
2. Marriage could simply be one of the many factors,¹²²
3. Marriage could be the first consideration where practicable,¹²³
or
4. Agencies could have a weak preference for married couples when evaluating multiple prospective adopters.¹²⁴

As noted earlier, such provisions have generally been held constitutional. The choice among these approaches is appropriately one for state legislatures, which should choose among them with due regard for the social science evidence presented here.

IV. LIMITATIONS OF A MARRIAGE PREFERENCE

We see a number of potential limitations to our approach but believe these are not insuperable.

A. Will a Marriage Requirement Hinder Placement?

We are acutely aware that adoption criteria sometimes backfire and become self-defeating. One concern here is that a marriage preference will signal to some prospective adoptive parents that they “need not apply.” While our charge in this symposium

¹²¹ See, e.g., VA. ADMIN. CODE § 40-130-320(B) (2005) (“Consideration shall be given to placing children with families of the same racial or cultural or religious identity; however, no one or all of these factors shall be determinative since the best interests of the child shall always be paramount.”).

¹²² See, e.g., FLA. ADMIN. CODE ANN. r. 65C-16.005 (2004) (specifying a number of criteria to be considered in approving an application for adoption, which are “not listed in any order of priority”).

¹²³ See, e.g., MICH. ADMIN. CODE r. 400.6520 (1980) (rescinded 2000) (“First consideration shall be given to placing children with families of the same racial identity.”). This standard is no longer used with respect to race, but it does suggest one way to structure a preference for marriage. As noted above, similar statutes requiring religious matching have been upheld against constitutional challenges where the requirement does not preclude or substantially delay a child’s adoption by anyone. See *supra* note 21.

¹²⁴ See, e.g., 12 COLO. CODE REGS. § 2509-8 (2006) (“An effort shall be made to place siblings with the same adoptive applicant(s).”).

is not to consider the welfare of adults in and of itself,¹²⁵ questions of fairness in the placement process affect the well-being of all children being placed — at least where adoption criteria dissuade some prospective adopters from pursuing a placement.

We acknowledge that this may occur if poorly handled. We should note, first, that discouraging potential adopters is a problem inherent in a system guided by the “best interests of the child,” rather than “equality for adopters.” Second, we believe that this can be solved by education and widespread advertising campaigns that seek adoptive parents of all characteristics to broaden the adoptive pool to absorb the masses of children that will be transferred to the state for placement under the proposals considered in this symposium.¹²⁶ We also believe that the existing financial barriers to adoption, such as fees, should be eliminated, particularly if the number of children needing an adoptive home soars.

B. Will a Marriage Preference Place the Most Desirable Infants with Married Couples, Leaving Special Needs Children to Be Placed with Families Least Able to Afford to Care for Them?

Although the pool of children available today for adoption is diverse and racially mixed, African American children remain in the system much longer than Caucasian children.¹²⁷ Consequently, one impact we might predict is that more minority children will be placed for adoption with single parents and cohabitants, as white infants are grabbed up by married couples. As a corollary, under this scheme, special-needs children may be more likely to go to those individuals who are less able financially to care for the children — either because they are single parents with a single income, or because they are cohabiting couples, which as a group “tend to be less well-off financially than married-couple households.”¹²⁸

¹²⁵ This child-first focus is largely consonant with the approach taken by many states. *See, e.g.*, 65 FLA. ADMIN. CODE ANN. r. 65C-16.005(3)(k) (2004) (discussing the role in placement of the prospective parent’s employment status outside the home and providing that “the needs of the child must be given priority over the employment situation of the parent.”); HOLLINGER ET AL., *supra* note 6, at 7-19–7-23.

¹²⁶ Missouri takes this approach to securing a diverse group of adopters: “The division of family services and all persons involved in the adoptive placement of children as provided in subdivisions (1), (2) and (4) . . . shall provide for the diligent recruitment of potential adoptive homes that reflect the ethnic and racial diversity of children in the state for whom adoptive homes are needed.” MO. ANN. STAT. § 453.005(2) (2003).

¹²⁷ *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 19–20 (2002); *see also* Child Welfare League of Am., NDAS: Children of Color in the Child Welfare System, at http://ndas.cwla.org/research_info/minority_child/ (last visited Jan. 12, 2006) (noting both that 58 percent of children in foster care were children of color and that African American children are less likely than children in other racial or ethnic groups to be adopted).

¹²⁸ *See* Smock, *supra* note 72 (noting that “children already disadvantaged in terms of parental income and education are relatively more likely to” live in a household in which the adults are cohabiting).

Here, too, we do not see this consideration as fatal. Parents adopting special needs children receive significant federal and private funding to supplement the cost of parenting. These programs include cash benefits through state grants or the federal adoption assistance program,¹²⁹ nonrecurring adoption expenses,¹³⁰ medical assistance, tax credits, and a host of social service benefits.¹³¹ Although these supplementary payments may be meager in comparison to actual expenditures, we believe that closing this gap through increased assistance to families adopting special needs children is more appropriate than stripping out consideration of marital status.

C. Signaling About the Value of Child-Rearing by Single Parents and Cohabiting Families

We live in a society in which children are increasingly being raised in single-parent and other non-traditional families. Stressing the signaling effect that adoption criteria play, Professor Hollinger concludes in her treatise that “a societal goal may be to promote two-parent families, but without specific evidence that children are harmed by unmarried adopters, states should not discourage unmarried individuals from seeking to adopt.”¹³²

We believe that Professor Hollinger frames this question in the wrong way, placing the burden of acting in the wrong place and asking the question at the wrong time before any evidence of harm could result.¹³³ By the time that any harm concretely results from ignoring criteria that would improve children’s lives, the children who have been placed will have to live with the results. More fundamentally, the state should not have to have specific evidence of a harm before it acts to promote the welfare of children entrusted to them. Rather, the state has an affirmative moral obligation to do the best it can by these children, which means that it must consider criteria that significantly impact the welfare — for the better — of children placed for adoption. We believe that specific evidence — not of harm, but of improved lives — exists and cannot be discounted or ignored.

¹²⁹ 42 U.S.C. § 673(a)(3) (2005).

¹³⁰ 42 U.S.C. § 673(a)(6)(A).

¹³¹ See generally HOLLINGER ET AL., *supra* note 6, at 9-18–9-31.

¹³² *Id.* at 3–53.

¹³³ Presumably, Professor Hollinger would respond that it is better for children to be placed with someone than to remain in foster care. We might share her concern about stranding children without parents if we were proposing an absolute bar, but we are not.

CONCLUSION

Children entrusted to the state for placement are, for a time, children of the state. There is no one in whom the state has a greater interest in protecting and securing the best possible future. The social scientific evidence on family structure and children could not be clearer: children are most likely to thrive and, indeed, survive in a married home. Thus, adoption policy should seek to place children in a home with two parents who have made a public vow to one another, to their family and friends, and to the state that they are committed to one another. This vow, and the institutional weight attached to marriage, makes it much more likely that an adoptive child will have a safe, affectionate, and enduring connection to two parents over the course of his or her lifetime. Such a connection, as we have shown in this article, is clearly in the “best interests of the child.”