Mediation and Some Lessons From the Uniform State Law Experience

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Virtually every practicing attorney and legal academic first encountered uniform statutes when studying the Uniform Commercial Code (UCC) in law school. Yet the UCC's widespread acceptance and periodic renewal are not the legacy of most uniform law ventures. Taking a harder look at the uniform statutory process and its products may allow participants in a new effort to set realistic goals, or at least assist them in anticipating problems they are likely to face.

This Article offers an overview and some pointers regarding the distinct challenge of developing a successful uniform mediation law.[1] It discusses problems that stem from the private nature of the uniform act drafting operation, and also from the diversity of political and legislative settings in which a uniform statutory solution is evaluated. The use of mediation now permeates multiple public and private settings, and the related body of mediation law has experienced vast growth.[2] At the outset of a long-term project to develop a uniform mediation act, it would be premature if not foolhardy to prescribe a pathway for success. I do, however, start from a belief that the legislative process possesses a certain coherence and that aspects of the anticipated journey may be chartable at least in broad terms. In particular, the journey may be affected by understanding which rationales best support a uniform law approach for mediation, by raising questions as to how one measures the success of such an approach, and by becoming aware of major structural or procedural obstacles that may be

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[1] Unless otherwise noted, I use the term "uniform" to refer either to uniform or model laws. Where necessary, I differentiate between uniform and model acts. See *infra* notes 17–20 and accompanying text for an explanation of the difference between these two approaches.

[2] The body of law related to mediation includes more than 2000 state or federal statutory provisions and innumerable court rules and agency regulations, as well as a large body of case law. *See* NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 13:01 (2d ed. 1994).

encountered en route. The Article relates these broad considerations to the current regulatory landscape of mediation law in an effort to provide reference points for the uniform mediation project.

Part I presents an overview of the uniform law enterprise, focusing on the National Conference of Commissioners on Uniform State Laws and on the Conference's distinction between uniform and model acts. Part II considers possible reasons for adopting a uniform statutory approach. It examines public-regarding purposes and also the self-interested vantage point of various participants before discussing how these perspectives might apply in the mediation context. Part II also identifies different approaches to measuring and defining the success of a uniform law project, and suggests that a broader understanding of what constitutes success may be helpful. Finally, Part III raises several problems that are likely to confront any effort to promulgate a uniform law and indicates how these problems may arise in the mediation law setting.

I. THE CONFERENCE AND ITS PRODUCTS

The primary originator of uniform statutory efforts in this country is the National Conference of Commissioners on Uniform State Laws (Conference). Formed in 1892, the Conference's stated purpose is to "promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable."[3] The Conference has a close connection to the American Bar Association (ABA); it grew out of an ABA decision in 1889 to work for uniformity of the laws through voluntary state action.[4] The Conference's constitution requires its drafting committees to consult with the ABA—the only public or private entity so favored[5]—and to submit uniform acts to the ABA for its review.[6] The Conference has

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[3] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR 399 (1994) [hereinafter 1989 HANDBOOK].

[4] *See* WALTER P. ARMSTRONG JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 18 (1991). The Conference was founded at a meeting of representatives from seven states held in conjunction with the 1892 ABA Annual Meeting. *See id.* at 11. The ABA contributes financial support to the Conference on an annual basis. *See* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 89 (1993).

[5] *See* 1989 HANDBOOK, *supra* note 3, at 413.

[6] *See id.* at 401, 404.

long maintained that its close relationship with the ABA and with state and local bar associations offers otherwise unattainable access to and acceptance from both state legislatures and the public at large.[7] In recent decades, Conference products that have encountered disapproval or even substantial opposition within the ABA House of Delegates have been starkly unsuccessful in state legislatures.[8] While widespread ABA support is not sufficient to ensure broad enactment by state legislatures, it may well be a necessary precondition.

The Conference is composed of commissioners from all fifty states, Washington, D.C., and Puerto Rico. Each jurisdiction determines—usually by statute—the method of appointment, number of commissioners, and length of tenure. The norm is three or four commissioners per state, appointed by the governor or the legislature on a nonpartisan basis for three to five year terms.[9] Through regular reappointments, commissioners often serve for extended periods of up to twenty years or more.[10] Commissioners must be members of the bar;[11] they are typically practicing attorneys, law professors, judges, and legislators.[12] The Conference receives most of its

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[7] *See* ARMSTRONG, *supra* note 4, at 85-86, 91.

[8] *See, e.g., id.* at 104-105 (reporting that 1972 Uniform Motor Vehicle Accident Reparations Act drafted by Conference and disapproved by ABA has never been adopted in any state); *id.* at 111-112 (reporting on narrow ABA approval of Uniform Land Transactions Act and Uniform Simplification of Land Transfers Act, neither of which has been enacted by a single state).

[9] *See, e.g.,* MASS. ANN. LAWS ch. 6, § 26 (Law. Co-op. 1988) (authorizing the governor to appoint "three suitable persons" for five year terms); OHIO REV. CODE ANN. § 105.21 (Anderson 1994) (authorizing the governor to appoint "four competent persons" for three year terms). There are variations, especially with regard to the number of commissioners; one-fourth of the states allow for appointment of seven or more commissioners. *See* 1989 HANDBOOK, *supra* note 3, at 12-29 (listing commissioners for all 50 states plus Washington, D.C. and Puerto Rico).

[10] *See* 1989 HANDBOOK, *supra* note 3, at 399 (describing how commissioners may become life members after 20 years of service); *id.* at 12-29 (indicating that as of 1989, 60 commissioners had been elected to life member status and more than 40 others had at least 15 years service).

[11] *See id.* at 400.

[12] *See* CONFERENCE FACT SHEET (1996). What I refer to as the *Conference Fact Sheet* is a summary of the organization, its history, and its procedures, along with a detailed chart recording passage of uniform and model acts as of September 30, 1996. These materials typically are included as part of the annual Conference Handbook. *See* 1989 HANDBOOK, *supra* note 3, at 395-397, 558-563. However, the Conference has not issued a Handbook since 1994, when its 1989 Handbook was published. In addition

funds through state-by-state appropriations. In addition, major uniform law projects may receive support from external sources such as foundations, interest groups, and federal agencies.[13]

The Conference operates primarily through standing and special committees. Proposals for uniform acts, which may be generated by many different sources, are referred to the Standing Committee on Scope and Program (Scope and Program Committee). That committee investigates each proposed act and then reports to the Executive Committee on whether the subject is appropriate for Conference attention. If the Scope and Program Committee recommends a proposal as desirable and feasible, and the Executive Committee approves, then a special committee is appointed to prepare drafts of an act.[14] Each draft act must be considered, section by section, by the entire Conference at no less than two annual meetings.[15] After that consideration, the Conference may decide by a vote of the states whether to promulgate the draft as a uniform or model act. Each state is entitled to one vote; a proposed act must be approved by a majority of the

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to regular commissioners, the Conference provides that officials of a state legislative service or drafting bureau may serve as associate commissioners, able to assist in drafting and debating but not voting. *See id.* at 399. There are between 40 and 50 such associate members at present. *See id.* at 12–29.

A separate private organization consisting of lawyers, judges, and academics is the American Law Institute (ALI). Its focus is on drafting Restatements of the Law, which are used primarily by courts rather than as templates for state legislatures. The ALI does have an ongoing formal relationship with the Conference in that both organizations provide representatives on a Permanent Editorial Board for the Uniform Commercial Code—the UCC is widely recognized as the paragon uniform statutory effort. Apart from that arrangement, the ALI is not directed toward codification the way the Conference is. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 600-601 (1995).

[13] *See* ARMSTRONG, *supra* note 4, at 68, 101; Patchel, *supra* note 4, at 89.

[14] *See* 15 U.L.A. iii (1997); 1989 HANDBOOK, *supra* note 3, at 401-402. The uniform mediation law project, which is closely coordinated with the ABA and its Section on Dispute Resolution, is proceeding in conjunction with the Conference process. The Scope and Program Committee effort has been undertaken, and the Executive Committee is interested in the idea of a uniform or model act. It now appears likely that there will be a joint drafting effort featuring interlocking drafting committees from both the Conference and the ABA. *See* Letter from Gene N. Lebrun, Conference President, to Chief Justice Thomas J. Moyer and Roberta Cooper Ramo, ABA Model Mediation Project Co-Chairs (Nov. 10, 1997) (copy on file with author).

[15] *See* 15 U.L.A. iii (1997); 1989 HANDBOOK, *supra* note 3, at 404.

states represented at an annual meeting and at least twenty jurisdictions.[16]

In seeking to promote uniformity in state law, the Conference may produce statutes designated as either uniform acts or model acts. The special drafting committee, the Executive Committee, and the Conference each has input into whether a draft statute is circulated, presented, and approved as uniform or model.[17] The Conference's criteria for distinguishing the two are not terribly detailed or precise. An act is to be designated "uniform" if uniformity of its provisions among the various jurisdictions is a principal objective and there is substantial reason to anticipate enactment in a large number of jurisdictions.[18] Legislatures are urged to adopt uniform acts exactly as written. An act is to be designated "model" if uniformity of provisions is a desirable, though not a principal, objective *or* if the act may substantially achieve its purposes even though a number of jurisdictions do not adopt the statute in its entirety.[19] Model acts serve more as guideline legislation, which states may borrow from or modify to suit their individual needs and conditions. Model acts may be more appropriate when the subject matter is of interstate interest but not substantial interstate implication, and also when the statute provides an approach for handling an emergent need in order to keep imminent state legislation sensible and harmonious.[20]

When these alternatives are considered in the context of mediation, one can make a plausible case for a model act approach. The current regulatory setting includes rules promulgated at both the state and local levels,

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[16] *See* 1989 HANDBOOK, *supra* note 3, at 405.

[17] *See id.* at 441.

[18] *See id.*

[19] *See id.* at 441–442.

[20] *See* ARMSTRONG, *supra* note 4, at 67-68 (quoting earlier Executive Committee report). The Conference is not the only organization authorized or able to produce these two types of laws. The ABA has produced model codes on its own without contributions from the Conference. One notable example is the Model Procurement Code for State and Local Governments, jointly completed in the 1970s by the ABA Section of Public Contract Law and the Urban, State, and Local Government Section, and adopted by some 15 states and many more municipalities. *See* F. Trowbridge Vom Baur, *A Personal History of the Model Procurement Code*, 25 PUB. CONT. L.J. 149, 150, 172 (1996). On occasion, the ABA and the Conference have actually competed in the drafting process. The Uniform Status of Children of Assisted Conception Act is a recent example. Both the Conference and the ABA Family Law Section produced their own drafts; the ABA House of Delegates approved the Conference act in 1989. *See* ARMSTRONG, *supra* note 4, at 123–124.

governing disputes that may be court-annexed or private, and involving subject matter that ranges from relatively narrow domestic relations disputes or neighborhood disagreements to broader multiparty commercial or environmental conflicts. Moreover, the torrent of existing mediation statutes embraces disparate patterns of coverage with respect to subjects important enough to deserve regulatory consideration. For certain issues there is a single, dominant statutory position;[21] other subjects have generated two contrasting approaches.[22] A third category of problems has spawned a variety of statutory responses;[23] there are even some matters characterized by the unexpected absence of any statutory treatment.[24] It is

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[21] One example is laws that authorize courts to mandate mediation in domestic relations cases involving contested custody or visitation issues. These statutes typically exclude situations in which there is domestic violence. *See, e.g.*, ALA. CODE § 6-6-20(e) (Supp. 1997); CAL. FAM. CODE § 3170(b) (West Supp. 1998); WIS. STAT. ANN. § 767.11(5), (6), (8) (West Supp. 1997).

[22] States are divided, for example, on whether mediation of domestic relations cases should be mandatory. *Compare* CAL. FAM. CODE § 3170(a) (West Supp. 1998) (authorizing local courts to compel domestic relations parties into mediation), *and* ME. REV. STAT. ANN. tit. 19-A, § 251(2) (West Supp. 1997) (same), *and* DEL. FAM. CT. R. CIV. P. 16(a), (b) (same), *with* 23 PA. CONS. STAT. ANN. § 3901 (West Supp. 1997) (authorizing courts to arrange for mediation of domestic relations issues only with consent of the parties), *and* VA. CODE ANN. § 16.1-69.35(6) (Michie 1996) (same), *and* MICH. R. CT. 2.403(A)(1), 3.216(B)(2), (3) (prohibiting or limiting mediation of disputes that involve custody or visitation rights). As noted above, states mandating mediation of domestic relations disputes usually exclude cases marked by violence. *See supra* note 21.

[23] Mediation privileges create a right to block compelled disclosure in discovery and other proceedings whether or not the proceedings are governed by rules of evidence. Statutory provisions creating these privileges differ in terms of the scope of information they protect, the source of the information protected, whether they are absolute or qualified, whether they apply only in civil proceedings, who may assert or waive the privilege, and how "mediation" is defined for purposes of applying the privilege. *See* ROGERS & MCEWEN, *supra* note 2, §§ 9:10–9:17 (discussing multiple statutory approaches).

[24] Laws mandating mediation often permit judges discretion not to order the parties to participate in mediation, but in doing so they give little or no guidance as to the exercise of or limits on this discretion. *See, e.g.*, ME. R. REFERRAL ALT. DISP. RESOL. SERV. 1 (mandating mediation of small claims matters and certain domestic relations matters, "unless the judge . . . having jurisdiction over a particular matter grants a waiver"); MICH. R. CT. 2.403(A)(2) (mandating mediation of tort cases, subject to judicial discretion if the court "finds that mediation of that action would be inappropriate").

not surprising that in light of the wide range of substantive settings and the diverse patterns of existing regulatory response, states differ as to the subject matter areas and the procedural issues that they view as requiring statutory attention. For this reason, it may be impractical to impose the more rigid mold of a uniform law.[25]

On the other hand, there are risks involved in promulgating a model act rather than a uniform statute. It may be that jurisdictions will adopt certain provisions yet fail to discard their pre-existing requirements. For example, by adopting new fairness-based procedural norms while retaining their existing structure of rules, states could tilt the balance away from simplicity or efficiency and end up discouraging the use of mediation in a number of settings.[26] Further, a model act that blesses diversity may encourage more public or private entities to maintain the status quo by seeking wholesale exemptions from coverage under the new law.[27] Existing mediation provisions often are embedded in substantive law titles or chapters of state codes.[28] This history, combined with a less homogeneous model statute approach, could effectively encourage spouses, landlords, neighbors, and employees to think of themselves as having a predictable interest group orientation. Uniformity, by contrast, leaves these participants in the role of "parties to mediation" who could on different occasions occupy any of the four above-mentioned roles. As a result, they presumably would have less reason to pursue an exemption from the new legal regime.

As of September 30, 1996, there were ninety-six uniform acts and

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[25] *Cf.* Vom Baur, *supra* note 20, at 161–162 (recounting how range of state and local procurement processes led drafters to opt for model code approach).

[26] *Cf.* Constance Cushman, *The ABA Model Procurement Code: Implementation, Evolution, and Crisis of Survival*, 25 PUB. CONT. L.J. 173, 189 (1996) (criticizing practice of grafting selected model code provisions onto an already process-burdened bureaucracy).

[27] *Cf.* Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297, 304–307 (1996) (describing how certain entities successfully secured their own exclusion from coverage under new state statute patterned after a model act).

[28] *See, e.g.*, CAL. UNEMP. INS. CODE § 1382 (West 1996) (compelling mediator to disclose amount of wrongful discharge backpay award in certain circumstances); IOWA CODE ANN. § 216.15B (West Supp. 1997) (establishing mediation confidentiality requirements and exemptions with respect to discrimination complaints brought before Civil Rights Commission); KAN. STAT. ANN. § 38-1522(a) (1993) (requiring mediators and other professionals to report suspected child abuse or neglect to state department of social services).

twenty-nine model acts on the Conference's list of current approvals.[29] In addition, over 140 previously approved acts have been withdrawn as either obsolete or superseded.[30] These uniform and model acts have been categorized in various ways, based on either subject matter or function.[31] First are statutes aimed at *encouraging reciprocal interstate cooperation.* Such laws prompt a state to act reciprocally with respect to rights and remedies—for example, to protect parents residing in other states who are owed child support and thereby avoid the injuries to their own residents that would follow if other states were provoked into more hostile action.[32] These statutes often involve child-parent relations. The Uniform Acts on Adoption, Child Custody Jurisdiction, and Reciprocal Enforcement of Support are notable examples. Second are acts that seek to *avoid conflicts of law* stemming from the fact that an event may be affected by several different states' rules. These conflicts frequently arise in relation to determining the applicable law at death so as to facilitate the processing and distribution of decedents' estates. Examples include the Uniform Anatomical Gifts Act, the Uniform Act on Testamentary Additions to Trusts, and various aspects of the Uniform Probate Code. Third are statutes developed to *promote the efficient flow of commerce* between states. Obviously, these acts address commercial and business subjects; the Uniform Commercial Code, Uniform Partnership Act, and Model Employment Termination Act are notable examples. Fourth are statutes without major interstate consequences that are intended to *respond to emergent needs or clarify archaic usages.* They often involve establishing predictable or fixed rules of procedure that affect the operation of courts. Examples include the Uniform Acts on Attendance of Out of State Witnesses, Federal Lien Registration, and Declaratory Judgments. The four categories are not mutually exclusive—for instance, the Uniform

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[29] *See* CONFERENCE FACT SHEET, *supra* note 12.

[30] *See* ARMSTRONG, *supra* note 4, at 130; 1989 HANDBOOK, *supra* note 3, at 466-472 (listing acts that have been withdrawn).

[31] For efforts to classify Conference statutory products by subject matter, see James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2104 (1991). *See also* Kim Quaile Hill & Patricia A. Hurley, *Uniform State Law Adoptions in the American States: An Explanatory Analysis*, 18 PUBLIUS 117, 120-121 (1988) (listing popular and unpopular uniform laws in subject matter setting). For efforts to classify Conference acts based on their principal purpose, see 1989 HANDBOOK, *supra* note 3, at 440; Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 149-150 (1996).

[32] *See* Ribstein & Kobayashi, *supra* note 31, at 150.

Arbitration Act could be deemed an effort to promote economic efficiency or a response to emergent procedural needs[33]—but each of the four may be said to encompass a large number of uniform or model statutory efforts.

As soft as these categories are, a uniform or model mediation act accentuates the degree of overlap among them. A mediation statute would address emergent procedural needs by offering predictable rules on matters that tend to involve lawyers and courts.[34] Yet an important dimension of such an act would be to avoid conflicts of law and promote reciprocal cooperation among states. Particularly with regard to issues that permit or require judicial enforcement, differing approaches could trigger interstate hostilities in the absence of such a uniform or model act. Two clear examples are the enforceability of agreements to mediate and the admissibility in court of statements made during a mediation session. In the former instance, one party may seek to compel mediation pursuant to the law of state X while the other party resists based on the law of state Y. In the latter setting, evidence from a mediation in state X may be offered as admissible in a state Y court proceeding even though it would not have been admissible in state X. In addition to its procedural character and its promotion of interstate cooperation, a uniform or model act also could enhance economic efficiency across state lines by facilitating quicker, less costly resolution of commercial and employment-related disputes.

Apart from furthering several different objectives, a uniform or model mediation act also implicates a range of subject matter areas. The proposed statute would have no special focus on commercial settings, children and families, or probate issues, but it should have an important effect on disputes in each of these substantive domains and others as well. Some commentators and interested groups contend that mediation is biased against particular interests because it sharpens, or does not sufficiently alleviate, the pre-existing imbalance of power and resources between disputants.[35]

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[33] *See* White, *supra* note 31, at 2104.

[34] Even this description is incomplete. A substantial amount of mediation is conducted away from the courts by nonlawyers in neighborhood or community settings. *See generally* JENNIFER E. BEER, PEACEMAKING IN YOUR NEIGHBORHOOD (1986); COMMUNITY MEDIATION: A HANDBOOK FOR PRACTITIONERS AND RESEARCHERS (Karen Grover Duffy et al. eds., 1991).

[35] *See, e.g.*, Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441, 523 (1992) (contending that divorce mediation reinforces disparities in power between men and women and undermines recent divorce law reforms that had enhanced women's economic rights); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549–

Even if these contentions prove unfounded,[36] or can be addressed by a well-crafted statute, there is still a considerable perception that mediation affects the bottom line when resolving subject matter disputes. In sum, a uniform or model mediation act serves major interstate cooperation objectives as well as meeting traditional procedural needs, and it implicates substantive policy matters to a greater degree than many other types of procedural statutes.

1550, 1607 (1991) (contending that mandatory divorce mediation is disempowering and often actively harmful to women); Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1319 n.2 (1995) (citing numerous critiques of divorce mediation as placing women at a disadvantage); Carol A. Wittenburg et al., *Employment Disputes*, *in* MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 441, 449–451 (Dwight Golann ed., 1996) (contending that disparity in resources and power between employers and employees presents distinct challenge for mediation); Lamont E. Stallworth, *Government Regulation of Workplace Disputes and Alternative Dispute Resolution*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 369, 384 (Bruce E. Kaufman ed., 1997) (contending that unrepresented claimants are especially vulnerable to unfair treatment in mediation of workplace disputes). *See generally* Richard Delgado, *ADR and the Dispossessed: Recent Books About the Deformalization Movement*, 13 L. & SOC. INQUIRY 145, 152–154 (1988) (contending that ADR's unstructured setting and lack of formal rules increase likelihood that outcomes will be affected by racial or other prejudice "with the result that the haves once again come out ahead").

[36] *See, e.g.*, ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 151 (1992) (reporting that women do not fare worse in divorce mediation outcomes than in normal negotiation of divorce disputes); Peter A. Dillon & Robert E. Emery, *Divorce Mediation and Resolution of Child Custody Disputes: Long-Term Effects*, 66 AM. J. ORTHOPSYCHOL. 131, 138–139 (1996) (discussing nine year follow-up study that compared families assigned to custody mediation with families pursuing regular litigation and found that noncustodial parents assigned to mediation reported more frequent current contact with their children and that parents in the mediation group reported communicating more frequently about their children); Donald E. Stull & Nancy M. Kaplan, *The Positive Impact of Divorce Mediation on Children's Behavior*, MEDIATION Q., Winter 1987, at 57–58 (reporting that children of parents who experienced mediation performed better in school and were less likely to engage in delinquent behavior than children whose parents experienced adjudicative resolution).

II. RATIONALES FOR UNIFORMITY AND DEFINITIONS OF SUCCESS

A. *A Private Legislative Process*

It is useful to think of the Conference as a private legislative operation, analogous to the public legislative operation in Congress or a state legislature. Like Congress, the statutes produced can be viewed as furthering certain public goals or broad societal interests. Alternatively, the Conference legislative process can be characterized more skeptically as self-interested, with narrowly focused goals.

Several distinct but overlapping public rationales support the uniform law movement.[37] One is a desire to enhance commercial and business development in what has become an interstate or national economic system. This could mean contributing to more efficient interstate transactions or establishing minimum business standards that prevent a race to the bottom among state legislatures. A recent example is the Model Employment Termination Act, which proposed simplified, less costly procedures for resolving claims of arbitrary or unjust discharge in the workplace.[38] In addition to promoting consistency in employment relations among multistate firms, such an act encourages a reliable judicial approach to the interpretation of key terms such as "good cause" or "business judgment."

A second public purpose is the reaffirmation and promotion of states' rights. When states frame uniform solutions for matters affecting their common interests, they are strengthening state sovereignty and removing any excuse for the federal government to absorb new powers. Moreover, a uniform state law approach may offer more stability than a federal regulatory solution. Federal agencies can revisit or change their rules after notice and minimal discussion, whereas a widely adopted uniform law can only be modified by the acts of many state legislatures.

A third public rationale might be called good government or best practices responsiveness. When substantial social, economic, or legal problems arise, a timely and progressive legislative response is what one hopes for from government. Individual states may generate such responses on their own, but the uniform law approach offers special advantages.

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[37] *See* Hill & Hurley, *supra* note 31, at 118-119; White, *supra* note 31, at 2098-2103.

[38] *See* MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 80-99 (Supp. 1991); Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 370 (1994).

These include a more detached and nonpartisan drafting process, a regular willingness to rely on experts, and greater patience in setting the legislative calendar. That the problem is complex or evokes strong views only strengthens the case for a thoughtful approach to keep emergent state laws pointed in a single, sensible direction.

Although they are technically public officials appointed by the governor, commissioners are often referred to as part of a private legislature because they differ from federal and state representatives in two critical respects. They are not democratically elected, and they are not politically accountable.[39] This arrangement does tend to promote a more competent and sophisticated legislative product. Commissioners take an intellectual interest in uniform law that a typical state senator or assemblyman would not. Commissioners also are nonpartisan, they do not have to answer to the people, and the method of their low key reappointment enables them to focus on long-range issues that elected legislators often must ignore if not disdain. Still, notwithstanding or perhaps because of this insulation from the public political arena, a number of commentators have identified pressures within the Conference's private legislative process that may derail or even undermine the commitment to broad public or good government objectives.[40]

One risk is the extraordinary influence of interest groups, especially those that are well organized and amply financed. Interest groups of course influence public legislatures through political lobbying techniques, but they do not officially participate in the process of creating public laws. By contrast, interest groups can and do officially participate in the creation of uniform laws. The Conference understandably wants expertise, input, and support from these organized interests, and group members through their lawyers may serve on Conference committees that investigate, draft, or review proposed legislative solutions. The Conference will listen to representatives from all sides, but the depth and continuity of a group's participation often reflects relative resources. Thus, for example, segments of the banking industry may contribute sufficient business to a few large law firms so that those firms will incur the costs of participating in drafting committee meetings and monitoring developments over a multi-year gestation period for Article 4 of the UCC. Bank customers and their

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[39] *See* Patchel, *supra* note 4, at 91; White, *supra* note 31, at 2096.

[40] Several recent articles have applied public choice-related critiques to the uniform lawmaking process. *See generally* Patchel, *supra* note 4; Ribstein & Kobayashi, *supra* note 31; Schwartz & Scott, *supra* note 12.

consumer group representatives are not likely to have as much influence on the drafting process over time.[41] In addition, well organized interest groups may be able to block widespread adoption of Conference-approved acts based on their power to delay or defeat proposed bills within particular state legislatures. Because this power to obstruct in a few states threatens the overarching goal of uniformity, the Conference may feel compelled to give these groups veto-type control over particular issues or legislative provisions.[42]

The economic critique of uniform lawmaking identifies risks attributable to other participants in the private legislative process. Lawyers play a major role both as advisors and commissioners. They have at least some professional self-interest in maintaining a need for their services. Legal rules that rely on complex or vague terms may require more lawyer assistance in order to determine what rights or responsibilities apply in particular situations. This may result in continuing if subtle pressures favoring litigation, or it may simply increase the need for legal planning and advice.[43]

Reformer types, notably law professors, also play a substantial role in the private legislative process; they too may not be immune from the allure of self-interest. Legal academics can write about and teach uniform law proposals even if the proposals are enacted by only one or two state legislatures. They may also enhance their academic reputations by contributing to a Conference-approved product—they get satisfaction and status from being part of a law reform movement. This is not to suggest that law professors are so starry eyed they will work for proposals that are utterly hopeless. But legal academics in general may well have less concern than interest groups do with the transition from Conference approval to broad enactment by state legislatures.[44] Further, legal academics in the mediation area may derive particular benefits from a uniform law effort. When mediation is deemed worthy of Conference legislative attention, this contributes to its validation as a new professional approach. Mediation

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[41] *See* Patchel, *supra* note 4, at 98–105; Ribstein & Kobayashi, *supra* note 31, at 142–143; Schwartz & Scott, *supra* note 12, at 610.

[42] *See* Ribstein & Kobayashi, *supra* note 31, at 143.

[43] *See id.* at 144.

[44] *See* Schwartz & Scott, *supra* note 12, at 610–611; *see also* Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 917 (1980) (arguing that legal academics are predisposed to value scholarship that is novel, unconventional, or paradigm-shifting, and to view merely thoughtful work as pedestrian).

teachers and scholars should then have an easier time recruiting graduates to enter the field and persuading skeptical faculty colleagues as to its legitimacy.[45]

One need not buy into the whole public choice-related vision to recognize that some of these factors are likely to affect the private legislative process. Although participation in law reform organizations like the Commission implies at least some appetite for changing the current state of the law, there are countervailing pressures as well. The shared interest in a widely approved uniform or model law can push the process toward less significant change from the status quo and also toward generally worded legislative rules or standards. At the same time, factors of self-interest may play a more pronounced role with respect to proposed substantive statutes than procedural ones. Where a uniform or model act addresses allocation of certain economic benefits, such as banking or employment termination standards, or protection of identified status positions, such as those of children or decedent estates, organized interest groups can anticipate outcomes and invest in the process to help shape the outcomes they desire. By contrast, procedural objectives that are framed in more neutral terms and are less systematically related to predictable substantive goals may not be as susceptible to this kind of pressure.[46]

A uniform or model mediation act should be viewed as furthering some if not all of the public-regarding rationales previously identified. Most prominent, perhaps, is the good government rationale. With hundreds of conflicting or overlapping public and private approaches now in play, the uniform mediation project can encourage rationality if not consistency by promulgating best practices on issues such as mediator training,

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[45] The final participants in this private legislative process are the commissioners themselves. Although extended tenure and the absence of compensation (beyond expenses) liberate them from more traditional political constraints, they too have private interests that may affect the content of uniform laws. There are reputational benefits gained from participation and expertise. Commissioners who are lawyers may enhance their legal practices as counselors or expert witnesses based on their familiarity with a particular uniform law product or process. There are also the modest rewards of expense-paid trips to locations where acts are drafted. And there may be benefits to the business interests of clients who are affected by the new uniform act. *See* Ribstein & Kobayashi, *supra* note 31, at 144–145; Schwartz & Scott, *supra* note 12, at 610–611.

[46] *See generally* Arthur Earl Bonfield, *Administrative Procedure Acts in an Age of Comparative Scarcity*, 75 IOWA L. REV. 845, 847 (1990) (distinguishing between substantive and process objectives in context of agency procedures required by administrative procedure acts).

confidentiality, and enforcement of agreements to mediate. Cooperation between states in the administration of justice will also be served if mediation of family disputes or inheritance-related disagreements must satisfy certain best principles. In addition, a set of guidelines for mediating private commercial or employment disputes may promote business efficiency and facilitate economic growth.

Yet a mediation statute also faces some of the risks identified by scholarly critics of uniform lawmaking. There is the risk that certain standards—for instance, directing the mediator to act "in the best interests of the child" or "consistent with the law"—will be too vague to be readily or consistently applied, or else will require searching judicial review. There is the prospect that certain groups will secure special favors in the private legislative process, such as exclusions from coverage so that they can continue to mediate or litigate under the rules and standards with which they are familiar. If mediation supporters are the primary drafters, they may be willing to countenance such exclusions in their effort to maximize the act's acceptability by avoiding major controversy. More generally, there is the possibility that pressures from interest groups and commissioners for a law that is adoptable by the Conference and enactable by most states will result in something less, even much less, than a best practices approach. To be sure, compromise and accommodation are regular features of any legislative process given proponents' ultimate goal of producing a law. The pressure to accommodate various interested parties may, however, become especially intense when drafters and supporters face the prospect of a multi-year internal review process followed by the challenge of earning approval from fifty different legislatures.

B. *Variations on the Theme of Success*

Of the ninety-six uniform acts on its current list, the Conference reports that forty-seven have been enacted by twenty or more states and that twenty-four have been enacted by forty or more states.[47] The twenty-four that have achieved something close to uniform adoption[48] include seven UCC provisions; the other seventeen are a mix of procedural, family,

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[47] *See* CONFERENCE FACT SHEET, *supra* note 12 (recording passage of uniform and model acts as of Sept. 30, 1996).

[48] I refer to enactment by 40 of 52 jurisdictions (50 states plus Washington, D.C. and Puerto Rico)—a better than three-fourths enactment rate (77%)—as close to uniform adoption.

probate, and business or commercial laws.[49] The more widely enacted uniform laws reached their level of success through two basic patterns of enactment history. The first is a "sudden burst" pattern. A few states adopt in initial years, then there is a flurry of enactment activity, followed by a return to the more sedate pace. The other is a "slow and steady" pattern. Two or three states adopt every other year or so, but there is never a sudden surge of state enactments.[50] The various categories of uniform laws identified earlier[51] do not appear to fall into one specific pattern of enactment history, and there is no sound basis for predicting whether either pattern would apply to a mediation act.

The attempt to measure a uniform or model act's success in terms of how many states have adopted it gives rise to various areas of concern. One is the difficulty of determining whether a jurisdiction has enacted enough major and minor provisions of an act's approved text to be deemed a substantial adoption.[52] The Model State Administrative Procedure Act, approved by the Conference in 1981, provides an appropriate recent example. An administrative law expert writing in 1992 reported substantial or significant adoption by six states.[53] Today, the *Uniform Laws Annotated* reports substantial adoption by three of the six states,[54] and the Conference itself reports adoption by only one of those three states.[55]

A second concern involves the low and diminishing proportion of Conference products that actually garner widespread acceptance. Only one in four currently approved uniform acts has been adopted in forty or more jurisdictions. Further, rates of adoption have declined in recent years. Of the sixty-four uniform acts approved since 1980, fewer than half have been enacted in twenty jurisdictions, only twelve have been adopted in forty or

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[49] *See* CONFERENCE FACT SHEET, *supra* note 12; *see also* Hill & Hurley, *supra* note 31, at 120 (listing 13 most widely adopted uniform law proposals as of 1985).

[50] The Appendix contains graphs illustrating enactment histories for three "sudden burst" uniform acts (Child Custody, Controlled Substances, and UCC) and also three "slow and steady" uniform acts (Arbitration, Enforcement of Foreign Judgments, and Partnership).

[51] *See supra* notes 31–33 and accompanying text.

[52] *See* 15 U.L.A. iv (1997).

[53] *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1079-1080 (1992).

[54] *See* PREFATORY NOTE TO MODEL STATE ADMIN. PROCEDURE ACT, 15 U.L.A. 1 (1997) [hereinafter PREFATORY NOTE].

[55] *See* CONFERENCE FACT SHEET, *supra* note 12.

more jurisdictions, and six of those twelve involve revisions of various articles of the UCC.[56] Adoption rates for model acts are much lower: only two of the twenty-nine model acts on the Conference's current list have been enacted by more than eight states.[57] The figure may be slightly misleading—at least one model act that *was* widely enacted has been superseded by a version less favorably received.[58] Still, of the thirteen model acts promulgated since 1980, the Conference reports that eleven have been enacted by two states, one state, or no states at all.[59] Even accounting for the long enactment process, the rate of approval for both uniform and model acts appears to be on a downward slope. There is some feeling, expressed by a former Conference president, that lawyers and legislators may be reacting against a barrage of uniform statutes that they find unnecessary or impracticable.[60] Of course the probability of securing widespread adoption is difficult to gauge at the outset of the planning and drafting process. One consequence of such uncertainty is that there may be little deterrent value to claims that a particular proposal is unlikely to be enacted by many jurisdictions.[61]

The nature of the acts adopted by a supermajority of jurisdictions cannot readily be classified by subject matter. Both the ten to fifteen acts most widely adopted and the dozen or so adopted by no states at all involve a mix of family, probate, commercial, and court-centered statutes.[62] There *is* a variation among states, ranging from fifty-nine enactments by Colorado and Montana to thirty-three by Alabama, thirty-one by Georgia, and twenty-two by Louisiana.[63] In general, the high-end states are from the midwest, west, and northwest, while most low-end states are located in the

[56] *See id.*

[57] The Model Consumer Credit Code and the Model Mandatory Disposition of Detainers Act have each been adopted by 11 jurisdictions. *See id.*

[58] *See* PREFATORY NOTE, *supra* note 54, at 1 (reporting that more than half of the states have enacted an administrative procedure act based wholly or partially on the model acts of 1946 or 1961).

[59] *See* CONFERENCE FACT SHEET, *supra* note 12.

[60] *See* ARMSTRONG, *supra* note 4, at 113 (quoting former Conference president George C. Keely).

[61] *See* Schwartz & Scott, *supra* note 12, at 608-609.

[62] *See* CONFERENCE FACT SHEET, *supra* note 12; Hill & Hurley, *supra* note 31, at 120-121.

[63] *See* CONFERENCE FACT SHEET, *supra* note 12.

south and southeast.[64] One study has suggested that states with a robust good government tradition have been more frequent participants while those with a strong states' rights philosophy have been least responsive to the uniform law movement.[65] Low levels of state enactment for particular uniform acts are doubtless attributable in part to extrinsic factors such as the tenor of the times. Some acts may reflect Conference agreement on issues or objectives too innovative or unknown to achieve broad popularity. Others may come too late—the identified problem either has been addressed already in disparate yet tolerable fashion by the states or perhaps has been widely accepted as a problem that can remain unaddressed in the regulatory arena.

Given that "enactability" is at times difficult to measure and in general difficult to achieve in widespread terms, it is important to consider additional or even alternative ways of identifying success for uniform or model acts. These laws may promote uniformity indirectly; as when states borrow certain provisions to address part of the identified need, or they adopt in principle the act's basic approach, or even when states are prompted to avoid unwise legislative policies they might otherwise have pursued.[66] A model or uniform act may also lead to legislative adoption by local jurisdictions; on some issues this may be as meaningful or effective as statewide enactment.[67] Further, model or uniform acts may shape the development of state law because they influence how judges approach certain kinds of cases, or because law professors' promotion of the legislative approach in their scholarship and teaching is absorbed by a new generation of practitioners.[68] The Conference itself has recognized that there are indicia of influence besides widespread enactment, and it has

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[64] *See* Hill & Hurley, *supra* note 31, at 122.

[65] *See id.* at 121-122. There is some tension between this suggestion and the earlier-noted contention that promotion of states' rights is an important public rationale for the uniform law movement. Of course, strong advocates of state sovereignty may prefer their own state's laws even over uniform laws. *See generally* Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 545-552 (1995) (arguing that a principal value of federalism is empowerment of state governments which then enhances their separate abilities to temper the direction of federal law, respond to the needs of local citizens, and adopt novel programs).

[66] *See* ARMSTRONG, *supra* note 4, at 109-110.

[67] *See, e.g.*, Vom Baur, *supra* note 20, at 172 (discussing local jurisdictions' adoption of model government procurement code).

[68] *See* Patchel, *supra* note 4, at 159-160 (arguing that importance of enactment should be placed in perspective).

encouraged discussion though not pursuit of additional avenues to success.[69]

These alternative ways to measure influence or accomplishment should be pursued in connection with the uniform mediation law project. Extensive adoption of particular mediation provisions or certain broad principles comports with the reality of diverse approaches to mediation undertaken through local legislation and court rules as well as statewide statutes. Deterrence of unwise or excessive regulatory intervention is one appropriate response to the expressed concern that mediation may become unduly rigid or bureaucratized.[70] Moreover, the dynamic growth of mediation and its numerous areas of current controversy may mean that a proposed statute's influence on judges and law professors offers a special opportunity to develop evolving standards of best practice. With regard to each of these alternative forms of success, a model act approach is likely to offer enhanced flexibility even though it also produces less satisfying results on the traditional enactability scoreboard.

III. PITFALLS ALONG THE WAY

The literature on uniform and model laws does not include a manual for how to draft and secure widespread enactment of the perfect statute. Moreover, in seeking to derive from other uniform law experiences lessons that might apply to a uniform mediation project, one must be mindful of subject matter specifics that distinguish those experiences from the practical realities of mediation. Nonetheless, there are certain key issues that tend to arise in many uniform statutory efforts. By focusing on several issues of structure and process, I hope to suggest possible directions in which the mediation law project might proceed.

One structural issue involves tensions between uniformity and diversity. In conceptualizing a statutory plan for mediation, there are plainly advantages to pursuing a more fixed approach. Uniformity is likely to result

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[69] *See* 1989 HANDBOOK, *supra* note 3, at 440 (suggesting that Conference acts may promote uniformity indirectly through adoptions in principle, adoptions of particular sections or parts, and impact on case law and teaching practices).

[70] *See, e.g.*, Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 908-909, 914-915 (1997) (discussing dangers associated with institutionalization); Panel Discussion, *What Happens When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions*, 9 OHIO ST. J. ON DISP. RESOL. 307, 309-311 (1994) (comments of Professor Baruch Bush) (same).

in simplification of the role of government. Whether it is courts encouraging or directing certain mediation procedures or agencies monitoring performance by private parties, consistent predictable rules and standards should facilitate government efforts. Reduced complexity also should enable individuals to have easier and better informed access to mediation, presumably an important objective of the project. Uniformity would save money as well—for governments by avoiding duplication of effort in various problem-solving contexts and for individuals who will find it less costly to participate on their own or with representation from nonlawyers.[71] In addition, a uniform approach to mediation would minimize the substantively based advocacy that might otherwise be expected—for instance, from landlords and tenants or employers and employees—and that could undermine a broader best practices strategy.

A more uniform statutory plan for mediation may bring disadvantages as well as potential benefits. There is considerable diversity in the way that parties to mediation come together and interact. They may be court-directed or privately initiated. Mediation may be part of an isolated transaction or a long-term relationship. The parties may be relatively equal in their bargaining sophistication—both one-shot or both repeat players—and in their economic resources, or they may be starkly unequal in these respects. The parties may also be difficult to identify in certain types of public disputes, such as potential tenants or neighbors in a dispute over the location of low income housing, or future victims of environmentally harmful spillage.[72] While a uniform statute might be expansive and detailed enough to address these and other variations, the "one size fits all" approach may result in overproceduralization for some kinds of disputes and underproceduralization for others.[73] Too much reliance on uniformity also may frustrate the potential for state-by-state innovation and experimentation, as well as blocking more decentralized lawmaking efforts responsive to local conditions or priorities within each state.[74]

A possible response to the tension just described is a statute that offers

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[71] *See* Asimow, *supra* note 53, at 1077; Bonfield, *supra* note 46, at 849; Ribstein & Kobayashi, *supra* note 31, at 138.

[72] *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 335 (2d ed. 1992).

[73] *Cf.* Bonfield, *supra* note 46, at 849–850 (identifying similar concerns with respect to a single, comprehensive administrative procedure act and its effects on the diverse missions and circumstances of various government agencies).

[74] *See* Ribstein & Kobayashi, *supra* note 31, at 140–141.

elements of both uniformity and diversity. One might imagine a certain baseline structure of mandatory fair procedures or minimum standards, with additional options or prescriptions presented in more flexible terms. The Model State Administrative Procedure Act (MSAPA) has been touted by its supporters as an apt example of this type of multi-tiered approach.[75] Unlike the federal Administrative Procedure Act, which prescribes procedures only for formal adjudications,[76] the MSAPA covers all types of agency orders.[77] The MSAPA includes certain fundamental due process protections that are extended to all agency adjudication; two examples are broad prohibitions on ex parte contacts and a mandated separation of adjudicatory functions from adversarial ones, such as prosecution, investigation, and advocacy.[78] At the same time, the MSAPA includes numerous flexibility-enhancing provisions that allow agencies to make adjudication less formal, costly, and adversarial. These include options for conference, summary, and emergency hearing models that dispense with various elements of the trial-type approach.[79]

One could envision an analogous multi-tiered structure for a model or uniform mediation statute. Provisions establishing confidentiality for mediation may be the strongest contender for a uniform statutory response. A broad respect for confidentiality is essential in order to encourage the use of mediation, and in particular to avoid a chilling effect on parties and mediators if communications thought to be privileged are subject to subpoena at a later time or in another jurisdiction.[80] On the other hand, the justice system's need for information may warrant exceptions allowing for or compelling the production of evidence in certain clearly identified circumstances.[81] With respect to the law's treatment of confidentiality, the

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[75] *See* Asimow, *supra* note 53, at 1090–1105.

[76] *See* 5 U.S.C. § 554(a) (1994) (prescribing procedures for adjudications "required by statute to be determined on the record after opportunity for an agency hearing").

[77] *See* MODEL STATE ADMIN. PROCEDURE ACT §§ 1-102(5), 4–101(a), 15 U.L.A. 11, 67 (1981); Asimow, *supra* note 27, at 308.

[78] *See* MODEL STATE ADMIN. PROCEDURE ACT §§ 4–213, 4–214, 15 U.L.A. 88, 89–90 (1981); Asimow, *supra* note 27, at 312–316.

[79] *See* MODEL STATE ADMIN. PROCEDURE ACT §§ 4–401 to 4–403, 4-501 to 4–506, 15 U.L.A. 100–110 (1981); Asimow, *supra* note 53, at 1096–1104.

[80] *See* ROGERS & MCEWEN, *supra* note 2, § 9:02; Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 443–446 (1984).

[81] *See, e.g.*, N.C. GEN. STAT. § 95-36 (1993) (permitting mediator to testify when allegations of crime are involved); N.D. CENT. CODE § 31-04-11 (1996)

absence of uniformity at least on some issues may undermine the interstate application of mediation agreements and perhaps weaken the fundamental policy favoring mediation as an alternative to lawsuits.[82]

Other subjects seem more suited to a flexible approach. Provisions addressing mediator qualifications illustrate the need to preserve diversity in a legislative setting. A reasonable argument can be made that mediators operating in court-annexed programs or in the shadow of the legal regime will be more competent and instill more confidence in judges, parties, and the public if they have law degrees.[83] That argument may give insufficient weight to other forms of professional education and may even fail to recognize how legal training can adversely affect the skills that a mediator brings to the table.[84] Yet assuming *arguendo* that a law degree is a worthwhile qualification for at least some court-annexed mediation programs, it may well become a barrier to entry for neighborhood and

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(allowing use of evidence presented in course of mediation when it relates to a crime); UTAH CODE ANN. § 78-31b-7 (1987 & Supp. 1991) (requiring mediators to report instances of child abuse to local or state authorities); WYO. STAT. ANN. § 1-43-103(c) (Michie 1997) (allowing mediators to report instances of child abuse). *See generally* ROGERS & MCEWEN, *supra* note 2, §§ 9:12, 9:30.

[82] Additional mediation issues might also warrant comprehensive treatment in core statutory language. The enforceability of pre-dispute mediation clauses and the establishment of certain prohibited conduct by mediators are subjects that might best be addressed through uniformly applicable provisions. *See* ROGERS & MCEWEN, *supra* note 2, § 8:02 (discussing enforcement of mediation clauses and possible defenses to enforceability); *id.* § 11:03 (discussing mediator liability to the parties for malfeasance); Steven G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 941-944 (1997) (contending that more certainty regarding potential civil liability of mediators is desirable while identifying problems in current approaches based on tort, contract, and fiduciary duty); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 504, 535 (1991) (arguing for clarification of ethical restrictions governing lawyers who serve as mediators).

[83] *See, e.g.*, Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1036-1038 (1993); Donald T. Weckstein, *Mediator Certification: Why and How*, 30 U.S.F. L. REV. 757, 767-768 (1996).

[84] *See* George Nicolau, *Ill-Considered Criteria Endanger Mediation, SPIDR President Warns*, 2 ALTERNATIVE DISP. RESOL. REP. 244, 245 (1988) (warning that litigation or judicial background is at best irrelevant to performing the facilitative, nonevaluative role of mediator); Weckstein, *supra* note 83, at 767 (noting risk that existing professions could monopolize the practice).

community-based mediators.[85] Moreover, other advanced degree requirements for mediators may be viewed as hindering innovation in what is a problem-solving profession, and as frustrating efforts at decentralizing the power to resolve disputes.[86] Accordingly, the issue of mediator qualifications may call for a varied approach based on the type of mediation setting and also on the differing values that mediators and parties ascribe to professional education, apprenticeship, and certified training.[87]

A second structural issue worth identifying involves the possibility that certain types of mediation or subject matter areas should be wholly or partially exempted from a uniform or model act. It is likely that at the state legislative level if not sooner, interested groups or entities will try to make

[85] *See* Bullock & Gallagher, *supra* note 82, at 928-930; Press, *supra* note 83, at 1039-1040; Paul J. Spiegelman, *Certifying Mediators: Using Selection Criteria to Include the Qualified—Lessons from the San Diego Experience*, 30 U.S.F. L. REV. 677, 687-689 (1996).

[86] *See* Sally E. Merry, *Defining "Success" in the Neighborhood Justice Movement*, *in* NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA 172, 181 (Roman Tomasic & Malcolm Feeley eds., 1982); Press, *supra* note 83, at 1040; Spiegelman, *supra* note 85, at 688.

[87] One could, for instance, require training in child development for custody and visitation mediation or training in skills for dealing with juveniles in truancy mediation; such training, however, would not be needed for mediators confronting corporate or environmental disputes. *See generally* Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 BYU L. REV. 687, 693-700 (analyzing current education and training requirements for 28 states that regulate qualifications for child custody and visitation mediators).

Apart from mediator qualification standards, one might envision variations in providing for informal and formal discovery as part of mediation and also for specific levels of judicial involvement in reviewing or approving mediated solutions. *See generally* ROGERS & MCEWEN, *supra* note 2, §§ 4:06, 6:05 (discussing tradeoffs between prediscovery and postdiscovery mediation, and advantages of case-by-case approach to integrating mediation with discovery); *id.* §§ 2:02 n.13 and accompanying text, 7:05 nn.13, 14, 27 and accompanying text (identifying judicial approval of mediated agreements, judicial requirement of mediator's report, and opposition to such required reports as possible approaches to judicial involvement). The flexibility preserved by these types of provisions could be applied within the same area of law or even the same case. There might, for instance, be more formal judicial involvement in a divorce proceeding when child custody issues are being mediated than when only property questions are at issue.

a case for exclusion.[88] They will be motivated by a genuine belief that continuation of the status quo in their situation best serves the public or private interests of parties to mediation, and also perhaps best preserves a nonparty's special institutional or financial investment in mediation.

Some requests for exclusion will rely on the argument that the interests at stake are too volatile or weighty to be subjected to prescribed mediation standards and procedures. Family violence is an existing example predicated on volatility; many states that require mediation in domestic relations cases have created exceptions for situations involving domestic violence.[89] Environmental disputes affecting the public at large may become an example based on the importance of the interests at stake. Recently, the chairman of the Sierra Club expressed serious reservations as to the wisdom of submitting to local mediation conflicts regarding management of natural resources.[90] He voiced concerns that a largely urban environmentalist constituency is geographically too remote to participate in power-sharing through local mediations, that the disparity in mediation-related skills and resources between industry representatives and local environmentalists will be disabling over the long term, and that it is too difficult psychologically to negotiate with the opposition while simultaneously attacking in public their harmful proposals.[91] Regardless of how persuasive one finds these concerns to be, their expression raises the prospect that national environmental groups may seek broad exemptions from mandatory mediation coverage under a uniform or model act.

Other requests for exclusion may rest on the claim that the interests at

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[88] *Cf.* Asimow, *supra* note 27, at 304-307 (recounting efforts by two state agencies to be excluded from coverage under California's new Administrative Procedure Act).

[89] *See, e.g.*, ALA. CODE § 6-6-20(e) (1996 & Supp. 1997); CAL. FAM. CODE § 3170(b) (West 1994 & Supp. 1997). *See generally* ROGERS & MCEWEN, *supra* note 2, § 7:02 nn.27-28 and accompanying text.

[90] *See* Michael McCloskey, *The Limits of Collaboration*, HARPER'S MAG., Nov. 1996, at 34-36 [hereinafter *The Limits*]; Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, HIGH COUNTRY NEWS, May 13, 1996, at 7 [hereinafter *The Skeptic*].

[91] *See The Limits*, *supra* note 90, at 35-36; *The Skeptic*, *supra* note 90, at 7; *see also* Jon Margolis, *How a Foe Saved the Quincy Library Group's Bacon*, HIGH COUNTRY NEWS, Sept. 29, 1997, at 13 (reporting that timber industry outmaneuvered local environmentalists in their collaborative approach to a logging dispute, and that national environmental groups stepped in to redress the inequity while expressing discomfort over the local collaboration).

stake are too trivial to trigger uniform standards or procedures. Here one might imagine a high school cheerleader angered at being left off the travel squad, or a prisoner objecting to the drab new color scheme in his cell block. When such disputes arise outside the court system, they may raise the question of whether prisons or school boards should be exempted at least from mandatory aspects of a mediation act. This is not meant to suggest that a uniform or model mediation law should succumb to any or all such requests for exclusion. It is, however, distressingly easy at times to make a draft act's supporters look ridiculous by forcing them to defend statutory coverage that appears either insufficiently sensitive to major public values or excessively burdensome in the way it would apply.[92]

An alternative to requests for total exclusion will be efforts to secure contracting-out provisions whereby parties may agree to different procedures or standards than what the statute requires or recommends. In at least one state, the law already allows parties to a mediation to agree that they will not follow otherwise mandatory provisions.[93] In some instances a voluntary opt-out arrangement may be attractive because it furthers the consensual or shared interests of the parties. The danger is that the parties may not be equally aware of what their interests are or equally capable of protecting them. Inequalities of information or resources may complicate efforts to assess these so-called voluntary requests for exclusion.

My final observations involve the legislative process. Without meaning to suggest that in law or life there is more to be learned from failure than success, I offer here two thumbnail sketches of promising Conference acts that have fallen flat in the state legislative arena. One—an old failure—is the Uniform Divorce Act of 1907, thoughtfully analyzed by Professor James White in a 1991 article.[94] The uniform act arose in response to widely held perceptions that divorce laws had become too relaxed and that migratory divorce—fueled by uneven standards between states—was a substantial contributing factor.[95] The Conference would have restricted divorce both by modestly tightening general standards and by significantly burdening the option of obtaining a divorce in another state.[96] The Act had the approval of churches and the turn-of-the-century women's movement as

[92] *See* Asimow, *supra* note 27, at 308-309.

[93] *See* FLA. R. CIV. P. 1.720(f)(1) (1997) (allowing parties to a mediation to select a mediator who does not satisfy the state's certification requirements).

[94] *See* White, *supra* note 31, at 2120-2133.

[95] *See id.* at 2108-2109.

[96] *See id.* at 2121-2122.

well as enthusiastic support from two Presidents, and it enjoyed a considerable media following.[97] Yet only three states adopted the 1907 Act, and the Conference withdrew it in 1928.[98]

The other failure—of more recent vintage—is the Model Employment Termination Act of 1991 (META).[99] The model act was promulgated in response to general agreement that common law regulation of wrongful discharge in the workplace was too onerous for employees and too risky and unpredictable for employers. The commissioners solicited substantial input from a range of interest groups and drafted an act that established a relatively objective "good cause" standard, recommended arbitration as a cheaper and more informal adjudicatory method, and in general sought to offer employees better prospects for relief and lower transaction costs in exchange for lesser amounts of monetary recovery and the sacrifice of their common law tort options.[100] META has been introduced in about ten states, has been seriously considered in only one or two, and has not been enacted by any state.[101]

What lessons do these two failures suggest in terms of the *process* of securing widespread legislative enactment? One is the requirement for an articulate and forceful presentation as to why a uniform or model act is needed. Despite Conference assertions that migratory divorce was a major problem and that stronger law would diminish rates of divorce, scholarly opponents relied on public data to show that migratory divorce was of little impact and imperfect legislation was *not* a principal cause of rising divorce rates.[102] In the mediation context, it is important to be clear as to why a model or uniform act is needed. If promoting best practices and establishing predictable direction out of current confusion or chaos are key rationales,

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[97] *See id.* at 2107–2123.

[98] *See id.* at 2107, n.44 and accompanying text.

[99] MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 80 (Supp. 1991).

[100] *See* St. Antoine, *supra* note 38, at 367–370; Theodore J. St. Antoine, *The Model Employment Termination Act: Fairness for Employees and Employers Alike*, 1992 LAB. L.J. 495, 495–500 [hereinafter *Fairness for Employees*].

[101] *See* Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1506 n.384 and accompanying text (1996) (META introduced in Hawaii in three different legislative sessions and in Massachusetts and Oklahoma in two different sessions); St. Antoine, *supra* note 38, at 380 (META introduced in about ten states); CONFERENCE FACT SHEET, *supra* note 12 (META not enacted by any state).

[102] *See* White, *supra* note 31, at 2123, 2128–2129.

that case should be made with rigor and some specificity.

Second is the importance of soliciting and receiving input from *all* interested and affected parties—which means knowing who those parties are. With respect to the divorce act, the Conference heard from concerned elites but not from the large number of men and women who were uncomfortable with or opposed to restrictions on their access to divorce.[103] When advocates assert the moral righteousness of their position (as occurred in the divorce act setting), they may shame their opponents into silence—but that silence should not be misconstrued as assent or acquiescence.[104] Proponents of a mediation act presumably will not project a sense of moral superiority that stifles debate by shaming the opposition, but they do need to be prepared to delve into the silences. By reaching out to affected persons or interests underrepresented in the private legislative process, supporters improve their chances of avoiding unpleasant surprises when a model or uniform act reaches the state legislatures.

A third and final lesson is to understand early the major flashpoints that may divide two or more key interested players, and to maintain regular communication with all sides to such disputes. In the case of META, the Conference built a solid foundation—employer and employee groups had grown weary of the patchwork common law response and wanted a more rational statutory approach to wrongful discharge.[105] At some point in the drafting process, though, the tilt toward employer interests became too strong. It may have been the limitation imposed on recovery of damages for bad-faith terminations,[106] or the extent to which parties could waive the model act's basic arbitration scheme[107] or even contract out of the good

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[103] *See id.* at 2128.

[104] *See id.* at 2126–2128.

[105] *See* St. Antoine, *supra* note 38, at 380-381 (describing AFL-CIO decision in 1987 to support concept of statutory solution to unjust dismissal); *Fairness for Employees*, *supra* note 100, at 497 (describing employers' discomfort at random and often excessive jury verdicts in common law wrongful discharge actions).

[106] *See* MODEL EMPLOYMENT TERMINATION ACT § 7(b), 7A U.L.A. 93 (Supp. 1991); St. Antoine, *supra* note 38, at 375 (describing how employers prevailed on damages limitations in the Conference drafting committee).

[107] *See* MODEL EMPLOYMENT TERMINATION ACT § 4(i), 7A U.L.A. 90 (Supp. 1991); St. Antoine, *supra* note 38, at 377 (describing how employers secured amendment at the 1991 annual meeting allowing parties to contract for private dispute resolution procedures).

cause standard altogether.[108] Whatever the reasons, the interest groups representing employees seem to have quietly but resolutely walked away from the finished product after participating constructively in the early drafting process.[109] Obviously it is not possible at this point to know which mediation issues will elicit strongly divided views from major interested groups or will trigger special concern from groups that are leery of a uniform or model act approach. Anticipating those issues in advance may be less important than reacting to the disagreements and trying to keep all important players invested in the act as it evolves in the months or years to come.

IV. CONCLUSION

After more than a century of uniform state law activity, it seems safe to observe that there is no yellow brick road to widespread enactment. Decisions about what to include and omit from a uniform or model mediation act will be determined primarily through considered debate as to the merits of particular mediation law issues, rather than through reliance on general characteristics of the uniform law process. That is as it should be: uniform commissioners, whose status and tenure do not depend on partisan promises or campaign contributions, are in many respects better prepared than other legislators to approach the ideal of an informed and deliberative lawmaking process.

This Article has maintained, however, that attention to certain aspects of the uniform statutory approach may well enhance efforts to develop and disseminate a well-conceived mediation statute. Drafters and supporters should decide on the basic rationales underlying a mediation act and then state those objectives with conviction—in the "purpose" section of the statute and elsewhere. Given that some mediation issues may require uniform statutory treatment while others would benefit from a more pliable

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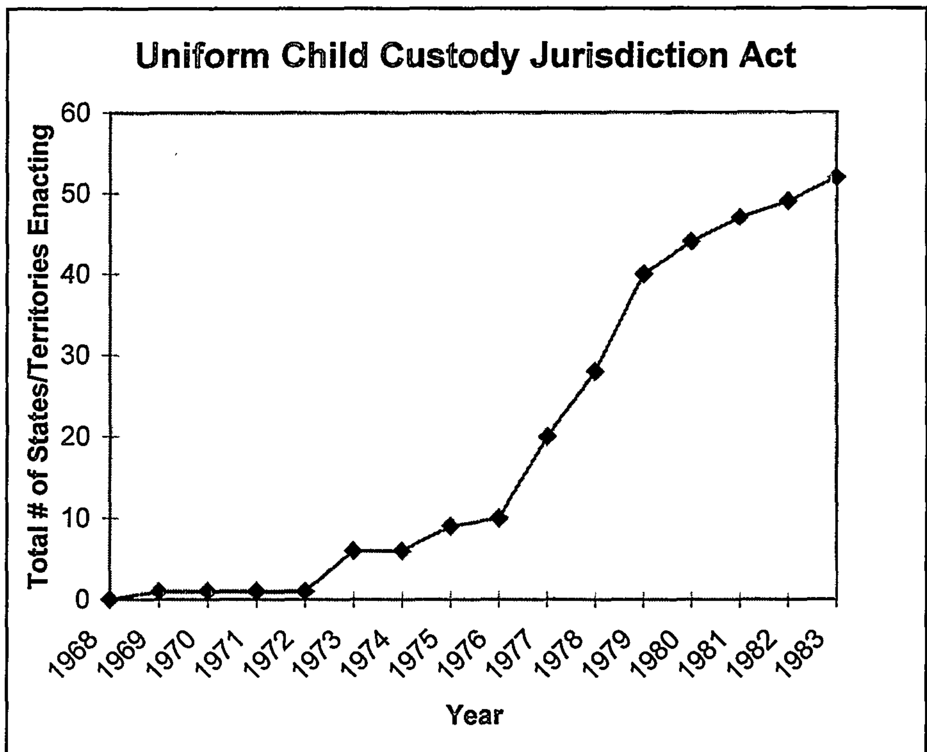
[108] *See* MODEL EMPLOYMENT TERMINATION ACT § 4(c), 7A U.L.A. 89 (Supp. 1991); St. Antoine, *supra* note 38, at 379 (describing how drafting committee allowed parties by express agreement to dispense with statutory good cause protections and replace them with a mandatory severance payment scheme).

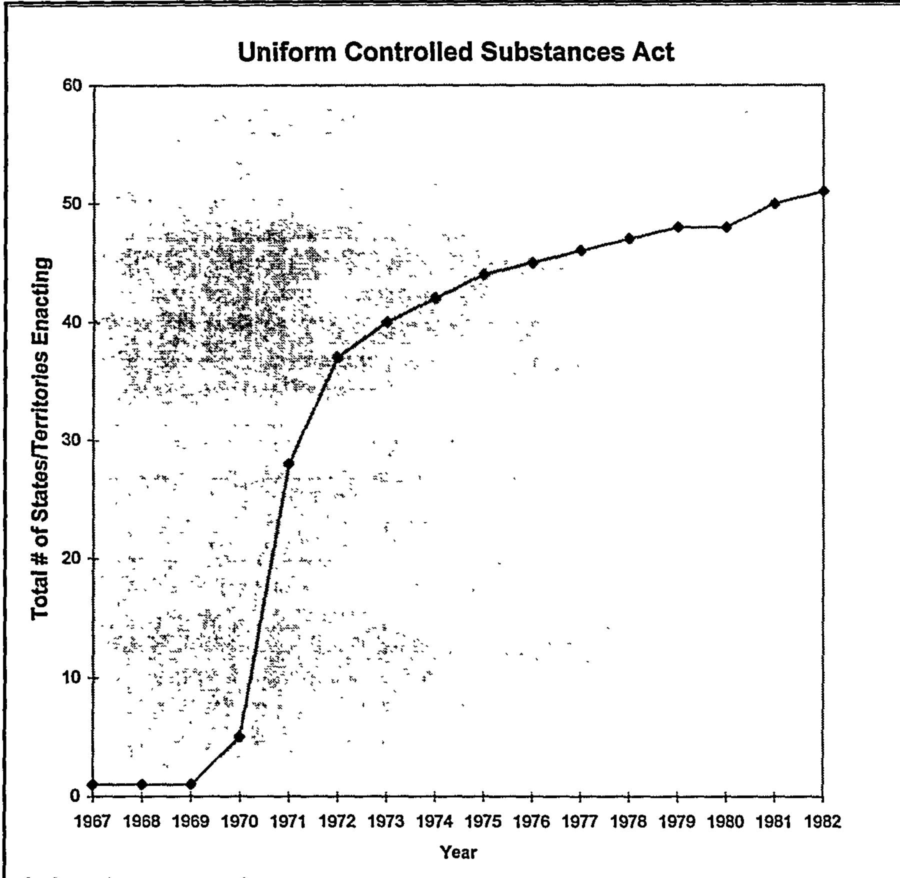
[109] *See* St. Antoine, *supra* note 38, at 381 (noting change of position by AFL-CIO). Professor St. Antoine points out that the employer community's support for widespread enactment of META has been less than outspoken, perhaps because employers believe they can continue to take advantage of the current legal system. *See id.*; *see also* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 902–920 (1994) (criticizing META as inadequate and stacked against employees).

legislative response, proponents should look toward a two-tiered approach that sets forth consistent rules or standards for certain core matters yet creates options or guidelines for many additional "legislatable" subjects. With regard to the Conference's internal enactment process, drafters should be prepared to respond to forceful interest group requests for exemption from coverage or, in the alternative, for "contract out" provisions. They also should try to anticipate major controversial issues and should resist the temptation to construe interest group silence as assent particularly with respect to groups that may be underrepresented in the Conference enterprise. Finally, with respect to post-Conference lawmaking developments, it is important to define success broadly—wholesale approval from state legislatures is surely welcome, but so too are partial enactments and evolving acceptance through the law schools and courts.

APPENDIX

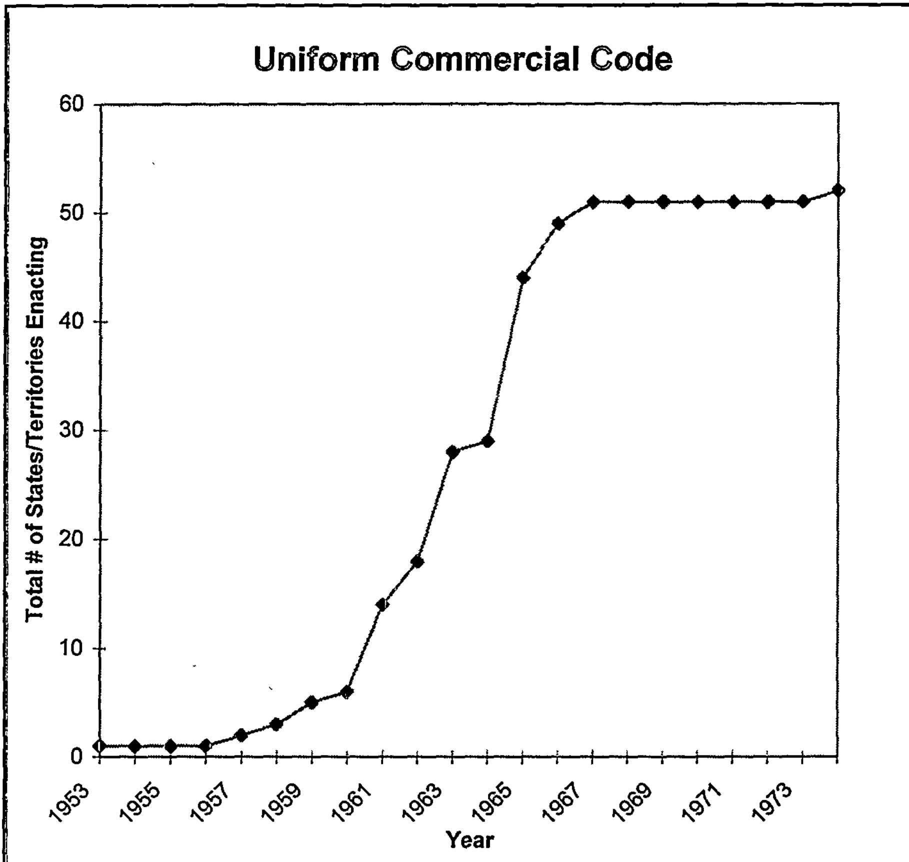


Uniform Child Custody Jurisdiction Act			
Year	# States Enacting	Total # States	States
1969	1	1	ND
1973	5	6	CA, CO, HI, OR, WY
1975	3	9	MD, MI, WI
1976	1	10	DE
1977	10	20	AK, FL, ID, IN, IA, MN, MT, NY, OH, PA
1978	8	28	AZ, CT, GA, KS, LA, MO, RI, SD
1979	12	40	AR, IL, ME, NE, NV, NH, NJ, NC, TN, VT, VA, WA
1980	4	44	AL, KY, OK, UT
1981	3	47	NM, SC, WV
1982	2	49	MS, VI
1983	3	52	DC, MA, TX
Source: UNIF. CHILD CUSTODY JURISDICTION ACT,			
	9 U.L.A. (Part I) 117-118 (Supp. 1997)		

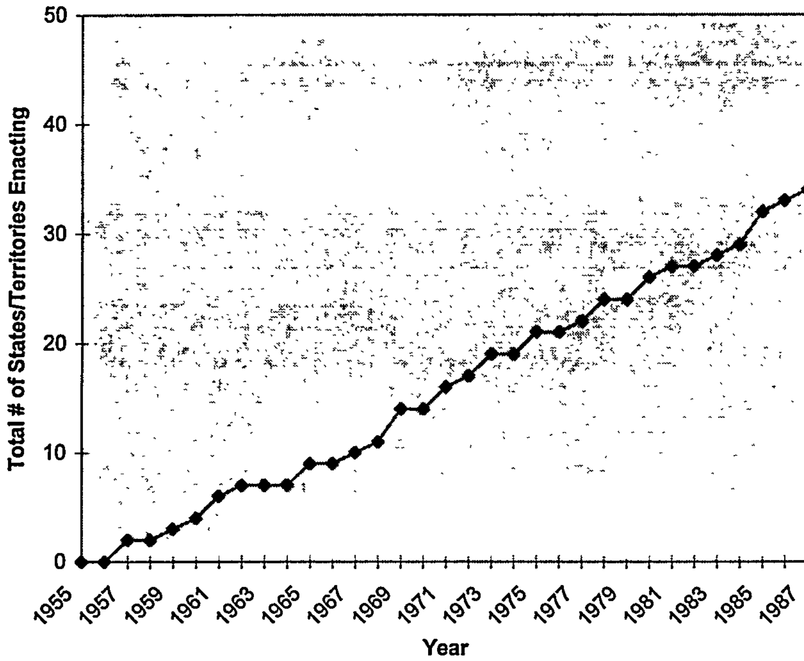


Uniform Controlled Substances Act			
Year	# States Enacting	Total # States	States
1967	1	1	CT
1970	4	5	MD, NJ, SD, VA
1971	23	28	AL, AR, ID, IL, IA, MA, MN, MS, MO, NE, NV, NC, ND, OK, PR, SC, TN, UT, VI, WA, WV, WI, WY
1972	9	37	CA, DE, HI, KS, KY, LA, NM, NY, PA
1973	3	40	FL, MT, TX
1974	2	42	GA, RI
1975	2	44	ME, OH
1976	1	45	IN
1977	1	46	OR
1978	1	47	MI
1979	1	48	AZ
1981	2	50	CO, DC
1982	1	51	AK

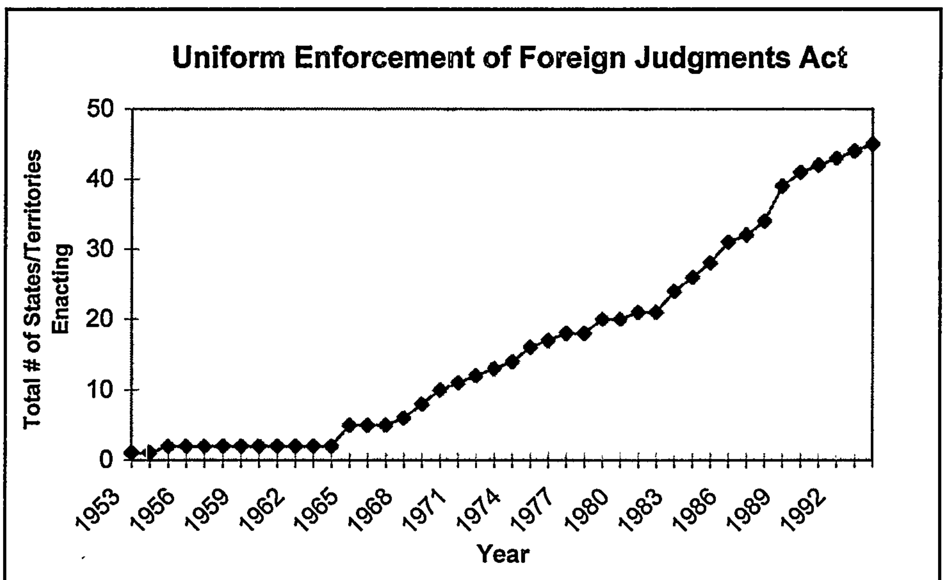
Source: UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. (Part III) 1-2 (1997)



Uniform Commercial Code			
Year	# States Enacting	Total # States	States
1953	1	1	PA
1957	1	2	MA
1958	1	3	KY
1959	2	5	CT, NH
1960	1	6	RI
1961	8	14	AR, IL, NJ, NM, OH, OK, OR, WY
1962	4	18	AK, GA, MI, NY
1963	10	28	CA, IN, ME , MD, MO, MT, NE, TN, WV, WI
1964	1	29	VA
1965	15	44	AL, CO, DC, FL, HI, IA, KS, MN, NC, ND, NV, TX, UT, VI, WA
1966	5	49	DE, MS, SC, SD, VT
1967	2	51	AZ, ID
1974	1	52	LA
	Source: U.C.C., 1 U.L.A. 1-2 (Supp. 1997)		



Uniform Arbitration Act			
Year	# States Enacting	Total # States	States
1957	2	2	FL, MN
1959	1	3	WY
1960	1	4	MA
1961	2	6	IL, MI
1962	1	7	AZ
1965	2	9	MD, TX
1967	1	10	ME
1968	1	11	AK
1969	3	14	AR, IN, NV
1971	2	16	NM, SD
1972	1	17	DE
1973	2	19	KS, NC
1975	2	21	CO, ID
1977	1	22	DC
1978	2	24	OK, SC
1980	2	26	MO, PA
1981	1	27	IA
1983	1	28	TN
1984	1	29	KY
1985	3	32	MT, UT, VT
1986	1	33	VA
1987	2	35	NE, ND
Source: UNIF. ARBITRATION ACT, 7 U.L.A. (Part I) 1 (1997)			



Uniform Enforcement of Foreign Judgments Act			
Year	# States Enacting	Total # States	States
1953	1	1	WA
1955	1	2	OR
1965	3	5	PA, WI, WY
1968	1	6	OK
1969	2	8	CO, ND
1970	2	10	KS, NY
1971	1	11	AZ
1972	1	12	AK
1973	1	13	CT
1974	1	14	ID
1975	2	16	ME, SD
1976	1	17	TN
1977	1	18	MN
1979	2	20	IA, NV
1981	1	21	TX
1983	3	24	HI, OH, UT
1984	2	26	FL,MS
1985	2	28	LA, RI
1986	3	31	AL, DE, GA
1987	1	32	MD
1988	2	34	MO, VA
1989	5	39	AR, MT, NM, NC, WV
1990	2	41	DC, KY
1991	1	42	IL
1992	1	43	VI
1993	2	45	NE, SC
1994	1	46	NH
Source: UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT,			
	13 U.L.A. 13-14 (Supp. 1997)		

Uniform Partnership Act			
Year	# States Enacting	Total # States	States
1915	2	2	PA, WI
1916	1	3	MD
1917	4	7	AK, IL, MI, TN
1918	1	8	VA
1919	3	11	ID, NJ, NY
1921	2	13	MN, UT
1922	1	14	MA
1923	1	15	SD
1929	1	16	CA
1931	2	18	CO, NV
1939	1	19	OR
1941	3	22	AR, NC, VT
1943	1	23	NE
1945	1	24	WA
1947	1	25	DE
1949	3	28	IN, MO, OH
1950	1	29	SC
1954	2	31	AZ, KY
1955	1	32	OK
1957	2	34	RI, VI
1961	1	35	TX
1962	1	36	DC
1971	2	38	AL, IA
1972	3	41	FL, HI, KS
1973	2	43	ME, NH
1976	1	44	MS
1984	1	45	GA
Sources: UNIF. PARTNERSHIP ACT (1914), 6 U.L.A. 79 (Supp. 1997),			
not including UNIF. PARTNERSHIP ACT (1994), 6 U.L.A. 1 (1995);			