There Oughta Be a Law—A Model Law

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Uniform and model laws are frequently proposed to standardize “what the law is or should be” for specific jurisdictions. These model acts can come from national or international drafting organizations, such as the Uniform Law Commission, or from interest groups or associations that want to promote specific policies. Ms. Whisner provides an overview of the various types of model laws that researchers should know about.

¶1 I have never drafted a statute, but I think it would be hard to do well. You’d want to learn a lot about the problem you want to address, the groups affected by it, and other approaches that have been tried. You’d want to think carefully about definitions, remedies, and administrative mechanisms. And you’d have to keep your eye out for potential ambiguities and hidden loopholes, as well as ways that the legislation could cause damage that you don’t intend. Facing all of these challenges, I would welcome a law that had already been researched, drafted, and reviewed by people who knew what they were doing—a model law. But model laws aren’t just for the convenience of legislators. They also serve the interests of the groups or individuals who draft them. If you are concerned about a problem and think there might be a good legislative solution, then drafting a model law and getting it into the hands of legislators who would advocate for it would be a way to advance your cause.

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1. Maybe my assumption that models would be welcome is not universally held. One author advises drafters to “start with a draft prepared by someone else when there is good reason to do so, but start from scratch whenever you can.” Tobias A. Dorsey, LEGISLATIVE DRAFTER’S DESKBOOK 198 (2006). I have not found any book or article advising legislators to look for and use model legislation or offering suggestions on how to review and modify model legislation with which they are presented. Lawrence E. Filson & Sandra L. Stroffoff, THE LEGISLATIVE DRAFTER’S DESK REFERENCE 108–14 (2d ed. 2008) has a section headed “Using models,” but it is not about model legislation in the sense I’m using the term; instead, it discusses, for example, using one federal grant program as a model when drafting a new federal grant program. Dorsey, Filson, and Stroffoff all gained their drafting experience in the Office of Legislative Council of the U.S. House of Representatives—that is, a place where they have probably seldom encountered model state legislation. Perhaps drafting guides written by people with experience in the state legislatures would discuss model laws.
¶2 A few organizations are noted for their work drafting model legislation. The most visible is the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), founded in 1892.2 It has produced hundreds of model laws, many widely adopted in the states.3 The Uniform Law Commission distinguishes between “uniform laws” and “model acts”: a uniform law “seeks to establish the same law on a subject among the various jurisdictions,” while a model act’s “principal purposes can be substantially achieved even if the act is not adopted in its entirety by every state.”4 Once uniform laws are approved, Commissioners are obligated to “endeavor to procure consideration by the legislature of the state, unless the commissioners consider the act inappropriate for enactment in their state.”5 The paradigmatic example of a uniform law is the Uniform Commercial Code, which smooths business transactions across state lines; parts of it have been adopted in all U.S. jurisdictions.6 Another example is the Uniform Child Custody Jurisdiction and Enforcement Act—which also adopted throughout the states—which is meant to remove the incentives for parents fighting over custody to shift their kids from state to state to try to work the court system to their advantage.7 Not all of the

2. The name “National Conference of Commissioners on Uniform State Laws” is a mouthful. Some people refer to the organization by its initials, NCCUSL, but even “nuh-Kews’ll” doesn’t really roll off the tongue. Several years ago, the commissioners recognized this problem and changed NCCUSL’s constitution to include the alternative name “the Uniform Law Commission.” Nat’l Conference of Comm’rs on Unif. State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Hundred and Sixteenth Annual Conference 168 (2007); Nat’l Conference of Comm’rs on Unif. State Laws, Constitution, art. 1 [hereinafter NCCUSL Const.], http://uniformlaws.org/Narrative.aspx?title=Constitution (last visited Nov. 8, 2013).

3. “In its history, the Conference has promulgated well over three hundred uniform or model acts . . .” Nim Razook, Uniform Private Laws, National Conference of Commissioners for [sic] Uniform State Laws Signaling and Federal Preemption, 38 Am. Bus. L.J. 41, 45 (2000). Razook observes that it is difficult to come up with a precise number, among other reasons because of uncertainty about whether to count separately each article of a code like the U.C.C., and whether to count revised acts. Id. at 45 n.16. He provides a chronological listing of acts through 1999 in an appendix. Id. at 82–97. The Directory of Uniform Acts and Codes Tables—Index pamphlet that accompanies Uniform Laws Annotated lists some acts more than once (e.g., the Supervision of Trustees for Charitable Purposes Act is listed three times: under S and as a subheading under Probate and under Trusts), so counting the laws in the Directory of Uniform Acts isn’t a reliable way to find the total. (There are 445 entries, by the way, according to a count by A.J. Blechner, a graduate assistant at the University of Washington.) I counted 130 laws in the organization’s 2012 list of laws currently recommended for adoption. Unif. Law Comm’n, Guide to Uniform and Model Acts 2012–2013 (2012) [hereinafter Unif. Law Comm’n Guide].


6. The U.C.C., a joint project of the Uniform Law Commission and the American Law Institute, has been adopted throughout the United States. For example, articles 3 and 4 (Negotiable Instruments and Bank Deposits and Collections) have been adopted in fifty-two jurisdictions. Unif. Law Comm’n Guide, supra note 3, at 9. The Guide counts adoptions in fifty-three jurisdictions: fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Id. at 1. The holdout for articles 3 and 4 is New York, id. at 33, and yet New Yorkers seem to be able to conduct business with the rest of us. There must be a story there, but I won’t pursue this particular digression here.

7. See Unif. Child Custody Jurisdiction & Enforcement Act § 101 Cmt., 9 U.L.A. 657 (1999). This uniform act has been adopted in fifty-one jurisdictions. Unif. Law Comm’n Guide, supra note 3, at 8. The two jurisdictions that have not adopted it are Massachusetts and Puerto Rico. Id. at 33.
uniform laws have been embraced by the states (or the District of Columbia, Puerto Rico, or the Virgin Islands). Here are some of the least popular uniform laws, as of 2012: Uniform Assignment of Rents Act (2005), three adoptions; Uniform Certificate of Title Act (2005, 2006), zero adoptions; Uniform Computer Information Transaction Act (UCITA) (1999, 2000, 2002), two adoptions; Uniform Estate Tax Apportionment Act (2003), six adoptions; Uniform Guardianship and Protective Proceedings Act (1997), four adoptions.8 So having “uniform” in its name does not indicate that a law has been uniformly adopted. Several model laws have not been adopted at all, despite having been around for a decade or more.9

¶3 The Uniform Law Commission can fairly be characterized as mainstream, part of the establishment. It has always had close ties to the American Bar Association.10 All of the commissioners are attorneys, in most states appointed by governors.11 They include judges, law professors, lawyers in private practice, and government lawyers.12 An index entry in 1965 was “National Conference of Commissioners on Uniform State Laws, members of not revolutionaries.”13 While still not revolutionaries, the commissioners today are working on new issues. Recent model legislation includes the Uniform Asset-Freezing Orders Act (2012),14 the Uniform Deployed Parents Custody and Visitation Act (2012),15 the Uniform Electronic Legal Material Act (2011),16 and the Uniform Prevention of and Remedies for Human Trafficking Act (2013).17

8. UNIF. LAW COMM’N GUIDE, supra note 3, at 7, 11, 15, 16. (I didn’t list any of the laws proposed in the past couple of years because the legislatures wouldn’t have had time to adopt them yet.)
10. See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 11 (1991) (founding meeting of NCCUSL held in conjunction with ABA meeting); NCCUSL CONST., supra note 2, art. 7 (“The President shall also cause an annual written report to be made to the House of Delegates of the American Bar Association upon the work and recommendations of the Conference during the preceding year. The President shall file for the records of the American Bar Association copies of Uniform Acts finally approved and recommended by the Conference for enactment by the several States.”).
11. NCCUSL FAQ, supra note 4.
12. To get a quick sample, I chose a recent law (the Uniform Debt Management Services Act (2011)), and searched for information about the members of the drafting committee. The eleven men, from seven states and the District of Columbia, included a bankruptcy court judge (who chaired the committee), two law professors (one was the reporter for the project), six very experienced lawyers (admitted dates ranged from 1943 to 1968), a government attorney, and the president of the board of the National Consumer Law Center. I think this committee was unusual (for this century) in having only men, but I would guess that it was typical in having a judge, several lawyers in private practice, and a couple of academics.
13. William E. Hogan, The NCCUSL: With a Name Like That It Must Be Useful, CORNELL L.F., June 1979, at 2, 4 (quoting 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1423 (1965)).
The Uniform Law Commission is also in the mainstream of legal research. That is, its proposed laws, along with commentary and supporting material, are easy to find. *Uniform Laws Annotated* is a standard source in print and on Westlaw. It looks and feels like the annotated statutory codes we’re used to. It enables researchers to find case law from different jurisdictions interpreting the uniform laws and model acts promulgated by the Uniform Law Commission.¹⁸ Researchers may also follow the work of the commission through its published annual proceedings.¹⁹

The American Law Institute (ALI), founded in 1923, is likewise a part of the legal establishment. Its members are “eminent judges, lawyers, and law professors from all areas of the United States and from many foreign countries, selected on the basis of professional achievement and demonstrated interest in improving the law.”²⁰ Perhaps best known for its restatements, the ALI also produces model legislation. Projects have included

- Code of Criminal Procedure (1924–30)
- Contribution Among Tortfeasors Act (with Uniform Law Commission) (1936–39) (later: Uniform Contribution Among Tortfeasors Act)
- Model Code of Evidence (1939–42)
- Model Code of Pre-Arraignment Procedure (1963–75)
- Model Land Development Code (1960, 1965–76)
- Model Penal Code (1950–62)
- Model Penal Code: Sentencing (1999–)
- Model Penal Code: Sexual Assault and Related Offenses (2012–)
- Model Penal Code Commentaries (1976–85)
- Uniform Commercial Code (with Uniform Law Commission) (1942–52)

¹⁸. *Uniform Laws Annotated* was published by Edward Thompson Company beginning in 1922 and by West Publishing and its successors since 1969. *Armstrong*, supra note 9, at 138. Researchers who think of uniform laws as laws might be surprised to find the resource listed under secondary sources in Westlaw Classic and WestlawNext—but of course the uniform laws and model acts are not laws at all until they are adopted by a legislature.

¹⁹. The title since 1920 has been *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the . . . Annual Conference*. HeinOnline offers a library with material from the National Conference of Commissioners of Uniform State Laws:

This provides access to the full text of all Model Acts drafted, recommended or endorsed by the Conference. It includes the NCCUSL—Archive Publications, Handbook of the NCCUSL and Proceedings of the Annual Conference Meeting, 1st–119th Conference (1891–2010) are all available transcripts of the Proceedings of each Annual Meeting, as well as the transcripts of the discussions in the Committee of the whole of each Uniform and Model Act. Also included are the approved ‘successive drafts’ of each Uniform and Model Act.


• Youth Correction Authority Act/Program (1938–40, 1944–51)
• Youth Court Act (1938–41)

§6 The ALI projects done in conjunction with the Uniform Law Commission are easy to research: the text, notes about adoption, and annotations are in *Uniform Laws Annotated*. Others are separately published. For example, the Model Land Development Code was published in 1975, with the full title *A Model Land Development Code: Proposed Official Draft, Complete Text and Commentary: Submitted by the Council to the Members of the American Law Institute for Discussion at the Fifty-Second Annual Meeting on May 20, 21, 22, and 23, 1975*. To my knowledge, there isn’t a single source (like *Uniform Laws Annotated*) that lists adopting jurisdictions and judicial interpretations for these individual model laws. Instead, we can learn about the model laws’ influence through secondary sources. For instance, a treatise on land use informs me that the Model Land Development Code has had its greatest effect in influencing states’ regional growth controls.22 ALI’s drafts and the proceedings of its governing bodies (the council and the membership) are widely available to researchers, in print and online.23

§7 The ALI’s approach is cautious and measured. According to its own style manual, “it has avoided ‘novel social legislation.’ Codifications such as the Uniform Commercial Code, the Model Penal Code, and the Federal Securities Code have built upon, rationalized, and synthesized previous legislation in these areas rather than proposing legislation in fields where it had not previously existed.”24 A few years ago, the ALI addressed the hot-button issue of the death penalty, but it did so in its usual scholarly, process-filled manner. You can read the resolutions, transcripts of discussions, and background papers in a 114-page report.25 The result was a motion passed by the membership and approved by the ALI Council: “For reasons stated in Part V of the Council’s report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”26 The resolution only takes capital punishment out of the Model Penal Code, without, say, denouncing it as immoral or calling for states

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to abandon it.\textsuperscript{27} It could be that such a measured position will be more influential than something more heated.\textsuperscript{28}

\textsuperscript{8} The American Bar Association (ABA) also proposes model laws. The Business Law Section developed the Model Business Corporation Act and the Model Nonprofit Corporation Act, which are published as separate works—and rather hefty works, at that.\textsuperscript{29} Other laws from the ABA are harder to find and research. For example, the ABA approved the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings in August 2011,\textsuperscript{30} but the only copy of the act I found on the ABA’s web site still cautions: “This Act has not been approved by the ABA House of Delegates, nor by the Section of Litigation and should not be construed as ABA Policy.”\textsuperscript{31} The ABA’s Model Act Governing Assisted Reproductive Technology, approved in 2008, was published in the \textit{Family Law Quarterly}.\textsuperscript{32} The ABA has other model laws, but I have not found a list of all of them.

\textsuperscript{9} The Council of State Governments does not draft or advocate for model laws of its own. Instead, its Committee on Suggested State Legislation reviews legislation for inclusion in an annual publication and on a web site that is updated several times a year.\textsuperscript{33} Among other things, the committee considers whether the

\begin{itemize}
  \item \textsuperscript{27} Different possibilities were debated:
    \begin{itemize}
      \item Three possible alternatives were at issue at today’s meeting: (1) Withdraw Section 210.6 without comment—the Council’s position; (2) Withdraw Section 210.6 with a comment from the Steiker Report and the ultimate phrase: ‘the Institute calls for the rejection of capital punishment as a penal option’—the Leahy amendment; and (3) A compromise of the two proposals—Withdraw Section 210.6 with a comment, but without the ultimate phrase—the Garner amendment to the Leahy amendment.”
    \end{itemize}
  
    \begin{itemize}
      \item “In essence, the body split the baby in half: it . . . rejected an explicit call for the abolition of capital punishment, but it also adopted the language from our report recognizing ‘current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” Carol S. Steiker & Jordan M. Steiker, \textit{Special Feature: No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code}, 89 Tex. L. Rev. 353, 360 (2010).
    \end{itemize}
  
  
  
  \item American Bar Association Model Act Governing Assisted Reproductive Technology (February 2008), 42 Fam. L.Q. 171 (2008).
  
\end{itemize}
issue addressed by the model law is significant nationally or regionally and sufficiently complex “that a bill drafter would benefit from having a comprehensive draft available.”

A recent volume includes laws on autonomous vehicles (Florida), brew pubs (Illinois), adoption agencies (allowing religious organizations to refuse placement if it would violate its religious principles) (Virginia), fracking (Texas), electronic communications by jurors (California), and sexting and cyberbullying (Nevada).

¶10 The Uniform Law Commission, the ALI, the ABA, and the Council of State Governments all have wide-reaching interests: virtually anything that can be addressed by legislation. Organizations with more focused substantive interests often propose model laws too. For instance, the Animal Legal Defense Fund offers a Model Animal Protection Laws Collection. The National Council of Examiners for Engineering and Surveying recently revised its model law for engineering and surveying licensing boards. The National Alliance for Public Charter Schools publishes a model law and also has an interactive tool for comparing existing state laws with the provisions of the model. AARP’s web site has model bills on payday loans, check cashing, homeowner associations, and accessory dwelling units. And the Specialty Equipment Market Association, a trade association for companies and individuals that “make, buy, sell and use all kinds of specialty parts and accessories to make vehicles more attractive, more unique, more convenient, faster, safer, more fun and even like new again,” offers four model bills (for state or local government) related to custom automobiles.

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34. Id.
35. Id. at 14, 19, 21, 43, 57, 94.
Doctors also take an interest in legislation. The American Medical Association (AMA) has model laws on

- Physician-led health-care teams
- Corporate practice of medicine
- Obesity (includes Competitive School Food and Beverage Act, Healthy Schools Act, and Menu Labeling Act)
- The patient-physician relationship
- Public safety (includes Prohibit the Shackling of Pregnant Prisoners Act and Prohibit Minors Access to Indoor Tanning Act)
- Truth in advertising (Health Care Professional Transparency Act)

I have not seen any of these model bills, though, because they may only be viewed by AMA members. I can only speculate about why the organization would not want everyone to see its proposals. Perhaps leaders are concerned that others would modify the bills (to physicians’ disadvantage) and then present them to legislators as AMA bills. Or perhaps they want to get them to legislators before potential opponents can create rival bills.

You don’t have to have an organization behind you to propose a model law. The pages of law reviews include model laws drafted by lawyers, academics, and

49. See id.
50. See id.
52. There was an option to create an account, and I did, but my nonmember account did not allow me to access the legislative advocacy resources.
There was even a model law crafted by students in an eighth-grade social studies class.56

¶13 Although I was familiar with the work of the Uniform Law Commission and the ALI—and I knew that professional associations, public interest groups, and individual scholars propose model laws—until quite recently, I was unaware of another major player in the field. The American Legislative Exchange Council (ALEC) was founded in 1973 as a “nonpartisan membership association for conservative state lawmakers who shared a common belief in limited government, free markets, federalism, and individual liberty.”57 ALEC’s task forces “actively solicit more input from private sector members, seizing upon ALEC’s long-time philosophy that the private sector should be an ally rather than an adversary in developing sound public policy.”58 The task forces have produced hundreds of model bills on a wide range of topics.59 According to ALEC, “Each year, close to 1,000 bills, based at least in part on ALEC Model Legislation, are introduced in the states. Of these, an average of 20 percent become law.”60 The Center for Media and Democracy counted 466 bills introduced in 2013—at least one in each state—of which 84 passed.61

¶14 ALEC has become controversial for reasons of both substance and procedure. Some critics disagree with the legislative solutions ALEC favors, such as “stand your ground” laws, “right to work” laws, and tort reform proposals.62 And much criticism is aimed at the way ALEC works. Although ALEC says that it is bipartisan, only a few of the thousand or so legislators who belong are Democrats.63 Many large corporations are members and pay handsomely for the access that membership gives them to the legislators.64 ALEC did not make its model laws


58. Id.

59. Id.

60. Id.


64. Dues for legislators are $100 for two years. Membership Application, AM. LEGIS. EXCH. COUNCIL, available at http://www.alec.org/wp-content/uploads/Legislative-Membership.pdf (last visited Nov. 8, 2013). Basic dues for a corporation start at $7000; private members pay extra for membership on
publicly available until the Center for Media and Democracy obtained and posted more than 800 bills and resolutions.65 Now ALEC’s own website has a searchable list of model measures.66 But ALEC still wants to protect many of its communications: it stamps documents with a disclaimer stating that documents sent to legislators are not subject to public records laws.67 Some critics have urged the IRS to withdraw ALEC’s tax-exempt status, alleging that ALEC’s activities include lobbying.68 Defenders compare ALEC to the National Conference of State Legislatures, which takes donations from large corporations.69

**¶15** There are many other model and uniform laws (and creators of model legislation) that I haven’t had a chance to explore, including the *Uniform Building Code*70 and the *Manual on Uniform Traffic Control Devices*.71 Did you know that the United States Department of Commerce created the widely adopted Standard State Zoning Enabling Act in the 1920s?72 And there are international models too—for instance, the UNCTAD Model Law on Cross-Border Insolvency.73 So I can’t pretend to have covered the field. But I hope I’ve offered a helpful survey of the model laws and some of the major organizations that draft and promote them.

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70. Apparently the *Uniform Building Code*, published for years by the International Conference of Building Officials, has been superseded by the *International Building Code*, published by the International Code Council. See About ICC, INT’L CODE COUNCIL, http://www.iccsafe.org/AboutICC/Pages/default.aspx (last visited Nov. 8, 2013). Even mentioning something that I don’t want to discuss starts me down a path.
72. See STUART MECK & KENNETH PEARLMAN, OHIO PLANNING AND ZONING LAW § 3:3 (2013).