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TAMPERING WITH MARRIAGE

THERE ought to be a law punishing, in the interest of the state, those who tamper with marriage.¹ Tamperers may be divided arbitrarily into two obvious groups: those who, for their own purposes, make use of the ceremony and comply with the legal formalities, but who have little or no intentions of maintaining the orthodox status;² those who deny that the state has an enforceable interest in the family and insist that the process of establishing the relationship is a matter of personal contract.³ This second group, motivated by a desire for social reform, is, perhaps, a desirable source of criticism of the existing institution and should not come under the operation of the law. The first group, however, is undesirable because it is characterized neither by open and honest approval nor disapproval, but, apparently conforming, serves insidiously to shake the solidarity of the old-fashioned, stereotyped American family.⁴ The state has already seen the need for statutory protection of certain aspects of

¹ At the present time the statutes relating to marriages may be classified under the following heads: (a) statutes relating to the application for marriage (1 VERNIER, AMERICAN FAMILY LAWS [1931] § 17); (b) statutes relating to the formalities of the marriage ceremony (*id.* §§ 23-26; also [1931] 52 C. J. 1005); (c) statutes providing which attempts to marry shall be valid (1 VERNIER, *op. cit. supra*, §§ 49, 50, 51, 53 and 57; [1925] 38 C. J. 1275 *et seq.*). At the present time there appear to be no statutes which specifically make it a criminal offense to tamper with marriage.

² See *infra* notes 83-86.

³ There is a literature on this subject of which the following books are illustrative: DELL, LOVE IN THE MACHINE AGE (1930); ELLIS, LITTLE ESSAYS OF LOVE AND VIRTUE (1930); LICHTENBERGER, DIVORCE: A SOCIAL INTERPRETATION (1931); LINDSEY, COMPANIONATE MARRIAGE (1931); POPENOE, MODERN MARRIAGE: A HANDBOOK (1925); RUSSELL, MARRIAGE AND MORALS (1929).

⁴ GOODSSELL, A HISTORY OF THE FAMILY AS A SOCIAL AND EDUCATIONAL INSTITUTION (1930) 477 *et seq.*

the institution. Statutes directed at control of sex irregularities⁵ and property aspects⁶ exist in abundance. But there is a blind spot as to those persons who seek to profit by donning the traditional cloak of marriage without intending to assume the obligations.

The Blind Spot

The interest of the state in encouraging conventional marriage and in maintaining the orthodox status is evidenced by legislation⁷ and judicial opinion.⁸ By legislative and litigation processes the rights of the individual members of the family have been clarified.⁹ The nature and extent of the interest of the state in protecting the marriage status are not completely defined.¹⁰ In considering a remedy, one may choose either one of two extreme positions: abandon the theory that the state has an interest and permit the principle of individual contract¹¹ to function, or clarify the interest and require

⁵ MILLER, CRIMINAL LAW (1934) § 96 (rape), § 142 (seduction).

⁶ 3 VERNIER, *op. cit. supra* note 1, § 167 *et seq.*

⁷ The interest of the state is made apparent by many statutes prohibiting the marriage of certain individuals. See for example, 1 VERNIER, *op. cit. supra* note 1, § 43.

⁸ See *Perry v. Perry*, 199 Iowa 685, 202 N. W. 572, 574 (1925), in which the court says: "Courts must recognize that society has an interest in the permanency and stability of the marriage relation, and a severance of this relation must not be decreed except for just cause * * *."

See also *Spencer v. Spencer*, 61 Fla. 777, 55 So. 71, 72 (1911), where the court says: "The public is a silent party to all such suits, having an interest in their results, inasmuch as they affect the status of children as well as public morals and decency." And see generally SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS (6th ed. 1921) §§ 1732, 1771 and 1922, and cases cited.

⁹ LICHTENBERGER, *op. cit. supra* note 3, at 298 *et seq.*; MOWRER, DOMESTIC DISCORD (1928) 25 *et seq.*

¹⁰ As long as the interest is evidenced only by general formulae in the body of judicial opinions, it can hardly be said to be of much practical value. When, however, the state enacts specific legislation to protect its interest, or when the court sets up administrative agencies to assist it in the work, then one may say that the vagueness is clarified. Agencies such as the King's Proctor in England (10 HALSBURY, *Divorce, LAWS OF ENGLAND* [2d ed. 1909] § 1212 *et seq.*), and the Friend of the Court in Detroit (MICH. COMP. LAWS [1929] § 12783), indicate an awakening of responsibility beyond the formal phase.

¹¹ This principle has been attempted on various occasions, but has broken down after a period of time. Some form of marriage has finally made its appearance in spite of lack of protection from the state. For example, the aftermath of the breakdown of the Roman Empire found a type of Christian marriage developing. Again, in the middle of the French Revolution there was a form of marriage. As a result of the Russian Revolution, marriage restrictions were taken away entirely, but public interest has gradually forced more stable arrangements. CALVERTON, *THE BANKRUPTCY OF MARRIAGE* (1928) 233 *et seq.*

respect for it. It is convenient to discuss the second alternative by reviewing briefly the causes of the present inadequacy, to attempt an analysis of the forgotten factor, and to predicate upon certain assumptions and obstacles a proposal for a remedy.

Suggested Causes of the Present Inadequacy

Several causes may be advanced to account for the present lack of certainty in the state's interest in protecting the marriage status.

The law has lagged behind the other social sciences in a study of the human relations. The classical doctrine of the watertight compartment theory of the social sciences¹² has tended to shut off the law from normal interchange of ideas and discoveries in neighboring fields. While the physician¹³ and the social worker,¹⁴ to say nothing of the business man,¹⁵ have been learning to deal with human problems in the most realistic fashion, the lawyer functions in a system which still clings to the elementary concept that the causes of marital discord, as well as the symptoms, may be expressed in such simple formulae¹⁶ as adultery, desertion and cruelty. There is all too little interest in comparative law—that is in studying rules of law and legal concepts in different jurisdictions and legal systems. There is need for a comparative study of social and economic concepts, such as marriage and the family, in each of the social sciences, including the law. There should be some device for keeping each, if not abreast of the others, at least in touch with what is going on. One may question the practical efficacy of existing devices to this end.¹⁷

Again, the traditional processes of the law have been administered in terms of litigation.¹⁸ Whatever may have been the value of this

¹² POUND, PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK (1923) 152.

¹³ See MEDICAL CARE FOR THE AMERICAN PEOPLE (1932) 138 *et seq.*

¹⁴ See generally the proceedings of the National Conference of Social Work.

¹⁵ TABUSCH, *Standards of Business Conduct*, PROFESSIONAL AND BUSINESS ETHICS (1926) 242.

¹⁶ See MOWRER, *loc. cit. supra* note 9; GROVES, SKINNER AND SWENSON, THE FAMILY AND ITS RELATIONSHIPS (1932) 152: "The legal ground for divorce is often not the true cause."

¹⁷ For example, the functional approach of the law school has been the subject of criticism. Brosman, *Modern Legal Education and the Local Law School* (1935) 9 TULANE L. REV. 517-543; see *infra* note 72.

¹⁸ Legal scholars have long insisted upon the symbolic character of our litigation processes, the trial representing a quarrel concerning the thing in litigation, with the

device in a ruder age,¹⁹ or even today, in the settlement of disputes over property,²⁰ there are modern problems of human relationship which do not respond²¹ to proposals for solution based upon a modified battle. The interest of the state in marriage has usually come before the courts incidentally in the course of a conflict between two antagonistic individuals, each seeking personal remedies, redress or protection against the other.²² Thus the logical train of judicial thought, which begins with the generalization that the state is interested in marriage and the family, is set in the frame of a process resulting in an advantage primarily to a litigant.

The law traditionally offers the public a litigation process which ends with a court order as final as the surgeon's knife. It has been slow to provide something comparable to "treatment" by a physician. Only recently has the marriage license clerk been invested with the responsibility and discretion of refusing licenses for physical and mental defects or other causes.²³ Only recently has there

judge as an umpire between the contestants. In this picture the attorney is seen as analogous to the champion in the earlier trial by battle. See MAINE, *EARLY HISTORY OF INSTITUTIONS* (1875) c. 23. These processes have been variously criticized by Sunderland: "To sue is to fight and fights make endless feuds. Parties hesitate to resort to the courts because they shrink from a state of war with their neighbors or business associates." Sunderland, *A Modern Evolution in Remedial Rights,—The Declaratory Judgment* (1917) 16 MICH. L. REV. 69, 76. "Doubtless, the early conception of the jury as a formal substitute for the old methods of proof—battle, compurgation, and ordeal—accounts for the absence from the record of all matters affecting the means by which the jury arrived at the verdict." Sunderland, *The Problem of Appellate Review* (1926) 5 TEX. L. REV. 126, 142.

¹⁹ Originally, trial by battle was confined to the nobility; it was considered an advance over a system of private vengeance. MCKECHNIE, *MAGNA CARTA* (1914) 360 *et seq.*

²⁰ MARSHALL AND MAY, *THE DIVORCE COURT, OHIO* (1933) 11.

²¹ See Elson, *Divorce—A Study in Cooperation between Family Welfare Agencies and Legal Aid Bureaus*, a paper delivered at a meeting of the National Conference of Social Work in Kansas City (1934), and published in Bulletin No. 35 of the National Association of Legal Aid Organizations.

See also Lenroot, *The Child, the Family and the Court* (U. S. Dept. of Labor, Pub. 193, 1929) 21.

²² The following cases illustrate the fact that the remedy provided by divorce and annulment procedures is available only for the party who emerges triumphant from the ordeal: *Weiss v. Weiss*, 174 Mich. 431, 437, 140 N. W. 587, 589 (1913), where the court says: "That rule [recrimination], as applied to divorce, means that it is a remedy provided only for the innocent and injured party, and if the evidence discloses that both have shown grounds for divorce neither is entitled to it." Also see *Rolfsen v. Rolfsen*, 115 S. W. 213 (Ky. 1909); *Staples v. Staples*, 136 S. W. 120 (Tex. Civ. App. 1911).

²³ MAY, *MARRIAGE LAWS AND DECISIONS* (1929) 15 *et seq.*; 1 VERNIER, *op. cit. supra* note 1, § 17.

been a movement to create specialized domestic relations courts.²⁴ Even today divorce jurisdiction is generally withheld from such courts, seriously limiting their usefulness.²⁵ The judges, who hear divorce cases, are not always free to view the subject of family dissolution or rehabilitation in the scientific light of individualized treatment.²⁶ A perennial revision of the substantive and procedural law relating to the family under the auspices of a continuing commission of experts in each jurisdiction would be of value.

The Mental Element in Marriage

Improvements in the process of handling domestic problems have come about, in large measure, because courts and legislatures are increasingly concerned over the presence in marriage problems of a third element in addition to sex and property.²⁷ Sex regulation has been a matter largely for the criminal law.²⁸ Property interests may be disposed of civilly in actions between the parties.²⁹ But the mental element in marriage is of concern to the state as well as to the parties.

In an earlier day in the system of ecclesiastical law the mental element in marriage was included in the broader term—"the spiritual element."³⁰ Historically, the English ecclesiastical courts formulated

²⁴ See Lenroot, *supra* note 21, at 45.

²⁵ (1931) 5 ENCYC. SOC. SCIENCES 197.

²⁶ " * * * In a system so highly developed as our own, precedents have so covered the ground that they fix the point of departure from which the labor of the judge begins. Almost invariably, his first step is to examine and compare them. * * * *Stare decisis* is at least the everyday working rule of our law. * * * the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. * * * Some judges seldom get beyond that process in any case." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1928) 19-20.

²⁷ For example, in the case of *Gowin v. Gowin*, 264 S. W. 529, 535 (Tex. Civ. App. 1924), it is said: "The marriage contract is one of a peculiar character, and subject to peculiar principles."

In addition, see CALVERTON, *op. cit. supra* note 11, cc. XI and XVI; HALLE, *WOMAN IN SOVIET RUSSIA* (1934); AUSHELES, BROK, RAGOOD, *MARRIAGE, FAMILY AND DIVORCE* (Moscow, State Pub. Assoc. 1925); Kopelianskaia, *Marriage in the U.S.S.R.* (1935) 349 *LIVING AGE* 160; Strong, *We Soviet Wives* (1934) 32 *AMERICAN MERCURY* 415.

²⁸ GROVES, *MARRIAGE* (1933) 5 *et seq.*

²⁹ 3 VERNIER, *op. cit. supra* note 1, § 180; Daggett, *The Wife's Action for a Separation of Property* (1931) 5 *TULANE L. REV.* 55.

³⁰ SIR JAMES DALRYMPLE OF STAIR, *INSTITUTIONS OF THE LAW OF SCOTLAND*

a dignified concept to support it.³¹ Marriage had sex and property aspects, but it was, as well, a sacrament. When jurisdiction over marriage became a matter for the civil courts, the machinery for enforcing the sanction changed from church to state. At first marriage was regarded as an ordinary commercial contract,³² perhaps because the English common law courts took over only the commercial aspects of marriage, leaving the rest to the ecclesiastical jurisdiction.³³ With two court systems functioning side by side, the spiritual element was not likely to be forgotten. In this country, from colonial days, there was only one system of courts.³⁴ In 1857 the English ecclesiastical control came to an end.³⁵ With only civil machinery to administer it, something was lost from the spiritual overtones. The broader concept is gradually emerging in the present legal system. It has still to reach the earlier level.

The civil ideal may be expressed as a "marriage of true minds." This has a significance broader than is implied in the doctrine "*consensus non concubitus facit matrimonium*."³⁶ It is one of those

(1681) Pt. 1, tit. iv. See also GOODSSELL, PROBLEMS OF THE FAMILY (1928) 3-101; *Ecclesiasticism and the Law* (1908) 16 AMER. LAWY. 275. "The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament * * *." KAN. REV. STAT. ANN. (1923) § 101.

³¹ 1 COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW (1860) §§ 546, 568.

³² See 1 BL. COMM. *433.

³³ For example, see *Baker v. Smith*, Sty. 295 (K. B. 1651); *Holcroft v. Dickenson*, Carter 233 (Com. Pl. 1672).

³⁴ Our courts, in colonial days, had difficulty in determining the nature and extent of their jurisdiction to deal with family problems, but finally came to the conclusion that the jurisdiction was equitable and not ecclesiastical. "The jurisdiction of this court is that of the English chancery, with the various additions which have been made to it by our own laws. This court has jurisdiction in cases of fraud, and especially in all cases of contracts procured by fraud. * * *

"Viewing this contract as one obtained by fraud, and upon this ground alone, I am of the opinion, that this court has cognizance of the case, and may annul this marriage." *Ferlot v. Gojon*, 1 Hopk. Ch. 478, 494 (N. Y. 1825). See also *Denison v. Denison*, 35 Md. 361 (1872).

In *Short v. Stotts*, 58 Ind. 29 (1877), the court said: "The doubt which seems to have arisen in the early cases was not whether, on the principles of the common law, the action would lie, but whether, as the ecclesiastical courts had cognizance of matrimonial matters, such action could be maintained in a common law court * * * but the establishment of separate ecclesiastical courts in England was not part of the common law * * * the whole system of English ecclesiastical courts as separate from the civil, is foreign to our institutions, and has no place in our jurisprudence. There is here, therefore, no conflict of jurisdiction between courts of one class and the other."

³⁵ Matrimonial Causes Act, 1857, 20 and 21 VICT. c. 85.

³⁶ *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54 (1811).

concepts which could be better understood if studied comparatively and simultaneously in all the social sciences. The comparative ineffectiveness of the law in dealing with the mental element is indicated by its unwillingness to attempt to do anything toward the solution of certain legally marginal domestic problems which recur with some frequency.³⁷ One wonders what physicians, psychiatrists, social workers and representatives of other sister professions would have done with these cases if interprofessional cooperation were easy.

Before progress in the name of reform can be made, an adequate formula should be stated. Judicial opinions distinguish marriage from the ordinary contract by stating that it is "something more," a "status."³⁸ But it is not clear how much more or what are the elements of the status. One may ignore the "blind spot" and leave the subject to be treated as an individual contract. But if one chooses to argue that it is for the public welfare, and therefore justifiable, to develop the interest of the state in the subject and to stabilize, regiment and dignify domestic relations, an occasion is offered for an exercise of the police power.³⁹ Before taking action, however, it is well to establish a foundation of certain assumptions and to consider certain obstacles.

³⁷ Ryle v. Waechter, 202 Iowa 695, 210 N. W. 926, 49 A. L. R. 557 (1926); Somberg v. Somberg, 263 N. Y. 1, 188 N. E. 137 (1933); Morrow v. Yannantuono, 152 Misc. 134, 273 N. Y. Supp. 912 (1934); Snedaker v. King, 111 Ohio St. 225, 145 N. E. 15 (1924).

³⁸ "It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. * * * It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U. S. 190, 210 (1888).

In Gowin v. Gowin, 292 S. W. 211, 213 (Tex. Comm. App. 1927), it is said: "* * * Marriage, because it is a status and so far as anything here present is concerned is governable by state law."

See also GROVES AND OGBURN, AMERICAN MARRIAGE AND FAMILY RELATIONSHIPS (1928) 3-4; GROVES, *Companionship in Marriage*, *op. cit. supra* note 28.

³⁹ The police power has already been extended in other analogous situations as far as it would be necessary here. Cf. for example, the Federal Espionage Act (Act of Congress of June 15, 1917, 40 STAT. 219 [1917], 50 U. S. C. § 33 [1934], as amended May 16, 1918, 40 STAT. 553); Abrams v. United States, 250 U. S. 616 (1909).

Assumptions

The first assumption is that under modern conditions, the family, as a piece of social, economic and legal machinery, is valuable to the state.⁴⁰ It provides (1) a place for rearing children, (2) a device for holding private property, (3) a means for regimenting the mutual interests of the sexes.⁴¹ It is a different sort of agency from the primitive,⁴² the Roman⁴³ and the medieval⁴⁴ prototypes. It is shorn of much of its solidarity and authority.⁴⁵ It is attacked as an obstruction to socialization of property, sex freedom, individualism.⁴⁶ Yet, it is regarded as a fundamental human need. Insofar as it is useful to the state, public interest may attach to it and protect it.

The second assumption is that since the family is admittedly subject to modification by social and economic pressure, it may also be affected adversely or beneficially by statute and court decision.⁴⁷ In the past these efforts have been directed largely in three directions—segregation of married people into a special class, improving the condition of members of the class, and controlling the process by which the relationship may be dissolved. The state, by legal process, has sought progressively to draw a line between those who are married and those who are not, by such devices as registration⁴⁸

⁴⁰ GROVES, *op. cit. supra* note 28, at 38 *et seq.*

⁴¹ JACOBS AND ANGELL, *A RESEARCH IN FAMILY LAW* (1930) 37, 38.

⁴² For a discussion of the purposes of the primitive family, see (1931) 6 *ENCYC. SOC. SCIENCES* 65; GOODSSELL, *op. cit. supra* note 4, at 31 *et seq.*; GROVES, *SOCIAL PROBLEMS OF THE FAMILY* (1927) c. 2.

⁴³ 2 WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* (1925) 332 *et seq.*; GOODSSELL, *op. cit. supra* note 4, at 112 *et seq.*

⁴⁴ "Quite as truly as in primitive Palestine, Greece and Rome, the home of the early middle ages was the heart of the industrial life of the community." GOODSSELL, *op. cit. supra* note 4, at 277.

⁴⁵ GROVES, *op. cit. supra* note 28, at 215.

⁴⁶ CALVERTON, *The Decay of Modern Marriage*, *op. cit. supra* note 11, especially at 70 *et seq.*

⁴⁷ The church had very definitely in mind the establishment of a strong family. Similarly, modern legislatures by their action of legislation indicate a belief in the usefulness of the laws which they pass.

See Seagle, *Family Law* (1931) 6 *ENCYC. SOC. SCIENCES* 81; GOODSSELL, *op. cit. supra* note 4, at 537 *et seq.*

⁴⁸ The following statutes show the historical progress of registration of marriages in England over a period of sixty-two years: Marriage Act, 1836, 6 and 7 W.M. IV, c. 85, § 30; Marriage and Registration Act, 1856, 19 and 20 VICT. c. 119, § 12; Extra-parochial Places Act, 1857, 20 VICT. c. 19, § 10; Marriage (Society of Friends) Act,

and license,⁴⁹ inspection for physical defects,⁵⁰ a ceremony⁵¹ and the like. Rewards and special privileges may be given to make the status sociologically and economically,⁵² as well as romantically, attractive.

1860, 23 and 24 VICT. c. 18, § 2; Regulation of Births, Deaths and Marriages (Army) Act, 1879, 42 and 43 VICT. c. 8, § 2; Foreign Marriage Act, 1892, 55 and 56 VICT. c. 23, § 20; Marriage Act, 1898, 61 and 62 VICT. c. 58, § 1 (3). For registration of marriages in the United States, see 1 VERNIER, *op. cit. supra* note 1, § 34.

⁴⁹ The English statutes requiring issuance of license before performance of the marriage ceremony have an ancient lineage extending over a four hundred year period. 25 HEN. VIII, c. 21, §§ 2-12 (1533-4); *Canones Ecclesiastici*, 1603, 101, 104; Marriage Act, 1823, 4 GEO. IV, c. 76, § 20; Marriage Act, 1824, 5 GEO. IV, c. 32, § 2; Marriage Act, 1836, 6 and 7 WM. IV, c. 85, § 1; Ecclesiastical Jurisdiction Act, 1847, 10 and 11 VICT. c. 98, § 5; *Canones Ecclesiastici*, 1882, 2; Marriage Act, 1886, 49 and 50 VICT. c. 14, § 1; Marriage Measure, 1930, 20 GEO. V, no. 3, § 3.

For a compilation of the American statutes governing marriage licenses, see 1 VERNIER, *op. cit. supra* note 1, at 59.

⁵⁰ The most modern development in the field of prohibited marriage began at the turn of the century. This is the prohibition of marriages on account of disease. Only half of the American jurisdictions have, as yet, adopted such legislation. Eight states (Alabama, Louisiana, Maine, North Dakota, Oregon, Texas, Wisconsin and Wyoming) provide that the parties must present to the license issuer a medical certificate to the effect that they are free of the prohibited disease. Louisiana and Wisconsin provide for detailed physical examination. 1 VERNIER, *op. cit. supra* note 1, at 200. A leading case on the subject is *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966 (1914), upholding the constitutionality of the Wisconsin statute requiring a medical examination and certificate.

⁵¹ In England the ceremony has held and holds deep religious significance, and, consequently, has become an important part of the marriage act. In the United States, however, statutes upon the form of marriage do not attempt to impose detailed rules. Over half of the jurisdictions have not legislated upon the general subject at all, and in the twenty-three that have, not one requires any particular form of marriage ceremony. 1 VERNIER, *op. cit. supra* note 1, at 92. Common law marriages require detailed ceremony. HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* (1904); 1 VERNIER, *op. cit. supra* note 1, at 102; Hall, *Common Law Marriage in New York State* (1930) 30 COL. L. REV. 1.

⁵² The field of taxation offers a notable example of such privilege. In England a married man secures an exemption of £150, a single man is allowed £100. For the first child, the parent is allowed an exemption of £50 and £40 for each subsequent child. Finance Act, 1920, 10 and 11 GEO. V, c. 18. The United States federal income tax law allows a married person living with his spouse \$2500 as a personal exemption, while his single neighbor is allowed only \$1000. In addition the married man is allowed \$400 for each child. 48 STAT. 692 (1934), 26 U. S. C. § 25(b) (1935). In Germany a tax is levied on all bachelors. *Taxing German Bachelors*, LITERARY DIGEST (July 19, 1930) 14.

Headlines in our daily newspapers depict the economic favoritism shown European married couples. 4412 *Wed to Obtain Award Offered by Fascist Party*, N. Y. Times, Apr. 23, 1935, p. 5, col. 4; *German Unemployment Relief Plan Includes Dowries for 200,000 Brides*, N. Y. Times, Mar. 23, 1934, p. 22, col. 4; *Mussolini Offers Award to Army, Navy, and Air Force Officers in Birth Rate Drive*, N. Y. Times, May 16, 1935, p. 25, col. 3.

Another field is that of homesteads and exemptions in the United States. "The conservation of family homes is the purpose of homestead legislation. The policy of the

The state in this country for the last century has also been more and more interested in facilitating dissolution of the marriage tie for cause.⁵³ The consent divorce,⁵⁴ just around the corner for the individualist, may be a logical next step. Such a relaxation of historical legal obstacles to family dissolution has a part in modifying the formal marriage relation.⁵⁵ The creation by law of a special class with rewards and benefits to its members cannot but affect the attitude of the public toward membership in the class. The state has exercised its police power in the past to keep out of that class certain persons who, because of age, physical and mental condition, and other reasons, are not regarded as suitable members. To include in the list of undesirables those who intend to tamper with the institution for their own purposes is merely to enlarge the protection of the state to cover mental, as well as physical and property, menaces.

The third assumption is that the state is interested in fostering, not marriage at any cost, but a family stable enough to perform certain, definite, social and economic functions.⁵⁶ To this end some preliminary selection of personnel is inevitable. If one conceives of such a family as analogous to a professional group charged with certain functions in the public service, it is possible to argue for the erection and maintenance of useful admission requirements. Under such a system adherence to a standard of conduct and a code of ethics could be enforced by a process of discipline more like disbarment⁵⁷ than divorce.

state is to foster families as the factors of society, and thus promote the general welfare * * * the state is concerned in the conjugal and parental relations; in the promotion of marriages and the rearing of children." WAPLES, HOMESTEADS AND EXEMPTIONS (1893) § 2. "The protection of the *family* from dependence and want is the expressed object of nearly all the homestead and exemption laws." THOMPSON, HOMESTEADS AND EXEMPTIONS (1878) § 40.

Even in time of war the family is shown partiality. Our 1917 Draft Act provided that the President should have the power to exclude "those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable." 40 STAT. 79 (1917), 50 U. S. C. § 165 (1934).

⁵³ NEV. COMP. LAWS (1929) § 9460.

⁵⁴ Note, *Collusive and Consensual Divorce and the New York Anomaly* (1936) 36 COL. L. REV. 1121.

⁵⁵ See reflections of this attitude in current literature collected and quoted in CALVERTON, *op. cit. supra* note 11, at 70 *et seq.*

⁵⁶ Brinkmann, *Social Aspects of the Family* (1931) 6 ENCYC. SOC. SCIENCES 67.

⁵⁷ *In re Peck*, 88 Conn. 447, 91 Atl. 274 (1914); *Wernimont v. State ex rel. Little Rock Bar Association*, 101 Ark. 210, 142 S. W. 194 (1911).

A fourth assumption is that the public will accept reasonable regimentation in regard to marriage.⁵⁸ In the past this has been true. At present there are differences of opinion on the subject.⁵⁹ The nature of that regimentation will determine its acceptability. The success already achieved by the better domestic relations courts and social agencies suggests the trend of such future control. Action by the state assumes the inability of the family to solve its own problems. It is a matter of public education to persuade the unspecialized public to substitute for the simpler traditional legal remedies and patent medicines the specialized services of professional workers competent to provide individualized treatment for families which are not functioning properly. Interprofessional cooperation should be a fundamental part of the process. The family as distinguished from its members should receive more consideration. If the proposals for regimentation are made with discretion, their reasonableness should carry them through the initial period of misunderstanding. The individualist will probably not be convinced.

It is not enough to consider a group of assumptions. Certain long standing concepts are obstacles to an advance. It is important to consider them.

Obstacles

The first obstacle is the idea that marriage is a cure-all.⁶⁰ If a person has been guilty of pre-marital irregularities, the ceremony,

⁵⁸ See Adey, *King Edward's Abdication*, 1 EVENTS (Jan. 1937) 65.

⁵⁹ See LICHTENBERGER, *op. cit. supra* note 3, at 98: "With the passing of the belief in the sacramental nature of marriage in all Protestant countries, and the general establishment of civil-contract marriage throughout modern civilization, the doctrine of the indissolubility of marriage was destined to decline, together with the era of ecclesiastical domination."

See also RUSSELL, *The Family and the State*, *op. cit. supra* note 3; DELL, *op. cit. supra* note 3; CALVERTON, *op. cit. supra* note 11.

⁶⁰ Official sanction of this attitude has been given by the various state statutes providing for the legitimation of children born out of wedlock, by the subsequent marriage of their parents. 4 VERNIER, *op. cit. supra* note 1, § 156 *et seq.*

Undoubtedly, the most fertile sources of this idea can be traced to the characteristic formulae expounded by (1) moving pictures: Eastman, *What Can We Do About the Movies?* (1931) 6 PARENTS MAGAZINE 19; Furnas, *Moral War in Hollywood* (1935) 143 FORTNIGHTLY 73; Dane, *What is Love? Is it What We See in the Movies?* (1935) 94 FORUM 335; (2) books, magazines and newspaper articles: *What Women like to Read in Newspapers*, LITERARY DIGEST (May 12, 1934) 9; Keyes, *Happily Ever After* (1929) 88 GOOD HOUSEKEEPING 38; Durant, *Modern Marriage* (1930) 18 MENTOR 7; Sugrue, *I Sent a Letter to My Love* (1937) 123 AMERICAN MAGAZINE 40; and (3) tab-

like some magical formula, too often, is supposed to make him respectable, restore his social standing, set the record straight, legitimize his children, protect him from criticism.

From the standpoint of the state this is a matter of fact to be determined in each case, not an assumption. The number of unsatisfactory marriages proves this.⁶¹ Among the applicants to marry, there are eligibles and ineligibles. The problem is to determine, as soon as possible, in which class a particular person belongs.⁶²

Administrative machinery is necessary to make such determination.⁶³ If this machinery has interprofessional contacts its decisions will be based upon a broader and profounder set of facts. Standards are necessary. If they are drafted along interprofessional lines they will fit the situation more accurately.

If the standards and administrative machinery are well established some applicants will fail of admission. Among them will be some who are unable to make the grade, and others who do not choose to conform.

The position of those outside the pale today is less harsh than in colonial times.⁶⁴ Pre-marital irregularities are being recognized more and more as symptoms of human need. They call forth a spirit of scientific inquiry with a view to a remedy rather than a somewhat self-righteous ostracism. The term "bastard" has given

loid newspapers: *Our Lying Press* (1932) 135 NATION 547; Spivak, *Rise and Fall of a Tabloid* (1934) 32 AMERICAN MERCURY 306.

⁶¹ LICHTENBERGER, *Comparative Statistics*, *op. cit.* *supra* note 3, at 41.

⁶² Pre-marital advice clinics are being established in a number of cities. For a discussion of them and their related problems, see: POPENOE AND JOHNSON, *APPLIED EUGENICS* (1933); Popenoe, *Marriage Clinic* (1932) 7 PARENTS MAGAZINE 15; Crozier, *Why Marriages Go Wrong* (1933) 115 AMERICAN MERCURY 60; Popenoe, *Cooperation in Family Relations* (1934) 26 J. OF HOME ECON. 483; Popenoe, *Is there a Scarcity of Good Husbands?* (1936) 28 READERS DIGEST 21.

⁶³ In the legal profession such administrative machinery is set forth in detail by the various state statutes. See Rules for Admission to the Bar (23d ed. West Pub. Co. 1936). Similarly, the medical profession has its statutory administrative set-up. Laws and Board Rulings Regulating the Practice of Medicine in the United States and Abroad (45th ed. American Medical Assoc. 1936).

⁶⁴ See 3 CALHOUN, *SOCIAL HISTORY OF THE AMERICAN FAMILY* (1932) 266: "A man that formally broke up his family or a woman that formally deserted her husband had to take into account the antagonism of the neighborhood and the bitterness of its frown. City life is a great solvent of custom; neighbors do not know each other, or if they do, they are tolerant, or the problem may be solved by moving. Hence one is free to follow fancy in matters of divorce."

place to the gentler phrase "illegitimate child." And this in turn has been modified to "illegitimate parent," which places the blame where it belongs. The child of the non-conformist may become legitimate.⁶⁵ The public, through certain news agencies, is inured to unpleasant facts.⁶⁶ Whether it reacts morbidly or intelligently to such a stimulus depends in large measure upon the balanced leadership afforded by the state. An opportunity is presented here, not to assume placidly the universal operation of a simple formula, but scientifically to gather facts and patiently to set about solving one of the most complicated problems which man is called upon to face.

The second obstacle is the idea that the litigation process will, in general, accomplish socially desirable results when applied to the solution of domestic problems. The domestic problem is seldom a purely legal one.⁶⁷ It has ramifications of social and economic character. To solve the legal aspect of the case without regard to the others is as bad as treating the disease rather than the patient.⁶⁸ The litigation process is perhaps adequate for the determination of individual private rights. It does not serve so well to enforce the interests of the state in the family because it can be set in motion by one member of a family for blackmail,⁶⁹ vengeance,⁷⁰ acquisition

⁶⁵ 4 VERNIER, *op. cit. supra* note 1, §§ 242, 245.

⁶⁶ See *supra* note 60.

⁶⁷ The records of domestic relations courts, when contrasted with the records of the orthodox courts in handling domestic cases, indicate the far greater variety of problems which the new method of approach reveals.

⁶⁸ It is sometimes said that "the operation was a success though the patient died."

⁶⁹ Many suits for breach of promise of marriage are under suspicion as having been brought for blackmail. See Brown, *Breach of Promise Suits* (1929) 77 U. OF PA. L. REV. 474; White, *Breach of Promise of Marriage* (1894) 10 L. Q. REV. 135; Wright, *The Action for Breach of the Marriage Promise* (1924) 10 VA. L. REV. 361.

Whatever the motives for bringing such suits may be, it is interesting to compare some newspaper headlines in New York State before and after the statute prohibiting such actions. Before its passage such headlines as: *Mrs. G. T. Orr sues E. B. Orr and Mrs. D. Clark for Alienation of Husband's Affections*, N. Y. Times, Mar. 27, 1935, p. 5, col. 7; *Mrs. H. Bedford-Jones Awarded \$100,000 in Suit Against Former Husband's Wife*, N. Y. Times, Apr. 5, 1935, p. 19, col. 5; *Mrs. L. T. Wells, First Wife of G. C. Wells, Sues Z. R. Wells, Second Wife*, N. Y. Times, Apr. 19, 1935, p. 19, col. 4, appeared with frequency.

In 1935 New York State abolished its so-called "heart-balm" causes of action. N. Y. Laws 1935, c. 263. Shortly thereafter the following headline appeared in the New York Times: *Supreme Court Dismisses \$100,000 Suit Brought by Mrs. C. F. Vanderbilt Against Mrs. L. V. Hegeman as Banned by 1935 N. Y. State Law*, N. Y. Times, Dec. 30, 1935, p. 2, col. 3.

of property,⁷¹ as well as a determination of the rights of the parties. The grinding of a divorce mill⁷² is too speedy to give much attention to the individual case. An inquisitorial process⁷³ promises more. Perhaps a combination of the two would work well.

A third obstacle is the undue emphasis placed by emotional literature, music and the motion picture upon happiness rather than duty as the object of marriage.⁷⁴ A combination of the two will do for the individual. The state is interested primarily in seeing that the responsibilities are cared for. One wonders whether there may not be a value in the devices leading to marriage in other countries, as family agreements⁷⁵ and professional intermediaries.⁷⁶ In marriages contracted under such devices the business obligations are, at least, brought to the attention of the parties and the ultimate decision involves several non-emotional factors. It might be well for the state to emphasize the value of self-discipline as a benefit to be derived from marriage.

⁷⁰ Typical of this attitude is the famed "shot-gun wedding" and similar methods of coercion. See *Lee v. Lee*, 176 Ark. 636, 3 S. W. (2d) 672 (1928); *Short v. Short*, 265 Ill. App. 133 (1932); *State v. Edgins*, 171 S. C. 81, 171 S. E. 444 (1933), (1934) 43 YALE L. J. 1193.

⁷¹ *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114 (1889); *State ex rel. Hagerl v. Templeton*, 18 N. D. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234 (1909).

See Munson, *Some Aspects of the Nature of Permanent Alimony* (1916) 16 COL. L. REV. 217.

The alimony racket has been the subject of much investigation in recent years. In New York City there is an organization entitled Alimony Reform League of New York City. In 1935 it published the results of a three year survey. See *Report on Three Year Survey Among Divorced Couples*, N. Y. Times, July 1, 1935, p. 17, col. 5. Further efforts are indicated by a headline, *Creation of Marital Court Urged for Morals Hearings before Temporary Alimony and Counsel Fees are Awarded*, N. Y. Times, Dec. 16, 1934, § 2, p. 5, col. 3.

⁷² It has been stated that divorce cases are handled so rapidly that the court does not have time to consider available evidence of the physician, social worker, or psychiatrist as to the family situation. MARSHALL AND MAY, *THE DIVORCE COURT—MARYLAND* (1932) 41, 67.

⁷³ Monachesi, *Italian Surveillance Judge* (1936) 26 J. CRIM. L. 811; Déak and Rheinstejn, *Machinery of Law Administration in France and Germany* (1936) 84 U. OF PA. L. REV. 846; Tyndale, *Organization and Administration of Justice in France, with an Outline of French Procedure with Respect to the Production of Evidence* (1935) 13 CAN. B. REV. 567.

⁷⁴ See Introduction to MOWRER, *FAMILY DISSOLUTION* (1927).

⁷⁵ For an excellent discussion of this subject, see 2 WESTERMARCK, *Consent as a Condition of Marriage*, *op. cit. supra* note 43, at 278-353.

⁷⁶ *Ibid.*; DEPOMERAI, *MARRIAGE* (1930) 157.

A fourth obstacle is the idea that marriage is a natural right⁷⁷ and that it should be jealously guarded against encroachments by the state. Statutes have hedged it about with restrictions.⁷⁸ These statutes have been held constitutional.⁷⁹ Every effort that is made to draw more clearly the line between the rights of the state and those of the individual, forces public attention and aids the individual to decide where he stands in the present general uncertainty surrounding marriage. If the attitude of the state were clearer, it is likely that more would rally in support.

Misunderstanding is occasioned by the fear that barriers to marriage will create more illicit relationships.⁸⁰ Such relationships exist under the present system. Perhaps a lowering of the existing standards would include more people bearing the magical tag. It does not follow that the resulting condition of marriage and the family would be more stable. Psychologically, it may serve to arouse respect for the institution to make it difficult of access.⁸¹ Keeping up with the Joneses is a recognized American characteristic. Again the leadership of the state will determine, in large measure, the progress of the idea.

We have now viewed with alarm, and theoretically, a certain activity described as tampering with marriage, and have enumerated

⁷⁷ In the now famous case of *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 966, 974 (1914), involving the constitutionality of the Wisconsin law requiring medical examination before marriage, Justice Marshall, in dissenting from the decision of the majority, said: "I cannot agree to the decision of this case because: (1) To marry is a natural right. It is thus guaranteed by the purpose and spirit of the constitution." The majority held, however, that supervision and control of marriage fell within the police powers of the state and that marriage was not an unlimited natural right.

⁷⁸ 1 VERNIER, *op. cit. supra* note 1, §§ 37-47.

⁷⁹ *Buck v. Bell*, 143 Va. 310, 130 S. E. 516, 51 A. L. R. 855 (1925), *aff'd*, 274 U. S. 200 (1927).

⁸⁰ If married people are regarded as a professional group, then all the concepts, administrative machinery and motives regarding the raising of professional standards are in point. There seem to be certain stock objections to raising standards in any professional field. In the law see: *Proceedings and Reports of the Section of Legal Education and Admission to the Bar of the American Bar Association* for any year, set forth in the *Annual Reports of the American Bar Association*, and in the *American Law School Review*. See also Porterie, *The Two Sides of the Question of Raising Academic Requirement for Admission to the Bar from a High School Education to a Two-Year College Course* (1935) 1 LA. S. B. 17.

In the field of medicine, see: Bierring, *The Standards of Medical Education and Qualification for Licensure* (1934) 3 BAR EXAMINER 275.

⁸¹ "Thwarting is the natural stimulus to fighting." MORGAN, *CHILD PSYCHOLOGY* (1932) 174.

certain assumptions and obstacles on the road to a solution. The next step is to secure a clearer picture of the objectionable conduct and the device for controlling it.

The Practical Problem

The proposal which is the subject of this article, is a law punishing those who tamper with marriage. The word "tampering" requires definition. The elements of the proposed offense should be (a) the act of marrying or procuring or encouraging someone else to go through the marriage ceremony, (b) with the major intent of accomplishing some personal benefit rather than accepting the obligations incident to the orthodox marriage. The act of marrying is already defined in the laws of the respective states;⁸² the act of procuring or encouraging is a matter for the jury; the nature of the intent is also a matter for the jury. Whether the question should or should not go to the jury should depend upon an interprofessional investigation by competent experts into the legal, social and economic implications of the case, rather than upon some exclusive legal formula. There are four situations known to the law where the parties may evidence an unorthodox intent: marriages involving fraud,⁸³ marriages involving duress,⁸⁴ marriages in jest,⁸⁵ and marriages where the parties endeavor to modify the orthodox terms of

⁸² 1 VERNIER, *op. cit. supra* note 1, § 14.

⁸³ Brown, *Duress and Fraud as Grounds for the Annulment of Marriage* (1935) 10 IND. L. J. 473; Crouch, *Annulment of Marriage for Fraud in New York* (1921) 6 CORN. L. Q. 401; Emmerglick, *Nullity of Marriage for Fraud* (1931) 19 KY. L. J. 295; Vanneman, *The Annulment of Marriage for Fraud* (1925) 9 MINN. L. REV. 497; Note (1874) 1 CENT. L. J. 235; Note (1922) 22 COL. L. REV. 662; Note (1925) 73 U. OF PA. L. REV. 195; Note (1919) 28 YALE L. J. 272; Note (1924) 34 YALE L. J. 207; (1925) 5 B. U. L. REV. 138; (1918) 6 CALIF. L. REV. 224; (1920) 20 COL. L. REV. 708; (1925) 25 COL. L. REV. 233; (1932) 18 CORN. L. Q. 97; (1920) 34 HARV. L. REV. 218; (1925) 10 VA. L. REV. 765; (1920) 30 YALE L. J. 88. See also Reynolds v. Reynolds, 3 Allen 605 (Mass. 1862); Moss v. Moss, [1897] P. 263.

⁸⁴ Bassett v. Bassett, 72 Ky. 696 (1873); Brown, *supra* note 83; Note (1907) 7 COL. L. REV. 128; Note (1930) 30 COL. L. REV. 714; (1934) 14 B. U. L. REV. 837; (1917) 3 CORN. L. Q. 51; (1934) 43 YALE L. J. 1191; Notes (1899) 43 L. R. A. 814, and (1919) 4 A. L. R. 870; Note (1934) 91 A. L. R. 414.

⁸⁵ (1931) 11 B. U. L. REV. 296; (1921) 21 COL. L. REV. 194; (1931) 19 GEO. L. J. 239; (1930) 9 N. C. L. REV. 96; (1931) 4 SO. CALIF. L. REV. 160; (1930) 64 U. S. L. REV. 617; (1922) 29 W. VA. L. Q. 60; (1930) 6 WIS. L. REV. 42; Note (1921) 11 A. L. R. 215. See Reszel v. Reszel, 7 Mich. 33, 40 N. W. 858 (1883); McClurg v. Terry, 21 N. J. Eq. 225 (1870); Crouch v. Wartenberg, 86 W. Va. 664, 104 S. E. 117 (1920).

the status by mutual agreements or mental reservations.⁶³ Each of these situations has a legal and an interprofessional or public aspect.

Marriage Involving Fraud

From the legal viewpoint the pivotal question is the presence of fraud. There are three generally accepted rules as to what constitutes fraud in consummated marriages. The English rule, more rigid than the others, is limited to situations where there is a mistake as to the identity of the person.⁶⁷ The majority rule in the United States recognizes situations where there has been misrepresentation or concealment of some fact essential to the marriage contract or the marriage relation.⁶⁸ Ante-nuptial pregnancy of the wife, if unknown to the husband, is ordinarily such an essential.⁶⁹ Ante-nuptial lack of chastity,⁹⁰ bad character,⁹¹ insignificant fortune,⁹² poor health,⁹³ difference in religion,⁹⁴ and uncertain temper⁹⁵ are not

⁶⁶ Jackson v. Jackson, 93 N. J. Eq. 216, 113 Atl. 495 (1921); Note (1929) 27 MICH. L. REV. 934; (1918) 6 CALIF. L. REV. 224; (1931) 25 ILL. L. REV. 556; (1914) 63 U. OF PA. L. REV. 695; (1926) 12 VA. L. REV. 239; (1921) 30 YALE L. J. 756; Note (1916) L. R. A. 1916E 1274.

⁶⁷ Moss v. Moss, [1897] P. 263; Alexander v. Alexander, [1920] S. C. 327; EVERSLEY, DOMESTIC RELATIONS (4th ed. 1926) 26-30.

⁶⁸ The general rule has been succinctly stated by Crouch as follows: "In the case of a consummated marriage, a misrepresentation (or concealment probably) of a material fact, going to the essence of the marriage contract or of the marriage relation, made with intent to induce another to marry and without which he would not have done so, justifies the court in annulling the marriage; but upon grounds of public policy the misrepresentation of any other fact probably does not." Crouch, *supra* note 83.

⁶⁹ A pre-nuptial pregnancy: Gould v. Gould, 78 Conn. 242, 61 Atl. 604 (1905); Wallace v. Wallace, 137 Iowa 37, 114 N. W. 527 (1908); Smith v. Smith, 171 Mass. 404, 50 N. E. 933 (1898).

⁹⁰ Generally, pre-nuptial unchastity: Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147 (1916); Varney v. Varney, 52 Wis. 120, 8 N. W. 739 (1881).

⁹¹ Misrepresentation as to honesty and industry: Corder v. Corder, 141 Md. 114, 117 Atl. 119 (1922); Dooley v. Dooley, 93 N. J. Eq. 22, 115 Atl. 263 (1921); Keys v. Keys, 6 Misc. 355, 26 N. Y. Supp. 910 (1893); Sheridan v. Sheridan, 186 N. Y. Supp. 470 (1921).

⁹² Misrepresentation as to wealth or social status: Wier v. Still, 31 Iowa 107 (1870); Browning v. Browning, 89 Kan. 98, 130 Pac. 852 (1913); Oswald v. Oswald, 146 Md. 313, 126 Atl. 81 (1924); Chipman v. Johnston, 237 Mass. 502, 130 N. E. 65 (1921); cf. Brown v. Scott, 140 Md. 266, 117 Atl. 114 (1922).

⁹³ Misrepresentation as to health: Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850 (1907); Cummington v. Belchertown, 149 Mass. 223 (1889).

⁹⁴ Misrepresentation as to religion: Beckley v. Beckley, 115 Ill. App. 27 (1904).

essentials.

The more liberal and the minority American rule began in this fashion,⁹⁵ but with the advent of a series of recent cases in New York, seems to have become very much the same as in ordinary contracts.⁹⁷

The rule as to non-consummated marriage has approximated that of ordinary contracts.⁹⁸ The legal process, through litigation, leads to the granting or refusal of an annulment, a remedy or reward to one party against the other. The interest of the state is confined to generalized formulae.

From the interprofessional and public viewpoint the question is whether a family thus brought into being, can survive the handicap and perform, in reasonable fashion, the functions required of it by the state. If it shows promise, it should receive all possible encouragement and assistance from every professional group which is in a position to make a contribution. If not, it should be dissolved not because of the fraud, but because it is useless to perform a public service. The functioning portion of society should not be burdened with it.

Such action would clarify the interest of the state in the family. It might deal with the rights of the individual members of the family in other proceedings. If the defrauded spouse can show damages, he or she should receive a judgment of complete reimbursement. But the fact that one or both of the parties (and perhaps their accomplices) has promoted a marriage with the intent to defraud as a major portion of his mental attitude, should justify criminal action by the outraged state. The public institution of marriage has been treated with contempt and the offender should be punished.

Marriage Involving Duress

From the legal viewpoint marriage is regarded as a civil contract, valid only when made with the consent of both parties. Con-

⁹⁵ Misrepresentation of mildness of temper and amiability of disposition: *Williamson v. Williamson*, 34 App. D. C. 536 (1910).

⁹⁶ See *supra* note 88.

⁹⁷ *Shonfeld v. Shonfeld*, 260 N. Y. 477, 184 N. E. 60 (1933), and cases cited therein.

⁹⁸ 1 BISHOP, MARRIAGE, DIVORCE AND SEPARATION (1891) § 763.

sequently, if one of the parties is forced into the situation under duress, there is no legally valid meeting of the minds. The problem then is to determine what acts constitute duress.^{98a}

In laying down the rule as to cases where the man is the one who claims he was forced into the marriage, there are two factors. If he does only what the court feels he ought to do, it is not duress.⁹⁹ If there is a total absence of any direct threats of bodily harm previous to or at the time of the marriage, there is no duress.¹⁰⁰

Where the woman is the claimant, the rule is usually a subjective one—was this woman coerced?¹⁰¹ Physical force or threats are not always necessary provided her will is subject to another's. If duress is found, the result of the proceeding is an annulment. This is a proceeding between the parties. The interest of the state is limited to statements of policy, such as that the man did no more than he ought to do. In a particular case, it may very well be a question whether he ought to marry at all rather than an assumption that marriage is the proper step to take in the interest of the parties.

From an interprofessional or public viewpoint the question is whether a family thus brought into being can survive the handicap and perform in reasonable fashion the functions required of it by the state. If it shows promise it should receive all possible encouragement and assistance from every professional group which is in a position to make a contribution. If not, it should be dissolved, not because of the presence of duress, but because it is useless to perform a public service. The functioning portion of society should not be burdened with it.

The interest of the state in the individuals may be expressed

^{98a} See 3 WORDS AND PHRASES (1st Series, 1904) 2270: "At common law 'duress' meant only duress of the person, and nothing short of such duress amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract * * *."

⁹⁹ *State v. Edgins*, 171 S. C. 81, 171 S. E. 444 (1933).

¹⁰⁰ *Rogers v. Rogers*, 151 Miss. 644, 118 So. 619 (1928).

¹⁰¹ *Doscher v. Schroder*, 105 N. J. Eq. 315, 147 Atl. 781 (1929); see 1 *BOUVIER, LAW DICTIONARY* (Rawle's 3d rev. [8th ed.] 1914) 960: "There is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless. The question in each case is: Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining it, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained."

by awarding damages to the injured party and punishing criminally those who thought so lightly of marriage as to coerce someone into it—not for the good of the public, but for personal ends.

Marriage in Jest

From a legal standpoint reality of consent is essential to the validity of a contract. If marriage is merely a contract, those who say the words without intending the consequences, should, logically, be regarded as having created no binding legal agreement. Some courts have taken this view, saying:

Mere words without any intention corresponding to them, will not make a marriage or any other civil contract. But the words are the evidence of such intention, and if once exchanged, it must be clearly shown that both parties intended and understood that they were not to have effect. In this case the evidence is clear that no marriage was intended by either party; that it was a mere jest got up in the exuberance of spirits to amuse the company and themselves. If this is so, there was no marriage.¹⁰²

Other courts, perhaps because the facts varied somewhat, have laid down a different and sterner ruling:

These facts show that both parties had arrived at the age at which, under the law, they were authorized to contract marriage. A proper construction of the pleadings shows that, although the marriage was agreed upon and took place in a spirit of levity and joke, nevertheless there was no fraud on the part of either party as against the other. The pleaded facts of the case, therefore, fail to disclose any informality or other cause for setting aside the marriage.¹⁰³

The result of the legal process in such cases is to grant or refuse an annulment at the request of one of the parties. The interest of the state is indicated in the foregoing quotations. But it is submitted that in the litigation process the interest of the state is directed toward a point which is not essential. The question is not—did the parties intend to go through the marriage. In a particular case the policy of the law in refusing an annulment may be as harmful as if it were granted. The example which the facts furnish the community may have far-reaching repercussions.

From an interprofessional or public viewpoint the question is

¹⁰² McClurg v. Terry, 21 N. J. Eq. 225 (1870).

¹⁰³ Hand v. Berry, 170 Ga. 743, 154 S. E. 239, 240 (1930).

whether a family thus brought into being can survive the handicap and perform in reasonable fashion the functions required of it by the state. If it shows promise it should receive all possible encouragement and assistance from every professional group which is in a position to make a contribution. If not, it should be dissolved, not because of jest, but because it is useless to perform a public service. The functioning portion of society should not be burdened with it.

The interest of the state in the individuals may be expressed by awarding damages to the injured party and punishing criminally those who treated marriage as a matter of jest.

Marriage under Special Agreement

From the legal viewpoint occidental marriage has certain fairly well-recognized fundamentals. Where an individual, by mental reservation,¹⁰⁴ or both parties, by some express or implied agreement,¹⁰⁵ seek to create an individualistic marital status, the law frowns. Here again the legal solution is the refusal or the granting of an annulment. The courts speak in the following terms:

Marital intercourse, so that children may be born, is an obligation of the marriage contract and "is the foundation upon which must rest the perpetuation of society and civilization." The obligation may not be modified by private agreement between the parties.

The evidence in this case convinces me that the defendant entered into the marriage with the intention of not submitting to marital intercourse and of not having children; that the plaintiff believed the defendant would submit to marital intercourse and entered into the marriage with that belief. Under such circumstances the marriage will be annulled.¹⁰⁶

The interest of the state in the present litigation process is limited to the expression of policy toward marriage. It does not go so far as to endeavor to determine the reasons for the unusual situation or to invite interprofessional aid in its solution.

From an interprofessional or public viewpoint the question is whether a family thus brought into being can survive the handicap

¹⁰⁴ *Millar v. Millar*, 175 Cal. 797, 167 Pac. 394, Ann. Cas. 1918E 184 (1917); (1918) 6 CALIF. L. REV. 224. See also *supra* note 86.

¹⁰⁵ *McClurg v. Terry*, 21 N. J. Eq. 225 (1870); *Barker v. Barker*, 151 N. Y. Supp. 811 (1914), (1915) 63 U. OF PA. L. REV. 690.

¹⁰⁶ *Miller v. Miller*, 132 Misc. 121, 122, 228 N. Y. Supp. 657, 658 (1928).

and perform in reasonable fashion the functions required of it. This is to be determined by expert testimony, not by an assumption.

The interest of the state in the individuals may be expressed by awarding damages to the injured party and punishing criminally those who endeavor to graft upon the recognized fundamentals, conditions of their own.

Here are a set of examples. As to each there is a legal and interprofessional or public approach. The machinery for the legal approach adjusts the difficulties between the parties, but does not clarify the interest of the state. At present the most popular tool available is the process of annulment.

Annulment as a Remedy

Annulment is a concept which has appeared in various legal systems: Greek,¹⁰⁷ Roman,¹⁰⁸ and early Germanic.¹⁰⁹ The medieval ecclesiastical law used it liberally in dissolving marriages where divorce was prohibited.¹¹⁰ Surrounding it were the procedures of penance¹¹¹ and excommunication.¹¹² The decrees of the court rested upon the conscience, as well as upon the person and property, of the litigant.¹¹³ After the case was at an end he did not pass out of the supervision of the court, but remained in a species of lifelong probation.

The English ecclesiastical courts¹¹⁴ employed the process with little, if any, change. The transition to the present civil court was made with a minimum of disturbance.

In America, except for control of the state by the New England

¹⁰⁷ 3 WESTERMARCK, *op. cit. supra* note 43, at 318; GOODSSELL, *op. cit. supra* note 4, at 96; DE POMERAI, *op. cit. supra* note 76, at 162 *et seq.*

¹⁰⁸ COLQUHOUN, *op. cit. supra* note 31, § 1108; WESTERMARCK, *op. cit. supra* note 43, at 319; GOODSSELL, *op. cit. supra* note 4, at 139; DE POMERAI, *op. cit. supra* note 76, at 162 *et seq.*

¹⁰⁹ WESTERMARCK, *op. cit. supra* note 43, at 325; GOODSSELL, *op. cit. supra* note 4, at 202; DE POMERAI, *op. cit. supra* note 76, at 162 *et seq.*

¹¹⁰ GOODSSELL, *op. cit. supra* note 4, at 203-206.

¹¹¹ THWING, *THE FAMILY* (1913); GOODSSELL, *op. cit. supra* note 4, at 206; SHELFORD, *MARRIAGE AND DIVORCE* (1841) 177.

¹¹² GOODSSELL, *op. cit. supra* note 4, at 203.

¹¹³ DE POMERAI, *op. cit. supra* note 76, at 175 *et seq.*

¹¹⁴ COLQUHOUN, *op. cit. supra* note 31, § 644; CARTER, *A HISTORY OF THE ENGLISH COURTS* (1927) 145.

church,¹¹⁵ annulment was a civil and not an ecclesiastical process.¹¹⁶ While its name remained the same, its significance was modified. Penance and excommunication were abandoned, and with them that wide command of the facts of the situation which helps to insure against litigation error. The conscience of the litigant became his own. The sanctions of the state might affect his person and property, but were much less awful than their predecessors. Most serious, the probation period disappeared.

Thus reduced, annulment still serves to dispose of certain invalid marriages. Under the older statutes¹¹⁷ the discretion of the court was limited. Under some of the more recent statutes¹¹⁸ this discretion is plenary; this is more like the ecclesiastical process. The limitations upon it are: its employment as a means of punishing a guilty spouse,¹¹⁹ a task properly for the criminal law; its employment as an instrument to decide guilt or damage between parties,¹²⁰ a task properly for the civil law; its employment as a litigation process, a task unsuited to the development of the interest of the state in the family. It should be aided to regain a position analogous to that which it held in ecclesiastical law and should be considered as one of several judicial tools.

The Proposed Remedy

Bringing together the various threads, it appears that to develop the interest of the state in marriage and the family certain specific remedies are desirable:

1. A careful segregation of objectives and legal processes so that the individual rights of the members of ailing families may be disposed of individually without obscuring the interest of the state.
2. A correlation of the processes by which the interest of the state in the family as distinguished from its interest in the individual members of the family may receive adequate attention.
3. These processes for advancing the interest of the state in-

¹¹⁵ See generally, BEARD, *RISE OF AMERICAN CIVILIZATION* (1929) cc. I and II.

¹¹⁶ ADAMS, *PROVINCIAL SOCIETY, 1690-1763* (1928) 278-279.

¹¹⁷ 1 VERNIER, *op. cit. supra* note 1, § 50.

¹¹⁸ N. Y. DOM. REL. LAW §§ 7, 25.

¹¹⁹ *Wood v. Wood*, 2 Paige 108, 111 (N. Y. 1830). See also *supra* note 22.

¹²⁰ *Beeby v. Beeby*, 1 Hag. Ecc. 789 (1799).

clude (a) an annulment proceeding conducted at the instance of the state upon an interprofessional plane where the sole question is whether the family which has started under a handicap can continue to bear the burdens of public responsibility; (b) a statute punishing in the interest of the state those who tamper with marriage. This statute would be called into operation after the enlarged annulment process had functioned and upon the facts developed by that process. A desirable feature of the statute would be wide discretion in the court as to the action it may take in specific cases. The right to impose a fine, imprisonment, probation, suspended sentence should be given.

Conclusion

This article has set forth a problem and suggested a solution. Three final questions deserve a word. The constitutionality of the statute would seem to involve nothing more than arises in the case of other crimes.¹²¹ If the effect of the combined annulment and criminal proceeding is to give the court a very complete statement of the facts of the case, such a movement would appear desirable from every standpoint except that of the accused who has something he desires to conceal.

The social wisdom of the policy can be determined only by the trial and error method. As this is the method employed with respect to all the advances of civilization, it should excite neither surprise nor fear. Safeguards are provided in the form of experts from the various social sciences and the appellate court. There are mistakes in the operation of every human institution. If they occur in the administration of this process they are to be expected, but should not cause alarm.

The question whether it is worth while to make the experiment will be determined by the imagination and enthusiasm of the legal, social and civic leaders in the respective communities. The greatest argument in its favor is this: the present legal system provides a two-dimensional plane in which to solve family problems. The proposal

¹²¹ Criminal statutes must conform with certain constitutional safeguards, such as double jeopardy, *ex post facto* laws, trial by jury, accused's privilege of being confronted by his accuser, *habeas corpus*, cruel and unusual punishments, self-incrimination, etc. The draftsman of the proposed statute could easily provide for constitutional conformity.

is to add a third, fourth and fifth dimension by the introduction of the viewpoints of the various social sciences. The result should be richer, more complete, true in each dimension.

John S. Bradway

DUKE UNIVERSITY SCHOOL OF LAW.