

# INFORMAL AND FORMAL MARRIAGE—AN APPRAISAL OF TRENDS IN FAMILY ORGANIZATION\*

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THE phenomenon of informal marriage is of universal scope, making itself felt in every American jurisdiction, including those which do not recognize the so-called common law marriage. Legal discussion, however, is largely focused on the institution of common law marriage, usually seen in the parochial frame of reference of ambiguous legal doctrine as applied in individual states. It has been asserted that common law marriage creates confusion, conflict, and uncertainty; that the law should do away with the dichotomy of informal and formal marriage. It is frequently recommended that the states should take a clear-cut position upon the question of validity or invalidity of common law marriage, and that in doing so they should abolish it.<sup>1</sup> More and more states follow this call; and the negative trend may have reached a crucial point. What are the consequences of abolition? Does it mean that double standards will no longer prevail in marriage? Will only one kind of marriage remain—the one based on a ritual; the formal, licensed, ceremonial one?<sup>2</sup> To what extent would abolition of common law marriage result

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<sup>1</sup> 1 VERNIER, *AMERICAN FAMILY LAWS* 108 (1931). The trend in Canada is evidently in the other direction, favoring eventual recognition of common law marriage. See Keyes, *The Validity of the Common Law Marriage in Ontario*, 1 OSGOODE HALL L.S.J. 58 (1958). On trends in marriage, see Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 *LAW & CONTEMP. PROB.* 3 (1953); as to common law marriage, see Jacobs, *Common Law Marriage*, 4 *ENCYC. SOC. SCI.* 56 (1937). A historical approach does not seem to be very promising for gaining insight into a social problem of marriage arising out of present-day conditions. See Keyes, *supra* at 65, referring to "misreading of history."

<sup>2</sup> To facilitate discussion this article follows the conventional distinction between informal and formal marriage. This distinction is arbitrary. Common law marriage, for example, has its own form requirements; courts frequently insist on compliance with a detailed ritual which purportedly is a prerequisite for judicial recognition. See Bradway, *Tampering with Marriage*, 6 *BROOKLYN L. REV.* 277, 285 n.51 (1937). On the other side, "formal marriage" sometimes may be entered into rather informally, as, for example, in jurisdictions such as Nevada, which permits the operation of so-called marriage mills. See the description of the Nevada situation in the dissenting opinion of Mr. Justice Clark in *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 23 n.6 (1954).

in greater certainty? And to what extent has certainty been achieved in the non-recognizing states? In trying to answer these questions it may be helpful to begin with a discussion of the notions of common law marriage familiar in American jurisdictions. The complications which will become apparent from this discussion may throw new light on informal marriage and its social significance. As a by-product this may facilitate a more intelligent choice among the local variables of informal marriage, including the controversial one attributed to the common law.

#### REGIONAL TRENDS

The esteem in which common law marriage is held is on the decline. Eight years ago about twenty American jurisdictions were usually listed as recognizing common law marriage.<sup>3</sup> Today only sixteen jurisdictions are left on that list. Indiana, Michigan, Mississippi, and South Dakota, by legislative intervention, have recently abolished common law marriage.<sup>4</sup> Less than one-third of the American states—representing approximately one-third of the total American population—have retained common law marriage. However, the area covered by the recognizing jurisdictions extends over almost one half of the territory of the United States.<sup>5</sup> This fact is noted because it may indicate that population growth has something to do with the negative trend. According to this proposition it may be important to know whether a recognizing state has a high population density, as has Pennsylvania, or at least a fast growing population, as Florida. Has, perhaps, the national census any relevance for our problem; may nationwide changes in numbers of people result in changing perspectives on marriage?

Let us look at geographical trends more closely. Common law marriage jurisdictions tend to cluster in certain regions. In the deep South are the recognizing states of Florida, Alabama, Georgia, and South Carolina.<sup>6</sup> In the region

<sup>3</sup> See JACOBS & GOEBEL, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 115 (3d ed. 1952).

<sup>4</sup> IND. ANN. STAT. § 44.111 (Burns Supp. 1959); MICH. STAT. ANN. § 25.2 (1957); MISS. CODE ANN. §§ 465.5 (1956), 461.2 (Supp. 1958); S.D. CODE §§ 14.0101, .0110, .0120, .0121 (1939), as amended and repealed by S.D. Laws 1959, ch. 50. The law digests in *Martindale-Hubbell*, compiled by leading members of the local bars, come up with a result showing about 16 jurisdictions in which common law marriages are still recognized. Details, however, are clouded. Watkins & Eager of the Jackson Bar state in the Mississippi Law Digest that "common law marriages were valid prior to Apr. 5, 1956," leaving open the question of what happened thereafter. Maas & Bailey of the Virgin Islands Bar make the following enigmatic statement under the heading "Common Law Marriage": "In absence of statute, common law applies." 4 MARTINDALE-HUBBELL LAW DIRECTORY, *Digests of the Laws of the States, the District of Columbia, Puerto Rico and the Virgin Islands* (92d ed. 1960).

<sup>5</sup> The broad area covered is due primarily to the fact that the large states of Alaska, Montana, and Texas still recognize common law marriage.

<sup>6</sup> See *Kelly v. Kelly*, 247 Ala. 316, 24 So. 2d 265 (1945); *Caras v. Hendrix*, 62 Fla. 446, 57 So. 345 (1912); *Peacock v. Peacock*, 196 Ga. 441, 26 S.E.2d 608 (1943); *State v. Ward*, 204 S.C. 210, 28 S.E.2d 785 (1944).

of the Southwestern prairie we find Texas, Oklahoma, and Kansas.<sup>7</sup> We note the recognizing Western mountain states of Colorado, Idaho, and Montana,<sup>8</sup> and in the East the neighboring states of Ohio and Pennsylvania.<sup>9</sup> Finally, there are a few scattered single jurisdictions: Alaska, Iowa, Rhode Island, and the District of Columbia.<sup>10</sup>

Are any generalizations possible on the geographical level? Occasionally a statement can be found that rural states, or states with frontier conditions, have a greater inclination to recognize common law marriage.<sup>11</sup> But it is difficult to classify states. Some may argue that Alaska still retains a flavor of the old frontier; yet are Alabama and Texas rural or industrial? Further, two of the main industrial centers of the nation, Ohio and Pennsylvania, still adhere to the concept of common law marriage, although with misgivings. How should the District of Columbia be classified? Two tentative generalizations may be made at this point. One of them, that jurisdictions recognizing common law marriage are found frequently in pairs or groups of bordering states, was discussed earlier. In addition, there seems to be a fairly well-balanced spread over the entire country, with even New England having its common law marriage jurisdiction in Rhode Island and the Middle West in Iowa. Whether this balanced spread has any social significance is part of our consideration.

#### AMBIGUITY OF LEGAL DOCTRINE

At this point a mark of caution should be inserted. We must remain aware of the danger of simplification which is characteristic of a discussion of common law marriage. To some extent this discussion has been of that sort in order to stimulate thoughts on regional trends which, if existing, may affect

<sup>7</sup> See *Whetstone v. Whetstone*, 178 Kan. 595, 290 P.2d 1022 (1955); *Maxfield v. Maxfield*, 258 P.2d 915 (Okla. 1953); *Texas Employers Ins. Ass'n v. Elder*, 155 Tex. 27, 282 S.W.2d 371 (1955).

<sup>8</sup> See *Graham v. Graham*, 130 Colo. 225, 274 P.2d 605 (1954); *Mauldin v. Sunshine Mining Co.*, 61 Idaho 9, 97 P.2d 608 (1939) (not discussing "common law marriage" as such but holding valid a marriage without license or ceremony); *Elliot v. Industrial Accident Bd.*, 101 Mont. 246, 53 P.2d 451 (1936).

<sup>9</sup> *Rea v. Fornan*, 46 N.E.2d 649 (Ohio App. 1942); *Rager v. Johnstown Traction Co.*, 184 Pa. Super. 474, 477, 134 A.2d 918, 920 (1957) ("Marriage in Pennsylvania is a civil contract and does not require any particular form of solemnization before officers of church or state").

<sup>10</sup> *Parks v. Parks*, 6 Alaska 426 (1921); *Gammelgaard v. Gammelgaard*, 247 Iowa 979, 77 N.W.2d 479 (1956); *Silva v. Merrit, Chapman & Scott Corp.*, 52 R.I. 30, 156 Atl. 512 (1931); *Hoage v. Murch Bros. Constr. Co.*, 50 F.2d 983 (D.C. Cir. 1931). Common law marriage in the District of Columbia is not based on the common law of Maryland, but on the marriage laws of the District established by Congress. These laws do not specifically prohibit common law marriages, so they are considered to be recognized.

<sup>11</sup> *McClish v. Rankin*, 153 Fla. 324, 331, 14 So. 2d 714, 717 (1943); *McChesney v. Johnson*, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934). Williams, *Solemnization of Marriages: The Common Law Marriage—Never Solemn and No Longer Common—Will It Remain Law?*, 13 U. MIAMI L. REV. 447, 449 (1959), indicates that this was the original justification for common law marriage, but that the concept today is being exploited by enterprising females.

common law marriage. This approach must now be revised. It may be fallacious to compile statistics on one form of marriage without being assured of a common denominator.<sup>12</sup> What, then, is a common law marriage?

Unfortunately, no clear answer to this question is possible, and no definition will be given here. A valid definition of common law marriage without infinite qualifications can hardly be found.<sup>13</sup> All we have are approximations which demonstrate ambiguous and vacillating notions of some more or less informal kind of marital status. Whatever hazy notions we have vary not only from jurisdiction to jurisdiction but from case to case within a recognizing jurisdiction. Even non-recognizing jurisdictions may mean different things when they disapprove of common law marriage. Again, the shades of non-recognition may vary from case to case. A good deal may depend on how the issue comes up. Who is making the decision—a state court or a federal court, an industrial commission or a welfare agency? Who is asking for what relief? Does the litigation involve workmen's compensation,<sup>14</sup> deportation,<sup>15</sup> or an interest in real property?<sup>16</sup> Is the plaintiff an alleged common law wife seeking alimony in a separate maintenance or divorce suit?<sup>17</sup> Is the case an application for welfare funds for dependent children?<sup>18</sup> Is it a criminal prosecution for bigamy with the government trying to establish a second marriage, entered into without dissolution of a prior marriage? Or is it a prosecution for rape with common law marriage alleged as a defense?<sup>19</sup> Quite possibly the same

<sup>12</sup> See JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 14-15 (1959).

<sup>13</sup> See CARSON, *THE FAMILY, MARRIAGE AND DIVORCE IN FLORIDA* 36 (1950); KOEGEL, *COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES* 7 (1922); 1 VERNIER, *AMERICAN FAMILY LAWS* 102 (1931). All three of these authorities attempt to give standard definitions of common law marriage.

<sup>14</sup> Courts tend to take a liberal attitude in finding common law marriages in workmen's compensation cases. See JACOBS & GOEBEL, *op. cit. supra* note 3, at 117.

<sup>15</sup> Notions of the law of marriage are manipulated by courts to facilitate deportation of persons considered undesirable. See *United States ex rel. Devine v. Rodgers*, 109 Fed. 886, 887 (E.D. Pa. 1901). This case involved deportation of the idiot son of a Jewish uncle-niece marriage which was performed in Russia. The rationalization of the court avoided reference to the specific facts.

<sup>16</sup> Courts tend to be stringent in finding common law marriages in litigation over the right to share in an estate. See JACOBS & GOEBEL, *op. cit. supra* note 3, at 117.

<sup>17</sup> Courts tend to be stringent in finding a common law marriage if an alleged wife requests alimony; see Rothstein, *A New Look at Common Law Marriages in Florida*, 10 *MIAMI L.Q.* 87, 99 (1955). This statement is substantiated by the fact that two cases on common law marriages wherein divorce was the issue, decided in Florida since the Rothstein article was written, have both gone against the existence of a common law marriage. *Van Derven v. Van Derven*, 105 So. 2d 805 (Fla. Ct. App. 1958); *Jordan v. Jordan*, 89 So. 2d 22 (Fla. 1956). These two cases also illustrate the courts' predisposition against certain professions. In the *Van Derven* case the alleged common law wife was a waitress, in the *Jordan* case a "disc jockey" in a night club.

<sup>18</sup> Cf. FLA. STAT. § 409.183 (1959).

<sup>19</sup> The state operates equally well on either side of the common law marriage question. In *Green v. State*, 21 Fla. 403 (1885), the state was attempting to manipulate presumptions to

court on the same set of facts may find a common law marriage in one litigation and no common law marriage in another. The conventional semantic tool used to rationalize away this apparent inconsistency is to say that a common law marriage is found to exist for certain purposes—as, for example, the granting of relief to an alleged widow under an employer's liability act—but that a marriage may not necessarily exist for other purposes. Frequently the mere existence of children born from the relationship, and the reluctance to burden them with illegitimacy, will influence the outcome in favor of a valid common law marriage, irrespective of whether the litigation involves different questions wholly unrelated to status.<sup>20</sup> Indeed, the existence of children, although of great actual weight, may not be mentioned in the opinion, or it may appear merely as *obiter dictum*.

Further problems arise as to cohabitation. Is it an essential element of a valid common law marriage, or is it merely a matter of evidence?<sup>21</sup> What does cohabitation require? What about the repute of being husband and wife—is this an additional element, or merely a matter of proof?<sup>22</sup> These questions disturb the legal mind, although really it makes little difference to the parties whether a case is lost because cohabitation or repute is not sufficiently alleged or whether it is lost because of insufficient evidence on these points.<sup>23</sup> The distinction, however, is not entirely academic. Courts frequently favor procedural and evidentiary rationalizations to avoid embarrassment on the part of the losing party, which might be the result if the merits of a claimed common law marriage were examined. Again, this illustrates how futile it may be to furnish answers on a conceptual level. All the facts of the individual case are needed to get close to the flow of decisions.

Doctrinal complications should not surprise us. Some states customarily classified as not recognizing common law marriage adhere to doctrines which make it rather doubtful whether the negative classification is proper. Tennes-

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establish the existence of a prior common law marriage in order to convict the defendant of entering into an allegedly bigamous second ceremonial marriage. And in *State v. Ward*, 204 S.C. 210, 28 S.E.2d 785 (1944), the state was challenging the existence of a common law marriage in order to convict the defendant of statutory rape. In both instances, however, the strategy was effective only for obtaining convictions in the trial court. It failed on the appellate level. The perspectives on common law marriage may also differ in the lower and upper courts. See note 52 *infra*.

<sup>20</sup> See Rothstein, *supra* note 17, at 91–92.

<sup>21</sup> See JACOBS & GOEBEL, *op. cit. supra* note 3, at 123–24.

<sup>22</sup> Repute is necessarily based upon hearsay. To some, a “marriage by hearsay” may make the concept of common law marriage even more difficult to accept, for the reason that many a lawyer, by habit, is in a rut of judging values in terms of evidence, trial techniques, and procedures. See Weyrauch, *The Kinsey Reports and the Legal Mind*, 11 U. FLA. L. REV. 277, 278 (1958). On repute see Note, *Common Law Marriage—A Legal Anachronism*, 32 IND. L.J. 99, 104 n.26 (1956).

<sup>23</sup> See *Westfall v. J. P. Burroughs & Son*, 280 Mich. 638, 642, 274 N.W. 358, 359 (1937); JACOBS & GOEBEL, *op. cit. supra* note 3, at 123–24.

see, for example, has developed new doctrines of marriage by estoppel, by prescription, and by ratification.<sup>24</sup> One may even say, as did a federal court,<sup>25</sup> that Tennessee has retained a modified concept of common law marriage. The same characterization can be applied to many jurisdictions which allegedly do not recognize common law marriage. Other states are hard to classify because of lack of authority in any direction. Maine seems to be an example, although it is ordinarily counted as a non-recognizing jurisdiction.<sup>26</sup> Consequently legal authors who compile statistics on common law marriage may arrive at different results, depending perhaps on their emotional reaction to the institution.<sup>27</sup> Earlier, sixteen jurisdictions were tentatively mentioned as still recognizing common law marriages; actually there may be many more, particularly if one adopts a non-technical, functional classification.

#### VARIATIONS IN SOCIAL POLICIES

The problems become even more involved in the realm of underlying policies on common law marriage. The reasons why common law marriage is retained in the deep South presumably differ substantially from the reasons why the institution is still recognized in Ohio or Montana. Ethnic considerations may have a bearing on the attitude toward common law marriage in Southern states. Strangely enough, this sociological factor is more frequently touched upon in literature, newspaper reports, and court opinions than in treatises or law review articles, which are perhaps too far removed from the pressures of individual cases.<sup>28</sup> A shift in perspective on race and social structure may result

<sup>24</sup> Note, *Informal Marriages in Tennessee—Marriage by Estoppel, by Prescription and by Ratification*, 3 VAND. L. REV. 610 (1950), contains an exhaustive discussion of the "escape devices" employed in Tennessee.

<sup>25</sup> *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949).

<sup>26</sup> See KOEGEL, *op. cit. supra* note 13, at 165; Note, 34 IND. L.J. 643, 671 (1959).

<sup>27</sup> Vernier attempts to avoid this pitfall by using a comparative tabulation; he compares the statistics compiled by other authors. VERNIER, *op. cit. supra* note 1, at 106.

<sup>28</sup> Compare the closely resembling factual situations involving Southern Negro marriages in Marjorie Kinnan Rawlings' novel *Cross Creek* at 180-204 (Chas. Scribner's Sons 1942), and in the Mississippi case of *Walker v. Matthews*, 191 Miss. 489, 3 So. 2d 820 (1941). On the perspectives of courts, see *Orr v. State*, 129 Fla. 398, 409, 176 So. 510, 514 (1937): "The institution of marriage is the foundation of our republic. . . . While it may have faults, it is commonly acknowledged to be the best plan created by the ingenuity of man. These colored people failed to obtain a license to marry or to have a ceremony performed in conformity with our law and customs, but the facts indicate a common law marriage. The admission, 'We was clear to marry, but got no court house papers,' should not militate against them here." According to press reports, the Florida legislature refrained from abolishing common law marriage, fearing that such abolition would work an undue hardship upon the Negro population. See Murray, *Third Survey of Florida Law*, 12 U. MIAMI L. REV. 428, 429 (1958). On the relation between slave marriage and common law marriage, see CARSON, *THE FAMILY, MARRIAGE AND DIVORCE IN FLORIDA* 43-44 (1950). On prohibitions against miscegenation and common law marriage, see Williams, *supra* note 11, at 448. On Negro marriages in general, see Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 644 (1956).

in a shift in perspective on common law marriage, particularly in tightening up state control over marriage and possible miscegenation by requiring a license to marry in each individual instance.<sup>29</sup> These newer trends in the South conflict with older policies of minimum interference. All this hardly influences perspectives on common law marriage in other American jurisdictions which do not have statutes and policies on miscegenation.

Sometimes policy variations can be found in the same geographical vicinity. The bordering states of Utah and Nevada do not recognize common law marriage.<sup>30</sup> But can they be validly grouped together without further clarification? Utah, for example, has a strong policy against common law marriages of Utah domiciliaries, even if entered into in a recognizing jurisdiction.<sup>31</sup> We may have here, perhaps, an underlying idiosyncrasy in respect to any kind of informal marriage, based on a fear that a hazy concept of the law of marriage may be manipulated to re-establish, or at least to facilitate, polygamy, which was once accepted practice in Utah.<sup>32</sup> Nevada, neighbor of Utah, has different problems. Nevada features not only divorce mills, but also marriage mills where licenses can be obtained at will.<sup>33</sup> For years the statistics on formal marriages contracted in Nevada, increased by migratory unions, were more than twenty times the national average.<sup>34</sup> Such an inflated concept of formal marriage may leave little room for recognition of common law marriage. Indeed, if a state were to adopt a practice of granting marriage licenses upon feeding coins to a vending machine, the marriage thereafter to be performed by the shop owner, it would be hard to retain any functional distinction between informal and formal marriage.

Compare also the inflated Nevada statistics on licensed marriages and the waning statistics of Tennessee. Tennessee is far at the opposite end of the census, having the lowest rate of licensed marriages in the nation.<sup>35</sup> Does this mean that many people in Tennessee effect informal unions, perhaps later sustained by Tennessee estoppel doctrines? If so, how does this differ from openly admitting common law marriage? Or do these low figures on marriage licenses merely indicate that people in Tennessee go to neighboring states to

<sup>29</sup> The recent abolition of common law marriage in Mississippi may have significance in this context. See note 4 *supra*.

<sup>30</sup> NEV. REV. STAT. § 122.010 (1959); UTAH CODE ANN. § 30-1-2(3) (1953).

<sup>31</sup> *In re Vetas' Estate*, 110 Utah 187, 170 P.2d 183 (1946). In this case a man and woman domiciled in Utah performed a common law marriage in Idaho. After 12 years of "marriage" the husband died and the Utah court refused to recognize the woman as his wife to administer his estate. The parties had even attempted a ceremonial marriage before entering the common law union.

<sup>32</sup> See JACOBS & GOEBEL, *op. cit. supra* note 3, at 233.

<sup>33</sup> See *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 23 (1955) (dissenting opinion of Clark, J.).

<sup>34</sup> See JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 43 (1959).

<sup>35</sup> See *id.* at 44.

marry? The deeper one delves into the statistics, the more problems are disclosed. For example, one would expect common law marriage states to show statistics on licensed marriages below the national average because of the flow of informal marriages being diverted from the county courthouses. The contrary is true. Many common law marriage jurisdictions show statistics on licensed marriages above the national average.<sup>36</sup> In addition, many of the so-called non-recognizing states are below the national average as to reported licensed marriages, although, as a matter of logic, it would seem that they should show higher figures.<sup>37</sup> A parallel phenomenon is found in the ethnic dimension: It is asserted that common law marriage is more frequent in the non-white population, perhaps as a relic of the old slave marriages.<sup>38</sup> If this were true, one would expect a lower incidence of licensed marriages among non-whites. The contrary seems to be the case. Since the turn of the century the rate of licensed marriages has been substantially higher in the non-white population than in the white population.<sup>39</sup>

What does all this mean? Are intangible sociological factors at work which result in different policies in different American regions and ethnic stratifications, as well as in statistical fluctuations? Or are the phenomena merely accidental? Raising these questions may be more important than furnishing haphazard answers. The manifestations of marriage are based on problems of enormous complexity. Field research is needed, perhaps in cooperation with case workers of welfare agencies. Attempts to reach solutions by familiar techniques of legal research do not seem very promising.<sup>40</sup> But this is the very

<sup>36</sup> *E.g.*, Georgia, Mississippi (prior to abolition of common law marriage), Montana, South Carolina, and Texas. See JACOBSON, *op. cit. supra* note 34, at 43, table 12.

<sup>37</sup> *E.g.*, California, Connecticut, Illinois, Massachusetts, Minnesota, New Jersey, New York, North Carolina, North Dakota, Oregon, Tennessee, West Virginia, and Wisconsin. See JACOBSON, *op. cit. supra* note 34, at 43, table 12.

<sup>38</sup> *ORR v. State*, 129 Fla. 398, 409, 176 So. 510, 514 (1937). See CARSON, *op. cit. supra* note 28, at 43, 332; BRISTOL & EHRMANN, *MARRIAGES AND DIVORCES IN FLORIDA IN RECENT YEARS 7* (1949): "In Florida the 'real' rate of marriage and divorce is probably higher than recorded because many persons, particularly Negroes, change their domestic relations without recourse to legal procedure and records. If all of these informal marriages and divorces could be legalized and recorded, it is probable that all counties would show an increase and that the largest proportional increase from this procedure would occur in those counties with the largest percentage of Negroes."

<sup>39</sup> See JACOBSON, *op. cit. supra* note 34, at 60-61.

<sup>40</sup> Carson suggests that there may be a relation between the frequency of marriage and local policies as to gambling and liquor sales. In a private research he found that the incidence of marriage is low in dry counties and in the so-called Bible belt, while the marriage statistics are much higher in wet counties and the so-called Gold Coast. See CARSON, *op. cit. supra* note 28, at 328-31. It is apparent that this kind of problem cannot be solved by the conventional library research. See Cavers, *Science, Research, and the Law: Beutel's "Experimental Jurisprudence,"* 10 J. LEGAL ED. 162, 163 n.4 (1957). For an example of a fruitful local research conducted by sociologists, see BRISTOL & EHRMANN, *op. cit. supra* note 38. Local field research of the described kind can be conducted by the sociology departments of state universities, thus decentralizing expense and effort. The information obtained, however, must be deliberately fed to law schools, which otherwise, because of organizational peculiarities, may never gain access to the factual results.



method by which the lawyer, bound by training and habit, approaches the issue.

#### HOSTILITY TOWARD COMMON LAW MARRIAGE

Not all of the jurisdictions which openly recognize common law marriage are actually in favor of the institution. At least six of them are more or less hostile to the concept. Among these are Florida, Ohio, Pennsylvania, Texas, Oklahoma, and Kansas.<sup>41</sup> The negative statements made by judges are frequently couched in such high sounding language as "the law does not favor, but merely tolerates, common law marriage,"<sup>42</sup> or "such informal marriages are seldom recognized and are held valid by courts only to protect the rights of innocent persons."<sup>43</sup> The Supreme Court of Florida has stated that abolition should be left to the legislature.<sup>44</sup> In the meantime, it is said, rather stringent requirements should be applied as to the evidence, particularly if a woman tries to reap financial benefits from an alleged common law marriage.<sup>45</sup> The consequence of these negative predispositions is a lobby favoring legislative abolition of common law marriage. Even the judicial branch of the government participates in this lobby by way of dictum in reported decisions.

Although the state legislators hesitate to yield to pressure, they employ various dilatory strategies to channel the population away from common law marriage while retaining it as a matter of form. The target of these legislative steps is primarily the stratum of the population of lower economic and social status. Two examples from Florida are illustrative. In 1959 the Florida legislature provided for registration of common law marriages as a prerequisite to obtaining welfare funds.<sup>46</sup> Eligibility under the assistance to dependent children program depends on a showing of a "suitable home" and a "stable moral environment for the child." An alleged common law marriage qualifies for these purposes only if it is registered with the county judge. The requirements for and costs of the registration are the same as in the case of an application for a marriage license.<sup>47</sup> The underlying legislative intent is obvious: If people encounter that much trouble in having their common law marriage approved,

<sup>41</sup> *Brawley v. Thomas*, 82 Ohio App. 400, 81 N.E.2d 719 (1947); *Baker v. Mitchell*, 143 Pa. Super. 50, 54, 17 A.2d 738, 741 (1941). The language of the Pennsylvania court provides a good example of judicial feeling: "The law of Pennsylvania *recognizes* common law marriages. But they are a fruitful source of perjury and fraud, and, in consequence, they are to be *tolerated, not encouraged.*" See also *Whetstone v. Whetstone*, 178 Kan. 595, 290 P.2d 1022 (1955); *Maxfield v. Maxfield*, 258 P.2d 915 (Okla. 1953); *Texas Employers Ins. Ass'n v. Elder*, 274 S.W.2d 144 (Tex. Civ. App. 1954).

<sup>42</sup> *Texas Employers' Ins. Ass'n v. Elder*, 274 S.W.2d 144, 147 (Tex. Civ. App. 1954).

<sup>43</sup> *In re Estate of Redman*, 135 Ohio St. 554, 558, 21 N.E.2d 659, 661 (1939).

<sup>44</sup> *In re Colson's Estate*, 72 So. 2d 57, 58 (Fla. 1954).

<sup>45</sup> See *Williams*, *supra* note 11, at 449; *Rothstein*, *supra* note 17, at 95.

<sup>46</sup> FLA. STAT. § 409.183 (1959). See also *id.* § 409.18(3)(c).

<sup>47</sup> See FLA. STAT. §§ 409.18(1), 409.18(3)(a)(7), 409.183 (1959).

at least for purposes of obtaining welfare funds, they may decide to get a regular marriage license "at no extra cost." The second Florida method of channelling the population in the direction of formal marriage provides that any person who enters into the contract of marriage without a health certificate shall be guilty of a misdemeanor.<sup>48</sup> Thus, although their union is recognized by the law, the parties to a common law marriage may be subjected to punishment. The actual implications of this somewhat odd provision, which was adopted in 1945, are hazy because of present lack of enforcement. However, it may furnish a tool to prevent socially undesirable unions by application of the police power. A technically valid child marriage, possible under common law, could be broken up by detaining the participants as "juvenile delinquents," or, if one of them is an adult, by arresting him for contributing to such delinquency.<sup>49</sup> Although it is often not admitted, power may effectively terminate legal rights. Once they are behind the walls of a detention home or the county jail, it may become futile for the participants to insist on their marriage, particularly since the police power of the state, bolstered by an outraged society, interferes with a sufficient showing of cohabitation and the repute of being married.

#### ARGUMENTS FAVORING ABOLITION OF COMMON LAW MARRIAGE

The reasons which are given for complete abolition of common law marriage are manifold. Our society has changed. We no longer have frontier conditions. County seats are easily accessible.<sup>50</sup> The social environment and perspectives on marriage have also changed. Marriage has been affected by the emancipation of women, the sex consciousness of the modern public, and the development and extensive use of birth control devices. As a result of this, it is asserted, cohabitation does not imply an intent to be married to the same extent that it did a century ago.<sup>51</sup> Issues of morality are raised in this context. The term *common law wife* is used by the public, and sometimes even by judges, in a disrespectful fashion. The word is used to imply that a woman is

<sup>48</sup> FLA. STAT. § 741.0512 (1959). There may be some doubt as to the application of this statute to a common law marriage, but other states with similar statutes have applied them to the common law marriage contract. In *Kansas v. Walker*, 36 Kan. 297, 13 Pac. 279 (1887), both parties to an informal union were convicted, although their common law marriage was recognized, after they publicly rejected the authority of society, church, and state, to regulate or interfere with their "autonomistic marriage." Criminal sanctions will hardly be enforced against the more ordinary kinds of common law marriage.

<sup>49</sup> See CARSON, *op. cit. supra* note 28, at 34. For statutory definitions of a "juvenile delinquent" and "contributing to the delinquency of a minor" see FLA. STAT. §§ 39.01(6), (11), (12), and §§ 828.19-21 (1959). The definitions are broad enough to cover almost any deviation from accepted patterns, certainly including any misdemeanor resulting from non-compliance with the requirements of formal marriage. See also Bradway, *Tampering with Marriage*, 6 BROOKLYN L. REV. 277, 286 (1937).

<sup>50</sup> See *McClish v. Rankin*, 153 Fla. 324, 331, 14 So. 2d 714, 717 (1943); *McChesney v. Johnson*, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934).

<sup>51</sup> See Note, *Common Law Marriage—A Legal Anachronism*, 32 IND. L.J. 99, 102 (1956).

not a real wife, that she is engaged in a meretricious relationship; that she is on the same level as a "divorcee" or an "easy lay."<sup>52</sup> The legal conceptualists are equally disturbed by the difficulty of drawing a line between illicit cohabitation and common law marriage. They claim that the law permits only two alternatives, a valid marriage and an invalid marriage, with no in-between stages. The trouble with common law marriage, they say, is that it may require a certain degree of cohabitation, illicit at its inception, before it becomes a valid marriage. Common law marriage would, therefore, legitimize promiscuity.<sup>53</sup> It is further alleged that most common law spouses do not really consider themselves married. They do not think, for example, that formal divorce would be necessary in order to bring the relationship to an end.<sup>54</sup> The claim of common law marriage, it is asserted, is raised usually at a belated stage, at a time when cohabitation has ceased, with no other purpose than to obtain retroactively advantages that attach only to a valid marriage.<sup>55</sup>

A further argument for abolition of common law marriage is that it would be abused by gold diggers seeking financial advantages from innocent persons by embarrassing litigation. The fact is emphasized that alleged common law wives are usually in the role of plaintiffs.<sup>56</sup> The Supreme Court of Florida adds

<sup>52</sup> Some courts find it difficult to distinguish between common law marriage and prostitution. The Supreme Court of New York stated in a borderline situation involving 18 years of alleged cohabitation between a policeman and a prostitute in houses of ill fame: "The term 'common-law wife' is one not known to the law, and the law looks with no favor upon the connection indicated by it. As ordinarily used, this term is a synonym for a woman who, having lived in a state of concubinage with a man during the time when she might have been openly declared to be his wife, if she were such, only seeks to assume that relation openly after his death, and when she is impelled to it by the loss of the support which he has given to her, and by a desire to obtain that support by sharing in the proceeds of his property." *In re Brush*, 25 App. Div. 610, 613, 49 N.Y. Supp. 803, 806 (1st Dep't 1898). The judicial bias may even work against a non-surviving alleged common law wife; see *In re Estate of Speeler*, 6 Ohio Op. 529, 22 Ohio L. Abs. 223 (P. Ct. 1936). Occasionally the bias may work against a common law husband claiming custody of his children, especially if they are young girls; see *State ex rel. Ballenger v. Hazlett*, 4 Fla. Supp. 50 (Cir. Ct. 1950). Apparently the judicial predisposition against common law marriage is somewhat stronger in lower courts than in appellate courts. Perhaps the lower courts assume a social function of enforcing middle class perspectives on marriage, a process which is slowed down by the upper courts.

<sup>53</sup> It is asserted, for example, that the situation resulting from recognition of common law marriage would be puzzling, paradoxical, and even ridiculous. The parties could not possibly be "half-married" in an intermediate stage of cohabitation. The marital relation would exist in toto or not at all. See Note, 23 IOWA L. REV. 75, 83 (1937). Public opinion is more realistic. Parents wearily recognize the in-between stage of "going steady" practiced by the young generation which more and more replaces formal engagement. The objection of the adult world is frequently voiced in the form that "young people nowadays behave as if they were already married."

<sup>54</sup> See KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 102 (1922).

<sup>55</sup> *In re Brush*, 25 App. Div. 610, 613, 49 N.Y. Supp. 803, 806 (1898).

<sup>56</sup> See Rothstein, *supra* note 17, at 93. Gilkey states that informal marriage favors the harlot and the adventuress. Gilkey, *Validity of Common-Law Marriages in Oregon*, 3 ORE. L. REV. 28, 46 (1923).

further weight by observing a marked increase in litigation on common law marriage since 1945, the year when actions for breach of promise were abolished in the state.<sup>57</sup> The implication is that judgment-hungry women no longer assert a mere engagement in order to obtain benefits, since this avenue has been barred by the new anti-heart-balm legislation, but now claim a full-fledged common law marriage, with resulting claims for support. The reasoning is somewhat similar to that asserted in favor of the statute of frauds, the form requirements assuming the function of safeguarding deliberation and preventing fraud and perjury.

Still a further argument is based on considerations of public welfare and health. Requiring a health certificate as a condition precedent to a marriage license may be futile if physical examination can be evaded by entering into a common law marriage.<sup>58</sup> The government has few opportunities to check health: in school, in the military service, and perhaps prior to marriage.

One of the most effective arguments for the abolition of common law marriage is little concerned with well being, affection or rectitude. It is based primarily on issues of wealth and power. Unrecorded common law marriages result in confusion of the public records.<sup>59</sup> Land transactions may be jeopardized when they take place without the required joinder of an alleged common law husband or wife. Title to land may be clouded after the death of one of the participants, with all kinds of complications arising out of dower, homestead, and tenancy by the entirety. Also, the government may be unable to keep track of the population. No reliable statistics on marriage and divorce are possible so long as a hazy concept is permitted to befuddle the census.<sup>60</sup>

All these rationalizations favoring abolition of common law marriage acquire new shades of meaning when we consider the persons and pressure

<sup>57</sup> *Fincher v. Fincher*, 55 So.2d 800, 802 (Fla. 1952). Present trends do not substantiate this statement. Only five cases involving common law marriage have been reported in Florida since 1955, the year in which Rothstein's survey was published; see Rothstein, *supra* note 17, at 104. See also Murray, *Third Survey of Florida Law*, 12 U. MIAMI L. REV. 428, 430 (1958); Murray, *Fourth Survey of Florida Law*, 14 U. MIAMI L. REV. 181 (1959).

<sup>58</sup> See Williams, *supra* note 11, at 447, 448; Roxborough, *Antenuptial Physical Examination on Common Law Marriage in Michigan*, 16 U. DET. L.J. 174 (1953); Gilkey, *supra* note 56, at 48; Note, *Common Law Marriage—A Legal Anachronism*, 32 IND. L.J. 99, 109 (1956).

<sup>59</sup> See Hall, *Common Law Marriage in New York State*, 30 COLUM. L. REV. 1, 11 (1930); Note, 32 IND. L.J. 99, 108 (1956). But see *Thomson v. Thomson*, 236 Mo. App. 1223, 1232, 163 S.W.2d 792, 797 (1942): "All history teaches us that there is no permanency in the preservation of written records; and the present day bombing and total destruction of entire cities and towns, accompanied by the almost total extinction of the population of such places and the forced migration and dispersal of the survivors, constitute a cogent argument in support of the wisdom of the ancient rules of evidence which permit proof of marriage by evidence other than that of issuance of a license and proof of performance of a ceremony."

<sup>60</sup> An Ohio court complains: "Why require statistics to be compiled or provided for, when, if all these formalities are unnecessary, they will certainly be neglected and the statistics will certainly be incomplete and inaccurate?" *Bates v. State*, 9 Ohio C.C.R. (n.s.) 273, 276 (1906). See also CARSON, *op. cit. supra* note 28, at 51.

groups who make them. At once a heavy institutional pressure becomes apparent.<sup>61</sup> It is not only the courts which look with disfavor upon common law marriage but also state attorneys general, the American Bar Association, various state bar associations, the Commissioners on Uniform State Laws, the Social Security and Veterans' Administrations, welfare organizations, state bureaus of vital statistics, and, we may assume, the Bureau of the Census.<sup>62</sup> In addition there may be an insurance lobby because of the frequency with which common law marriages are claimed by alleged widows to obtain benefits under workmen's compensation laws.<sup>63</sup>

#### ARGUMENTS FAVORING RETENTION OF COMMON LAW MARRIAGE

On the other side of the fence we find primarily conservative state legislators, frequently elected from rural, sparsely populated districts. These legislative groups may be the primary targets of institutional pressure. Since they

<sup>61</sup> Legal authors frequently reflect in their writing the policies of the institutions to which they are attached. A formal recital of disclaimer may have little actual significance. Compare Billig & Lynch, *Common Law Marriage in Minnesota: A Problem in Social Security*, 22 MINN. L. REV. 177 (1938), with Moynahan, *Common Law Marriage in Ohio*, 5 OHIO ST. L.J. 26 (1938). Billig was employed as senior attorney and Lynch as claims attorney in the Office of the General Counsel of the Social Security Board. Moynahan was employed as research attorney in the same office. The authors state in identical language that they express their opinions as individuals only, and in no sense for the Social Security Board or the Office of the General Counsel of that Board. A further comparison of both articles shows corresponding policy considerations and language favoring the Board, culminating in parallel invitations to the local bars of Minnesota and Ohio to reconsider the issue of common law marriage in view of the enormous claims which may be raised by alleged "widows" and "widowers" against the federal government. See Billig & Lynch, *supra* at 177-79; Moynahan, *supra* at 32-34.

Koegel, who was associate counsel of the United States Veterans' Bureau, discusses his professional experiences in World War I with claims based on alleged common law marriages, which, he feels, were mostly unjustified; see KOEGEL, *op. cit. supra* note 54, at 102. That the views of the Veterans Administration on common law marriage may be colored in favor of the government was recognized by a federal court in *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949): "In addition to denying plaintiff the benefits of the veteran's insurance, the action of the Veterans Administration in effect pronounces that the two small children here concerned had a father who died a bigamist, that they themselves are bastards, and that their mother is an adulteress. As will appear hereinafter, by pressing its inquiry only a little farther the Veterans Administration could, without difficulty, have reached the opposite decision."

<sup>62</sup> As to the views of state attorneys general on common law marriage, see Howery, *Marriage by Proxy and Other Informal Marriages*, 13 U. KAN. CITY L. REV. 48, 64-99 (1944-45); as to those of the American Bar Association see 1 VERNIER, *AMERICAN FAMILY LAWS* 108 (1931); as to the views of state bars see, e.g., *Annual Report, Florida Bar Committee on Family Law*, 32 FLA. B.J. 230 (1958); as to the views of the Commissioners on Uniform State Laws see KOEGEL, *op. cit. supra* note 54, at 167; as to the views of the Social Security and Veterans' Administrations see note 61 *supra*. The perspectives of local welfare organizations can be inferred from the example of FLA. STAT. § 409.183 (1959); as to those of bureaus of vital statistics see Note, 23 IOWA L. REV. 75, 81 (1937), which refers to the 76th Annual Report of the Massachusetts Bureau of Vital Statistics.

<sup>63</sup> The legislative history of the recent abolition of common law marriage in Indiana is closely linked with a continuing pressure on the Indiana legislature to reduce liability in workmen's compensation cases. See Note, 32 IND. L.J. 99, 108 (1956).

often dominate local politics, their reluctance to abolish common law marriage may be one of the reasons why it is still retained in some jurisdictions.<sup>64</sup> The issue of abolishing common law marriage may be only incidental to more important ones; it may be part of a power struggle of much larger scope. So far the outcome is a status quo. Since these groups are on the defensive and control fewer institutional facilities than those favoring abolition of common law marriage, the strategy is essentially one of delay and procrastination. Consequently, the arguments of these groups do not often appear in print. These rationalizations, therefore, are much less articulate than those favoring abolition. They refer primarily to practical needs.<sup>65</sup> Common law marriage, some feel, furnishes a handy tool to avoid hardship in individual cases. It may aid and protect the poor and the ignorant in their family relations.<sup>66</sup> Also, it may benefit an innocent spouse after removal of some impediment to a prior formal marriage, or after migration to a more obliging jurisdiction.<sup>67</sup> Finally—and this is probably one of the main arguments—it may be used to protect innocent children from the stigma of illegitimacy.<sup>68</sup>

To this short list we may add some further grounds which are not sufficiently spelled out elsewhere. The enormous complexity of our modern federal system, a complexity which supersedes the unlimited space of the frontier days, is relevant here. Not only do we have fifty-one different laws of marriage, but sometimes the variations are substantial within a few miles' radius. Florida, for example, is unconcerned about affinity. A man in Florida apparently may marry his step-mother after she obtains a divorce from his father, even if she has had children from that marriage.<sup>69</sup> Alabama, Florida's neighbor in the northwest, considers such marriages contrary to the laws of nature "as generally recognized in Christian countries."<sup>70</sup> We may safely assume that public feeling on the problem of affinity does not really differ in Florida and Alabama. Many seemingly strong policy clashes in the law of marriage are fictitious. Variations of the described kind may eventually grow within the same region, perhaps more or less capriciously initiated and developed by local legislators and courts, but without response from the people. Common law

<sup>64</sup> See Williams, *Solemnization of Marriages: The Common Law Marriage—Never Solemn and No Longer Common—Will It Remain Law?*, 13 U. MIAMI L. REV. 447, 453 (1959).

<sup>65</sup> See Black, *Common Law Marriage*, 2 U. CINC. L. REV. 113, 131 (1928).

<sup>66</sup> See Williams, *supra* note 64, at 453. In Southern states this rationalization coincides largely with a less outspoken one, occasionally appearing in newspapers, that legislative abolition of common law marriage would work an undue hardship upon the Negro population. See Murray, *Third Survey of Florida Law*, 12 U. MIAMI L. REV. 428, 429 (1958). See also note 28 *supra*.

<sup>67</sup> See KOEGEL, *op. cit. supra* note 54, at 153–60; JACOBS & GOEBEL, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 144–47 (1952); Note, 10 TUL. L. REV. 435, 441 (1936).

<sup>68</sup> See Black, *Common Law Marriage*, 2 U. CINC. L. REV. 113, 114 (1928).

<sup>69</sup> FLA. STAT. § 741.21 (1959).

<sup>70</sup> See *Osoinach v. Watkins*, 235 Ala. 564, 566, 180 So. 577, 579 (1938).

marriage may furnish a counteracting device to be applied in individual cases by local courts. On the other hand, increasing rigidity on the local level in matters of marriage may eventually result in federal regulation of the whole marital scheme. The question may be whether American society as a whole is benefited by a state regulated, airtight system of formal marriage. State regulation, if it is to be retained in the field of domestic relations, may require the continued presence of conceptual avenues of escape. The ambiguity and evasiveness of the concept of common law marriage may serve this social function. From this standpoint, the well balanced distribution of common law marriage jurisdictions over the United States is worthy of closer scrutiny. Is this balance accidental? The answer is not easy because of the many intangible factors in a subdivided and stratified society such as ours.

A further argument that could be made for retaining common law marriage is of a more psychological nature. Almost all of the objections to common law marriage, in particular the ones bearing a moral connotation, can be raised equally against formal marriage. True, society has changed, but so has the concept of formal marriage. Easy divorces are available, and frequently a formal marriage may be entered into for temporary convenience, without an unconditional intent to be bound for life.<sup>71</sup> Cases illustrate that notorious concubinage and even debauchery may ultimately lead to a formal and ceremonial marriage.<sup>72</sup> Modern dating practices encourage promiscuity in various shades, although they normally culminate in formal marriage. A sociologist asserts that today's marriage is for most young Americans merely a legally sanctioned analogue to a first liaison which provides for greater privacy than does the back seat of an automobile or a temporarily deserted living room.<sup>73</sup> And medieval English authorities stated that not infrequently the call of sensuality might lead to an ecclesiastical ceremony, the church thereby becoming a vehicle for lust and carnality rather than an instrument of faith and truth.<sup>74</sup>

Every divorce lawyer knows that gold diggers abuse formal marriage as well as common law marriage. The female party is the aggressor in the vast majority of matrimonial cases,<sup>75</sup> and issues of wealth and property usually overshadow considerations of status, irrespective of whether the litigation concerns an informal or a formal marriage. Blackmail and extortion by a "formal and licensed" wife is frequent in divorce litigation, both in the preliminary phase of cruel bargaining on the divorce grounds, and later when the issue is custody of

<sup>71</sup> See MEAD, *MALE AND FEMALE* 354-56 (1949); GORER, *THE AMERICAN PEOPLE* 120 (1948).

<sup>72</sup> See *Cole v. Cole*, 3 Fla. Supp. 91 (Cir. Ct. 1953); *French v. McAnarney*, 290 Mass. 544, 195 N.E. 714 (1935).

<sup>73</sup> GORER, *op. cit. supra* note 71, at 120.

<sup>74</sup> See Note, 32 *IND. L.J.* 99, 100 n. 4 (1956).

<sup>75</sup> See JACOBSON, *op. cit. supra* note 34, at 119.

the children and the support money which goes with them.<sup>76</sup> On the other hand, the claim of blackmail and fraud, although vigorously voiced, is not always substantiated in litigation involving alleged common law marriages.<sup>77</sup> As to the argument that form may safeguard deliberation, and that by insisting on licenses it may be more difficult for women to take advantage of gullible males, again the counter argument can be made that lack of form may also safeguard deliberation, at least as far as the female party is concerned. A woman may think twice before entering into a sexual relationship without formal license. In any event, the degree of deliberation of both parties is rarely high because of the romantic concept of love, no matter whether a formal or informal relationship is the result. The hasty, though formal, marriages of young couples who run off to neighboring jurisdictions to save themselves a few days' waiting period required under local law do not speak for a high degree of deliberation.<sup>78</sup>

It is true that so-called common law spouses frequently do not consider formal divorce to be necessary. Consequently, a common law marriage is often terminated by factual desertion, or so-called poor man's divorce. But this is also true of many formal marriages. The conventional assertion of lawyers that both common law marriage and licensed marriage can be dissolved only by formal divorce is not borne out by reality. Every year in the United States thousands of husbands abandon their wives, even though their marriages were formal, and a great many of them are never located again.<sup>79</sup> Legal presumptions work in favor of subsequent marriages, particularly if the deserting spouse has lived in many states, or if his itinerary is uncertain or erratic. The more or less fictitious presumption that somewhere he obtained a valid divorce may be impossible to overcome. As a result of this, the poor man's divorce is frequently more effective than, let us say, a formal Nevada divorce decree.<sup>80</sup>

<sup>76</sup> See CARSON, *THE FAMILY, MARRIAGE AND DIVORCE IN FLORIDA* 373, 397, 722 (1950); Weyrauch, *The Kinsey Reports and the Legal Mind*, 11 U. FLA. L. REV. 284 (1958).

<sup>77</sup> *Chaachou v. Chaachou*, 73 So.2d 830, 838 (Fla. 1954). This case, still pending in 1960 is referred to as an illustration of the assumed evils of common law marriage; see Murray *supra* note 66, at 429; Williams, *supra* note 64, at 449 n. 36. Actually, the case seems more to illustrate judicial procrastination.

<sup>78</sup> See *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 23 (1954) (dissenting opinion of Clark, J.).

<sup>79</sup> According to a 1957 estimate, about 100,000 husbands abandon their families annually in the United States, with a total of about 1,000,000 "fugitive husbands" and about 5,500,000 individuals affected. Details may be obtained by writing to the Family Location Service, Inc., formerly National Desertion Bureau, Inc., 31 Union Square, New York, N.Y. Actually, any estimate is highly speculative because of the absence of statistics and lack of common denominator on marriage breakup. See Rheinstejn, *supra* note 28, at 645-53.

<sup>80</sup> See *Spears v. Spears*, 178 Ark. 720, 12 S.W.2d 875 (1928); *Teel v. Nolen Brown, Inc.*, 93 So.2d 874 (Fla. 1957); *Walker v. Matthews*, 191 Miss. 489, 3 So.2d 820 (1941). Compare the ineffective Nevada divorce in *Williams v. North Carolina*, 317 U.S. 287 (1942), 325 U.S. 226 (1945). On the legal effectiveness of divorce by presumption, see Rheinstejn, *supra* note 28, at 650-51.



Thus the formal-informal marriage dichotomy corresponds to the possibility of formal and informal divorce, the latter one being a divorce by presumption. As poor man's divorce may effectively dissolve any marriage, no matter whether common law or licensed, it is perhaps not very realistic to imply an intent to be married from a fictitious notion that only formal divorce or death may terminate the relationship.

The upshot is that since most arguments against common law marriage can be applied equally to licensed marriage, presumably more is involved than a rational desire to do away with the evils of informal unions.<sup>81</sup> We may have, partially at least, the manifestation of a subconscious anxiety, perhaps a carry-over from infancy, supported by puritan heritage. The subjects of this anxiety may want to prevent the breaking up of the home by knitting parent images together in a compulsive ritual. Common law marriage as an ambiguous and elusive notion tends to increase this anxiety, thus furnishing a scapegoat. Yet abolition may not help. Formal marriage, in modern times, offers little more personal security than common law marriage unless the parties to it are bound together by choice rather than social pressure and legal compulsion.

#### EMERGENCE OF ESCAPE STRATEGIES

The discussion may not properly be left at this point. The issue is infinitely more complicated. All the arguments for retaining common law marriage do not preclude the possibility of numerous alternative escape avenues in case of abolition, even if abolition were to become uniform in the United States. Non-common law marriage jurisdictions have developed other types of informal marriage. Although only a few major examples will be mentioned here, we may assume that each non-recognizing jurisdiction produces its own escape devices which moderate the rigidity of formal marriage.

Tennessee has developed over more than a century a whole battery of techniques by judicial fiat.<sup>82</sup> Marriage by estoppel may be found in cases of cohabitation over a long period of time, irrespective of a bona fide attempt of the parties to comply with the requirements of statutory marriage. Marriage by

<sup>81</sup> According to Black, *supra* note 68, at 132, obscure emotions and psychological inhibitions are responsible for the hostility toward common law marriage. Parallel explanations of a more rational nature are, of course, not foreclosed—for example, the desire of the federal government or of private business to preserve their wealth by narrowing the circle of recipients of social security or workmen's compensation benefits. See notes 61–63 *supra*. In a bundle of motivations, the ones based on suppressed anxieties are usually subconscious but powerful, thus furnishing incentive for action. The parallel motivations which are on a conscious level, being less embarrassing, furnish rationalizations for the proposed action. The reasons given by lawyers for abolition of common law marriage are ordinarily taken from the conscious level of the personality. An occasional innuendo pointing in the direction of underlying anxieties may make the argument more effective.

<sup>82</sup> For a collection of cases, see Notes, 19 TENN. L. REV. 83 (1945); 20 TENN. L. REV. 621 (1949); 3 VAND. L. REV. 610 (1950). See also *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949): "That Tennessee does not recognize common law marriages is a statement often used, but loosely, and with little support."

conclusive presumption or by prescription, and marriage by ratification after removal of some impediment, are other techniques used in Tennessee for granting relief in cases of continued cohabitation.

Missouri, Washington, and Louisiana have developed a method of marriage by presumption which differs somewhat from the Tennessee approach.<sup>83</sup> In these states prolonged cohabitation and repute of being married merely raise a rebuttable presumption that somewhere and somehow a formal marriage was contracted. Actually, this so-called rebuttable presumption may be so hard to overcome that, if the court wishes, it becomes conclusive for all practical purposes. Marriage, after all, may take place anywhere, because it is not linked up with notions of domicile, as is divorce. The person attacking this kind of a marriage may be faced with the burden of searching the records in all American jurisdictions, and even in foreign nations, regardless of the residence of the presumed spouses. A Louisiana writer submits, therefore, that this manipulation of evidence is in fact a relaxation of the rule requiring some act of celebration, and that it closely approaches a recognition of common law marriage.<sup>84</sup> Louisiana, although technically not recognizing common law marriage, also has a so-called putative marriage to protect the innocent spouse. A reasonable belief in the existence of a marriage may be sufficient to brush aside all formal requirements.<sup>85</sup>

Kentucky has developed a statutory method of recognizing common law marriage for limited purposes of workmen's compensation, while denying recognition in other respects.<sup>86</sup> Virginia and West Virginia treat children from common law marriages as legitimate, although the marriage itself is held to be

<sup>83</sup> Louisiana: See Comment, 24 TUL. L. REV. 217, 230 (1949); Missouri: See JACOBS & GOEBEL, *CASES AND MATERIALS ON DOMESTIC RELATIONS* 118 (3d ed. 1952), stating that this method in effect circumvents statutory abolition of common law marriage; Washington: See Note, 1 WASH. L. REV. 277 (1925). These three states are given merely as illustrations. Actually, marriage by presumption is available in all American jurisdictions, particularly all those that purportedly do not recognize common law marriage. Black, for example, prefers to classify Maryland as a common law marriage jurisdiction for these reasons. See Black, *supra* note 68, at 119. *But see* Myerberg, *Common Law Marriage*, 29 GEO. L.J. 858, 861 (1941).

<sup>84</sup> See Comment, 24 TUL. L. REV. 217, 230 (1949). This is only another illustration of the everyday experience that it does not make any practical difference whether one has rights or whether one can prove them. As the marriage by presumption fits into peculiar patterns of common law thinking, it is presumably available in any American jurisdiction, irrespective of mandatory form requirements of local statutes. Adopting the rationale of the Louisiana Comment, *supra*, this means that the actual situation in any American jurisdiction closely approaches recognition of common law marriage, no matter how desperately the local policy makers try to do away with it.

<sup>85</sup> See LA. CIV. CODE arts. 117, 118 (1870); Succession of Marinoni, 183 La. 776, 164 So. 797 (1935); Comment, 10 TUL. L. REV. 435 (1936).

<sup>86</sup> KY. REV. STAT. § 342.080 (1959). This statute concerns the question of dependency for purposes of workmen's compensation. It provides that compensation shall cease when a dependent enters into a "legal or common law marriage." See *Elkhorn Coal Corp. v. Tackett*, 243 Ky. 694, 49 S.W.2d 571 (1932).

void.<sup>87</sup> New Hampshire has a form of marriage by statutory fiction. After prolonged cohabitation, and the death of one of them, the parties are deemed to have been legally married. There are still other instances in which a valid marriage may be found despite irregularity, or complete absence, of solemnization.<sup>88</sup>

Florida, still a recognizing jurisdiction, has already laid the foundation for alternative doctrines of informal marriage in case common law marriage should be abolished. The directory-mandatory dichotomy as to license requirements can be manipulated to sustain marriages, even though formal requirements are not met. Even those Florida authorities favoring abolition of common law marriage are in favor of retaining this distinction to avoid individual hardship cases.<sup>89</sup> At the present time all Florida license requirements are held to be directory.<sup>90</sup> If common law marriage should be abolished, query how much form would be required in order to sustain a valid marriage? The void-voidable dichotomy can be manipulated equally as well in Florida as in any other jurisdiction to reach practically the same effects as in a common law marriage. The strategy will be to find a voidable marriage in case of formal defects. In other words, a marriage would be legal until invalidated by some affirmative step. The likelihood of such a step is not very great after the birth of a child or death of one of the spouses. This argument has already been made in Florida to sustain certain kinds of proxy marriages.<sup>91</sup> In one instance the Supreme Court of Florida developed a doctrine of ostensible marriage for the purpose of holding an alleged husband liable.<sup>92</sup> In another case a bigamous marriage was sustained by way of estoppel, at least for the purpose of obtaining separate maintenance, although the alleged wife apparently was everything else but bona fide.<sup>93</sup> In these cases conventional doctrines were manipulated

<sup>87</sup> See Notes, 30 VA. L. REV. 352 (1944); 40 W. VA. L.Q. 77 (1933).

<sup>88</sup> See N.H. REV. STAT. ANN. §§ 457:39, 457:40 (1955); *De Lisle v. Smalley*, 95 N.H. 314, 63 A. 2d 240 (1949); OP. ATT'Y GEN. N.H., published in *Howery*, *supra* note 62, at 84. That common law marriage is now recognized in New Hampshire to a limited extent, see Note, 34 IND. L. J. 634, 671 (1959).

<sup>89</sup> See *Williams*, *supra* note 64, at 451-52.

<sup>90</sup> *Caras v. Hendrix*, 62 Fla. 446, 452, 57 So. 345, 347 (1912).

<sup>91</sup> See *CARSON*, *op. cit. supra* note 76, at 46, 127. The technique is related to the concept of marriage by ratification. However, it is somewhat broader, since it may cover cases of voidable marriages in which no ratification is expressed. Georgia in similar situations applies the concept of a "marriage de facto" that can be dissolved only by the affirmative step of divorce. Common law marriage, which is also recognized in Georgia, runs parallel, and its abolition presumably would not affect the independent institution of "marriage de facto." See *JACOBS & GOEBEL*, *op. cit. supra* note 83, at 315.

<sup>92</sup> *Frankel v. Fleming*, 69 So. 2d 887 (Fla. 1954); *Fleming v. Alter*, 69 So. 2d 185 (Fla. 1953), 7 U. FLA. L. REV. 356 (1954).

<sup>93</sup> *Astor v. Astor*, 7 Fla. Supp. 29 (Cir. Ct. 1955), discussed by *Murray*, *Fourth Survey of Florida Law*, 14 U. MIAMI L. REV. 181, 187 (1959).

to reach unconventional results. Although the factual situations were unique, and ordinarily would not permit generalization, the prediction may be made that decision makers will easily overcome imaginary hurdles of precedent and stare decisis after abolition of common law marriage.

The situation in Indiana is interesting. That jurisdiction recently abolished common law marriages by expressly declaring them "null and void."<sup>94</sup> In spite of this seemingly clear language almost all the alternative escape avenues already mentioned are now discussed for possible adoption. In addition, an argument is made that the legislature was not sufficiently specific for the courts to apply the "sanction of invalidity," particularly since other sanctions, criminal, administrative, civil, and fiscal, are available.<sup>95</sup> In other words, abolition of common law marriage will not necessarily be fully enforced.

This brings us to the ultimate escape strategy: non-enforcement of formal law, especially criminal statutes on fornication, adultery, and bigamy.<sup>96</sup> It is

<sup>94</sup> IND. ANN. STAT. § 44-111 (Burns Supp. 1959).

<sup>95</sup> See Note, 34 IND. L.J. 643, 662-64 (1959). A comparison of this student note with an earlier one, published in Indiana before abolition of common law marriage, shows a complete reversal of local perspectives. The earlier note, *Common Law Marriage—A Legal Anachronism*, 32 IND. L.J. 99 (1956), militantly advocates abolition of common law marriage in Indiana. The recent note, published after common law marriages were declared "null and void," displays considerable uneasiness about the now effective abolition, trying to circumvent its impact with great ingenuity.

<sup>96</sup> A few examples may illustrate this point. In a Mississippi case, *Miller v. Lucks*, a white man and a Negro woman were indicted in 1923 for unlawful cohabitation. The woman agreed to leave Mississippi, and the district attorney dropped prosecution as to both defendants. The couple went to Chicago, where they continued to cohabit and where, more than 15 years later, they entered into a formal marriage. After the woman's death in 1945 the man claimed her property, located in Mississippi, as surviving husband and sole heir. The Supreme Court of Mississippi sustained the marriage for the purposes of inheritance. The policy of the state constitution and of the local statute against miscegenation was held to be intended only to prevent persons of Negro and white blood from living together in Mississippi in the relationship of husband and wife, whereas in this case "this did not occur." *Miller v. Lucks*, 203 Miss. 824, 36 So. 2d 140 (1948), citing with approval *Whittington v. McCaskill*, 65 Fla. 162, 61 So. 236 (1913).

New York City reported in 1948 approximately 6,000 divorces granted for adultery, yet the annual report of the police department for the same year does not disclose a single arrest for the same offense. See PLOSCOWE, *SEX AND THE LAW* 156 (1951); Lasswell & Donnelly, *The Continuing Debate over Responsibility: An Introduction to Isolating the Condemnation Sanction*, 68 YALE L.J. 869, 879 n.27 (1959). Attorneys report instances in which prosecution for bigamy is dropped if the defendant, after indictment, obtains a divorce from his prior spouse. In *Williams v. North Carolina*, 317 U.S. 287 (1942), 325 U.S. 226 (1945), the state litigated for years against the two defendants, Mr. Williams and Mrs. Hendrix, claiming that their Nevada marriage was bigamous. After final conviction for bigamy, the state permitted a new formal marriage between the parties, now performed in North Carolina, and paroled them immediately thereafter. Not a single day of the sentences was ever served. See Baer, *So Your Client Wants a Divorce! Williams v. North Carolina*, 24 N.C.L. REV. 1, 32 (1945).

A large amount of illegal behavior is tolerated by police in the realm of sexual relations. Some police officials frankly state that they "consider it one of their functions to keep the judge from knowing things that he simply does not understand." See KINSEY, POMEROY &

not likely that social patterns of family organization will radically change after abolition of common law marriage. Non-enforcement of criminal sanctions may avoid individual hardship cases by establishing some kind of de facto marriage by way of executive toleration.<sup>97</sup> To all outside appearances this kind of tolerated sexual union may be hard to distinguish from a "tolerated" common law marriage, or even from any regular marriage, at least as far as an unsuspecting or sympathetic neighborhood is concerned. True, the children of these unions are illegitimate, but no one may be aware of that fact; and if they are adequately cared for, it may never become an issue.<sup>98</sup>

#### CONCLUSION

Perhaps some hypotheses and recommendations are in order. The unpopularity of common law marriage may arise from the fact that we are living in an increasingly status-conscious nation. The society pages of local newspapers, with formal announcements of marriages, are only manifestations of a universal trend. Middle class morality and modern conformism foster a standardized concept of marriage. Compulsory elements in marriage are on the in-

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MARTIN, *THE SEXUAL BEHAVIOR OF THE HUMAN MALE* 390 (1948); Weyrauch, *The Kinsey Reports and the Legal Mind*, 11 U. FLA. L. REV. 277, 280 (1958). Millions of Americans belonging to the lower layers of society are for all practical purposes permitted to live their lives with little regard to formal prescriptions on marriage; they engage in promiscuous sexual relations without being exposed to any social stigma other than being members of the lowest class. See Rheinstein, *supra* note 28, at 647. In the middle and upper strata of society the lethargic response of law enforcement may indicate that the prescription has become moribund, though it still may be effective for purposes of blackmail. See Lasswell & Donnelly, *supra* at 897; Weyrauch, *supra* at 284-85.

<sup>97</sup> The Georgia de facto marriages even enjoy a certain toleration by the courts. See note 91 *supra*. In *Campbell v. Allen*, 208 Ga. 274, 66 S.E. 2d 226 (1951), the child born of a bigamous common law marriage of 17 years' factual duration was recognized as legitimate and entitled to a share in the estate, irrespective of a pre-existing undissolved formal marriage.

<sup>98</sup> Black observes that a relationship, even though meretricious at its inception, may entail values which, in the interest of society, are worthy of protection. Black, *supra* note 68, at 133. South American jurisdictions developed a concept of "anomalous marriage," retroactively established by judicial decree, without regard to the intent of the parties to be married and with the outspoken policy of salvaging for society some of the worthwhile voluntary sexual unions. See Le Riverend-Brusone, *Anomalous Marriages*, 10 MIAMI L.Q. 481, 489 (1956); with reference to Bolivia, Chile, Cuba, Ecuador, Guatemala, Panama, and Paraguay see *id.* at 487 n.26. On the open acceptance of the "mistress system" in the Catholic countries of the Latin part of the world, see Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3, 18 (1953). On problems of factual marriage in France see Savatier, *Réalisme et Idéalisme en Droit Civil d'Aujourd'hui, Structures Matérielles et Structures Juridiques*, in 1 LE DROIT PRIVÉ FRANÇAIS AU MILIEU DU XXE SIÈCLE, ETUDES OFFERTES A GEORGES RIPERT, ETUDES GÉNÉRALES DROIT DE LA FAMILLE 75, 76-79 (1950). On Japan see Fuetto, *The Discrepancy Between Marriage Law and Mores in Japan*, 5 AM. J. COMP. L. 256 (1956). Soviet Russia originally recognized a concept of de facto marriage, but since 1944 insists on formal and mandatory registration, taking place in an elaborate ceremonial. See 2 GSOVSKI & GRZYBOWSKI, *GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE* 1153-59 (1959).

crease.<sup>99</sup> The influence of institutional pressure is heavily noticeable. For one reason or another, formal marriage, seemingly entered into for life, but actually conditioned upon cheap and speedy divorce, is more acceptable to our culture than a retroactive legal manipulation of informal unions. All social pressure goes therefore in the direction of formalized sexual ties, to be formally dissolved. To what extent this postulate corresponds to reality may be of little concern to a society in which double standards of morality are not infrequently found.

The label of common law marriage does not fit well in these newer social patterns. The rugged individualism of American frontier days, which favored the growth of common law marriage, is on the decline. All this may be part of a universal craving for greater certainty making itself felt in the law. The trend toward uniform legislation and the American restatements of the common law furnish illustrations. So does the growing desire "to get this marriage mess straightened out." On the other hand, common law marriage may still perform some valid social functions, not because of frontier conditions, but because of the increasing tension and complexity of our society. Problems arising out of the historical concept of federation, as confronted with the realities of modern life, are only one example. Common law marriage, jointly with other kinds of informal marriage, may assume the function of a safety valve for releasing accumulated pressure and avoiding hardship in individual cases.

It is submitted that abolition of common law marriage will not result in greater certainty. Informal marriage will continue to exist in changed appearance by manipulation of legal doctrines other than common law marriage which lawyers are so able to invent in case of need. The outcome will be, as the recent Indiana experience shows, the exchange of one ambiguity for other ambiguities.<sup>100</sup> Will a divorce be necessary, for example, to destroy the effects of a marriage by estoppel, by presumption, or by legal fiction? Which of these informal marriages may be a sufficient basis for a bigamy prosecution? How do these concepts affect legitimacy of children? What about the confusion of public records—will the situation be any better than before abolition of common law marriage? In any event, the controversy on common law marriage in its present state results in an enormous waste of effort and brain power which could be more constructively used for factual research on marriage. Even then, the outcome would uncover only some aspects of human nature, and hardly result in much certainty.

On the other hand, a change of legal label, wasteful as it may be, is not

<sup>99</sup> On compulsory elements in American marriage induced by social pressure and legal sanctions, see JACOBS & GOEBEL, *op. cit. supra* note 83, at 15; GORER, *op. cit. supra* note 71, at 119-21; Mudgett, *The Social Effect upon the Family of Forced Marriage*, 5 THE FAMILY 16 (1924).

<sup>100</sup> On ambiguity of legal doctrine see Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 232-36 (1943).

completely without significance. Abolition of common law marriage may have a tranquilizing function. It may create the appearance of moral achievement, while actually old impulses continue to be gratified in new channels. In this respect we face not only a legal issue, but also a psychological and sociological problem: how to cope with the subconscious anxieties of our times and their various manifestations. It is only natural that the institution of the family, which comprises both informal and formal marriage, is seriously affected. We should look for possible sources of the trouble rather than for new words. One valid undertaking would be to clarify the unbalanced influence of women on American morality; another might be to trace the subconscious effects of the Puritan heritage. Large segments of our population, if not the majority, have little historical or other relation to these phenomena, and the more or less forced process of assimilation may result in serious consequences of an emotional nature.<sup>101</sup> It is not impossible that these intangible influences increase social tension, ultimately resulting in exaggerated patterns of indulgence and deprivation. Abolition of common law marriage may fall into a vein related to other prohibitions in the American past which were legally ineffective and socially harmful as an outgrowth of unstable emotional conditions.

<sup>101</sup> Gorer points out some of the emotional strains to which immigrants, their descendants, and other minority groups are exposed. GORER, *op. cit. supra* note 71, at 188-211. The problem is of even wider scope. Puritan ideals, spreading over the country from New England, have become part of the national myth; and the process of assimilation was not always one of voluntary choice.