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Common Law Same-Sex Marriage

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Introduction

When courts and legislators in Iowa, the District of Columbia, and New Hampshire extended the right to marry to same-sex couples, they did more than just join the small but growing list of jurisdictions in the United States to do so. In addition, they introduced the possibility that—for the first time in the United States—a same-sex couple might be able to enter into a legally recognized common law marriage.

Historically in the United States, there have existed two major types of marriage, ceremonial marriage and common law marriage. A ceremonial marriage is a marriage that comes into being through a formal process that involves compliance with statutory formalities (such as applying for a license) followed by formal solemnization by a religious or civil official. In contrast, a common law marriage is a marriage that comes into being informally through the statements and conduct of the two individuals, without formal solemnization or compliance with statutory formalities.

Once entered into, a common law marriage provides the same rights, privileges, and

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1 Jeffrey & Susan Brotman Professor of Law, University of Washington School of Law.
3 See DC Code § 46-401(b).
5 Other states that currently extend the right to marry to same-sex couples include Connecticut, see Conn. Gen. Stat. Ann. § 46b-20(4), Massachusetts, see Goodridge v. Department of Public Health, 798 N.E.2d 941 (2003) and Vermont, see 15 Vt. Stat. Ann. § 8. For a period of just under five months, same-sex couples were lawfully permitted to marry in California, but that right was rescinded by a voter initiative that amended California’s constitution. See Strauss v. Horton, 207 P.3d 48 (Cal. 2009); In re Marriage Cases, 183 P.3d 384 (Cal. 2008).
6 See 52 Am. Jur. 2d Marriage § 1. See, e.g., In re Marriage of Martin, 681 N.W.2d 612, 616-17 (Iowa 2004).
8 See 55 C.J.S. Marriage § 10; 52 Am. Jur. 2d Marriage § 36.
responsibilities as a ceremonial marriage, and is as durable as a ceremonial marriage, requiring divorce proceedings to terminate the relationship. Thus while common law marriage allows for a less formal method of entry into marriage, there is no equally informal exit option, such as “common law divorce.”

Although once available in a majority of U.S. states, common law marriage fell out of favor during the twentieth century, and today only 11 states and the District of Columbia recognize common law marriages newly entered into within their borders, although other states will typically recognize common law marriages lawfully entered into in sister states.

Given the small number of the states that have recognized same-sex marriage and the small number of states that still recognize common law marriage, it is perhaps no surprise that, until recently, there was no overlap between those two groups and thus no possibility that a same-sex couple could legally enter into a common law marriage, making the concept of common law same-sex marriage an interesting concept in the abstract but little more. In only a handful of cases have litigants even suggested the possibility that a court recognize a same-sex marriage.

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13 See Jennifer Thomas, Common Law Marriage, 22 J. Am. Acad. Matrim. Law 151, 151 (2009). Of those 11, one, New Hampshire, recognizes common law marriages entered into within its borders only for limited purposes. See id. An additional four states will recognize those common law marriages created before dates specified by law. See id.
15 The four other states in which same-sex marriage is or was at one time lawful—California, see Elden v. Sheldon, 758 P.2d 582, 587 (Cal. 1988); Norman v. Norman, 54 P. 143, 146 (Cal. 1898), Connecticut, see Loughlin v. Loughlin, 910 A.2d 963, 972 (Conn. 2006); Hames v. Hames, 316 A.2d 379, 382 (Conn. 1972), Massachusetts, see Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998); Collins v. Guggenheim, 631 N.E.2d 1016, 1017 (Mass. 1994), and Vermont, see Stahl v. Stahl, 385 A.2d 1091, 1092 (Vt. 1978); Morrill v. Palmer, 33 A. 829, 830-31 (Vt. 1895)—do not recognize common law marriage and either never have or have not done so for some time.
common law marriage, and in those cases, the courts have held that common law marriage is an alternative to, and not a competing substitute for, ceremonial marriage, and thus that a type of ceremonial marriage that is prohibited by law cannot be entered into by means of a common law marriage.\(^{16}\)

Yet, with the introduction of legalized same-sex marriage in Iowa, New Hampshire, and the District of Columbia, there now exists the very real possibility that a same-sex couple could be deemed legally married (and have that marriage recognized in other states) without filling out a marriage application or going through any sort of formal ceremonial process. In other words, common law gay marriage—a true fusion of something old and something new—has arrived in the United States.

**A Closer Look at the Law in Iowa, New Hampshire, and the District of Columbia**

Although entering into a common law marriage does not require a formal process, there are certain elements that must exist in order for a common law marriage to come into being. While these elements vary across jurisdictions, they are typically said to include the following: (1) a present intent and mutual agreement to be married; and (2) cohabitation as a couple.\(^{17}\) In addition, many jurisdictions require that the couple hold themselves out to others as a married couple, and that they are so reputed to be within their community.\(^{18}\) The three jurisdictions in which same-sex common law marriage is theoretically possible differ somewhat significantly from one another on the elements required to establish a common law marriage.

Under Iowa law, three elements must exist to create a common law marriage: (1) a

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\(^{17}\) See 52 Am. Jur. 2d Marriage §§ 37-39; 55 C.J.S. Marriage §§ 10, 13, 23, 24, 26. Capacity to make such an agreement is sometimes also listed as an element, *see id.*, but because capacity is required for both ceremonial and common law marriages, courts do not always mention it as an element of common law marriage.

\(^{18}\) See 52 Am. Jur. 2d Marriage §§ 40.
present intent and agreement to be married by both parties; (2) continuous cohabitation; and (3) a public declaration that the parties are husband and wife.\textsuperscript{19} Iowa precedent considers the public declaration to be the “acid test” of whether a common law marriage exists: under Iowa law, there is thus no such thing as a “secret common law marriage,” although precedent allows for some declarations that are inconsistent with marriage (indeed, even some in which the person indicates being single), requiring only a “substantial holding out to the public in general.”\textsuperscript{20}

In contrast, there are only two elements needed to establish a common law marriage in the District of Columbia: (1) an express mutual agreement to be husband and wife, in words of the present tense; (2) followed by cohabitation as husband and wife.\textsuperscript{21} Thus, under District of Columbia law, there is no requirement that the couple hold itself out or be reputed to be a couple, thus evidently allowing for the possibility—at least as a theoretical matter—of a so-called “secret common law marriage.”

New Hampshire is the most unusual of the three states, so unusual that it is sometimes difficult to decide whether to classify it as a state that recognizes common law marriage, although at the very least it can be said to recognize a limited form of common law marriage.\textsuperscript{22} Under New Hampshire law, the general rule is that it will not recognize a common law marriage entered into within its borders except to the limited extent provided by statute, under which there is an exception to this general rule \textit{after} the death of one of the two persons (for probate and inheritance purposes).\textsuperscript{23} Thus, if both of the partners to the marriage are alive, a court in New Hampshire will not consider them “married” for purposes of divorce, alimony, or any other right,

\textsuperscript{19} See In re Marriage of Martin, 681 N.W.2d 612, 617-18 (Iowa 2004); In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979).
\textsuperscript{20} See Martin, 681 N.W.2d at 618. Accord In re Dallman’s Estate, 228 N.W.2d 187, 190 (Iowa 1975).
\textsuperscript{23} See In re Estate of Bourassa, 949 A.2d 704, 706 (N.H. 2008).
privilege, or responsibility of marriage.  

Pursuant to the terms of the New Hampshire statute, a couple will be deemed to have been legally married upon or after the death of one of them if they (1) cohabited and acknowledged each other as husband and wife and were generally reputed to be such; (2) for a period of 3 years and until the death of one of them. The requirement that there be an acknowledgement refers to a public acknowledgement to third persons, which, when coupled with the requirement that they be reputed as such, makes it akin to Iowa’s test barring secret common law marriages. In addition, it is the only one of the tests that has a minimum period of cohabitation and public acknowledgement as a couple.

Although the various tests for common law marriage use the gendered phrase “husband and wife,” it seems likely that courts in states recognizing ceremonial same-sex marriage would likely adapt their common law to include those who cohabit as and hold themselves out as “husband and husband” or “wife and wife.” Indeed, when the District of Columbia extended marriage rights to same-sex couples, it enacted a statute making clear that gender-specific terms relating to the marital relationship, whether they appear in statutes or in the common law, shall be construed to be gender neutral.

Thus, while each of the three jurisdictions has a slightly different test, it appears that—at least as a doctrinal matter—common law same-sex marriage is a possibility in all three of them. 

Does common law same-sex marriage make sense?

Despite the mechanically neat doctrinal arguments in favor of recognizing common law same-sex marriage in jurisdictions in which common law marriage exists, it is fair to ask whether

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27 See DC Code § 46-401(b).
it makes sense from a public policy standpoint to expand the scope of a waning doctrine such as common law marriage to encompass the relatively novel concept of granting legal recognition to same-sex relationships. 28

To answer this question, it helps to ask why common law marriage came into being in the first place, and what has motivated some states to eliminate it. According to many courts and commentators, judicial recognition of common law marriages occurred as a matter of historical necessity, since the social conditions of America’s frontier society made access to clergy or public officials difficult, due to the difficulties of traveling and the lack of nearby officials. As those conditions evolved, the rationale for recognizing common law marriages dissipated.29

To be sure, in the modern era, problems of travel have largely been eliminated, and public and religious officials are prevalent throughout the country. Yet in another sense, America—or at least certain parts of it—remains a frontier society of sorts for gays and lesbians, who perceive (often with good reason) that their relationships are not valued by public and religious officials charged with solemnizing marriages. Indeed, in states in which same-sex marriage has been legalized, some officials have refused to solemnize marriages between persons of the same sex, and some local governments have even gone so far as to stop issuing licenses to opposite sex couples as a means of avoiding having to marry same-sex couples.30

Moreover, many of the statutes extending the right to marry to same-sex couples include specific

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28 See generally De Santo v. Barnsley, 476 A.2d 952, 955 (Penn. 1984) (noting that, over time, the common law has moved toward reluctant toleration of common law marriage, and that “[t]o expand common law marriage to include a contract between two persons of the same sex would be, not simply inconsistent with such reluctant toleration, but an about-face.”).


provisions stating that religious officials are free to refuse to solemnize a marriage that is inconsistent with their religious beliefs.\(^{31}\) Thus, because gays and lesbians may lack full access to those charged with solemnizing marriages, the spirit behind the “frontier society” rationale for recognizing common law marriage makes some sense so far as same-sex marriages are concerned.

Moreover, not all courts and commentators accept the “frontier society” rationale for recognizing common law marriages, or at the very least, they describe it as at best the stated rationale but not the true reason for recognition.\(^{32}\) As an initial matter, those courts and commentators who invoke the “frontier society” rationale do not back their contention up with actual data from historical records showing the absence of available clergy and public officials,\(^{33}\) and indeed critics of that rationale contend that religious and civil officials empowered to perform marriage were regularly present throughout America’s frontier society.\(^{34}\) In addition, critics of the “frontier society” rationale point out that recognition or non-recognition of common law marriage across the United States was often not correlated with the “frontier conditions” extant in a given jurisdiction; thus, for example, common law marriage was recognized in New York City but not in Wyoming.\(^{35}\)

If not frontier conditions, what other rationales existed for recognizing common law marriages? One oft-cited rationale is a libertarian concept of autonomy and independence, the


\(^{32}\) See, e.g., In re Estate of Hall, 588 N.E.2d 203, 208 (Ohio 1990) (Grey, J., concurring). See also Sonya C. Garza, Common Law Marriage: A Proposal for Reviving a Dying Doctrine, 40 New Eng. L. Rev. 541, 542-43 (2006) (noting that most scholars rely on the frontier conditions argument, but that it is not true that there was a singular rationale).


\(^{34}\) See In re Estate of Hall, 588 N.E.2d 203, 208 (Ohio 1990) (Grey, J., concurring).

idea that marriage is a natural right and that individuals should be free to enter into marriages without the need to invoke the power of the state.\(^{36}\) That rationale would appear to have particular force so far as same-sex couples are concerned: having experienced for so long the denial of the right to marry as well as other civil rights at the hands of public officials, the idea of being able to enter into marriage without invoking the assistance of a state sanctioned official would likely have a certain amount of appeal for same-sex couples. Indeed, the quest to expand marriage to include same-sex couples is arguably a libertarian one (although the pure libertarian position would probably be to eliminate state involvement in the business of marriage altogether).

Other historical rationales for recognizing common law marriage apply with equal force to same-sex couples. Among those were legitimizing the children of those who did not enter into ceremonial marriages and preventing women (historically the dependent partner in an opposite-sex couple) from becoming economically dependent on the state should their partners die or decide to leave them.\(^{37}\) Broadly construed, these two rationales apply with equal force today to many same-sex couples, for despite the offensiveness of the concept of “legitimacy” in the former and the gendered nature of the latter, both rationales are designed to assure the same thing: that economically dependent members of a family unit are financially supported.

In sum, then, while there may be good reasons for a state to opt to eliminate common law marriage for all couples (such as the evidentiary problems associated with proving that the marriage was entered into and the attendant risk of fraudulent claims),\(^{38}\) the arguments in favor of common law marriage generally apply with equal force to same-sex couples, and thus so long

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as a state concludes that common law marriage makes sense for opposite-sex couples, it should extend that right to same-sex couples as well.

**Common law marriage and the caveat of the closet**

Same-sex couples differ in one important way from their heterosexual counterparts that may be significant in considering the expansion of common law marriage to include them. While heterosexuals do not, as a general rule, mask their sexual orientation (and by extension, mask the nature of their relationship with their intimate partner), it is not at all unusual for gay individuals to selectively or completely mask their sexual orientation from friends, family, co-workers, and others due to fears of discrimination, rejection, and violence.\(^{39}\) Is being closeted about one’s sexual orientation—and thus the identity of one’s life partner—compatible with the concept of common law marriage? And on the flip side, does common law marriage provide a method of entry into marriage for those same-sex couples who want or need to closet their sexual orientation or their relationships?

As discussed above, some states—including Iowa and New Hampshire—require as an element of common law marriage that the couple publicly hold themselves out as a married couple and be reputed as such. In the words of the Iowa Supreme Court, there is no such thing as a “secret common law marriage,”\(^{40}\) a requirement that would seem to make it incompatible with the closet. However, even Iowa’s test appears to allow a person to be partially closeted, for the court has said that it requires only a “substantial” holding out to the public in general, and has held common law marriages to be valid despite the fact that the partners sometimes represented themselves as single.\(^{41}\) Thus, such a test should be compatible with a couple who is to some extent closeted.

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\(^{40}\) *In re Marriage of Martin*, 681 N.W.2d 612, 618 (Iowa 2004).

\(^{41}\) See id.
extent out, but who is selectively closeted, such as when speaking in situations in which they might fear a particular instance of discrimination, rejection, or violence. In contrast, the District of Columbia’s test for common law marriage appears to be compatible with a deeper form of being closeted, as it neither requires that the couple hold themselves out as a married couple nor that they be reputed so to be.

Moreover, common law marriage allows a form of closeting one’s self that may be of particular benefit to selected classes of gay and lesbian couples. Specifically, those couples in which one partner is serving in the military, or in which one is a foreign national present in the United States, might benefit from a legal regime in which their relationship is “closeted” in the sense that it is not easily discoverable by those conducting searches of public records.

Under the military’s “don’t ask, don’t tell” policy, service members are subject to discharge if they, _inter alia_, marry or attempt to marry a person of the same-sex or state that they are homosexual.42 Entering into a ceremonial marriage (or, for that matter, a domestic partnership or civil union) creates a public record that could serve as evidence used to discharge a service member under the military’s policy, either under the provision addressing marriage and attempted marriage or that addressing statements regarding one’s sexual orientation.43 Indeed, for this reason, advocates for the rights of gays serving in the military counsel against entering into such relationships.44 Although a common law same-sex marriage would still be a “marriage” potentially subjecting a service member to discharge, and while the act of holding one’s self out as a couple would likewise subject one to discharge for making statements regarding one’s sexual orientation, the lack of a paper trail reduces the risk of being discovered, at least in a

42 See 10 U.S.C. §654(b).
44 See id.
public records search. Accordingly, while by no means foolproof, common law marriage might allow those serving in the military the opportunity to continue to serve while at the same time allowing them to marry.

Common law marriage might also be beneficial to same-sex couples consisting of a foreign national present in the United States on a temporary visa. Because applicants for such visas are required to state in their applications an intent to return to their home countries, evidence contained in public records indicating that they have entered into a marriage (or a domestic partnership or civil union) can result in either their deportation or their being denied future temporary visas to enter the United States. As with those subject to the military’s “don’t ask, don’t tell” policy, entering into a common law marriage would likewise in theory subject a foreign national admitted on a temporary visa to be deported or denied future temporary visas, but the lack of a paper trail reduces the likelihood of discovery, giving the couple time to sort out their immigration issues while still establishing their legal relationship as a couple.

**Conclusion**

It is not at all unusual for gays and lesbians to refer publicly to their partners as their “husband” or “wife” despite the fact that they are not legally married to one another. With the expansion of legalized same-sex marriage into states recognizing common law marriage, such statements—previously largely symbolic in nature—take on legal significance in that they can, with the right intent and when other criteria are satisfied, serve as the basis for forming a legally recognized common law marriage in certain jurisdictions in the United States.

While common law marriage has its detractors, and there exist sound policy arguments for its elimination, there is no basis in doctrine or policy to permit its continued existence for

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opposite-sex couples while denying it to same-sex couples, and indeed, there are even sound reasons why in some cases it makes even greater sense for it to be available to same-sex couples.