New Reasons For Uniformity

By Allison Dunham
Professor of Law, The University of Chicago Law School

(Remarks delivered by Professor Dunham to the alumni of The University of Chicago Law School during the Annual Meeting of the American Bar Association, Honolulu, August, 1967.)

In the last decade of the Nineteenth Century, the New York legislature invited a number of states to meet at Saratoga, New York to consider uniformity of state law, particularly that of commercial law and divorce. A result of that meeting was the creation of the National Conference of Commissioners on Uniform State Laws. In 1967, more than seventy-five years later, all areas subject to the jurisdiction of the United States except Puerto Rico and Louisiana had adopted the Uniform Commercial Code prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute jointly, but in the same year the New York state legislature again memorialized the states to meet in the near future on unifying divorce law. Success has been great in commercial law. This is at least the second time in which the National Conference has substantially unified commercial law. I need only remind you of the Uniform Negotiable Instruments Law promulgated in 1896. The National Conference, however, has had little or no success during its seventy-five years of existence in the field of divorce.

Continued on page 25

On Entering The Profession Of The Law

By Bennett Boskey

Volpe, Boskey and Lyons; Washington, D.C.

(There follows Mr. Boskey’s remarks to the Law School’s entering class, at the customary dinner in their honor, October 3, 1967.)

All good things must have a beginning. You talented men and women, just starting your first year at the University of Chicago Law School, have the enviable advantage of entering into the fellowship of one of the few truly great law schools found in the mainstream of our national life. For each of you, this week marks the beginning of your commitment to the law as a profession.

Most of you will never be quite the same again.

Ahead of you lies a broad mixture of experiences—a mixture of accomplishments and, alas, sometimes of disappointments. You will be seeking the paths of learning and of wisdom in a discipline almost as old as civilized man himself. But it is a discipline which every generation—and indeed, every member of this highly-individualized profession—must in some measure rediscover and redefine anew.

Soon—in your classrooms, in your outside reading and in your private discussions—there will be thrust at you what at first will seem to be an over-abundance of legal and other materials. These materials will be aimed at enlightening you concerning the hardy perennials of the law—contracts, property, torts, procedure, corporate and commercial transactions, constitutional developments—as well as concerning some of the more sophisticated-sounding subjects which have become such necessary auxiliaries if law school curricula are to be kept abreast of contemporary life. Here in the law school you will be encouraged to develop your talents for understanding—and not only for understanding, but also for utilizing—methods and techniques of analysis considerably different from those which, as your presence here tonight testifies, you mastered so successfully at college. Likewise you will be encouraged to seek to apply these methods and techniques of analysis in working towards solutions of many of the basic problems of our society.

If past experience is any guide—and one of the part-time axioms of the law is Justice Holmes’ observation that a page of history is worth a volume of logic—then by the time the winter winds have started to blow along the Midway this coming December and January, many of you will find yourselves in a state of sore confusion. This is sufficiently normal so that it should not be cause for alarm or despair. You ought not expect that your

Continued on page 27

II. AFFIRMED IN PART, REVERSED IN PART
People v.

III. REVERSED OR REVERSED AND REMANDED
People v.

IV. AFFIRMED BY APPELLATE COURT, BUT REVERSED BY HIGHER COURT
People v.

Continued from page 3

The significance of the second attempt by the New York legislature to induce the states to unify divorce law lies in the dramatization of a substantial change in the reasons for uniformity of state law and perhaps even in the methods of obtaining uniformity. When the National Conference was formed seventy-five years ago, the literature concerning its formation emphasized the fact that then in our federal system about the only method of obtaining uniformity of state law was by voluntary adoption by state legislatures of identical law. It was thought, as the United States Constitution was then interpreted, that Congress could not unify commercial law or divorce. Today, seventy-five years later, Congress can clearly unify the law concerning commerce by enactment of a law which applies not only to all inter-state transactions but to all transactions affecting interstate commerce. After the case of Katzenbach v. McClung, 379 U.S. 294 (1964), involving the Civil Rights Act of 1964, it is hard to imagine an area in which Congress cannot unify law by its enactment. If we can imagine an area, it may be the area of divorce.

In the seventy-five years since the founding of the National Conference, two other methods of obtaining uniformity of law have developed. The clause in the federal constitution concerning interstate compacts, long dormant, has come into its own with compacts on such matters as education, and air and water pollution. In addition, the United States government has become a member of the Hague Conference on Private International Law and the Rome Institute for Unification of Private Law and as a member of these organizations and of the United Nations and its constituent organizations, the United States is now participating in the drafting of conventions or treaties designed to obtain world uniformity of private law.
The reasons, as well as the methods, for uniformity have changed in seventy-five years. In 1892, the emphasis was on transportation of moveable things—identical law to be applied to a multi-state transaction involving the movement of a sack of flour from Minneapolis to Boston. To some extent in 1892, and to a greater extent in between the two world wars, the emphasis shifted to the mobility of money—the need for uniformity concerning intangibles.

The 1967 memorial of the New York legislature concerning divorce emphasizes anew another reason for uniformity, the mobility of persons. The lack of uniformity in many areas of law points up the possibility of discrimination between rich and poor. It did not go unnoticed in the New York legislature that the ability of Governor Rockefeller to obtain a divorce from Nevada was an ability not shared by the large number of people in New York who could only get a divorce under the very stringent New York divorce laws because they could not temporarily leave New York.

Mobility of persons is presenting a problem in another way. Both the Commissioners on Uniform State Laws and the Council of State Governments have received suggestions from federal agencies to the effect that it is difficult for them to move their employed lawyers, doctors and architects from one state to another, that is, from one regional federal office to another, because of the difficulties and differences in the licensing laws of the respective states concerning these occupations. In some states, employment by the federal government except in the General Counsel’s office, as an example, is not regarded as “practice of law” for the purpose of being admitted to practice on motion in a new state. In some states, a lawyer in the General Counsel’s office of a corporation cannot count his practice in that office as practice entitling him to admission on motion in a new state. It is probably true that in a recent sleet storm in a northern urban area where the utility companies brought personnel from all over the United States by quick jet transportation to work on repairing the power lines, these personnel, if required to have a license in order to make electrical installations within a particular village, were operating illegally. This is another illustration of the quick mobility of population changing the need for uniformity of state law.

Another new reason for uniformity which is developing is a reason which I call facility of administration.

This came to me in a dramatic form when I received a communication from the Department of State of the United States enclosing the pages of the Foreign Service Manual instructing foreign service officers on taking acknowledgments abroad for American citizens and others to be used in some state in the United States. This is the case which would arise if an American citi-zen, while touring in Europe, had to execute and have acknowledged a deed for land in Illinois. The instructions to foreign service personnel were many pages long and they started out with a statement that the foreign service officer had to find out the state in which the document was to be used. It then provided that if the document was to be used in, let us say, North Dakota, the secretary of the embassy could not take the acknowledgment because the North Dakota law permitted only secretaries of legations to take acknowledgments; the acknowledgment could not be taken by the Counsel General because the North Dakota law authorized only consuls to take acknowledgments, and so on for each state of the United States. The Department of State urged the National Conference to attempt to unify the law on this subject so that they could simplify the instructions to foreign service officers—having one uniform method of procedure by a foreign service officer wherever located in the world and whatever title the State Department assigned him. This is an illustration of the problem from the Executive Department, but it arises even in the court system. The federal courts, as an example, are directed by the United States Supreme Court not to grant habeas corpus on application of a prisoner in a state prison, unless the state does not provide an adequate procedure for post-conviction review of various constitutional claims of the prisoner, such as the denial of a fair trial. The circuit courts of the United States and the United States Supreme Court must know, therefore, the law of all the states in the circuit, even though the particular judge was trained under the law of one particular state. It would facilitate the judging functions if the circuit could be reasonably confident that the law of all of the states in the circuit was substantially identical. In Montreal we promulgated the Uniform Post Conviction Procedure Act and at the Honolulu meeting of the National Conference we promulgated and the American Bar Association approved a new statute authorizing federal courts to certify to state courts a question of state law which had not previously been decided by the state court, so that the federal court could, with confidence, decide the federal question on the basis of known state law. If all of the states in the circuit had this type of statute or rule of court, as one of the federal judges argued during the presentation of this act, the federal judges could know that they could find the answer in a substantially uniform way. Federal administrators have the same problem. Most federal agencies are operated on a decentralized or regional basis. There are regional offices in Chicago and Denver, for example, covering many states. To the extent that federal rules, including federal grants-in-aid, turn on a particular state law, it would facilitate administration by the federal government and reduce the necessity of having separate employees for each state, if the law in the region was substantially uni-
form. The Uniform Federal Tax Lien Registration Act serves this reason for uniformity.

This is not a problem solely involving federal employees; it is also a problem involving private corporations with multi-state operations.

Finally, there is a new or at least an increasing reason for uniformity in areas where custom, convention and habitual course of conduct are tending to establish a common expectation throughout the United States. This commonality of expectation is increasing at a faster rate than I suspect many lawyers realize. I will use a "non-law" illustration to make this point. A friend of mine has been with a national waterworks company since his graduation from engineering school in 1939. When I saw him for the first time in many years in 1964, twenty-five years after his graduation, I asked him what were the major changes in his business in the twenty-five years he had been with it. His answer was, the development of a common taste or tolerance (perhaps it would be better to say lack of tolerance) of brackish or poor-tasting water. The demand in his business for insertion of chemicals into municipal water supplies designed to eliminate various bad qualities of water has been the fastest growing element of his business and the demand, he asserted, was tending to make water quality substantially uniform nationwide. I asked whether he had an explanation for this phenomenon and he replied that he did. He said that it was the result of the tendency of the large multi-state corporations to transfer their junior executives from plant to plant throughout the country and the equally strong tendency of the wives of these executives to become members of the League of Women Voters or other similar organizations in the community in which they reside. He reported that as soon as the junior executive's wife tasted the water in her new location she mounted a campaign to have chemicals inserted in the water to make it equivalent in taste to the water of the community from which she had come.

In the law side of this problem, the strongest illustration is perhaps in the field of probate law. There is developing a common expectation that on death the rules concerning transmission of wealth, particularly the rules concerning the administration or activities of the personal representative, should be substantially uniform throughout the United States. Thus, the commonality of expectation is becoming an increasing reason for uniformity.

I should not close without referring to another reason for uniformity and that is the elimination of various kinds of economic discrimination. Here the divorce of Governor Rockefeller dramatizes the point. As we are developing an increased consciousness of discrimination against the poor, we are becoming more aware that the middle class and the higher income groups can shop for their law in such matters as divorce and abortion but the poorer elements of the community can not. In order to eliminate this kind of economic discrimination, increasing pressure is developing for unifying the law so that there is no advantage to the rich by their ability to leave temporarily the jurisdiction which has a bad law. One of the legislative sponsors of the recent Colorado abortion law, it is said, was induced to be a sponsor by his shock and embarrassment, when a client asked him about abortion, to find that his client (who fortunately had sufficient money) could best obtain an abortion by going to Japan. He was embarrassed that he could not give similar advice to his other clients because they did not have the price of the airline ticket.

It is likely that these newer reasons for uniformity will spread, so that the Commissioners and, indeed, the Congress, will be operating in areas of law which seventy-five years ago it was thought could be left to the "experimentation" of the individual communities.

Continued from page 3
form. The Uniform Federal Tax Lien Registration Act serves this reason for uniformity.

This is not a problem solely involving federal employees; it is also a problem involving private corporations with multi-state operations.

Finally, there is a new or at least an increasing reason for uniformity in areas where custom, convention and habitual course of conduct are tending to establish a common expectation throughout the United States. This commonality of expectation is increasing at a faster rate than I suspect many lawyers realize. I will use a “non-law” illustration to make this point. A friend of mine has been with a national waterworks company since his graduation from engineering school in 1939. When I saw him for the first time in many years in 1964, twenty-five years after his graduation, I asked him what were the major changes in his business in the twenty-five years he had been with it. His answer was, the development of a common taste or tolerance (perhaps it would be better to say lack of tolerance) of brackish or poor-tasting water. The demand in his business for insertion of chemicals into municipal water supplies designed to eliminate various bad qualities of water has been the fastest growing element of his business and the demand, he asserted, was tending to make water quality substantially uniform nationwide. I asked whether he had an explanation for this phenomenon and he replied that he did. He said that it was the result of the tendency of the large multi-state corporations to transfer their junior executives from plant to plant throughout the country and the equally strong tendency of the wives of these executives to become members of the League of Women Voters or other similar organizations in the community in which they reside. He reported that as soon as the junior executive’s wife tasted the water in her new location she mounted a campaign to have chemicals inserted in the water to make it equivalent in taste to the water of the community from which she had come.

In the law side of this problem, the strongest illustration is perhaps in the field of probate law. There is developing a common expectation that on death the rules concerning transmission of wealth, particularly the rules concerning the administration or activities of the personal representative, should be substantially uniform throughout the United States. Thus, the commonality of expectation is becoming an increasing reason for uniformity.

I should not close without referring to another reason for uniformity and that is the elimination of various kinds of economic discrimination. Here the divorce of Governor Rockefeller dramatizes the point. As we are developing an increased consciousness of discrimination against the poor, we are becoming more aware that the middle class and the higher income groups can shop for their law in such matters as divorce and abortion but the poorer elements of the community can not. In order to eliminate this kind of economic discrimination, increasing pressure is developing for unifying the law so that there is no advantage to the rich by their ability to leave temporarily the jurisdiction which has a bad law. One of the legislative sponsors of the recent Colorado abortion law, it is said, was induced to be a sponsor by his shock and embarrassment, when a client asked him about abortion, to find that his client (who fortunately had sufficient money) could best obtain an abortion by going to Japan. He was embarrassed that he could not give similar advice to his other clients because they did not have the price of the airline ticket.

It is likely that these newer reasons for uniformity will spread, so that the Commissioners and, indeed, the Congress, will be operating in areas of law which seventy-five years ago it was thought could be left to the “experimentation” of the individual communities.

Continued from page 3
course at the law school will resemble in any way the breezy saturation courses which now enable one to speak fluent French or Italian or Spanish with the tongue of a native after only a few weeks of vigorous effort. The law does not permit herself to be taken so readily. But she nevertheless is amenable to seasonal blandishments. As spring rolls round, many of you will find that at least some of the confusion has started to be dispelled—assuming, of course, that you yourselves have cooperated by hard work, perseverance and a reasonable amount of self-generated initiative.

Before this mysterious process of confusion followed by de-confusion has even begun to set in, it may be helpful to explore just a little the nature of the commitment which you are making to the law. Just what is it that you have committed yourself to, and what should you expect from that commitment?

You will find it is a familiar exercise in the law, when we are trying to identify and to zero in on what some principle or some concept really is, that we look closely at some of the things which it is not. To use a rather antique illustration, if you examine enough situations involving simple bailments which are not gifts or trusts, it will slowly dawn on you that you have acquired a degree of understanding as to what gifts and trusts actually are. Or if you scrutinize enough situations which involve mere exercises of free speech which are protected by the First Amendment, then you may develop an instinct for recognizing conduct which because of accompanying violence or other special circumstances has stepped over the line into the area where the Constitution permits the police power to operate. Or to take a