

Mr. William Pincus (cont.)

the poor. Indeed, the drafting process itself can be useful to the "War on Poverty". It has become increasingly clear that in many fields real progress requires thorough reexamination of substantive doctrines; a uniform marriage and divorce law project can serve as a model for future reexamination in other fields.

There can be no doubt that a new and uniform approach to marriage and divorce doctrines is needed. The current conceptual framework -- distinguishing invalid or annulable marriages (some of which are "void", others only "voidable") from valid marriages which can be terminated by divorce alone and only on grounds of a spouse's misconduct -- has its roots in medieval England; there was no absolute divorce and ecclesiastical courts had jurisdiction to annul "invalid" marriages. This historical tradition has no relevance to twentieth century society; but the historically derived framework does impede the process of modification required by changing social patterns. On occasion, of course, legislatures have been motivated to correct some of the most obvious anachronisms. In many states, for example, a child whose parents' marriage is later annulled is no longer bastardized by the common law rule that annulled marriages are "void ab initio"; the legitimation statutes were designed to prevent the imposition of penalties on innocent children since the "ab initio" rule served only to differentiate annulment from absolute divorce. There have been many such obvious hardship cases, and a great variety of legislative responses to them. As a result, substantive marriage and divorce doctrines are a hodge-podge -- within most states and from state to state. The state laws relevant to the status and dissolution of a marriage contracted at a time when one of the spouses is insane provides a good example. The statutes reveal a confused tangle of remedies and policy objectives. In two states the remedy is divorce; in several others no remedy is needed because the marriage is labelled "void" and another marriage can be contracted without any court action. In the states which require court action -- because the marriage is "voidable" by annulment -- the provisions for standing to sue include almost every possibility; an action can be brought by:

- either party;
- either party unless cohabitation after reason restored;
- only by the incapable party;
- only by the incapable party and his guardian;
- only by the incapable party or his guardian or relatives;
- only by the sane party or the incapable party's guardian or relatives;
- only by the sane party;
- only by the sane party, and then only if without knowledge of the insanity at the time;