October 3, 1969

To: Robert J. Levy

From: Caleb Foote

Re: Your uniform marriage law proposals

In connection with teaching Chapter 2 this week, I have finally gotten around to reading somewhat carefully those parts of your uniform opus which relate to marriage law (pp. 13-41 and Appendix C). I am breathless. I hope to get this to you in time for you to read on the plane en route to your meeting with Herma. Dictating my comments on what is surely the least felicitous piece of writing you have ever produced should at least serve to release some of the frustrations of my own present state of mind. The most plausible explanation for this draft that comes to my mind is that you have secretly commissioned Harry Foster to write it for you. Lest my reactions appear to be entirely negative, let me state at the outset that I agree with your proposals for better data gathering (p. 23, lines 6-10).

Before I read it, I was surprised that the marriage section comprised only about 12% of your 343 pages of text and footnotes, but after reading I could only admire your ability to fill that much space. My generally nasty reaction was partly conditioned by the expectations which you laid before me at the outset (pp. 6-7): to seek both "uniformity" (why?) and "significant reform" (great) of marriage law; do away with annulment (yawn); perpetuate traditional marriage law regulations (my god); and finally the mouse-like non-recommendation concerning de facto families (MY GOD!!). The "significance" of such a program escapes me. The underlined heading on p. 9, The Need for a Uniform Marriage and Divorce Law, is an entire misnomer, at least insofar as marriage law is concerned. Neither here nor in the scope section which follows is there the slightest demonstration of a need for

uniformity. I am hardly a Mishkin-federalist, but the value of uniformity here is far from self-evident. Off the top of my head I would suppose that marriage is an area peculiarly appropriate to the federal ideals of experimentation and tolerance of diversity. I am therefore annoyed that you won't even deign to give me so much as a hint of the analysis which has led you to assign the highest policy priority to the achievement of uniformity.

One would suppose that an analysis of the desirability of uniformity would also have to include a demonstration of its feasibility. The political fate of all previous uniform family law proposals should at least give you pause. In particular, the apparent assumption that you will proceed to draft this marriage law on the supposition that it will be uniformly adopted (p. 25, lines 11-14) strikes me as nothing more than a magical incantation. It seems self-evident, on the contrary, that you will have to draft a statute on the assumption that its adoptions (if any) will be piecemeal, that migratory marriage will continue to exist and that, if your regulations are to be "efficient" and "viable," you will be forced into the dead-end maze posed by our casebook problem at pp. 265-266. It is not clear whether your assumption of uniform adoption rests upon the second clause of the sentence at p. 20, lines 11-16. If this is correct, and that you mean to condition the effectiveness of the act in any state upon its adoption in other states, you should certainly say so directly at the outset and justify such a procedure. Surely you will have to resolve this question one way or the other before you can draft the rest of the statute. I would suppose that such a proposition would have politically devastating effects upon the proposal; in any event, in its present form (p. 20, lines 11-16), it appears entirely unworkable. Your reference

group is "contiguous states in any given region." Does this mean that California, Oregon, Idaho, Utah, and Arizona cannot or should not effectuate the act until Nevada has also adopted it? Is New Mexico contiguous with Utah? What about such combinations as Connecticut-New Jersey or Pennsylvania-Virginia, which although not contiguous are within easy driving distance of one another? What about the boundary lines where one "region" will be contiguous with another "region?" Unless you have a proposal which has solutions to such questions, you will have to assume non-uniformity and include in the act some adaptation of the Uniform Marriage Evasion Act or our pp. 265-266 statute. A second leg upon which a "need" for uniformity might rest would be a demonstration that regulation is so important substantively that we should override the values of federalism in order to achieve it. You never address this question directly, but by inference any such demonstration is woefully unpersuasive. The regulations you recommend are so unsupported by any rationale save habit and precedent (see below) that they hardly commend themselves for intra-state purposes, let alone displaying that higher urgency which should be a required justification for uniform proposals.

Parenthetically, what is your view of the proper role of uniform law in a federal system? When uniform laws are desirable, by whatever standards you show to be applicable, what should be their objective? Is it to enact a floor of minimum regulation (which may mean that the over-all quality of law is reduced to the lowest common denominator) or is it to impose a model (which necessarily assumes the commissioners have competence to compel adoption and prevent administrative nullification)? Here again my annoyance flows from your assumption of so many concepts that seem to me highly problematic. Another example, never directly adverted

to or discussed, is fuzzily but repeatedly suggested by your use of such slogans as "effective," "efficient," or "viable." Do you so discount as not even to be worth rebuttal the argument that, in matters pertaining to family privacy and autonomy, technical efficiency manipulated by social worker types on behalf of mass man is perhaps a thing more to be feared than encouraged? Indeed, you never demonstrate why you assume migratory marriage to be a bad thing. Please favor your readers with your rationale of why it was so horrible during all these years of silly California remarriage law for people to have gone to Nevada to get married.

A third prerequisite of uniform laws as an "effective" solution to "the migratory marriage problem" is a demonstration of the feasibility of intra-state enforcement. See Foote, Levy and Sander, page 781, for the proposition that what creates diversity in practise is not diversity of law but differential laxity of administration. You could hardly dispute a proposition bottomed on such authority, and surely you would agree that, given 100 percent adoption, non-enforcement of your laws' strictures in only a few states would activate the Gresham-Rheinstein syndrome. Therefore, local enforceability and the probability that such enforcement will infact occur are keystones of your "solution" of whatever it is that the "problem" is.

As one reading of your arguments on this matter left me puzzled, I compiled (doubtless maliciously) the following summary of your discussion, which appears to run from page 19, line 6 through the middle of page 23. The first sentence--"By and large, the supposedly pre-marital regulatory topics have been enforced, if at all, at the discretion of ..." is in itself something of a deterrent. Leaving to one side consideration of "by and large," does "these"

refer to all the regulations enumerated in the preceding ten lines, as would appear from the context, or only some of them, as would appear if one is to make any meaning of the sentence? Does "supposedly" qualify "pre-marital" or "regulatory", and if so, what difference does it make? Does the phrase "if at all" imply that one tenable empirical alternative is that there has literally been no enforcement at all of "these" regulations? To imply, as the whole of page 19 repeatedly does, that licensing and blood test regulations are unenforced by marriage license clerks is uncharitable, at the least in view of the climax we are to see/four pages hence. As we proceed, we learn, e.g., that blood tests are basically pre-marital (line 11--very interesting); that there have been some other enforcement efforts (lines 13-21); that "these" (?) efforts are "primitive" (line 21); that "marriage regulation by the state is for most practical purposes" (?) "non-existent" (line 22); that there are "occasional criminal prosecutions" (line 25); that "couples not permitted to marry in one state" (all couples? only a few? or does it make no difference?) evade the law (page 20, lines 1-5); that Minnesota juveniles who evade the law send cheery greetings to inform their Minnesota judges of their evasion (lines 5-9-fascinating); that waiting period laws"are still entirely too common" (lines 9-11--so much for your recommendation in favor of waiting (periods) page 7 supra); that the Uniform Marriage Evasion Act ~~xxxx~~ deserves to be spat upon (pages 20-21); that enforcement by parents "cannot be relied upon" (page 21, last line--thank God for small favors) and that parents even lie under oath (page 22, lines 1-8); that for "bigamous and incestuous" marriages "criminal enforcement can be expected" (lines 13-14); that criminal prosecution is "harsh" and will be "undermined" both by prosecutors and by juries (lines 21-24; and that "the only viable method of enforcing marriage prohibitions" (at last ! this tortuous climb has at least whetted my appetite) is to rely on marriage license

clerks (top of page 23). WOW! What a clincher!

The questions of policy, migratory enforcement and intrastate enforcement thus out of the way, we turn (middle of page 23) to the substative merits of particular regulations, and I am happy to agree with the first sentence after (a) on the need to determine some minimum age for marriage. But you then procede to discuss, without further definition, a concept described as "youth marriage." This is really indefensible; see your own discussion at page C-3. As one never knows whether you're referring to fourteen year olds or twenty year olds, this ambiguity renders most of the rest of the discussion useless. At page 23, line 17-21, you really get down to what I can only regard as dirty pool. Technically you may be correct if all you intend to assert in the sentence is the existence of the three statistical associations, although even by this standard the last two are imprecise, would probably be meaningless for policy purposes if precisely stated, and despite your "little doubt" the asserted associations may well be unsupported by data. In the context in which you make the statement, however, a causal inference is almost inescapable and even if you didn't intend one/it will certainly be read in by the methodologically unsophisticated Commissioners. The next sentence (lines 21-24) poses a number of problems. The difficulty with the studies you cite in appendix C is not a question of reliability but rather the following:

(1) That they are based on such inadequate samples that we do not know whether or not we can generalize any of the reported statistical associations;

(2) Even if we had an adequately randomized cohort study, imprecision of the divorce criterion, which presumably excludes many "real" failures and it includes many ultimate successes, makes it almost impossible to derive any meaning from such an association;

(3) the crudity of limiting the studies to establishing "the" over-all association between marriage age and divorce makes them irrelevant for legal purposes, where we require narrower data showing how and under what conditions, as in different subcultures, such an association exists; and (4) the fact that in none of the studies are other antecedent and possibly causal variables controlled. Most (although not all) of these defects are pointed out in your own Appendix C; indeed, you yourself state at p. C-12 that:

> What is still problematic is that no causal relationships have as yet been empirically verified, and the circular association of variables remains closed; young marriage is associated with low socioeconomic status, young marriage is associated with premarital pregnancy, premarital pregnancy is associated with low socioeconomic status, and so on, and on.

What, then, do you mean by the "very tentative hypotheses" (p. 23, line 23) which you pull out of the air, although I could not find the hypotheses? I suggest that you substitute for the first page and a half under "age" a sentence which says in effect: There are no data on whether or not marriage at age 16, or 18, or 20, causes a higher divorce rate (that being assumed to be an evil) than marriage at age 21, or 22, or 52, and that therefore the determination of what age uniformities are to be imposed by the statute will have to be selected by majority vote from among the commissioners' value preferences. Of course, you or the commissioners may wish to pass the buck to judicial "discretion" (see p. 24), for judicial values are irrefutable and of all classes in society judges are the least likely to be deterred from interfering in other people's lives by a total absence of data. (See the attached exhibit on judicial discretion in dealing with children.)

Again, I am bugged by the persistence of what appear to be unexamined assumptions. Even if we were to conclude that "youthful marriage" of some particular kind resulted in a higher divorce rate, why is it so apparently self-evident that the solution is to prohibit marriages at such an age? If, for example, it were found (as suggested by some of the studies you discuss) that one cause of instability was the economic dependence of young marrieds on their interfering in-laws, might not an alternative solution be for the state to pay them an allowance until they had completed their education? Furthermore, it seems to me quite inadequate merely to prohibit marriage without at the same time tightening up other laws to insure vigorous enforcement of fornication statutes, as otherwise you may merely force the rejects into unwedded bliss.

I am in favor of some limited waiting period, although I don't think it would have the slightest effect on the incidence of marriage dissolution. In any event, most states already have it, and it hardly seems a matter of sufficient importance to justify uniform legislation.

I do not really feel that your discussion of premarital counseling (pp. 31-36) is worth commenting upon. The quality of the argument is indicated by the first sentence which, for "fairly general agreement" on a completely unsubstantiated proposition, cites only the one author who is beyond doubt the most unreliable and most undiscriminating legal commentator writing in the field of marriage law. Indeed, as is so often the case, you shortly contradict yourself (bottom of p. 33) by pointing out that the programs are untested.

I must confess I am bewildered by why you devote so much space to what is surely the most asinine proposal in the field of marital law and yet end up without

suggesting either any policy or the criteria upon which policy should be determined. Under such a counseling plan, how much do you estimate it would cost to prevent one "gin rummy" marriage?

I think I have already written entirely too much and do not have the energy to deal with the last two items. Unlike the previous issues which you have discussed, the health and de facto problems pose very troublesome questions for me. I do not know what should be done about rapid developments in genetic technology (which for some reason you do not discuss) or about the social necessity yet political impossibility of according some sort of dignified recognition to the family habits of different cultures within our country. The genetic problem is certainly not ripe for uniform law consideration and, indeed, should be dealt with experimentally in different ways as it becomes acute. As for the necessity of recognizing some forms of de facto family status, notwithstanding bigamy technicalities, uniform legislation would be a disaster. New York or California should be free to experiment with solutions to this problem without fastening Nebraska and Mississippi like albatrosses around their necks.

I think you make a very persuasive case for abandonment of the marriage part of your uniform project.