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Common Law Divorce

While the term "Common Law Divorce" is relatively new, the practice which it describes is as old as the institution of marriage. The thesis which it seeks to explain is a simple one—"where there is a will, there is a way." A married couple, or an individual partner to the marriage, desirous of dissolving the relationship, will find a way of so doing. The formalities of domestic relations law will not deter parties from obtaining a divorce, but will only deter them from obtaining a legal divorce. Where the latter is difficult or expensive, desertion or "self-help" provides an easy solution to the problem. Professor Foster, after a thorough and foundational discussion of common law marriage, explores the various methods used to provide the "way out," the reasons for their use and the problems which arise as a result of such use. He concludes that the "do it yourself" method of obtaining a divorce has been used much too extensively and that judges should be a necessary and even an interested party in a divorce action. Although you may not contemplate a divorce, for yourself or for a client, the area does lend itself to interesting articles. Read on!

Henry H. Foster, Jr.*

INTRODUCTION

A number of years ago an Austrian law professor named Eugen Ehrlich became interested in what he called the "living law" of a community, as distinguished from the law which was enforced in the courts.¹ In studying the customs of peasants he found that the Austrian Civil Code was but a shell filled with the varying content of "living law" which in reality dominated life even though it was not formalized into legal precepts. Gerhard Mueller performed a similar service for Anglo-American law by documenting what in fact occurred in England during the period from 1660 to 1857

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1. For a brief description of Ehrlich and his contributions to sociological jurisprudence, see PATTERSON, JURISPRUDENCE 79-82 (1953). For Ehrlich's leading work printed in English, see EHRICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (Moll transl. 1936).

when presumably there existed a "divorceless" society.² He found that large segments of the population persisted in self-divorce; that ministers of dissenting sects frequently performed illegal marriage ceremonies and awarded extra-legal divorces, and that desertion was the most common way of terminating marital dissatisfaction.

It should not be too surprising that the most intimate of human relationships—marriage—has both a public and a private aspect and that there may be different levels of legal, religious, and social validity and significance. Self-interest engenders self-help when satisfaction cannot be obtained through regular channels, and if the law obstructs and religion inhibits, either custom will arise to compete, or legal and religious institutions will adapt in fact, if not in theory, to answer pressing human needs.³ Such has been our history both as to the formalities of marriage and its termination.

Although much has been written about so-called common law marriages, whatever that term may include, insufficient attention has been paid to informal or irregular divorce which is so widespread that by analogy it may be called "common law divorce."⁴ The latter is as much a social reality as private or clandestine marriage. They have a common pattern of private action without benefit of clergy—or law.

A. COMMON LAW MARRIAGES

In order to determine whether the above analogy is apt, it is necessary to summarize briefly and explain what is meant by "common law marriage." It was not until the Council of Trent in the mid-sixteenth century that church and state proscribed private marriage and required an officiant for its validity. Even then, as now, church doctrine held that in reality the parties themselves perfected the marriage although it must be in the presence of ecclesiastical authority. For centuries before the Council of Trent, the

2. Mueller, *Inquiry Into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545 (1957).

3.

In fact, whenever a rule of law lay across the path of human progress, or failed to give an adequate satisfaction for human needs, we may feel reasonably sure that human progress and human wants have found their way under its barrier by means of legal fiction or around it by equity. They have flowed over it sometimes in the form of legislation, but the barrier has rarely been so high and so strong in our race as to cause a pressure sufficient to result in revolution.

Page, *Professor Ehrlich's Czernowitz Seminar of Living Law*, PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 46, 68 (reprint 1914); HALL, READINGS IN JURISPRUDENCE 825, 834 (1938).

4. The author is indebted to Virginia S. Jordan for both the label "common law divorce" and many of the examples cited herein. Mrs. Jordan is a practicing lawyer at Tampa, Florida, and formerly was in charge of the Legal Aid Society in that city.

church had concentrated its attention upon establishing prohibited degrees of consanguinity and affinity, and promoting the doctrine of the sacramental character of marriage and its indissolubility.⁵ The church, for a long period, was satisfied if the parties sought a blessing for their union after a private ceremony.⁶ For some time before the Council of Trent, however, the church had insisted upon the presence of a priest at the marriage ceremony. His absence gave rise to ecclesiastical penalties such as penance, but did not impair the validity or efficacy of the private ceremony.⁷

The Council of Trent set the rule of legality for Catholic countries, and thereafter private informal marriages became a legal nul-

5. The origin of the doctrine that marriage is a sacrament is attributed to Augustine, Bishop of Hippo, who lived between 354-430 A.D. However, it was not until the second half of the twelfth century that the doctrine was thoroughly established in the western church. In 1164 in the fourth book of Peter Lombard's *Sentences*, we find the first clear recognition of the "seven sacraments," among which marriage appears. These were approved by the Council of Florence in 1439 and later by the Council of Trent (1543-1563). Another important development was the requirement of publication of banns of marriage, promulgated by the Lateran Council of 1215. The Reformation brought with it a denial of the sacramental character of marriage, although John Calvin did concede that marriage was "an institution of God." Martin Luther proposed that absolute divorce be granted for adultery and malicious desertion, and in 1560 those two grounds were incorporated into the law of Scotland. There is some evidence that during the reign of Elizabeth a few divorce decrees were issued which gave express permission to remarry, but a decision of the Star Chamber in 1602 put an end to such practice.

6. I HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 298-309 (1904), in describing the "bride mass" and the historical development of ecclesiastical marriages, points to four stages in such development: (1) During the first four centuries no liturgy was prescribed, the ancient forms of contract were accepted, nuptials were usually celebrated at the home of the bride, less often in the church, and "the priestly benediction, though doubtless commended as a religious duty, was not exacted by the church as essential to a legal or canonical marriage." (2) Between about the end of the fourth century and the middle of the tenth, it became traditional after a marriage to seek a priestly benediction and partake a sacrament, this leading to the "bride mass" which was the genesis of the ecclesiastical marriage liturgy. (3) Between the tenth and the twelfth centuries, an elaborate and imposing ritual was developed, the priest officiating at ceremonies before the church door and at the bridal mass within the church itself. (4) By the thirteenth century the ecclesiastical marriage involving *gifta* by the priest was in effect throughout Europe.

7. After the Norman Conquest, more stringent measures were taken to secure publicity and to enforce the observance of religious rites, without, however, going to the extent of declaring the unblessed marriage invalid. For example, the constitution of Archbishop Lanfranc, alleged to have been enacted by the Council of Westminster in 1076, declared the unblessed marriage to be "fornication." In 1102, at the council of London, an attempt was made by Anselm to check clandestine contracts by the declaration that "Promises of marriage made between men and women without witnesses are null if either party deny them." HOWARD, *op. cit. supra* note 6, at 312-15.

lity. England, however, did not proscribe informal marriages for the next two hundred years, although during the Reformation both England and other Protestant countries asserted state control over marriage and divorce. Lord Hardwicke's Act in 1753, however, required that marriage banns be published and that the ceremony be performed by a parish priest, except for Quakers and Jews. Dissenting sects flouted the law until its amendment in 1836, and it is estimated that at least one-third of all English marriages were illegal.⁸

Until the middle of the eighteenth century, there were, in theory, three different relationships between possible marriage partners, each of which involved different legal consequences. The parties, if married *in facie ecclesiae*, were regarded as validly married by the king's courts, the ecclesiastical tribunals and the church, and by society. In theory, such a marriage could be terminated only by death or what came to be called annulment (due to impediments existing at the time of marriage)⁹ or by act of Parliament. As a practical matter, the latter was a form of relief limited to nobility of great wealth.¹⁰ Informal, irregular, clandestine, or so-called common law marriages contracted without benefit of clergy, entered into by the parties themselves, although generally regarded as being on a plane of parity with church marriages, did have certain legal disadvantages such as proof of right to dower.¹¹ In addition

8. I ROYAL COMMISSION ON THE LAWS OF MARRIAGE, *Report*, xxi-xxiii (1868). In 1811, there were 2655 Churches of the Establishment as against 3451 dissenting Chapels. Throughout the period 1753-1836 non-conformists persisted in rejecting ceremonies in the established church.

9. Technically, annulments were brought by the aggrieved person during the lifetime of both spouses on grounds which made the marriage voidable, whereas declarations of nullity, based upon so-called diriment impediments which made the marriage void, could be brought at any time and asserted in any proceedings.

10. Mueller, *supra* note 2, at 550-51, estimates that Parliamentary divorce cost from £600 to £1,000, and that in 1688 the average annual income of the temporal lords was £2,800; that of baronets £880; that of esquires and gentlemen respectively £450 and £280; that of shopkeepers and tradesmen £45; that of artisans and handicrafts £40; that of laboring people and out-servants £15; that of common soldiers £14, and that of cottagers and common paupers £6 s 10. Between 1715-1775 Parliament passed 60 bills of divorcement; between 1775-1800, 74 such bills were passed; and between 1800-1836, approximately 80-90 bills were passed. The first undisturbed parliamentary divorce was granted in 1668, over ecclesiastical objections, to Lord Roos. The first attempt at Parliamentary divorce occurred during the reign of Henry VIII in the Marquis of Northampton's case, but that act was set aside a year later when Queen Mary ascended the throne. The ecclesiastical authorities thought they had settled the matter once and for all against such power on the part of Parliament in *Rye v. Fullcumbe*, Noy 100, 74 Eng. Rep. 1066 (1601), which held void a re-marriage after a Parliamentary divorce.

11. See 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 374-75

to these two forms of marriage, meretricious relationships were not uncommon and gave some semblance of marriage. In particular, it was difficult to distinguish between common law marriage and a meretricious relationship, informality and the lack of registration or public act being an indicia of each. The notorious "Fleet Marriages"—performed by disreputable parsons who were outside the jurisdiction of the bishop—further complicated matters because ostensibly the drunken marriages were *in facie ecclesiae*.¹²

Thus, there was extreme difficulty in distinguishing the above relationships and in determining the facts upon which status depended. So far as common law marriages were concerned, other impractical distinctions pertained. If the couple exchanged consent *per verba de praesenti* they were married ipso facto, but if their promises were exchanged *per verba de futuro*, they were merely betrothed. Betrothal, however, involved certain duties and responsibilities.¹³ Moreover, even though the words were "*de*

(2d ed. 1898), where comment is made about the common law requirement that for dower the endowment must have occurred at the church door, whereas ecclesiastical tribunals were satisfied with less in the way of formality. The apparent anomaly is explained in terms of the court's concern with evidentiary proof that a marriage actually took place and the assumption that a ceremony at the door would have such publicity as to constitute good proof.

12. The so-called "Fleet Marriages" were quite common and had become a national disgrace in the seventeenth and eighteenth centuries. It is reported that one Fleet parson, operating at the gates of the prison, averaged about 6000 "services" a year. The cost for such services varied according to the means of bride and groom, but it might be as low as the price of a dram of gin. See Mueller, *supra* note 2, at 558 and authorities cited therein. MACQUEEN, DIVORCE AND MATRIMONIAL JURISDICTION 2 (1858), states that even after Lord Hardwicke's Act, marriages without banns, performed by so-called "hedge parsons" were common and far more numerous than marriages *in facie ecclesiae*. Thus, although "Fleet marriages" may have been eliminated to some extent by Lord Hardwicke's Act, that Act's requirement of license, banns, and ceremony in the parish by the established church, was disregarded by Catholics, dissenters, and many others.

13. For example, although espousals made for children might be repudiated for any reason when they reached marriagable age, the betrothal of adults could be broken only for just and reasonable cause, otherwise ecclesiastical penalties might be incurred. See POWELL, ENGLISH DOMESTIC RELATIONS LAW 1487-1653, at 3-4 (1917). Examples of public espousals occur in *Twelfth Night*, V, 1, and in *The Taming of the Shrew*, III, 2. "After spousals, the engaged couple might call each other 'husband' and 'wife', although they were not really so. Thus Olivia calls Cesario (mistaking him for Sebastian) 'husband', and likewise Petruchio calls Katherine 'wife' and Baptista 'father.'" *Id.* at 4-5. Moreover, annulment might be had for *precontract* where an engagement was unilaterally breached without good cause and the jilter married another. Since spinsterhood in the middle ages might result in commitment to a church institution, it was tremendously important from the woman's point of view that marriage follow engagement. It should be noted also that the distinction between betrothal and

futuro," if the engaged couple had sexual relations ("*de futuro cum copulo*") the engagement was converted into a marriage. This was done on the interesting theological theory that the pair must have intended immediate marriage rather than sin. The assumption behind all this, apparently, was that romantic couples in tense situations are perspicacious concerning tenses!

There is no record of the *cum copulo* doctrine being accepted in the colonies or in the United States, although a private contract of marriage was legally acceptable, and in New England marriage was regarded as a matter for civil authority. Two different theories emerged as the common law form of marriage developed in the United States. One theory was that it is cohabitation and reputation as man and wife that established the relationship. The other was that such factors are merely some evidence of a prior exchange of vows creating the relationship, but that such an exchange must have occurred and additional evidence may be required.¹⁴ It may be more difficult to prove a common law marriage where the latter rule prevails. Moreover, the rule that a relationship which was meretricious in its inception will be presumed to continue as such, compounds the difficulty of proof. In short, although some 15 states still recognize private agreement to become man and wife immediately as a lawful form of marriage,¹⁵ no license or civil or religious ceremony being prerequisite, it has become increasingly difficult to prove the contract. Hence, by judicial decision, and in the absence of statutory abolition of common law marriages, many if not most of the 15 states which retain that form of marriage have in effect contracted the area of valid marriages and expanded the area of meretricious relationships. Whether or not this construction is in accord with the actual intent of the parties will be discussed later.

marriage was not always clear since it might hinge on subtle factors such as subjective intent. See POLLOCK & MAITLAND, *op. cit. supra* note 11, at 365.

14. For a somewhat misleading discussion of this distinction, see Grigsby v. Reib, 105 Tex. 597, 153 S.W. 1124 (1913). It should be noted that some states, such as Massachusetts, rejected the concept of common law marriage and from the start required a public ceremony. For example, see *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48 (1810), which held that the marriage ceremony must be performed by an ordained minister or a justice of the peace.

15. As of 1960, the following jurisdictions retained common law marriage: Alabama, Colorado, District of Columbia, Florida, Rhode Island, South Carolina, and Texas. See chart prepared on Divorce, Annulment, and Separation, by the National Legal Aid and Defender Association (1960).

B. ABUSES OF DIVORCE LAW

Just as love or expediency will find a way around dogma or the law, parties to an intolerable marriage will find a way out of the marriage. If nothing else, there will be a *de facto* termination of the relationship, and, if it subsists *de jure*, it will be drained of all its vitality and meaning. We all know what it is that hell hath no fury like. The cuckolded or misunderstood (or, perhaps, too-well-understood) husband has been an inspiration to dramatists from Athens to the present hour. Long suffering in the bonds of acrimony may be a duty we seek to impose on others, but the victim of marital strife, unless he (or she) be a masochist, is apt to seek a way out of holy deadlock. This is especially true in a culture where the pursuit of sexual and marital happiness has become a primary value if not an inalienable right. On the one hand, today's emphasis is upon the privileges, rights, and satisfactions of marriage, rather than upon duty, responsibility, and a stoical acceptance of the worse with the better. This leads to a sentimental and romantic over-emphasis upon physical love which, as often as not, culminates in disillusionment, frustration, or malcontent when the honeymoon comes to an end. Compromise is the only way for marital co-existence and too few are prepared to accept it without bitterness or a sense of defeat. On the other hand, the genuinely successful marriages of today embody a relationship which throughout history has been enjoyed by but few peoples in rare places. For if the pursuit of marital happiness is successful, the result is a full partnership in every sense of the term and a sharing on all levels of existence. Today we expect too much of marriage, but when those expectations are gratified, excellence has been achieved.

To the sociologist the meaningful inquiry is not into the causes of a high divorce rate but into the factor of marriage stability. Although divorce may be denied, as in Catholic countries, it by no means follows that there is stability. Research under the supervision of Max Rheinstein indicates there is a high incidence of broken homes in Catholic Italy; that desertion is common and concubinage and prostitution flourish, but in fact there is greater stability than in neighboring provinces in Switzerland.¹⁶ The availability of di-

16. See Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 635 (1956), where reference is made to the comparative law studies undertaken under Professor Rheinstein's direction. Incomplete and preliminary reports indicate that a comparison between Como Province in Italy and Ticino Canton in Switzerland, both of which are 95 per cent Catholic and have similar economic conditions and populations but different divorce laws, shows that there were about twice as many cases of family breakdown on the Swiss side but their number in

orce appears to be something of a factor contributing to the percentage of broken homes, but it is by no means true that the absence of divorce insures marital stability. Rheinsteins research in Germany indicates that social and economic conditions, such as war and depressions, have a closer relation to family stability than legislation which permits, forbids, or limits divorce as a form for terminating marriage.¹⁷

In England, before the Norman Conquest, divorce had evolved from a patriarchal society where it had been available at the whim of the husband, to the stage where the wife could terminate the marriage at will.¹⁸ After The Conqueror established the ecclesiastical courts in 1086, and with the advent of feudalism, women were deprived of equal rights and became subordinate again. Loss of legal status, disability and incapacity as to legal rights, subjugation to marriage rights of the lord, theological questioning as to whether or not she could have a soul, these were the afflictions visited upon wives and women by feudalism and the church.¹⁹

Italy was not negligible. Unfortunately Rheinsteins research has not as yet been published and this information was communicated orally at an international meeting of family law people in Chicago in 1957.

17. Dr. Rheinsteins in his report to the Conference on Marriage Stability on the International Association of Legal Science at Chicago in September, 1957, stated that his preliminary findings indicated specific legislation had less effect upon the divorce rate than other factors. For example, the divorce rate dropped sharply in Germany during World War I but had a dramatic increase in the immediate post war period, then leveled off and had a sharp rise in 1934 after Hitler came into power. Apparently, extreme changes in social and political conditions affect the divorce rate and if divorce is obtainable there is a more marked difference in its rate between rural and urban areas than between Catholic and non-Catholic areas.

18. See *Dooms* No. 79-81 of Aethelbert, reprinted in *I ANCIENT LAWS AND INSTITUTIONS OF ENGLAND* 23-25 (1840), which as to a wife provide "if she wish to go away with her child, let her have half the property. If the husband wish to have them, (let her portion be) as one child. If she bear no child, let paternal kindred have the 'fioh' and the 'morgengyfe.'"

19. POWELL, *ENGLISH DOMESTIC RELATIONS LAW 1487-1653* (1917), gives a clear picture of the legal and social status of women during the middle ages. He cites one authority as follows:

"A Good Woman (as an old Philosopher observeth) is but like one Ele [eel] put in a bagge amongst 500 Snakes, and if a man should have the luck to grope out that one Ele [eel] from all the snakes, yet he hath at best *But a wet ele [eel] by the taile*; and he that wedds himself to one fair . . . and if one beautifull and, never so Vertuous, yet let him think this he wedds but a woman, and therefore a necessary evil."

Id. at 147. Bishop Alymer, in a sermon before Queen Elizabeth, admitted that some women were superior to some men, but claimed that the majority were otherwise.

"Women are of two sorts, some of them wiser, better learned, discreeter, and more constant than a *number* of men; but another and

The deification of Mary in the twelfth century was accompanied by a debasement of women. It had become a man's world.

Although the ecclesiastical courts eventually evolved the dogma that marriage was indissoluble, there were several practical ways out for a disgruntled husband. The tables of consanguinity and affinity were expanded to such an extent that in rural areas, or between members of the same social class, annulment was a convenient escape hatch.²⁰ Moreover, precontract or a prior espousal to another before marriage might be grounds for an annulment, and even prenuptial sex relations with someone else might invalidate a subsequent marriage.²¹ In short, annulment or a declaration of nullity was readily available to the upper classes and frequently was resorted to even though, after the fourteenth century, it operated *ab initio* and consequently bastardized children.²²

a worse sort of them, and *the most part*, are fond, foolish, wanton fibbergibs, tatlers, triflers, wavering, witless, without council, feeble, careless, rash, proud, dainty, nice, talebearers, evesdroppers, rumor-raisers, eviltongued, worse-minded, and in every way soltified with the dregs of the devil's dunghill."

Ibid. Powell cites another authority as follows: "Deponares having tasted the martyrdoms of marriage, said, that there were but two good days in all the life of marriage, the one was the wedding day, and the other the day the woman dieth." *Id.* at 153. John Donne in one of his sermons said that it would be a sin for one to love his wife as he does his mistress. *Id.* at 178. The fact that Adam was made first and Eve second, she from Adam but he from divine materials, was one of the arguments relied upon in the disparagement of women. Powell concludes:

There can be no doubt that the belief in women's physical and mental limitations is far older than Christianity, but that she was morally weak seems to be the particular contribution of the early church fathers to an unjust and undignified conception in which womanhood was held during the middle ages and later times.

Id. at 148-49. He admits, however, that the prestige and influence of Queen Elizabeth did much to improve the esteem in which women were held, and says that conditions improved with the enlightenment of the Renaissance and the teachings of the Puritans after the Reformation.

20. The prohibited degrees of consanguinity and affinity were increased through the years until they reached the seventh degree. See Mueller, *supra* note 2, at 554-57. With the Reformation their number was decreased. In addition to the marital misadventures of Henry VIII, perhaps the most famous controversy between ecclesiastical authority and royalty over impediments and degrees was that involving Eleanor of Aquitaine, whose marriage to Louis VII of France was annulled, but whose marriage to Henry II of England she could not terminate, even though her relationship with Henry was within closer degrees than that with Louis.

21. Precontract, or prior betrothal to another, historically was one of the most common grounds for annulment, *i.e.*, if either had before marriage been engaged to another, the marriage could be annulled. Moreover, a marriage to the sister of one's mistress was regarded as incestuous, and on this ground the marriage of Henry VIII to Anne Boleyn was annulled because her sister Mary had been a mistress of the King. See POWELL, *op. cit. supra* note 19, at 207.

22. POWELL, *op. cit. supra* note 19, at 8, says

From about the fifteenth century, divorce *a mensa et thoro*, or from bed and board, did not legally terminate the marriage but constituted a legal separation.²³ However, there is substantial evidence that husbands in particular remarried after bed and board decrees and that such practice was widespread. Strype writing about marriage and divorce during the reign of Henry VIII, observes that "Noblemen would very frequently put away their wives and marry others if they like another woman better or were like to obtain wealth by her. And they would sometimes pretend their wives to be false to their beds and so be divorced and married again as they pleased."²⁴

With the Reformation came a tightening up of ecclesiastical law, a decrease in the number of prohibited degrees of consanguinity and affinity, and an attempt to eliminate some of the rampant abuses. The canons of 1603 sought to achieve such objectives by requiring husbands to post security against remarriage after a bed and board decree. The result of this requirement was noted by Godolphin, who reports:

By enjoying such security to be given, and such bonds to be taken, this seems to be a penal canon, viz. pecuniarily penal; whoever therefore breaks the law incurs the penalty, and whoever suffers the penalty, doth answer and satisfy the law, which before he had infringed.²⁵

In other words, by forfeiting the bond, the legally separated but undivorced spouse paid in full and was free of any legal sanction if he remarried! Apparently, such conduct was socially and legally acceptable, although inheritance rights must have been based upon the first marriage.

Conset, whose second edition of *Ecclesiastical Courts* appeared in 1700, spoke at length of the perennial fraud and collusion in divorce cases and, like Godolphin, referred to the frequent abuse of bed and board decrees. He says:

Up to 1337, children were not bastardized if their parents had married in ignorance of an existing impediment. After that date, both civil and church law held them to be illegitimate if a divorce was obtained; otherwise they were legitimate, although legal grounds for divorce actually existed.

23. There is considerable conflict in historical writings about divorce and annulment because what we now call "annulment" was at various times called "divorce." By the seventeenth century, however, Coke could say that marriage could be dissolved only by death or "divorce," *i.e.*, under the terminology of the time, judgment of nullity. See 2 COKE, INSTITUTES § 380; COKE, ANTIQUITIES AND LAWS OF ENGLAND 33 (3d ed., 1771).

24. POWELL, *op. cit. supra* note 19, at 64. In 1610, Edmund Bunny published his OF DIVORCE, written in 1595, and commented upon the frequency of remarriage after divorce *a mensa et thoro*.

25. POWELL, *op. cit. supra* note 19, at 87.

Also to avoid these second Marriages, whilst the former Husband or Wife are alive (being a thing frequently done) the Judges are wont expressly to Inhibit these Persons thus Separated [from bed and board], that they do not betake themselves to any other Marriage, with any other Persons, during the lives of them two thus Separated, with an admonition also, that they abide Unmarried, unless they be mutually reconciled to each other. And as often as it is complained of these second Marriages (of either of these parties thus Separate), before the King's Chief Commissioners in Ecclesiastical Causes, or before the Judges of the Archbishop of Canterbury, the Parties who offend in these cases, are punished and Corrected, and are Divorced and Separated from these second Marriages, or rather from these adulterous Wedlocks.²⁶

Although Godolphin's observation that forfeiture of security was full satisfaction seems to have gone by the boards by Conset's time, it should be noted that Conset is careful to state that penalty and declaration of the invalidity of the second marriage might occur where the matter was "complained of." Further, he states that remarriage after a bed and board decree was a "thing frequently done."²⁷

Conset's reports on custom as contrasted with law are corroborated by Ayliffe who bitterly denounced the prevalent abuses of marriage and divorce law. The latter was especially critical of the civil law and what he regarded as lax grounds for divorce and annulment.²⁸

In addition to the fraud, collusion, perjury, and corruption that blighted matrimonial actions before the ecclesiastical tribunals, bills of divorcement in Parliament often had an unsavory aura. For a brief period during Oliver Cromwell's reign, ecclesiastical jurisdiction was suspended and divorces were granted by magistrates. The ecclesiastical courts, however, resumed their traditional jurisdiction with the Restoration. Fabrication of grounds for an-

26. CONSET, ECCLESIASTICAL COURTS 279 (2d ed. 1700). Conset also points out that pretence of adultery and fabrication of other grounds was frequent and admonished judges to require corroboration by disinterested witnesses and not to rely upon unsupported statements. *Id.* at 279-80.

27. *Ibid.*

28. AYLIFFE, PARERON JURIS CONONICI ANGLICANI 225-26 (2d ed. 1734), says:

By the ancient *Civil-Law* the Reasons or Causes for rescinding Matrimony were various and several: So that a Wife might be divorc'd and put away from her Husband even for evil Manners, viz. If she got Drunk every Day, piss'd a bed every Night, or committed any other Filthy Actions. But, this Case of a Divorce for ill Manners being repealed, *Justinian* introduc'd several Causes of a Divorce less Arbitrary; But, these being also slight and frivolous, they are not now deem'd with us a sufficient Cause for rescinding of Matrimony lawfully contracted.

nulment or bed and board divorce was not uncommon, and the most celebrated early case on record is that of Lord Audley, who in 1631 was accused and convicted of *lenocinium* (accessoryship to his wife's adultery) and was beheaded.²⁹

In addition to the perversion of the legal and legislative processes, which was generally the escape route of persons of substance, desertion, self-divorce, or extra-legal divorce by ministers of dissenting sects, or according to local custom, were the ways out for the common man. It is important to note that the first metropolitan police department in the world was that established by Sir Robert Peel (hence the nickname "bobbies") in London in 1829. Before then it was relatively easy to lose one's self in London or some other urban center, and disappear without leaving a trace. Legal status for those without property meant nothing, and rights of inheritance were theoretical where there was little or nothing to transmit. Some groups, such as the street vendors of London, had their own private customs outside the law which governed all matrimonial matters.³⁰ And in rural England, wife sales occurred at county fairs, until well into the nineteenth century, the wives being sold and the rights thereto assigned as though they were cattle.³¹

In light of our above heritage from English law and custom, it is small wonder that modern America has been unable to eradicate, even if we really want to, the abuse and corruption of centuries. It is most satisfactory to have one's cake and to eat it too if the trick can be done. The relatively strict divorce codes of our states satisfy our clergy and moralists, and the liberal interpretation of substance and procedure by our courts gives a practical way out. Thus our ambivalence is reflected in the law and its administration. This gap between the letter of the law and its application, and the competition between law and custom, is not a recent development, but, as has been shown, such has been an omnipres-

29. Lord Audley's Case, 3 St. Tr. 401 (1631).

30. Mueller, *supra* note 2, at 565. He relies upon MAYHEW, LONDON LABOR AND THE LONDON POOR (1862). Mueller also reports that among London costermongers concubinage among persons of all ages was the rule and marriage the exception, and quotes from a brochure by a clergyman published in 1700 stating that there were many reasons in addition to adultery for leaving a wife or "send[ing] her packing." *Id.* at 563.

31. *Id.* at 566-72. Amazing as it may seem, quotations of market prices for wives were published in the *London Times* in the nineteenth century. Ashton, whose book *Old Times* (1885), relied on by Mueller, is cited as having reported that as late as 1882 there was wife selling in rural England and that during that year one wife was sold for a glass of ale and another for a penny and a dinner. This custom is related by Thomas Hardy in his novel, *The Mayor of Casterbridge* (1886)

ent characteristic of the social control of marriage and divorce in Anglo-American history. In 1832, Judge Hitchcock of Ohio observed:

Perhaps there is no statute in Ohio more abused than the statute concerning "divorce and alimony." Perhaps there is no statute under which greater imposition is practiced upon the court and more injustice is done to individuals. . . . The hearings are generally *ex parte*. Witnesses are examined, friendly to the applicant, and it is almost, if not utterly impossible, for the court in most instances to arrive at the real truths of the case. . . . But of the great multitude of cases which are before this court I am confident that by far the greater number are *not* [meritorious].³²

The American Bar Association in 1879, early in its existence, deplored the evils inherent in divorce law and recommended a uniform law for adoption in the states. The first bill proposing a federal law of divorce was introduced in Congress in 1884. In 1905, the American Bar Association proposed an "Act on Divorce Procedure" which was approved by an inter-church conference. A year later the governor of Pennsylvania called a national conference at which a model divorce act³³ was drafted. James Bryce, after his visit to America, wrote of our divorce problem and pointed out that the main difference between divorce at will under Roman Law and the actual divorcement in modern American states was that in the latter the courts must be invoked to do the job. He then cautioned: "But where the courts out of good-nature or carelessness make a practice of complying with the application of one party, unresisted or feebly resisted by the other, the difference almost disappears."³⁴

Although Judge Hitchcock and James Bryce, and even the American Bar Association, recognized the abuses and evils which historically have been ubiquitous in matrimonial causes, they shed little light upon the source of the evil and the incitement to abuse. The matrimonial cause, particularly as it has been handed down to us, inevitably lends itself to abuse because of the form in which it is heard and the issues which have become crucial. Inevitably? We should say inexorably! The justification for the adversary procedure and the premise behind it is that adversaries will appear and there will be a contest. In fact, ninety odd per cent of American di-

32. *Harter v. Harter*, 5 Ohio 318, 319-20 (1832).

33. See Alexander, *The Follies of Divorce—A Therapeutic Approach to the Problem*, 1 U. ILL. L.F. 695, 696 (1949).

34. BRYCE, *Marriage and Divorce Under Roman and English Law*, in *STUDIES IN HISTORY AND JURISPRUDENCE* 782, at 833 (1901), reprinted in 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 782, 829 (1909).

voices are uncontested.³⁵ The parties, having reached a financial and other settlement, short-circuit the law. One party, or perhaps only his counsel, appears before a judge who frequently, and in a perfunctory way, rubber stamps the decree. In urban areas, at least, such is typical. There is no real effort to discern actual facts, no probing for truth.

Tied-in with the structural form of the court and its proceedings is the matter of statutory grounds which do not reflect actual causes of family breakdown but seize upon symptoms thereof. In most states, a divorce decree, in theory at least, is awarded to the innocent and injured spouse and imposed upon the guilty partner. Even if the institutional structure was conducive to discovery of truth, "fault" is a will-o-the-wisp that is most elusive, especially in matrimonial matters. The temptation for client and counsel to stretch things a bit is almost irresistible, and in a sense, the law makes liars and perjurers out of hurt and bewildered people.

The lesson of history is clear. The moralistic or theological approach is impractical, unworkable, and ill-suited to matrimonial law. It is negative, destructive, has sacrificed viable marriages, and in fact punished the innocent and rewarded the guilty. The issue should be: can this marriage be saved? What help should be extended? If reconciliation is impossible, impracticable, or dangerous, what plans can be formulated for the future?

Perhaps it is time to pause to ask, what has all this to do with "common law divorce?" Simply this: the historic framework for matrimonial causes, procedural and substantive law, and the corruption and abuses necessarily involved in its administration, have created widespread disrespect for law. Further, they have indirectly weakened the efficacy of other means of social control such as religion and the pressure of public opinion. In its operation, marriage and divorce law have discriminated for different social classes and against them.³⁶ In England, Parliamentary divorce was avail-

35. The figure "ninety odd per cent" is an informed guess based upon experience and research but there are no statistics available to confirm or refute this estimate. Obviously, the percentage of contested cases varies from state to state and perhaps between urban and rural areas, but in all jurisdictions the rate is exceedingly high.

36.

It is piteful to think of the four hundred years of misery and injustice under which the citizens of this country have suffered in matters relating to divorce. . . . [I]f you were a peer with a naughty wife, you got an Act of Parliament passed to divorce her. It was an expensive proceeding and, incidently, of doubtful legality. But the eugenics of nobility and the purity of breed in the peerage made some such machinery necessary, and so you had "An Act for Lord Roos to marry again," and others similarly entitled. Only the very rich at the rate of

able only for extremely wealthy noblemen, divorce *a mensa et thoro* was a possible remedy for the well-to-do, and an annulment or decree of nullity was beyond the means of the average Englishman.³⁷ Self-help was the only practical alternative for the latter. Moreover, clandestine marriages were entered into not only by dissenters, but also by those who could not afford to pay high license fees or wished to avoid them.³⁸ In large measure, English law priced itself out of the market, whereas in Scotland divorce was available for the ordinary man.³⁹

Today, in the United States, the same factors (which impaired, if they did not destroy, the efficacy of English matrimonial law) are at work undermining our law of marriage and divorce. In many areas divorce is a luxury beyond the means of the poor, and even the cost of a marriage license may seem excessive. Desertion, merely "calling it quits," or some other form of "common law divorce" may be the practical alternative. It is an interesting commentary upon our law that the number of desertions each year

two or three a year could avail themselves of this procedure, and, of course, the very poor had not a look in at all.

PARRY, *THE LAW AND THE POOR* 126, 129 (Am. ed. 1914).

37. Mueller, *supra* note 2, at 552-53, says that before an ordinary man would be half through a bed and board divorce action "his annual salary would have been consumed—not leaving him a penny for bread and ale." Moreover, the cost of an action for absolute divorce, after the 1857 Act, was between £100 and £150, and "it took another eighty years until divorce really became available to the common man." Mueller concludes that the injustice involved in the case of *Regina v. Hall*, tried at Warwick, Spring Assizes, 1845, before Maule, J., was the immediate cause for the enactment of the Matrimonial Causes Act of 1857.

Hall's wife had been a vagrant and a woman of the most evil demeanor, whereof Hall left her. Meeting a maiden by the name of Maria, he told her he was a bachelor, and soon they were married. Mr. Justice Maule expressed his regret for the prisoner's ill fate, yet, in passing on the sentence, he pointed out there was *only one law for the rich and poor*. Hall should have gone to various courts to obtain damages for adultery from his wife's (poor) paramour, then he should have gone to the ecclesiastical courts to obtain a divorce *a mensa et thoro*, then he could have gone to the House of Lords, to obtain a divorce *a vinculo*, at a cost in excess of £1000. Poor Hall's weekly wage was hardly in excess of £1. Hall was convicted.

Id. at 549 n.15. There is disagreement as to whether Hall was convicted for his bigamy or for lying to Maria, and as to whether his penalty was one day or three months in jail.

38. ASHTON, *op. cit. supra* note 31, at 26. See also POWELL, *op. cit. supra* note 19, at 28-37, and Mueller, *supra* note 2, at 547, 562, where divorce by dissenting sects is discussed. There seems to be no doubt that ministerial divorces were given for adultery, and probably for other causes as well.

39. 13 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 268-69 (1952), estimates that the average Scotch divorce cost between £10 and £15. Other estimates range between £15 and £30, depending upon whether the divorce was undefended.

substantially exceeds the number of divorces.⁴⁰ We will now consider some examples of what we have called "common law divorce."

C. COMMON LAW DIVORCE

First of all, we are not concerned here with situations where there has been resort to the courts and, due to lack of jurisdiction or fraud and collusion, a judicial decree is void. Migratory divorces and collusive decrees, widespread as they may be, are not within our category of "common law divorce" even though indirectly they may affect the incidence of informal divorce.⁴¹ The immediate problem is *private* termination of marriage, independent of judicial action, which may be relied upon by the parties as carrying with it a privilege to remarry.

40. Rheinstein, *supra* note 16, at 652-53, demonstrates that desertion and a successful disappearance by a spouse frequently occurs in the United States at the present time. Over a million spouses disappear annually and tracing them is a major portion of the business of private investigators. There are various and conflicting figures on the desertion rate. However, in 1955, there were 4,600,000 wives and children in cases where parents were estranged and the father was not providing adequate support. Of that number, there were 1,900,000 deserted wives; 1,500,000 deserted unwed mothers with children, and 1,200,000 divorced or legally separated wives, according to public assistance reports.

An analysis of the figures of the Social Security administration provides the startling information that there must be "at least 4½ million women and children deprived of care and support by husband and father because of estrangement, exclusive of an unknown number of additional children, not living with their mothers, who come from homes broken by marital discord. . . . Desertion alone probably accounted for payments of about \$100,000,000 under the ADC program alone"—so says Charles I. Schottland, U. S. Commissioner of Social Security. Zukerman, *The Role of the Public Agency With the Deserted Family*, 15 PUBLIC WELFARE 101 (1957). The divorce rate in the United States stands at about 400,000 divorces per year. It also should be noted that with the exception of cruelty in its many forms, desertion is one of the most common statutory grounds for divorce.

41. Obviously, common knowledge of the machinations and peregrinations of celebrities such as motion picture stars and people of great wealth may affect the public image of marriage and domestic relations law. Migratory divorce historically was no problem in England due to the rule that a foreign divorce of an English marriage would not be recognized unless it was upon a ground recognized in England. Migratory marriage, on the other hand, was a serious English problem after Lord Hardwicke's Act in 1753. The blacksmith at Gretna Green thereafter became a famous personage and elopement excursions to the Isles of Man and Guernsey a regular offering. In the United States both migratory marriage and migratory divorce have been serious problems due to our federated system and the differences between the laws of the several states. It may be accepted as a fact of life that undue severity, hardship, or inconvenience in the law promotes out-of-state marriage and divorce and hence is largely self-defeating. Migratory divorce, however, is not unique to the United States. As

Common law divorce may occur from private agreement, as where the couple separates and agrees that each is free to go his own way; or it may arise due to unilateral action, as where the husband deserts the home. Desertion, the "poor man's form of divorce," may vary in incidence depending upon several factors such as economic conditions generally and of the family in particular, the availability and practicality of a legal remedy such as a divorce decree, and whether the particular marriage was of a common law or ceremonial variety. Of course, the character and social class of the parties and the intensity of their conflict also are matters of great importance in the choice of a particular avenue of escape from the marriage.

In addition to self-divorce by consent and divorce by desertion, there are other examples of common law divorce that perhaps are not quite so well known. For the most part, these varieties of self-help have some sanction in custom, common understanding, gossip, old wife's tales, or scuttlebutt, even though they are unrecognized by law. Not infrequently the spouse of a convict, even though the particular state does not have a civil death statute, assumes freedom to remarry or does so after a particular length of time without obtaining a divorce decree.⁴² There appears to be considerable misunderstanding in this regard and a common assumption of capacity to remarry.

The "magic seven" is another popular superstition among people of lower economic and social classes. The gossip is that after living apart for seven years no divorce decree or annulment is necessary and a remarriage will be valid.⁴³ Perhaps the magic number "seven" is based upon a presumed death statute. To some extent, "living apart" grounds for divorce may be based on such common understanding.⁴⁴

pointed out by Rheinstein, "Copenhagen divorces" for a number of years enjoyed popularity on the Continent and Brazilians frequently get illegal but socially-acceptable divorces in Uruguay. Rheinstein, *supra* note 16, at 641-42.

42. In a few states, such as New York, there is a civil death statute which permits the spouse of a convict to elect whether to terminate a marriage, and a remarriage may be deemed such an election and constitute a valid second marriage. See *In the Matter of Lindewall*, 287 N.Y. 347, 39 N.E.2d 907, (1942). *But cf.* *Villalon v. Bowen*, 70 Nev. 456, 273 P.2d 409 (1954), holding such remarriage invalid under Oregon civil death statute.

43. Remarriage in the Enoch Arden situation, or after it is shown that the absent spouse was exposed to a specific peril or missing in action, usually is held to be invalid if the absentee turns up unless a decree of presumed death is obtained. In some states this situation subjects the parties to the second marriage to possible bigamy or adultery prosecutions.

44. The best argument for "living apart" as grounds for divorce (there

Another form of extra-legal divorce is "lawyer's office divorce." This may occur at any stage of the proceedings before a final divorce decree. There are cases where, after signing the divorce complaint, the client abandons the case and proceeds to remarry.⁴⁵ More often, however, illegal remarriage occurs after the hearing but before the effective date of the divorce decree. Since about one-third of American divorce cases are abandoned before reaching the hearing and decree stage,⁴⁶ there may be a substantial number of illegal second marriages after proceedings are initiated, if we assume that reconciliation did not occur in all abandoned cases. Although it is difficult to believe that counsel did not fully advise his client in these cases as to the effective date of a divorce decree, there is some evidence of popular understanding to the effect that capacity to remarry is acquired upon initiation of divorce proceedings and that the decree is merely a technical matter.⁴⁷

Frequently remarriage occurs after a check on the departed spouse reveals that he (or she) has remarried, is rumored to be dead, or is in jail. The fact that the other party remarried may be regarded as freeing the deserted spouse from marital bonds and authorizing his remarriage. In some southern states there is a dual standard based upon color. Among some Negroes, if the husband has "gone to Georgia" the deserted wife assumes freedom to remarry. Perhaps in Georgia there is a comparable phrase signifying the same thing when the husband deserts and leaves that state.

The most interesting and extreme example of extra-legal divorce is the practice which has been observed in some counties of Georgia. When Negro couples obtain a marriage license, the application is filed in a "shoehole" or box. If they have a falling out, one or both appear before the clerk and the old application is refiled in

are such statutes in some twenty states) is that it provides an honest ground for divorce and eliminates the need of perjury or exaggeration while at the same time giving some assurance that the marriage is dead. See McCurdy, *Divorce—A Suggested Approach*, 9 VAND. L. REV. 685 (1956), where a strong case is made for the enactment of such grounds, which are in effect in most European countries.

45. In addition, it is not unusual for a client when told that he or she does not meet the requirements for divorce, to reply "But I can pay—surely there must be some kind of decree you can get me! I don't care how good it is!"

46. The estimate that one-third of American divorce cases are abandoned is based upon research which has been done in Maryland, Ohio, and Pennsylvania, and assumes that such states are typical.

47. Mrs. Jordan, who supplied most of these examples of "common law divorce," relates the story of Jackie, her client in several divorce cases, who on three different occasions went out and remarried after testifying in court but before the decree had become effective, despite counsel's careful

another "shoehole" or box, and thereafter a new marriage license may be issued to one or both.⁴⁸ In addition, there have been instances where clerks or persons at the courthouse tear up the old marriage application and tell disgruntled and naive spouses that such constitutes a divorce and that they are free to remarry.⁴⁹

Another curious custom which is said to have existed at one time among American Negroes is that of "jumping over a broom." The initial "jumping" signified a marriage of the couple, and if they later decided to call it quits, each jumped backwards over the broom. This reversal of ceremony is interesting because it is analogous to the Roman *diffarreatio* which was the reverse ceremony for *confarreatio* or the religious ceremony of marriage.

In the cases of "lawyer's office divorce" and "shoehole" divorce there is a semblance of legality for the ignorant or credulous, and rumor and gossip may deem such to be legally efficacious. Hence these situations are not cases of pure self-help. In all of the above examples of common law divorce there are popular misconceptions widely held by members of certain social classes. There are many different sources of misinformation, including social workers, church workers, pre-law students, court clerks, government employees, and doctors, as well as neighbors and friends. Remarriage in these situations may carry no social stigma within the particular class. Also, it may be that for some purposes, such as workmen's compensation awards or the ADC program, semi-legality is all that it is necessary, and this in turn may influence popular misunderstanding. In addition, the divergence between pleadings, testimony, and the true facts of the case as known to the parties and others, may be so great that it is small wonder that there are egregious misconceptions as to divorce law. Understandably, there is confusion as to the law and the facts, which becomes enhanced by gossip and repetition.

It is quite obvious that a major factor underlying popular acceptance of common law divorce is the existence of common law

description of the legal consequences of such action.

48. The story of shoeholes for marriage licenses in Georgia is a familiar one to Legal Aid attorneys in Florida. Somewhat analogous to the "shoehole" divorce may be the resumption of cohabitation by divorced couples. Obviously, the latter practice may be with the intention of remarriage, or on a trial basis, or may be regarded as meretricious. Pennsylvania, which ordinarily takes the position that common law marriages are "to be tolerated and not encouraged," in *Wagner Estate*, 398 Pa. 531, 159 A.2d 495 (1960), distinguished a common law remarriage of a divorced couple and held that public policy favored such remarriages, even though entered into with common law informality.

49. Information as to these practices was supplied by Virginia S. Jordan of Tampa, Florida. See note 4 *supra*.

or self-marriage in many of the states where self-divorce assumes forms other than desertion. Alabama, District of Columbia, Florida, Georgia, and South Carolina are among the fifteen states retaining common law marriage, and the instances of common law divorce cited herein are taken from experience and observation in Florida and Georgia. It may be a reasonable hypothesis that informality in contracting marriage engenders informality in terminating marriage; that parties naturally may assume that if they could "do it themselves" in entering into marriage, then "do it yourself" was permissible and legal for ending the relationship. More realistic, however, is the premise that in most of these cases marriage was never intended, that in fact the parties contemplated a liaison of indefinite duration in lieu of marriage and as distinguished from transient promiscuity. Their understanding all along was that if things became intolerable or unpleasant, each was free to seek greener pastures.

Several years ago Dr. Johnson of Fisk University wrote a paper on "Negro Personality Changes" in which he described different types of sexual unions and the legitimacy or illegitimacy of children produced by parties to such relationships.⁵⁰ The culture he describes accepted the children of common law marriages (apparently meaning a more or less permanent but non-legal relationship) as fully legitimate. Children who were born of sexual unions for pleasure were called "stolen children" and were regarded by some mothers as "the best." A woman with children, who had been married but later separated from her husband, might add other children to her family, the latter being referred to as "children by the way." There were also children who resulted from philandering by young men who "make foolments" on young girls. These generally were condemned by the community and usually placed with other relatives. In time, however, they became indistinguishable from other members of the family. Community regard for these various types of sexual unions and the children produced thereby was wholly apart from any legal dichotomy between legitimate and illegitimate children and upper class notions of sin. "Being closed out" for debt or practicing certain forms of birth control carried greater social stigma than illegitimacy and although the community church might regard illegitimacy as "a sin of the mother," it was not serious unless accompanied by other "sins" such as card playing or "frolicking."

Although the above description may be passe for most of Ameri-

50. Johnson, *Negro Personality Changes in a Southern Community in RACE AND CULTURE CONTACTS*, 208, 217-18 (Reuter ed. 1934).

ca in the 1960's, and more and more Negroes, both southern and northern, emulate the mores and standards of the comparable white social class, the fact remains that it is a good example of the gap which frequently occurs between custom and law. Whether or not the distinctions enumerated reflect corresponding differences in the analogous white culture is not pertinent to our present inquiry.

If we try to discern the causes for self-help in contracting and terminating marriage we may be forced to elect between subscribing to the view that it is the depravity and perversity of man that occasions the gap between law and custom, or adopt the sociological perspective that it is the law which is out of step with the times and should be changed or modified to comport with current needs and demands. Perhaps there is some merit in each view. The fact remains, however, that our law of marriage and divorce for the most part has devolved from the canon law of churchmen rather than lawyers. That is an important historical fact because law as a craft inculcates the art of compromise whereas theology unrealistically may insist upon maintaining dogma at all cost.

Since lawyers took over the administration of church-made law there has been amelioration of its severity by the employment of divers legal techniques. The use of presumptions is a familiar example. Estoppel and *res judicata* are other examples. Regardless of what the true facts may be, the validity of a marriage or remarriage may be presumed,⁵¹ or an attack upon a theoretically void divorce decree may be foreclosed.⁵² Fictions also may be employed. In such ways the law officially countenances or tolerates informal, illegal, extra-legal, or even void marriages and divorces.

The danger in all this—as there must be when we try to have our cake and eat it too—is what Max Rheinstein has called a “Gresham’s Law of divorce.” He says:

In the field of divorce it can be said with equal certainty that whenever it is possible for divorce seekers to obtain divorces with some difficulty in one place and with greater ease or speed in another, cases tend to accumulate in the place of easy, and to dry up in the place of hard divorce.⁵³

In other words, cases accumulate in a Nevada or Alabama. One might add that annulment acquires popularity where divorce is

51. For an example, see *Spears v. Spears*, 178 Ark. 720, 12 S.W.2d 875 (1928). See also Annot., 34 A.L.R. 464 (1925), and Note, 30 HARV. L. REV. 500 (1917), reprinted in *SELECTED ESSAYS ON FAMILY LAW* 287 (1950).

52. For a lengthy discussion of estoppel, *res judicata*, and the exclusion rule, see Foster, *Domestic Relations and Something About Res Judicata*, 22 U. PITT. L. REV. 313 (1960).

53. Rheinstein, *supra* note 16, at 641.

difficult, and for those who cannot afford the fare to Reno, or a New York annulment based upon fraud, the practical alternative may be self-divorce or desertion. Moreover, the extensive publicity given to irregular divorces obtained by celebrities, such as those procured in Mexico by mail order or otherwise, together with the fact that the parties to void or invalid decrees seldom are prosecuted or brought to account, demonstrates to the common man that law is not to be taken too seriously and can be evaded in other ways as well.⁵⁴ Where there is little in the way of property to worry about, and where it is known that adultery and fornication laws are almost never enforced, the law tends to become academic and remote and only the pressure of one's church or one's neighbors may impede private action based upon personal needs. Migratory marriages and migratory divorces on the one hand have debased legal institutions, and on the other hand they confirm the cynical observation that love *or* hate will find a way.

The reports of anthropologists indicate that in most cultures some approved form of escape from an impossible marriage is recognized. Divorce by mutual consent is common. Divorce at the will of the husband is typical of patriarchal societies and at the will of the wife in matriarchal societies. There are but few instances where marriage in both theory and practice is indissoluble,⁵⁵ although it is not uncommon for social or other sanctions

54. Judge Ploscowe, in *SEX AND THE LAW*, 155-57 (1951), reports that in 1948 there were the following number of arrests for adultery in the city indicated: Baltimore 3, Wilmington 16, Los Angeles 4, Duluth 2, and Boston 242. During the same year there were 248 arrests for fornication in Boston, but none in the other cities listed above. Student research using Shepard's Citator system, turned up only a couple of *Williams* type bigamous cohabitation decisions in the appellate courts since *Williams v. North Carolina*, 325 U.S. 226 (1945). Unquestionably, prosecutions are so rare as to be virtually non-existent.

55. HOWARD, *op. cit. supra* note 6, at 228-29, says that in theory at least, marriages are indissoluble among the Papuas of New Guinea, the Veddahs of Ceylon, and the Niassers of Batu. 3 WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* 268-70, 301, 304 (5th ed. 1921), adds some additional peoples, including the Aztecs of Mexico and orthodox Hindus. Both authors, however, note that indissoluble marriage is the exception rather than the rule. Frequently divorce is most informal, as among the Zuni Indians where a wife divorces a husband simply by placing his belongings at the entrance to the lodgings. A Cheyenne brave could dispose of a squaw by a "drum divorce" during an Omaha dance while other braves sang the "throw-away" song, or he might abandon her by "putting her on the prairie." The Todas of south India permitted husbands to divorce for cause, the grounds being "(1) she won't work, or (2) she is a fool." A counterpart to alimony under modern American law may be found among some cultures such as the Ifuagos of the Philippines. So-called "proof marriages," which may be terminated at will if no children are produced, are quite common among preliterate people, and the Eskimo of the Ungave

to be imposed for unfair or unwarranted unilateral divorce.⁵⁶ For example, the economic consequence of exercising a privilege of divorce may be such that the freedom is illusory.⁵⁷ Since marriage is an event commonly seized upon as a means of transferring property, and wives and children may be economic assets, it is not surprising that such economic factors often are reflected in law, religion, and custom as they pertain to marriage and divorce.⁵⁸

Thus, typically a middle ground is chosen between unrestricted divorce and indissolubility, and social control of some sort is imposed to regulate the dissolution of marriage. In theory, such a middle position is subscribed to in the United States, although in practice divorce is by consent in most states if the parties have agreed upon the terms of settlement. A few Catholic countries in Europe and South America deny divorce altogether.⁵⁹ At the other extreme, the Soviet Union, for a few years, permitted divorce by registration by one party.⁶⁰ Under Moslem law the husband may divorce at will by thrice repeating the formula "I divorce thee." Public divorce on specified grounds is recognized by most religions although divorce decrees may be given only limited effect among Catholics, Hindus, and Orthodox Jews.⁶¹

It would be too much to claim that the ubiquity of divorce reflects the wisdom of the species. As noteworthy as its prevalence is the frequency of its limitation and regulation by law and religion. If we may generalize at all, perhaps the most we can say

district and some North American Indians and West African Negroes contract marriages only for a short term.

56. The Code of Hammurabi seems to provide that if a husband divorced his wife without just cause he was required to forfeit one mina of silver. Justinian in Rome imposed severe penalties, including exile, for unwarranted divorce. Among the Teutonic peoples, the husband's original unlimited right to divorce in time was regulated and curbed. Among primitive people, severe sanctions may be imposed for unwarranted divorce. See WESTERMARCK, *op. cit. supra* note 55, at 293, 317, 367 *et seq.*, and HOWARD, *op. cit. supra* note 6, at 243-44, 249.

57. In primitive cultures, where there is a "bride price" or affinal exchange, termination of the marriage may require return of all property received by the parties or their relatives upon their marriage. Naturally, this serves as a potent economic pressure against divorce.

58. See BENEDICT, *PATTERNS OF CULTURE* 32, 224-25 (Mentor Book ed. 1957).

59. Italy, Spain, Eire, and Andorra forbid divorce to all residents, and in Liechtenstein and Portugal divorce is forbidden to Catholics. Brazil forbids all divorce.

60. See Gsovski, *Marriage and Divorce in Soviet Law*, 35 *GEO. L.J.* 209 (1947).

61. It is interesting that in Israel civil divorce is not recognized and only a Rabbinical decree will be treated as valid. See Laufer, *Marital Law in Transition: The Problem in Israel*, 9 *BUFFALO L. REV.* 321 (1960).

is that both marriage and divorce are significant social events and matters of public concern. It is this dual aspect of individual and social interest which inevitably gives rise to conflicts and gaps between law and private practice. Specific performance of the marriage contract, although it has been tried, is not a likely remedy.⁶² In our own society, if divorce is not obtainable with relative ease, or if it is too expensive, the result will not be a continuation of the family unit intact, but rather a resort to some form of self-help or to those practices we have included within the term "common law divorce."

CONCLUSION

From the standpoint of history one may discern a continuing struggle between man and authority over the institutions of marriage and divorce. The struggle persists because marriage has both private and public aspects and is the legitimate concern of the parties, the state, and religion. Perhaps Rome is the classical example of this conflict of values. From what appears to have been a divorceless society, at least where the couple were joined by *confarreatio* under the *manus* system, marriage and divorce eventually were secularized and became a matter of purely private contract.⁶³ The wife who had been subject to her husband's control under the patriarchal system acquired equal rights, after centuries of social evolution, to divorce at will. With the advent of Christianity, church and state control over marriage and divorce was re-established. In England between 1086 and 1857 ecclesiastical courts (subject to acts of Parliament after the Reformation) developed a strict law of divorce. But the law was only the top of the iceberg. Beneath the surface there was the greater part, comprising custom, usage, needs, and desires. For great masses of the people the law for barons, gentlemen, and persons of substance, was remote if not non-existent. To a lesser extent, the same holds true today in our own culture.

62. Although English law formerly recognized an action by a spouse for restoration of conjugal rights, an action in the nature of specific performance of the marriage contract, such actions have never been recognized in the United States. MADDEN, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 148 (1931).

63. BRYCE, *op. cit. supra* note 34, at 842-43, summarizes the evolution of Roman matrimonial law. It is interesting to note that Justinian disapproved of dissolving marriages by mutual consent but his grandson Justin restored that ancient law. The latter observed that it was difficult to reconcile those who hated each other violently, and who, if they were compelled to live together, frequently made attempts on each other's lives. The wisdom of Justin has been lost in the pages of antiquity.

Much of the confusion may stem from the social fact that there are three different, but at times overlapping, relationships which the law tends to treat as but two. Sexual unions may be (1) promiscuous, (2) of a more or less permanent nature, or (3) there may be a regular or common law marriage. Our law and mores agree that promiscuity does not create legal status or semblance of husband and wife. The second category, however, is ambiguous and confusing since, unlike the Romans, we do not recognize concubinage. Large segments of our society, and most often the parties themselves, do not view a more or less permanent liaison as marriage and, as often as not, marriage clearly is neither intended nor desired. However, parties to such a union may call one another "common law husband" or "common law wife." Usually, this is what is meant by "common law marriage." The courts on the other hand, reserve the terms "common law" wife, husband, and marriage, for the informally created but legally effective relationship of marriage. Common law marriage, in the social as distinguished from the legal sense, is both acceptable and proper in many states, including those which now require licenses for valid marriage.

Where the "common law divorce" to which we have referred terminates a common law marriage in the non-legal sense, one cannot quarrel with such a severance of a legal nullity. But where self-help is employed to terminate the legal status of marriage (whether the marriage itself was formal or informal), serious problems arise. It is clear that unless divorce is relatively inexpensive, desertion and self-divorce are bound to occur. The same is true where divorce is difficult. Perhaps it would not matter so much if only the parties themselves were involved or would suffer, but in an age of pensions, workmen's compensation, public assistance, ADC, insurance, and a plethora of other welfare legislation, children, relatives, and others are affected by the legal status of a given couple. In some measure the problem may be mitigated by statutory reform of the law pertaining to legitimacy and legitimation. In the last analysis, however, what is needed is a realistic and practical law of divorce so that resort to the law will be more attractive than self-help.⁶⁴ The law, to serve adequately as a substi-

64. For a convincing plea for the wholesale reform of the substantive and procedural law of divorce, see Alexander, *The Family Court: An Obstacle Race*, 19 U. PRRT. L. REV. 602 (1958), which is but one of Judge Alexander's many articles on the subject. For a popular treatment of the subject, see David G. Wittels, *Perjury Unlimited*, Sat. Evening Post, Feb. 18, 1950, pp. 28, 136, where it is reported that one Cleveland judge handles as many as fifty divorce cases a day and that it was possible to get a divorce "without either of the marriage partners ever appearing before a judge . . . without witnesses . . . without presentation of a shred of evi-

tute for self-help, must be responsive to the needs of litigants and their families and recognize that no social gain is achieved by denying divorce when a marriage is in fact dead.

In conclusion, we may note that this cursory and perhaps superficial examination of "common law divorce" is based upon limited experience and casual observation. Perhaps some meaningful data could be compiled indicating the extent and scope of the problem if Legal Aid societies throughout the United States could be persuaded to compile sociological data and information which would show the "living law" of marriage and divorce. As has been said, we suspect that our courts have seen but the top of the iceberg. There is no doubt that common law divorce is as prevalent as common law marriage, whatever we mean by each term, and that common law divorces (including desertions) substantially exceed in number the sum total of divorce decrees. The theme song seems to be: "Anything you can do, I can do better." It is submitted that the "do it yourself" craze has been carried too far and that the judge should be a necessary and even interested party to divorce proceedings.

dence that a divorce is justified." The classic criticisms of divorce procedure are those of Bradway, *The Myth of the Innocent Spouse*, 11 TULANE L. REV. 377 (1937), and Llewellyn, *Behind the Law of Divorce*, 32 COLUM. L. REV. 1281 (1932), 33 COLUM. L. REV. 249 (1933). Helpful books about the problem include BURKE, *WITH THIS RING* (1958); GOODE, *AFTER DIVORCE* (1956); PLOSCOWE, *THE TRUTH ABOUT DIVORCE* (1955); Gellhorn, *Children and Families in the Courts of New York City*, REPORT BY A SPECIAL COMMITTEE OF THE ASS'N OF BAR OF CITY OF NEW YORK (1954); VIRTUE, *FAMILY CASES IN COURT* (1956); and ERNST & LOATH, *FOR BETTER OR WORSE* (1951).