National Conference of Commissioners on Uniform State Laws

Mr. William Pincus
The Ford Foundation
477 Madison Avenue
New York, New York

Dear Mr. Pincus:

The National Conference of Commissioners on Uniform State Laws respectfully applies for a grant of $50,000 to assist in the research and deliberation necessary to provide an adequate basis for promulgation of a comprehensive uniform family law, particularly that of marriage, child custody and divorce.

The National Conference of Commissioners on Uniform State Laws is the national organization of state commissioners appointed by the governor of each state to promote unification of private law in the United States by adoption by the states of an identical statute. The National Conference, organized seventy-five years ago, has had a substantial affect in providing uniformity of private law in the United States. Perhaps its major achievement in the past decade is the Uniform Commercial Code, prepared in cooperation with the American Law Institute, which has now been adopted by all but three states and presumably will be adopted by the remaining states in the very near future. One of its most significant new projects, (completed in August 1966 with the help of foundation grants) is a model state anti-discrimination act which has already served as the basis of legislation in one state.

Under its Constitution and under the state statutes the National Conference is obligated to consider subjects where uniformity of state law is "desirable and

Mr. William Pincus (cont.)

practicable". Where ever a subject matter is customarily left to state law, in that area the Conference has a duty to draft legislation. In the 1880's when organization of the commissioners on uniform state laws was being discussed, confusing and inconsistent divorce and marriage laws, as well as laws on commercial subjects, were the most frequently cited illustrations of the need for national uniformity of state law. A committee to draft a uniform law in the field of divorce was formed in 1892, the first year of the National Conference and the Conference approved a limited act in 1900. Intermittently since that date other and newer acts on various aspects of marriage and divorce have been drafted and approved. The last was the Uniform Divorce Recognition Act promulgated by the Conference in 1947 and thereafter approved by the American Bar Association. In its long history the Conference has drafted family laws acts on its own initiative and has collaborated with others, such as the National Congress on Uniform Divorce Laws called by President Theodore Roosevelt in 1906.

Nonetheless, the efforts of the Conference in the field of family law have not been as successful as in commercial law. Periodically presidents of the Conference have commented on the slowness of our progress in this field. In 1939 a group of distinguished teachers of domestic relations law informed the Conference that while uniformity was desirable, it was not practically obtainable. Yet the Uniform Divorce Recognition Act drafted after that date has gained greater acceptance than earlier Conference endeavors in this field.

Although this discouraging record suggests the possibility of another failure, the National Conference believes that a new attempt should be made at this time. Since, as state officials, it is the duty of the Commissioners to seek uniformity of state law, past failure where uniformity is obviously so desirable is no excuse for not making an attempt.

For reasons which will appear later in this letter, the Conference believes that the time is auspicious for a reform in family law. Moreover, the experience gained by the Conference in drafting the monumental Uniform Commercial Code and in securing its enactment in more states than those which had accepted the many piecemeal acts on which it was based can now be applied to this family law project. For the Uniform Commercial Code the Conference sought a comprehensive coverage of the subject, after an outline had been carefully constructed; it used reporters or draftsmen drawn from the academic community to assist the Commissioners in maintaining a comprehensive approach and to undertake research in depth; it established panels of expert advisors to aid the generalists provided by the Conference in drafting.

Mr. William Pincus (cont.)

This seems to produce more chance of success than the older methods of law reform used by the Conference in its earlier efforts in both commercial and family law. The Conference believes that in many ways it is the only organization with the talent and method of operation capable of producing on a national scale both the intellectual and practical consideration of a major state problem. There is the necessity of broad-based deliberation on, and scrutiny of, proposals by practicing lawyers, law professors and judges familiar with the law subject involved. The regular procedure of the National Conference helps produce this deliberation. It customarily opens its meetings to representatives of other groups and its drafting is co-ordinated with the work of the American Bar Association and is approved by it. Secondly, a great amount of research and study is necessary as to the laws and practices on the subjects considered for deliberation. Finally, the National Conference can, as experience demonstrates, produce that disinterest in view point necessary to secure confidence in sponsorship. While the state Commissioners on Uniform State Laws are obliged to endeavor to obtain enactment of uniform acts, they have no special interest to represent other than that of uniformity of state law wherever uniformity is desirable.

The need for reform and uniformity in the field of family law is evident in many ways. For one thing, current marriage and divorce doctrines discriminate against the poor. Dean Pound, in The Spirit of the Common Law, 211-212 (1921), suggests that discrimination against the poor is not a new phenomenon. His story concerns an English judge sentencing a workingman convicted of bigamy at a time prior to the creation of statutory grounds for absolute divorce.

> On being asked what he had to say why sentence should not be pronounced, the accused told a moving story of how his wife had run away with another man and left him with a number of small children to look after while barely earning a living by hard labor. After waiting several years he remarried in order to pro0 vide a proper home for the children. Mr. Justice Maule shook his head. "My good man," said he, "the law did not in any wise leave you without a sufficient remedy. You should first have brought an action in Her Majesty's Court of Common Pleas against this man with whom, as you say, your wife went away. In that action, after two or three years and the expenditure of two or three hundred pounds you would have obtained a judgment against him

Mr. William Pincus (cont.)

> which very likely would have been uncollectible. You should then have brought a suit against your wife in the ecclesiastical court for a divorce from bed and board, which you might have obtained in two or three years after expenditure of two or three hundred pounds. You would then have been able to apply to Parliament for an absolute divorce, which you might have obtained in four or five years more after spending four or five hundred pounds. And," he continued, for he saw the accused impatiently seeking to interpose and to say something, "if you tell me that you never had and never in your life expect to have so many pennies at one time, my answer must be that it hath ever been the glory of England not to have one law for the rich and another for the poor."

The "principle" requiring one law for both rich and poor still operates, of course, and still subjects the poor to invidious discrimination. Any New York couple without funds to finance one spouse's overnight trip to Mexico is not treated equally by the state's law -- since New York courts have never accepted as valid exclusively "mail order" Mexican divorces.

Marriage and divorce doctrines discriminate against the poor in other ways as well. In recent years state and federal welfare and social insurance programs have been greatly expanded. Benefits under many of these programs are paid to "wives" and "children" -- and the definitions of these terms refer to state marriage and divorce laws (or, occasionally, to probate provisions) designed for quite different purposes. A great many persons, without education, without adequate legal advice, perhaps without funds to obtain a divorce, establish stable, long-continuing, family relationships; but because these relationships do not fit the state's description of a valid marriage, a spouse and children may be denied a workmen's compensation claim for federal OASDI benefits. In only about fifteen states can "common law marriage" doctrines still be used to give recognition to de facto family relationships. Even in these states, "as foreign as the statement of legalistic standards may be to the illiterate and ignorant who are so frequently participants in these relationships, the law rigorously exacts evidence of a present intention to be husband and wife and where words, conduct and other evidence indicates the intent that marriage should take place sometime in the future, neither the continued living together nor the holding out as man and wife is sufficient." Hobby v. Burke, 227 F. 2d 932, 933n. 2 (5th Cir. 1955). The same court reversed

Mr. William Pincus (cont.)

the district court's award of OASDI child's benefits because the plaintiffs had failed to prove the existence of a common law marriage:

> If this is harsh, it flows from local concepts which, if need be, can be ameliorated by appropriate local, Georgia action as its declared policies on such domestic matters may come under its legislative or judicial review. On such internal matters, Congress . . . takes the state policy as it is.
>
> Reflecting the contemporary distates for the visitation of penalties upon the innocent victims of such illicit relationships, the district court apparently thought that the Georgia declaration of policy favoring legitimacy . . . avoided the harsh denial of the statutory benefits to a child of acknowledged paternity and dependence. But . . . the policy . . . is applicable only to those situations . . . where a marriage contract has been undertaken, but is void or voidable because of the legal inability of one of the parties to make a valid contract.

Although some state courts utilize other "saving" doctrines (see Weyrauch, Informal and Formal Marriage -- An Appraisal of Trends in Family Organization, 28 U. Chi. L. Rev. 88 (1960)), the doctrines are neither widespread nor uniform. There can be no doubt that informal marriages as well as other types of relatively permanent and stable family relationships, occur most frequently among the poor and disadvantaged social classes; but because marriage doctrines are predominantly " 'white' and 'middle class' " (Weyrauch, Informal Marriage and Common Law Marriage, In Sexual Behavior and the Law, 324 (1964)), many disadvantaged persons and their children are unjustly penalized. There is substantial evidence that those who do not customarily make use of lawyers find "family law" one of the major reasons for seeking legal advice. The 1965 survey of the operation of lawyer referral services by the American Bar Association indicates that family law problems constitute 40% of the requests for legal services. Similar statistics are becoming available from the operation of legal aid services provided by various not-for-profit organizations including those financed, in part, by the Office of Economic Opportunity.

It is appropriate, now that public attention has finally been focused on poverty, that an effort be made to deal fairly with the specialized family problems of

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 annullable 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;

-- only by the "injured party", which in the context of the particular statute means the sane party.

Moreover, there seems to be little correlation between the provisions relating to remedy and standing and the labels attached to the marriage; in one state where the label is "absolutely void" the only available remedy is divorce. Finally, the judicial definition of the requisite "insanity" may vary with the parties, the issue, or the time at which the validity of the marriage is questioned. Needless to say, the doctrinal differences have produced burdensome conflicts of laws problems.

Finally, there is encouragine evidence that the time is now ripe for a vigorous effort to enact uniform and intelligent marriage and divorce doctrines. The Hague Conference on Private International Law, an organization of governments of which the United States has recently become a member, notwithstanding its own previous failures, decided in 1965 to consider once more the drafting of an international convention on the subject of divorce. The National Conference is a member of the State Department's Advisory Committee on The Hague Conference and is aiding the preparation of United States papers on this convention. The Advisory Committee has recommended that Dean Erwin Griswold, of the Harvard Law School, be appointed the initial United States delegate to the Conference. It is not unlikely that The Hague Conference will give international impetus to doctrinal reform in the United States.

Legislative committee and action in two of our most populous states also suggest that the time is now ripe for a vigorous reexamination of marriage and divorce doctrines. New York, after a major public relations and legislative debate, has now enacted anew divorce law which, while "revolutionary" in New York terms, is only a very limited and narrow attack upon the problem. The Governor of California has just appointed a special commission on the family which includes, among the topics on its agenda, the ascertainment of "the feasibility of uniform nationwide standards for residence before marriage can be performed or divorce granted".

Significant changes have taken place in the intellectual and social context of family law during the last twentyyyears. Wide publicity has been given to the complexity of divorce as a social phenomenon. There seems to be, moreover, almost universal agreement that the important topic for societal concern is family instability and "marriage breakdown" -- rather than the judicial decree which simply formalizes an already terminated family relationship. The simplistic notion that "divorce breeds divorce" is no longer as popular as it once was. See Rheinstein, The Law of Divorce and the Problem of Marriage

Mr. William Pincus (cont.)

Stability, 9 Vand. L. Rev. 633 (1956). Indeed, students of family law, including religious leaders, and to some extent the public at large, now seem to assess in a much more sophisticated fashion the significance of "the law" as a determinant of the number of marriage failures or the divorce rate.

In addition, it is now generally known that consensual divorce is much more likely to be the rule rather than the exception. In recent years both the professional and popular literature have often reported that legislative restrictions designed to curtail easy divorces have trapped only the occasional individual mired in a contested divorce action. Statutory grounds have often been ignored by the judges. Consider, for example, a study of Philadelphia practice indicating that, despite narrowly drawn legislative grounds and rigorous appellate court interpretations of those grounds in contested cases, for all practical purposes any Philadelphian who wants a divorce can obtain one. Note, The Administration of Divorce: A Philadelphia Study, 101 U. Pa. L. Rev. 1204 (1953). Or consider a study of New York practice reporting that the judges responded to legislative refusal to create grounds for absolute divorce in addition to adultery by vastly expanding the grounds for annulment. Note, Annulments for Fraud -- New York's Answer to Reno, 48 Colum. L. Rev. 900 (1948). The New York appellate courts have also compelled trial judges to ignore the most patent signs of perjured testimony of adultery in uncontested divorce actions -- making it substantially less difficult to obtain an absolute divorce and, incidentially, encouraging New York's thriving "divorce mill" detective agencies. See Wells, New York: The Poor Man's Reno, 35 Corn. L. Q. 303 (1950). The national press services have apprised every newspaper reader that "divorce by mutual agreement . . . has made available by the Supreme Court to practically any couple one of whom at least is willing to pay for the expense of the trip to Reno and commit perjury as to the intent of staying there definitely." Even the Governor of New York has taken advantage of current interpretations of the Full Faith and Credit Clause of the United States Constitution. The New York Court of Appeals recently recognized an economically less painful device for avoiding local legislative deterrents to consensual divorce; to obtain a binding decree one spouse need only have the price of a round trip ticket to Mexico. See Rosensteil v. Rosensteil, 16 N.Y. 2d 64, 262 N.Y.S. 2d 86 (1965). The press has dutifully informed the public of the existence as well as the frequent use of this alternative. See Samuels, To Juarez on the Divorce Run, New York Times, Sep. 12, 1965, p. 78 (Magazine section).

Many lawyers, legislators and members of the public at large are now aware that the status quo jeopardizes sound judicial doctrinal development, attorney's feelings as to their own professional integrity, and the public's respect for the law and its administrators.

Mr. William Pincus (cont.)

A major problem for the National Conference in undertaking such an ambitious project as the Uniform Family Law Code and the Commercial Code is financing the extraordinary research and coordinating activities required. The National Conference in its ordinary effort is supported by state appropriations; this is a subject which, in our federal system, is peculiarly a subject for state and not Congressional action. The Conference has a duty to devote a portion of its limited resources to this project and this it will do. As part of its ordinary procedure it will appoint a special committee to supervise the drafting and it will therefore devote some of its resources to the cost of assembling this committee from time to time to confer with the reporters and experts and it will administer the project. Professor Allison Dunham, the Executive Director of the Conference, attends all meetings of reporters and committees and actively participates in the research and drafting.

Financial help is needed for three aspects of the drafting and promulgation of a Uniform Family Law Code. The Uniform Commercial Code has taught us that to undertake a project of this magnitude, financial help from other sources is necessary to help support the research. The Model Anti-Discrimination Act has taught us that a preliminary memorandum in some depth outlining the problems which are related to the central problem of family law and which should be considered for inclusion in a comprehensive law is useful in defining the project and in pointing up the areas where additional research is necessary and where there is sufficient information available. Normally, no financial help is needed in the deliberative aspect of a project, but it is believed that help will be needed here. For the Uniform Commercial Code expert advisors from banks, manufacturers and other commercial establishments could be obtained at no cost to the Conference. For the current Consumer Credit project, about to be completed, we have discovered that advisors from various public groups such as consumer advisors, legal aid societies and some state officials, could not be obtained unless we reimbursed them for their expenses of attending meetings and in some cases pay them a small honorarium as consultants. It is clear to use that the family law project is unlike the Commercial Code. The advisors and consultants will include social workers, religious leaders, marriage counselors and sociologists and we expect many, if not most of these, will need help for travel expenses to attend drafting meetings.

Under the grant requested, the Executive Director, in consultation with the drafting committee of the Conference, would select a legal research director to prepare a substantial monograph which would analyze the existing legal and non-legal literature which seemed to have relevance to solution of family law problems by legislation and on the basis of this analysis he would congtruct a

Mr. William Pincus (cont.)

recommended outline or table of contents of a proposed comprehensive law. Included in this analysis would be recommendations as to the relationship of this comprehensive project to other existing uniform acts and those under consideration but not yet approved by the Conference. Included also would be a brief history of the many legislative attempts, unsuccessful as well as successful, in this field by numerous legal and non-legal groups to secure divorce and marriage law reform. The criteria of inclusion would be the usefulness of the material to constructing an outline of a proposed law and to a possible solution of a family problem by legislation.

Since much of the non-legal literature is directed primarily toward showing the existence of a social problem and the need for attempts at solution, a re-analysis of this literature is necessary to determine what, if anything, it indicates as to a preferable legislative approach. This part of the project, it is believed, can be completed in one year. We hope to secure Professor Robert J. Levy of the University of Minnesota Law School to undertake this part of the work. He has agreed, if we can make our arrangements in time, to take a whole year as his sabbatical in order to work on this project.

When the monograph described above is available, the next step is to arrange a meeting with a group of experts and the special committee to discuss its recommendations as to content of a uniform law.

On the basis of this small conference of experts, the Special Committee of the Conference will decide upon the content of the proposed law and drafting will then commence. It is expected that Professor Levy will continue as draftsman although segments of the project may be put in charge of assistant reporters as was the case with the other large projects of the Conference. Full-time reporters will not be used, but it is expected that we will engage academic personnel who can devote about one-third of their time to the project. During the drafting process there will be meetings of committee and advisors.

From time to time completed segments will be presented to the Conference for its consideration. Under the rules of the Conference, an act must be discussed, line by line, at two annual meetings before a vote by states is taken. If the state commissioners approve or promulgate the act, it is then submitted to the House of Delegates of the American Bar Association for approval. Thereafter, the Commissioners and other interested persons endeavor to secure enactment. While the draft is being considered by the Conference, it endeavors to obtain simultaneous consideration by as many interested groups as possible in an endeavor to reach a consensus on desirable solutions. Nevertheless, the Commissioners have a statutory duty to make the policy decisions, and the

Mr. William Pincus (cont.)

responsibility for the decisions will be theirs and not the advisory groups.

As can be seen from the outline of the project, it is intimately connected with legislation; indeed, it is the duty of the Commissioners, as state officials, to draft, promulgate and sponsor uniform laws. Nevertheless, because of the governmental nature of the organization, the Internal Revenue Service has ruled that contributions to it are contributions to or for the use of state governments and are, therefore, entitled to tax exempt and tax deduction treatment. A copy of the ruling is attached.

It is estimated that the project will take three years to complete a draft for final deliberation by the Conference as a whole. In utilizing this proposed (and ordinary) method of operation, the following use of the funds requested is contemplated:

1. Research and preparation of monograph recommending content of proposed uniform code of family law (one year)

Compensation of chief reporter (full time)	10,000
Research assistants (part time)	3,000
Secretarial assistance (part time)	1,500
Reproduction costs	250
Communication expense	150
Travel expense in connection with presentations and discussions (perhaps small honoraria)	3,000

2. Research and preparation of drafts and policy statements preparatory to drafting (2 years)

Compensation of Chief Reporter (part time)	15,000
Assistant reporters (part time)	10,000
Secretarial assistance (part time)	3,000
Reproduction costs	750
Communication expense	450
Travel expense in connection with meetings of reporters, expert advisors and special committee	12,000
	49,100

(Note: During this same period, the Conference will spend approximately $15,000 of its own funds toward the direct costs of the project -- e.g.,

Mr. William Pincus (cont.)

travel expense of the members of the special committee. In addition, the states will contribute the expenses of all of the members at the annual meetings, about 1/6th of the time of the Executive Director, and a substantial amount of administrative expense).

The work of bringing about a substantial degree of unification of state law in our federal system by voluntary state action is an undramatic but highly significant contribution to the goal of making our federal system work. Elimination of differences among the legal systems of the states on the subject of family law has effects far beyond assisting the individuals involved. The Conference hopes that this new effort in the field of marriage and divorce will herald a new era of state cooperation at unifying the law of the United States.

Sincerely yours,

William J. Pierce
Chairman, Executive Committee

WJP/ph
enc.

P.S. Enclosed is a brief description of the National Conference prepared several years ago which may be useful in your consideration of this project.