damental fairness notions of due process.[76] Of course the basic uncertainty as to what facts actually amount to a denial of fundamental fairness does much to confuse the issue of just when habeas corpus should lie, but once the courts accept the principle that an unconstitutional court martial will not be respected, fixing the details of what constitutes a fatal defect will not be difficult.

IV

In conclusion, it seems that much of the confusion and uncertainty concerning habeas corpus review of "criminal" courts martial can be removed without violating either precedent, justice, or logic. There are clearly two categories of court martial offense, "disciplinary" and "criminal." The unique factors requiring trial under military standards of due process affect only the former—in the latter the basic factors are those also extant in civil trials. Although the language of the basic precedent cases is often general, examination of their facts and holdings shows that they almost invariably fall within the "disciplinary" category, and are not on their reasoning applicable to "criminal" cases; thus the latter may be decided on the same logical grounds as criminal due process cases in the civil courts, unaffected by the precedents which so greatly limit collateral attack on "disciplinary" convictions. Courts martial, although separate from the civil court system, are not exempted from the Bill of Rights, and the expanded writ of habeas corpus is widely used to void unconstitutional convictions. Therefore, not only should it be uneasily stated that habeas corpus can free the victim of an unconstitutional court martial; it should be firmly stated as the rule and so held in appropriate cases.

[76] Wade v. Mayo, 334 U.S. 672 (1948).

SHAM MARRIAGES

In the recent federal case of *United States v. Lutwak*,[1] several aliens and American citizens were prosecuted for conspiring to violate Sections 180a and 220(c) of Title 8 of the United States Code,[2] each of which provisions forbids obtaining entry into the United States by willfully false or misleading representations, statements, or documents required by the immigration laws; and for defrauding the United States of its governmental functions and its immigration laws. Three American citizens had participated in marriage ceremonies with the aliens in order that the latter would be eligible for admission into the United States under the War Brides Act of 1945.[3] Upon a finding that the parties had agreed not to

[1] 195 F. 2d 748 (C.A. 7th, 1952), aff'd, Lutwak v. United States, 344 U.S. 604 (1953).

[2] 45 Stat. 1551 (1929), 8 U.S.C.A. § 180a (1942), makes it a misdemeanor to obtain entry into the United States by a willfully false or misleading representation or the willful concealment of a material fact. 43 Stat. 165 (1924), 8 U.S.C.A. § 220(c) (1942), provides for a maximum fine of $10,000 or a maximum imprisonment for five years or both for knowingly making under oath any false statement, affidavit, or other document required by the immigration laws or regulations prescribed thereunder.

[3] 59 Stat. 659 (1945), 8 U.S.C.A. §§ 232–36 (Supp., 1952), dealing with admission of alien spouses and minor children of citizen members of the armed forces during World War II.

be "really" married to each other but merely to use the marriage certificates to obtain admission of the aliens, the District Court and the Court of Appeals found the marriages invalid, the parties inadmissible, and the accused guilty as charged.[4] The Supreme Court upheld the conviction without deeming it necessary to pass upon the validity of the marriages. Mr. Justice Minton, speaking for the majority, said, "We do not believe that the validity of the marriages is material. . . . We consider the marriage ceremonies only as a part of the conspiracy to defraud the United States. . . . [By the War Brides Act] Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marriage relationship. . . ."[5] Mr. Justice Jackson, with whom Mr. Justice Black and Mr. Justice Frankfurter concurred, dissented on the ground that the validity or invalidity of the marriages should have been determinative. "If the parties were validly married, even though the marriage is a sordid one, we should suppose that would end the case. . . . Marriages of convenience are not uncommon and it cannot be that we would hold it a fraud for one who has contracted a marriage not forbidden by law to represent himself as wedded. . . ."[6]

By interpreting the word "marriage" in the War Brides Act to exclude certain types of marriage irrespective of their validity, the Court avoided the question of the legal effects of a marriage ceremony where the parties to it do not have the normal marital intent.

The relationship of matrimony, which is initiated by a contract,[7] constitutes, when validly concluded, a "bundle" of rights, duties, and other incidents, such as the mutual duty of marital fidelity, the duty of the husband to support the wife and legitimate children of the marriage, or the parties' incompetency to testify against each other.[8] While some of the property incidents of marriage may be exluded by an antenuptial or postnuptial settlement made between the par-

[4] Four of the defendants participated in the alleged sham ceremonies. Two of these were dismissed by the court upon a finding that their marriage had been consummated and that there was no proof that it had been intended merely as a sham. The fifth defendant, Regina Treitler, did not participate in a marriage ceremony, but she organized and participated in the alleged conspiracy to defraud the United States.

The case also involved the question of the admissibility as evidence of the adverse testimony of the alleged spouse of the defendant when the validity of the marriage was in question, and the admissibility of certain evidence tending to prove an alleged conspiracy. As to the admissibility of the alleged spouse's testimony, see Role of Judge Where Preliminary Question of Competency Coincides with Ultimate Issue: The *Lutwak* Case, 20 Univ. Chi. L. Rev. 313 (1953).

[5] 344 U.S. at 611.

[6] 344 U.S. at 621.

[7] At common law, this contract may be concluded informally, but the statutes of a majority of the states today require that its conclusion be "celebrated" before some designated official, usually a justice of the peace or a minister of a religious congregation.

[8] Other such incidents are: the incapacity of either party to enter upon a marriage relation with any third party as long as the marriage continues to exist; the parties' mutual rights of dower, homestead, and the surviving spouse's award; each party's expectation of an intestate or indefeasible share in the other's estate at death; the protected nature of the relationship against interference by third parties, etc.

ties, the other incidents may not. Thus, the parties have to take marriage as it is or leave it, and for this reason it is often said that marriage is a "status."

In the normal situation, the parties intend to create, or at least accept, the marriage relationship with all its inexcludible incidents. Sometimes, however, the parties to a marriage ceremony have a more limited intent. One or both of the parties may wish to exclude some or all of these inexcludible incidents, or may even intend not to be "really" married at all.[9] The "abnormal" intent may manifest itself in several distinct situations.

Sometimes both parties to a marriage ceremony intend to be "really" married but try to exclude from their relationship one or more of those incidents which are not excludible in a valid marriage. In such a case, has a marriage been created in which these incidents will be enforced in spite of the parties' contrary intention, or shall it be held that no marriage has arisen at all? This situation must be distinguished from the "mock" or "jest" marriage, in which neither party intends to produce any of the incidents or even to create the appearance of a marriage. The parties go through the ceremony with the expectation that the lack of intention to be married will be obvious, and that no one will mistake the "jest" or play for a ceremony of marriage seriously meant. Finally, the parties to the ceremony may be in agreement that, while they do not "really" wish to be married, they desire to create the appearance of a marriage for some particular purpose, e.g., to legitimate a child, to obtain a tax advantage, or to obtain entry into the United States. It is only to this situation that the term "sham" should be applied.[10]

While it is possible to draw theoretical lines between these various situations, it is not always easy, in a particular case, to clearly ascertain those facts which are essential for its proper classification. Often, or perhaps in most cases, the parties may, indeed, not have been clear themselves as to whether they wished to be "really" married for a particular purpose, or not to be "really" married at all and only to pretend that they are in order to achieve their purpose.

Thus, it is no cause for wonder that the courts have often failed to make the distinctions just outlined and that their decisions have been contradictory. In the majority of cases, however, the courts have held sham marriages to have

[9] This comment will not deal with the situation where only one party has an "abnormal" intent, while the other party's intent is "normal." Relying upon the contract principles applicable to these situations, it has never been doubted that in such cases a valid marriage results.

[10] Application of the term "sham marriage" to other types of limited-intent marriages, primarily to jest marriages, has resulted in an unfortunate confusion of the separate legal doctrine applicable to the different types of marriages in question, e.g., McClurg v. Terry, 21 N.J. Eq. 225 (1870), a jest marriage case often cited as a sham marriage authority; Hand v. Berry, 170 Ga. 743, 154 S.E. 239 (1930), where the validity of a jest marriage was upheld without consideration of the "unserious" nature of the marriage in contrast to other types of lack of intent. For the distinction between jest transactions and sham transactions in the law of contracts, see 1 Page, Contracts §§ 79, 80, and 82 (1920).

produced the regular marital relationship, thus imposing the tie of marriage upon parties who have never intended to assume it.[11]

Some courts have gone so far as to hold that a binding marriage results from the mere fact that parties have participated in the marriage ceremony. In *McKinney v. Clark*,[12] a judgment creditor of the "wife" petitioned for annulment[13] in order to be able to levy execution upon certain real estate held by the "wife" for life or as long as she would remain a widow. The widow had participated in a marriage ceremony two days prior to the date set for the sheriff's sale and it was shown that the ceremony had been performed for the sole purpose of terminating the widow's estate and thereby defeating the creditor. The parties to the ceremony never lived together as husband and wife. Nevertheless, the court held that a marriage had been created, declaring that the mere consent of the parties to exchange the words of marriage vows at the ceremony suffices to create a binding marriage. The same reasoning was applied in *deVries v. deVries*,[14] a case in which the "wife" sought annulment of a marriage concluded solely to secure her release from an employment contract and entered into with the understanding that no cohabitation was to follow.[15]

In *Hanson v. Hanson*,[16] where the ceremony was gone through merely for the purpose of enabling the husband to retain his employment and secure an increase in salary, the wife's petition for annulment was refused. The ratio decidendi was that "the annulment of a marriage otherwise legal and binding upon mere proof that the parties agreed beforehand to have it annulled would destroy the dignity and lessen the importance of the marriage relation."[17] One court deemed the interest of society in maintaining a marriage status so great as to warrant the upholding of even a jest marriage.[18] This marriage between teen-

[11] With respect to jest marriages, the prevailing rule is that no valid marriage results. This conclusion is often reached without consideration of the distinction between jest and sham marriages. See note 10 supra.

[12] 2 Swan (32 Tenn.) 321 (1852).

[13] The term "annulment" is often incorrectly applied in sham marriage cases. A decree of annulment retroactively voids the marriage ab initio; the marriage is, however, considered to have existed until the decree. A declaration of nullity simply declares that there is no marriage and, after such declaration, it is considered that a marriage never existed. Since, in a sham marriage held invalid, the parties never entered into the marriage contract, no marriage ever existed. A declaration of nullity, rather than a decree of annulment, should therefore be granted in such a case.

[14] 195 Ill. App. 4 (1915). See also Franklin v. Franklin, 154 Mass. 515, 28 N.E. 681 (1891).

[15] Though there is a distinction between the cases where the action for declaration of nullity is brought by a party to the marriage and those where it is brought by a third party, the courts have not considered the possibility of treating the cases differently.

[16] 287 Mass. 154, 191 N.E. 673 (1934).

[17] 287 Mass. at 160, 191 N.E. at 676. Accord: Delfino v. Delfino, 35 N.Y.S. 2d 693 (S. Ct., 1942). Cf. Anonymous v. Anonymous, 49 N.Y.S. 2d 314 (1944). See also Campbell v. Moore, 189 S.C. 497, 1 S.E. 2d 784 (1939); Schibi v. Schibi, 136 Conn. 196, 69 A. 2d 831 (1949).

[18] Hand v. Berry, 170 Ga. 743, 154 S.E. 239 (1930).

agers had resulted from a dare at an "hilarious" party, and it may be doubted that the interest of society was furthered by enforcing it. What these courts seem to express is the policy that marriage is a matter of too great a social concern to be toyed with.

One of the main concerns of society in upholding marriages is that offspring of such marriages be legitimate. That this policy looks to the interest of society rather than to that of the child was expressed in *Bove v. Pinciotti*,[19] where the court refused to grant a declaration of nullity because the effect of such a declaration would have been to bastardize the expected child, whose legitimacy provided the only motive for the marriage. Even the fact that the child had been stillborn prior to the bringing of the action did not affect the decision. According to the court, "the law considered them [the parties] as potential parents [at the time of the ceremony] and fastened that status [of marriage] upon them whether they wanted it or not," which status then became final.[20]

Shying away from a flat declaration that the relationship of marriage is created by the mere marriage ceremony and irrespective of any marital intent, in *Franklin v. Franklin*,[21] the court declared that a preliminary agreement of the parties not to enter into the marriage relationship would be void as against public policy.[22] The marriage, concluded solely to legitimatize a child was thus held to be binding.

Some courts which require that "marital intent" is necessary for the formation of the marital status have gone to great length in finding the factual existence of such intent. In *Campbell v. Moore*,[23] a written agreement that the parties would not live together and that neither would defend an annulment action brought by the other was held not to preclude the existence of marital intent.[24]

Other courts which seemingly require marital intent for the formation of the marital status have held that such intent need not actually be found but can be presumed as a matter of fact. The purpose of the parties which gave rise to the presumption of intent in *Schibi v. Schibi*[25] was the legitimation of a child. In *Wagner v. Wagner*,[26] where a similar presumption was used to uphold the exist-

[19] 46 Pa. D. & C. 159 (1942). See also Erickson v. Erickson, 48 N.Y.S. 2d 588 (S. Ct., 1944).

[20] Ibid., at 163. But see Campbell v. Moore, 189 S.C. 497, 1 S.E. 2d 784 (1939), where the court spoke of the "third party interest" of the child itself; and Conley v. Conley, 14 Ohio Supp. 22 (1943), where the court granted a declaration of nullity, saying that the main purpose for upholding marriages concluded solely to legitimatize a child was the interest of the child, which was, in that case, safeguarded by the Ohio "saving statute."

[21] 154 Mass. 515, 28 N.E. 681 (1891).

[22] But see Osgood v. Moore, 38 Pa. D. & C. 263 (1940), where the court held that an express agreement in writing that no marriage was to result would negative the marriage contract, since the policy of maintaining marriages was not so strong as to render nugatory an express agreement to the contrary.

[23] 189 S.C. 497, 1 S.E. 2d 784 (1939).

[24] The court also justified its conclusion by the policy consideration of the importance of the marriage status.

[25] 136 Conn. 196, 69 A. 2d 831 (1949).

[26] 59 Pa. D. & C. 90 (1947).

ence of a marital status, an elaborate rationale was used to explain the presumption. The court reasoned that since a child can be legitimate only if there has been a valid marriage and since the parties intended that the child be legitimate, they must also have intended to enter into a valid marriage.[27] These courts thus derive from the purpose pursued by the parties the conclusive presumption that they must have intended to create the status of matrimony rather than go through a mere sham ceremony.[28]

In a minority of the cases, ceremonies devoid of the marital intent have been held not to result in the relationship of marriage. Marriage, being a contract, is said to require for its valid conclusion the intention of the parties to enter upon the marriage relationship.[29] In *Dorgeloh v. Murtha*,[30] petitioner sought annulment of a marriage entered into when she was thirteen years old and concluded only to enable her to sign a theatrical employment contract without the necessity of consent by her absent parents. An elderly landlady had arranged the ceremony between petitioner and a man she had seen only once before. They parted immediately after the ceremony and did not meet again. Both parties subsequently remarried and so would have been bigamists had the court not held the original marriage invalid. The court declared that marriage, a civil contract, requires consent in the sense of a "meeting of the minds."[31] Similarly, in *McClurg v. Terry*,[32] the court said that "[m]ere words without any intention corresponding to them, will not make a marriage or any other civil contract."[33]

In *Stone v. Stone*,[34] contract rules were used to declare void a sham marriage, and it was pointed out that this result was not against public policy because society had nothing to gain from enforcing such a marriage.[35] Here, a petition for declaration of nullity was brought by a "husband" who had married the amour of his younger brother after the latter's flight. It had been agreed between the parties that the marriage would not be consummated and that its sole purpose

[27] To substantiate the presumption the court, in a dictum, also used testimony that the "husband" had before the marriage ceremony spoken of obtaining a "divorce" after the child was born.

[28] Cf. Anonymous v. Anonymous, 49 N.Y.S. 2d 314 (S. Ct., 1944).

[29] In the English ecclesiastical courts and in the canon law, strict contract rules are applied to the formation of the marital relationship and consent of the parties to enter into this relationship is essential for a valid marriage. Canons 1081, 1086. See also 2 Bouscaren, Canon Law Digest 301 et seq.

[30] 156 N.Y.S. 2d 181 (S. Ct., 1945).

[31] The court also seems to have been impressed by the fact that a contrary result would have declared two bona fide marriages bigamous because of the unsuspecting actions of a child under the influence of an "old spinster."

[32] 21 N.J. Eq. 225 (1870).

[33] Ibid., at 227. The case involved a jest marriage rather than a sham marriage. The courts, however, failing to make the distinction, have often cited the case as the leading authority for the position that sham marriages are void. See note 10 supra.

[34] 159 Fla. 624, 32 So. 2d 278 (1947).

[35] To reach this result, the court drew the perhaps imperfect analogy between a sham marriage and one induced by fraud.

was "to give the [unborn] child a name."[36] A later case, *Amsden v. Amsden*,[37] used the same contract rationale to declare void a sham marriage, likewise undertaken to legitimate a child, and then pointed out that not only was this result not against public policy, but that the contrary result would be.[38]

There are two sham marriage cases involving the federal immigration laws. In *United States v. Rubenstein*,[39] a prosecution for an alleged conspiracy to defraud the United States, an alien, in the United States on a temporary visa, hired defendant as her attorney and, at defendant's suggestion, went through a marriage ceremony with a man whom defendant had procured for that purpose; she thereby intended to become eligible for a permanent visa as the wife of an American citizen. Judge Learned Hand decided that the marriage, a contract, lacked the necessary consent of the parties and was therefore void. Thus the defendant was found guilty as charged. In a dictum, Judge Learned Hand also pointed out that, since the immigration statutes are concerned primarily with certainty of support for the alien, suppression of the fact that the parties "intend that that responsibility [of support] shall end as soon as possible"[40] may be an evasion of the statutes even though the marriage be valid. In the *Lutwak* case, the Court of Appeals followed the holding of *United States v. Rubenstein*, but the Supreme Court, although reaching the same result, went beyond the Court of Appeals and adopted Judge Learned Hand's dictum that the question of the validity of the marriage was not even in issue.

It is firmly established, then, that one of the basic requirements for the creation of a marriage is consent, but the law has not decided which of the incidents of marriage must be contemplated by this consent. Is it sufficient that the parties voluntarily go through the ceremony or is it necessary that they intend to create the marital status with all its incidents? The weight to be given to the parties' intent in regard to the formation of the marriage relationship is ultimately a question of the policy of society concerning the value and position of the marital status. There are two fundamental approaches to this policy ques-

[36] See also Conley v. Conley, 14 Ohio Supp. 22 (1943). The fact that the marriage, after the birth of the child, had "served its purpose" is caused by the now almost universal "saving statutes," which provide that a child is born legitimately if it is born of parents who, before its birth, participated in a marriage ceremony. Some states also provide for the legitimacy of the child if its parents participated in a ceremony subsequent to its birth. For a collection of these saving statutes, see Jacobs and Goebel, Cases and Materials on Domestic Relations 1075 et seq. (3d ed., 1952). In the light of the saving statutes, the argument used for upholding sham marriage—that the interest of the child necessitates such a conclusion—seems to lose much of its force. See note 20 supra.

[37] 110 N.Y.S. 2d 307 (S. Ct., 1952).

[38] The court said that "a marriage under the circumstances here disclosed clearly offends the sanctity and recognized purpose of the marital relationship. . . . If . . . the marriage [is] found valid, it will exist in name only and serve no good purpose, while the parties will be prevented from marrying again and possibly establishing homes where true love and happiness may prevail." Ibid., at 309–10. For a similar argument, see Crouch v. Wartenberg, 91 W. Va. 91, 112 S.E. 234 (1922).

[39] 151 F. 2d 915 (C.A. 2d, 1945).

[40] Ibid., at 918.

tion. It has been contended that marriage is of such serious import to society that the law should not permit people to toy with it or to use it as a contrivance for deceptive schemes. This is the position taken by a number of civil law jurisdictions.[41] Under this system, the parties are absolutely bound to the marital status if a ceremony has taken place. The opposite result, found in the canon law,[42] is based upon the argument that the high position of dignity and importance which should be accorded to the sacrament of marriage will not tolerate the enforcement of the marital rights and duties when the parties did not intend marriage. Moreover, it has been said that, instead of becoming a valuable asset to society, these marriages will become a detriment by preventing the parties from entering into more satisfactory unions; and that perpetuating such marriages will prove injurious to the stability of the family.

[41] E.g., German Civil Code, BGB § 1323, which, because of the special nature of the marriage relation, specifically exempts sham marriage contracts from simulated transactions, void under BGB § 117.

[42] See note 29 supra.

METHODS OF INVESTIGATING MUNICIPAL CORRUPTION

Every time I attempted to trace to its sources the political corruption of a city ring, the stream of pollution branched off in the most unexpected directions and spread out in a network of veins and arteries so complex that hardly any part of the body politic seemed clear of it. It flowed out of the majority party into the minority; out of politics into vice and crime; out of business into politics, and back into business; from the boss, down through the police to the prostitute, and up through the practice of law into the courts; and big throbbing arteries ran out through the country over the State to the Nation—and back. No wonder cities can't get municipal reform!

—Lincoln Steffens*

A full-scale attack on municipal crime and corruption involves at least three aspects: (1) investigation to find the facts; (2) punishment of the guilty parties by criminal prosecution or by removal from office; and (3) action—legislative, political, or otherwise—to prevent recurrence of the offenses.

It is the purpose of this comment to survey the various investigative, fact-finding agencies that have been employed to deal with problems of corruption in our cities. As bearing on the effectiveness of these agencies, the following points will be considered: the range of subject matter which the agency can investigate; the time and money at the agency's disposal; the freedom from outside control with which the agency can determine its course of inquiry; the power of the agency to hold hearings, and subpoena witnesses and records; and the availability of sanctions against dishonest testimony. The degree to which the agency can utilize the facts found to punish guilty parties and to prevent recurrence of the offenses will also be discussed. A detailed analysis of the legal

* Steffens, The Struggle for Self-Government 3 (1906).