

The Ever-Evolving Institution of Marriage in America

Marriage in 21st Century America is already a very different institution than it was in the 1950's. Back then we experienced a wave of marriages during and immediately after World War II, followed by a brief surge in the divorce rate. Then marriage settled into a relatively stable period when almost everyone was married by their late-20's and family life was still experienced as a relatively traditional institution.

By the end of the 1960's, however, the divorce rate was climbing rapidly and divorces became much easier to obtain. Gender roles in marriage were shifting, the average age of first marriages was higher, more women were in careers outside the home, and the birth rate was decreasing. Professional child care was becoming an important business. After peaking in the 1990's, the divorce rate in many American states has actually declined slightly since the start of the new millennium.

The number of births outside of marriage continues to rise in the United States. This trend is not just an American phenomenon. It is especially apparent in Europe as well as in the former communist countries. More recently it has spread to most of the rest of the Western Hemisphere and many of the developing countries in Africa and Asia. It is interesting to note that Chile, which is the Latin American country with the most restrictive divorce laws, has one of the highest birthrates outside of marriage.

Marriage as an institution is evolving in other ways. It is becoming less coercive, less bound by socially imposed rules, less obligatory and more optional. Marital tasks are more likely to be divided fairly and often equally, especially as men are becoming more active parents and contribute more to household chores. A growing majority of families are in two-income households. Most couples in the United States have either lived together prior to marriage, or at least have had sexual relations with each other before their marriage if they didn't live together.

Over 40% of all births in America are now outside of marriage, and the rate is even higher in Scandinavia, France, Russia, and even some countries in Latin America. When an unmarried couple in the United States has a child, they are subject to state laws on parenting time and child support when their relationship breaks up. Following the U.S. Supreme Court's 1972 decision in *Stanley v. Illinois*, the child of an unwed mother is legally the legitimate child of its natural parents.

State laws in the United States mostly leave unmarried couples in unregulated territory when their relationship ends. Except for their children and dividing jointly owned property, there is an almost complete absence of legal rules governing other areas, such as support obligations and the equitable division of property. Some states do not even recognize the validity of an agreement between cohabiting partners as to these matters. Such agreements are rare even when they are permitted by law.

In the United States there appears to be somewhat of a "caste system" that predicts whether a couple is likely to divorce. The rate of divorce is declining in marriages in which both partners have one or more college degrees and have similar wealth levels. Conversely, marriages in which one or both parties have only a high school education are experiencing a higher and rising divorce rate. This may help to explain why Massachusetts has a much lower divorce rate than Mississippi. Persons in

the first group above are also more likely to marry at a later age than those in the second category, which is another category for predictions of possible divorce.

Foreign-born or first-generation Americans coming from countries where there is a tradition of arranged marriages are increasingly selecting their own marriage partners. Where conjugal love rather than family is the basis of the marriage, divorce may come more easily if love vanishes. Another common type of divorce is one in which one spouse, usually the wife, has been a stay-at-home parent. As the children become more self-sufficient, the differences between the marriage partners come into focus and the marriage breaks up.

Marriage may be an institution for fewer people in the future, but partners who keep their marriage fresh and creative are generally healthier, wealthier and happier than their unmarried counterparts. Women who become pregnant outside of marriage have more options than was the case even a few decades ago. Many of these unmarried parents are now able to also lead satisfying and stable lives. The keys to success in each case may be healthy self-esteem and an ability to take responsibility for oneself and to one's family, however defined.

Despite the Supreme Court's 2015 decision in *Obergefell v. Hodges*, many gay and lesbian couples who live together have not rushed to get married. There are some initial indications that the ones who are married have relationships that are not much different from heterosexual marriages. Predictions that same-sex marriages would likely be less stable have so far not been proved to be accurate.

One issue that remains to be resolved for unmarried couples who live together, whether in a heterosexual or same-sex relationship, is their legal rights vis-à-vis each other when the relationship breaks up. Where there are children, it is clear that both rights and duties exist. Otherwise, it is mostly uncharted legal terrain. If state law does not choose to venture into this area, there should at least be a recognized right for the parties to contract with each other on the terms of their relationship.

The Netherlands recognizes same-sex marriages, but also allows formal intimate, but non-marital, partnerships for heterosexual as well as same-sex couples. The ability of two consenting adults to contract with each other as to the legal nature and the details of their intimate relationship, whether inside or outside of marriage, is an area to be more clearly defined in the future. With married couples, the device of post-marital agreements is already in place in most states, but so far it is little used.

In 2006 Virginia passed by referendum an Amendment to its Constitution which includes this provision: *This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.* This provision also be read as forbidding heterosexual contracts that define a marriage-like relationship. The entire Amendment was declared unconstitutional by the Fourth Circuit Court of Appeals in 2014, and the U.S. Supreme Court denied *certiorari* the same year. Even though the Amendment remains on the books, it now appears to be invalid for heterosexual and well as same-sex "kinda like a marriage" contracts.

There is lots of room for future lawyer creativity as to how to enable two adults, married or unmarried, heterosexual or same-sex, to contract as to the terms of their

relationship, both as to its more personal as well as its transactional elements. It remains to be seen whether the legal profession and the public is interested in exploring where this may lead.

Finally, the next frontier could be the one predicted by Justice Scalia in his 2003 dissent in *Lawrence v. Texas*, namely that the abolition of sodomy statutes could lead (among other things) to abolishing the prohibitions against polygamy. This possibility has already been addressed in TV series such as *Big Love* and *Sister Wives*. If bigamy were longer made a criminal offense, then neither would polygamy or polyandry (one wife, multiple husbands) be illegal. Any such change raises issues of instability and coercion that may rise to a different level than in existing two-person marriages. The media helped raise public consciousness in favor of gays and lesbians. So far, however, bigamy has not received anything like the same media treatment.

When it works, marriage is a wonderful institution. Many divorce professionals who are happily married will enthusiastically agree. Society keeps trying to learn what works and what doesn't work. As it does, the institution of marriage will continue to evolve.