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Harvey L. Zuckman

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## COMMENTARIES

### THE ABA FAMILY LAW SECTION v. THE NCCUSL: ALIENATION, SEPARATION AND FORCED RECON- CILIATION OVER THE UNIFORM MARRIAGE AND DIVORCE ACT

*Harvey L. Zuckman\**

The movement for divorce reform in the United States is a natural reaction to the nearly unmixed evil spawned by the fault system of divorce inherited from the English ecclesiastical courts. The need to establish the fault of one spouse in order to obtain dissolution of the marriage led, in many cases, to unnecessary additional discord between the parties where the divorce was contested, collusion between them where it was not, and perjury, subornation of perjury and distortion of our system of justice in either situation.<sup>1</sup> While the conviction that the system must be replaced by something better is not novel,<sup>2</sup> the first *comprehensive* no-fault statute enacted in the United States was the California Family Law Act of 1969,<sup>3</sup> which substituted "irreconcilable differences, which have caused the irremediable breakdown of the marriage" as the major test for dissolution of marriage.<sup>4</sup> The state of Iowa followed with its own sweeping legislation in 1970<sup>5</sup> and the movement for nationwide reform was on in earnest.

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\* Professor of Law, The Catholic University of America. A.B., University of Southern California, 1956; LL.B., New York University, 1959.

1. For a more detailed catalogue of the evils of the fault system, see King, *Marriage, Divorce and Custody Reform in South Dakota*, 18 S. DAK. L. REV. 654, 667-69 (1973); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 82-83 (1965); Zuckman & Fox, *The Ferment in Divorce Legislation*, 12 J. FAM. L. 515, 521-28 (1973).

2. When the National Conference of Commissioners was founded in 1892, one of the first suggestions made to it was the revision of the existing marriage and divorce law. See Levy, *Prefatory Note, Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 205 (1971).

3. CAL. CIV. CODE §§ 4000-5138 (West 1970).

4. *Id.* § 4506(1). The only other ground for dissolution in California is incurable insanity. *Id.* § 4506(2).

5. IOWA CODE ANN. §§ 598.1-.34 (Supp. 1974).

## I. ALIENATION

About the time that the California Governor's Commission was laying the foundation for California's new law, the National Conference of Commissioners on Uniform State Law (NCCUSL) appointed a committee to prepare a uniform marriage and divorce law. Contemporaneously, the American Bar Association's Family Law Section was asked to appoint a liaison committee to work with the NCCUSL committee.<sup>6</sup> While the appointment of the liaison committee should have facilitated acceptance by the ABA of any uniform act adopted by the commissioners, just the reverse occurred. Indeed, the conflicts were such that for a time two competing proposed acts were circulating—the Commissioners' official Uniform Marriage and Divorce Act (UMDA) and the ABA Family Law Section's Proposed Revision of the UMDA. It is unclear who was responsible for the enmity between the two committees, but its presence was obvious from the beginning. Professor Robert J. Levy, the reporter for the UMDA,<sup>7</sup> made his feelings unmistakably clear:

The very existence of the Family Law Section liaison committee was from the beginning a source of controversy. . . . Mrs. Merrill, a Special Committee Advisor, and the Reporter both opposed creation of such a committee because its membership might include persons disaffected by the Conference's selection of paid staff and *because the committee would not be able to assuage its resentment that the Conference rather than the Family Law Section had responsibility for drafting the Act.*<sup>8</sup>

Given this opposition to the mere creation of the liaison committee, Professor Levy's concern over possible disruption of the committee's work by the ABA group may have been a self-fulfilling prophecy.

There was no less bitterness on the other side. Professor Henry H. Foster, Jr., in looking back on his experience with the liaison group has said:

All of the members of the Family Law Section's so-called Liaison Committee and many other advisers and consultants became disenchanted with the procedures of the Committee and its *modus operandi*. It became clear that the "outsiders" were not invited to help formulate policy; rather they were to go over the exceedingly rough drafts turned in by the Reporters. . . . In effect, the

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6. See Foster, *Divorce Reform and the Uniform Act*, 18 S. DAK. L. REV. 572, 577 (1973).

7. A co-reporter, Professor Herma Hill Kay, was appointed later. See *id.*

8. Levy, *Introduction, A Symposium on the Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 531, 534 n.10 (1973) (emphasis added).

“outsiders” came to feel that they were window dressing and that their judgments regarding policy matters were unwelcome. *Ironically, only the “outsiders” had real experience and expertise in the field, since the Committee and its Reporters had little if any actual experience in matrimonial litigation.*<sup>9</sup>

Not surprisingly, the Commissioners’ final product (in my opinion a good one) faced trouble when the NCCUSL sought ABA endorsement for it.

From the date of its promulgation in August 1970, the ABA Family Law Section (the parent of the liaison committee) expressed its opposition to the UMDA and, in August 1971, forced a number of amendments upon the Commissioners. But no compromise could be reached on the critical sections of the UMDA dealing with the test for marital dissolution. As a result of the Family Law Section’s opposition, the House of Delegates of the ABA, which rarely refuses endorsement of uniform acts, rejected the UMDA in 1972 by a decisive margin.<sup>10</sup>

## II. SEPARATION

With the backing of the House of Delegates, a special committee of the Family Law Section then set to work to prepare a proposed revised UMDA (PR Draft) more to the Family Law Section’s liking. What emerged from this committee nearly caused a substantial setback for the cause of no-fault divorce reform.

The non-personal differences between the Commissioners and leaders of the Family Law Section centered on the definition (or lack thereof) of “irretrievably broken” marriage, the sole test for dissolution of a marriage under the UMDA.<sup>11</sup> Prior to the initial rejection of the Act by the ABA’s House

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9. Foster, *supra* note 6, at 577-78 (emphasis added).

10. Washington Post, Feb. 8, 1972, § A, at 2, col. 1. However pure the motives of the Family Law Section may have been in opposing the UMDA, *see* Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 18 S. DAK. L. REV. 601, 608 (1973), I have always suspected that the vote in the House of Delegates reflected to some degree the bar’s economic self-interest. Simultaneous with the House of Delegates’ consideration of the UMDA, it had before it a resolution endorsing the Uniform Abortion Act, permitting unrestricted abortion up to the 20th week of pregnancy. *See* 40 U.S.L.W. 2530 (Feb. 8, 1972). Interestingly, the no-fault UMDA, which threatens simpler judicial proceedings and increased filings in proper person, went down to defeat, while liberalized abortion, an issue which has troubled theologians, clergymen, doctors, lawyers and legislators for centuries, was endorsed without debate and by an overwhelming voice vote. *See id.* at 2532. As a lawyer friend remarked, “There isn’t much legal business from abortions.”

11. UNIFORM MARRIAGE AND DIVORCE ACT §§ 302, 305, *as amended*, August 1971. Until August 1973 these sections provided:

SECTION 302. [Dissolution of Marriage; Legal Separation.]

of Delegates, the NCCUSL steadfastly refused to provide a definition for "irretrievably broken" marriage<sup>12</sup>—and with good reason. The Family Law Section's reason for attacking this lack of definition was that it would lead to

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(a) The [.....] court shall enter a decree of dissolution of marriage if:

(1) the court finds that one of the parties, at the time the action was commenced, was domiciled in this State, or was stationed in this State while a member of the armed services, and that the domicile or military presence has been maintained for 90 days next preceding the making of the findings;

(2) the court finds that the conciliation provisions of Section 305 either do not apply or have been met;

(3) the court finds that the marriage is irretrievably broken; and

(4) to the extent it has jurisdiction to do so, the court has considered, approved, or made provision for child custody, the support of any child of the marriage entitled to support, the maintenance of either spouse, and the disposition of property.

(b) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

**SECTION 305. [Irretrievable Breakdown.]**

(a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make finding whether the marriage is irretrievably broken.

(b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:

(1) make a finding whether the marriage is irretrievably broken; or

(2) continue the matter for further hearing not fewer than 30 nor more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken.

(c) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

Many other sections of the UMDA, as amended in 1971, were proposed for revision in the Family Law Section's draft, but none so totally embodies the philosophy of no-fault reform as sections 302 and 305. Thus their revision posed the greatest danger to the no-fault thrust of the UMDA.

12. Even Professor Levy once admitted that he did not know exactly what the term meant. See Foster, *supra* note 6, at 578. The Commissioners' 1971 comments to section 302(a)(3) shed little light on its meaning:

Subsection (a)(3) embodies the basic shift from fault to no-fault grounds for dissolution of the marriage which is the primary object of this part of the Act. Many terms might have been used to characterize the concept. "Irretrievably broken" was chosen because this has become a term of common use in the literature of divorce reform, and so has gained a significant meaning upon which judges may rely for guidance. It is closely related to the standards recently adopted in California ("irremediable breakdown") and in Iowa ("breakdown of the marriage relationship . . . no reasonable likelihood that the marriage

"divorce on demand of one party."<sup>13</sup> But will it? So long as the courts have the final say as to whether a marriage is "irretrievably broken" there can be no demand divorce by the parties.

Moreover, is the absence of definition so terrible in this area of the law?<sup>14</sup> According to the drafters' apparent philosophy, the courts should continue to build the concept of irretrievable breakdown on a case-by-case basis and not be hampered by legislative preconceptions which necessarily cannot fit all cases. Of course, marital relationships do not fit into neat legal pigeon-holes. Concomitantly, it is difficult to articulate standards for such an inherently amorphous, albeit recognized, concept as irretrievable breakdown. As Justice Stewart has said relative to the similar definitional problem in controlling hardcore pornography, "I shall not today attempt further to define the kinds of material I understand to be embraced within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."<sup>15</sup> Certainly, competent judges should

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can be preserved") and equates to the doctrinal result attained under the concept of incompatibility, *Newman v. Newman*, 391 P.2d 902 (Okla. 1964) ("irremediable rift . . . such a conflict of personalities as to destroy the legitimate ends of matrimony and the possibility of reconciliation").

13. ABA FAMILY LAW SECTION, PROPOSED REVISED UNIFORM MARRIAGE AND DIVORCE ACT, PR DRAFT § 302, Comment. The comment reads:

The substance of the above new draft of Section 302 was agreed upon by the Special Committee. It constitutes an attempt to provide some certainty and some guidelines as to the meaning of "irretrievably broken." The California and Florida laws, and the UM&DA, have been criticized by leading experts in the field for their failure to define "breakdown" or to set up guidelines. See [for] example, Professor Max Rheinstein's latest book. In addition, an effort is made to tie in Section 302 more closely with Section 305 as redrafted. Despite the fact that Reporter Robert Levy stated at the hearings on Section 302 that he himself did not know what "irretrievable breakdown" meant, and despite repeated criticism from the Family Law Section, the UM&DA Section 302 has not been modified to include definition or guidelines. The result is a section which has no certain meaning and a ground for divorce which is not a justiciable issue, and that inevitably will lead to divorce upon demand of one party. Such a procedure could better be handled administratively than by a form of a judicial hearing. The Special Committee believes that the interests of society and the family would be better served by a specification of what is meant by "breakdown" and by a reference to conciliation or reconciliation services which would constitute some check on impetuous divorce and which could protect the interests of the parties and their children. At the same time the Special Committee is agreed that "dead marriages" should be terminated upon request but that efforts should be made to make sure that the marriage actually is "dead" and not viable. Under both the California law and the UM&DA there can be no assurance that some "live" marriages are not being pronounced "dead."

14. Some of the material which follows first appeared in slightly different form in Zuckman & Fox, *supra* note 1, at 595-99. The author gratefully acknowledges the permission of the *Journal of Family Law* to utilize this material.

15. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (concurring opinion).

also know irretrievably broken marriages when they see them.

Assuming the necessity of definition, however, extreme care must be exercised in supplying it or the fundamental philosophy of the legislation may be undermined. A good example of this problem is the English Divorce Reform Act of 1969<sup>16</sup> which provided a definition of irretrievable breakdown in terms of proof of adultery, cruelty, desertion or living apart for a prescribed period of time.<sup>17</sup> Thus, fault was not necessarily eliminated from English dissolution proceedings by the reform legislation, and a petitioner who does not rely on the living apart ground must prove an old fault ground *and* that the respondent's fault was symptomatic of irretrievable breakdown.<sup>18</sup>

Despite these difficulties and dangers, the Family Law Section, led by its then chairman Judge Ralph Podell, rushed in and, exhibiting a rather quaint view of society,<sup>19</sup> proceeded to propose a definition which could have turned the reform movement back toward the discredited fault system and caused other serious dislocations in the law. The Section defined irretrievably broken marriage in terms of proof either (a) that the parties had lived separate and apart for a period of more than one year preceding commencement of court action or (b) that such serious marital misconduct had occurred so adversely affecting the physical or mental health of the petitioning party as to make it impossible for the parties to continue the marital relation, and that reconciliation is improbable.<sup>20</sup>

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16. Divorce Reform Act 1969, c. 55 (1969).

17. *Id.* § 2.

18. See Levin, *The Divorce Reform Act 1969*, 33 MOD. L. REV. 632, 633-34 (1970).

19. Judge Podell begins a recent law review article on this subject in the following way:

At a time when the United States is facing increased crime and violence by juveniles and adults who have abandoned their parents or are the products of broken homes, one must ask: What are we doing to save the family? The sad answer is very little, if anything at all.

Despite all of this, there is a rapidly growing movement towards so-called "no-fault" divorce. This procedure removes the fault or blame concept from the divorce proceedings and permits a quick and easy dissolution of a marriage, even of many years duration and against the will of one of the parties, on the mere allegation that the marriage is irretrievably broken.

Podell, *supra* note 10, at 601. These hardly seem the words of one who is really in favor of eliminating fault from divorce proceedings.

20. PR Draft § 302(a)(2). Section 302 as revised by the Family Law Section reads in pertinent part:

(a) The [.....] court shall enter a decree of dissolution of marriage if:

(1) the court finds that one of the parties, at the time the action was commenced, actually resided in this State, or was stationed in this State while a member of the armed services, and that the actual residence or military service

The one year living separate and apart definition might not on its face appear unreasonable. But taken together with the further proposed revision of the UMDA requiring a three-month "cooling off" period after commencement of the proceedings,<sup>21</sup> a *minimum* of fifteen months must elapse before one could obtain a dissolution decree in a jurisdiction adopting the Section's proposed revision.<sup>22</sup> In addition, a lengthy period of living separate and apart creates the need for some kind of special proceedings *pendente lite* to protect the financial interest of the non-breadwinning spouse. This is

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has been maintained in this State continuously for 6 or more months, and in the county of commencement for 60 or more days, next preceding the commencement of this proceeding; and

(2) the court finds that the marriage is irretrievably broken, which finding shall be established by proof (a) that the parties have lived separate and apart for a period of more than one year next preceding the commencement of this proceeding, or, (b) that such serious marital misconduct has occurred which has so adversely affected the physical or mental health of the petitioning party as to make it impossible for the parties to continue the marital relation, and that reconciliation is improbable; and

(3) the court finds that the conciliation provisions of Section 305 have been met and that past efforts at reconciliation have failed or that further attempts at reconciliation would be impracticable or not in the best interests of the family.

(b) The only defense to a proceeding for dissolution of marriage or legal separation shall be the failure to establish: Either (1) the jurisdictional requirements, or (2) irretrievable breakdown of the marriage as above set forth, or (3) that conciliation requirements of this section have been met.

(c) Bona fide efforts at reconciliation shall not be deemed to interrupt the period of living separate and apart referred to in this section.

21. PR Draft § 305(a). This section provides:

(a) No finding as to irretrievable breakdown of the marriage may be made under Section 302 of this Act until 3 months have elapsed after commencement of the proceedings and until the [commissioner or court officer] has certified to the court that further efforts at reconciliation or conciliation are impracticable or not in the interests of the family. In order to determine such fact for certification the [commissioner or court officer] may require the attendance of either or both parties at a conference or interview at which is explored the practicability or need for reconciliation or reconciliation efforts.

Nowhere in the PR Draft is there any clear provision for waiving the three-month period even when the record establishes repeated unsuccessful efforts at reconciliation by the spouses prior to commencement of the dissolution proceedings. Section 305(b) states only that if a court officer finds that the parties have lived separate and apart for a year or more, or he is satisfied that past efforts at reconciliation were unsuccessful, or that further efforts would be impractical or not in the best interests of the family, he shall certify such fact to the court. The comments to this section say nothing of waiver.

22. The lengthy period between marital breakdown and dissolution imposed by the PR Draft runs counter to the modern trend of statutes requiring only short periods of living separate and apart as a ground for divorce. See, e.g., VT. STAT. ANN. tit. 15, § 551(7) (1974) (six-month period).



provided for in section 317(a) of the proposed revision.<sup>23</sup> One effect of such a lengthy dissolution proceeding is more court appearances in already overloaded courtrooms with correspondingly greater costs to the litigants.

Another unfortunate effect of the minimum fifteen-month wait is the encouragement it presents, to those who can afford it, to seek more immediate dissolution in a different jurisdiction. Any proposed legislation which encourages migratory divorce is ill-conceived for many reasons. Migratory divorce discriminates against those who cannot afford the expense of traveling to another jurisdiction, creates ethical problems for the lawyer in counseling clients hell-bent to dissolve their marriages, fosters cynicism toward the law ("it's not what you do but how and where you do it"), encourages deception of foreign courts concerning the issue of domicile and engenders vast legal confusion when the home jurisdiction refuses to recognize the foreign decree.<sup>24</sup>

Of course, the expense of special separate maintenance proceedings or migratory divorce can be avoided under the proposed revision if the parties are willing to play the "faulting game." One can file immediately for divorce under PR Draft section 302(a)(2) by alleging "serious marital misconduct" on the part of one's spouse which causes substantial injury to physical or mental health. Rather curiously, the definition-conscious drafters provide no definition of the term "serious marital misconduct." But can there be any doubt that judges experienced in the fault system will equate it to the old fault grounds and require proof of, for instance, adultery?

Moreover, the petitioner would have to provide medical evidence that his or her physical or mental health has been so adversely affected as to make it impossible for the parties to continue to live together. Thus, whatever form the marital misconduct takes, difficult questions of proof are introduced into the proceedings concerning the state of the petitioner's health and its relationship to the respondent's marital misconduct. This alternative route to dissolution, while perhaps faster, would increase courtroom legal fees, not to mention the fees for medical witnesses.<sup>25</sup>

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23. This section provides:

(a) At any time while spouses may be living separate and apart, and no proceeding for declaration of invalidity of marriage, dissolution of marriage or legal separation is pending between them, either spouse may, by petition setting forth the facts, commence proceedings for separate maintenance and obtain relief as provided in Section 304 of this Act, any court order may be enforced as provided in such section or as additionally or otherwise provided in this Act in any other type of proceeding pursuant to this Act.

24. See R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 713-14 (1968).

25. Unless poor persons seeking dissolution are provided the assistance of counsel

Compared to both the UMDA as amended in August 1971 and the UMDA as amended in July 1973, the PR Draft sections 302(a)(2) and 305(a) would have made the dissolution process more expensive and complex for the individual litigants without better serving society's interests.<sup>26</sup>

The PR Draft was approved by the Family Law Section in November 1972 and placed on the agenda of the ABA House of Delegates for endorsement at the August 1973 meeting of the ABA in Washington, D.C. At this point, despite public and private assurances that they would stand fast,<sup>27</sup> the Commissioners "blinked" and in July 1973 once again amended the UMDA, apparently with the hope that this might head off endorsement by the House of Delegates of the rival Family Law Section's proposed act and make possible the eventual endorsement of the official UMDA by the House of Delegates.

The Commissioners amended section 302(a) of the UMDA so that it now reads in part:

(a) The . . . court shall enter a decree of dissolution of marriage if:

. . . .

(2) the court finds that the marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding

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and funds for the proper presentation of their cases in court from the public treasury, they would simply be unable to afford the legal processes made available by the Family Law Section. The unavailability of divorce to the poor is a denial of due process of law, *see Boddie v. Connecticut*, 401 U.S. 371 (1971), and arguably a violation of the equal protection clause, *see id.* at 384-85 (Douglas, J., concurring), 388-89 (Brennan, J., concurring in part). The simpler procedures which are likely to be engendered by the UMDA should make divorce courts more accessible to the poor. *See King, supra* note 1, at 675-76.

26. To give credit where due, the PR Draft places commendably greater emphasis on the need for conciliation services where disharmony threatens a marriage and shows greater concern for the privacy of the parties and the rights of the children caught up in a dissolution proceeding. *See* PR Draft §§ 302(a)(3), (b), (c); 305(c), (d); 307 (b), (c), (d); 310; 319.

27. In a letter to the author, the president of the NCCUSL stated:

The National Conference will indeed press for the enactment of the Uniform Marriage and Divorce Act in state legislatures without the ABA approval. There has been extensive journalistic support for the Uniform Marriage and Divorce Act which has been critical of the failure of the House of Delegates to approve the Act. I would not care to speculate as to the chances of enactment without approval by the House of Delegates. While we would prefer to have approval by the ABA and will continue to seek it, the National Conference is autonomous and must proceed to promote enactment of Uniform Acts which it adopts irrespective of a failure to obtain responsible endorsement.

Letter from Judge Eugene A. Burdick to Professor Harvey L. Zuckman, June 15, 1972.

the commencement of the proceeding, or (ii) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage.

The amendment is significant in that section 302(a) provides for the first time definitions for the "irretrievably broken" marriage test. Unfortunately, as discussed above, the phrase "serious marital discord" is no more meaningful than "irretrievably broken" marriage; hence it poses some danger that judges might read into it their ingrained conceptions of fault. But even were such a reading made, the problems created thereby could readily be avoided by the petitioner following the first alternative—living separate and apart for more than 180 days. This period should be long enough for two people to decide whether they wish to make their separation permanent, yet short enough to discourage migratory divorce except by the most impatient. The very brevity of the period could make the more proof-ridden "serious marital discord" alternative a dead letter.

By their amendment to section 302(a), the Commissioners conceded the need for definition of "irretrievably broken" marriage and provided an alternative definition reasonably close to the one proposed by the Family Law Section (a period of separation). Nevertheless, reconciliation of the two opposing groups did not occur at this time. The leaders of the Family Law Section apparently felt that the 180-day separation alternative could too easily be avoided by a petitioner alleging "serious marital discord" and therefore further refinements in section 302(a) of the UMDA had to be made by the Commissioners.<sup>28</sup>

While the PR Draft was removed from the August 1973 agenda of the House of Delegates to provide more time for negotiation between the two warring factions, it soon became clear that the Commissioners had made their last concessions and were not inclined to continue the dialogue. At this point it appeared almost certain that sooner or later the various state legislatures would be confronted with competing model divorce codes.<sup>29</sup> To the disinterested no-fault divorce reformer, few situations could have been worse. Confronted with two choices, each backed by a prestigious organization of the legal establishment, the legislative response would almost certainly have been unfortunate. Some legislatures, confused by the choices available, might simply have stood pat with the antiquated and counterproductive legislation presently on the books. Others might have adopted the Family Law Section's ill-advised proposed revision. Even those legislatures

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28. This thinking was gleaned by the author from discussions with several of the leaders of the Family Law Section at the 1973 ABA summer meeting held in Washington, D.C. and the 1974 ABA mid-winter meeting held in Houston, Texas.

29. See Foster, *supra* note 6, at 579; Zuckman & Fox, *supra* note 1, at 598-99.

adopting the amended UMDA would not have been adopting a uniform act with the same effectiveness as other uniform acts not having competition within our federal system.<sup>30</sup>

### III. FORCED RECONCILIATION

That such a messy legislative situation was averted is, to my thinking, more a tribute to the worship of good public relations than to the good sense of the competing parties. The NCCUSL and the Family Law Section were still on a collision course as the 1974 mid-winter meeting of the ABA in Houston, Texas approached. The Commissioners were refusing to talk about further revision of their Act and the Family Law Section was still opposed to the UMDA, the 1973 amended version of which was to be considered by the House of Delegates for possible endorsement.

But a funny thing happened on the way to the House—the opposition in the Family Law Section Council moderated and the support for the Section's own proposed revision all but disappeared.<sup>31</sup> The agenda for the council meeting called for only a few minutes of pro forma discussion of the Section's position on the floor of the House. Former section chairman and chief drafter of the PR Draft Judge Ralph Podell was called upon to indicate what the Section's position would be on the floor of the House. Briefly, it was to continue the opposition of the Section to the UMDA and to argue for the proposed revision.<sup>32</sup>

But then one Council member after another rose to indicate dissatisfaction with the public image the Section was getting from its continued opposition. As one member put it, "The public sees us as the ones wearing the black hats in this case." Clearly a majority of the Council felt uncomfortable with the role the Section was playing and the reaction to it of the press and mem-

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30. Obviously, the effectiveness within a jurisdiction of a uniform act is enhanced by the inability of the citizenry to avoid its requirements—and avoidance is much more difficult when surrounding jurisdictions have enacted the same legislation. Just as clearly, the more competing model legislative proposals there are, the less the likelihood that adjoining states will enact the same legislation.

31. While at the Houston meeting of the ABA, the author was extended the privilege of attending the Family Law Section's Council meeting because of his status as secretary-treasurer of the Family Law Section of the Association of American Law Schools and because of his interest in the controversy over the UMDA. I was asked by the Section officers only to refrain in my writings from identifying specific council members with their positions on the issue. I have complied with this request except where the positions of particular council members were already a matter of public knowledge.

32. Technically, the House of Delegates could not endorse a proposed uniform act which had not been adopted by the NCCUSL, but it could give a large boost to an unofficial model statute such as the PR Draft merely by rejecting the uniform act on which the unofficial act is based.

bers of the profession generally.<sup>33</sup> By now, this short item on the agenda had become the dominant business of the first day of the meeting. Several motions were introduced the thrust of which were either to change position and support the amended UMDA or simply to withdraw opposition. After much debate neither of these approaches mustered majority support, but a motion by Professor Foster that the Section make a public policy statement concerning its position carried by a wide margin.

Professor Foster had been a foe of the "serious marital misconduct" alternative in PR Draft section 302(a)(2), and while the policy statement as finally phrased<sup>34</sup> did not expressly repudiate that section, its language appears to be inconsistent with it. The policy statement accepts irretrievable breakdown as the sole ground for dissolution and separation for more than 180 days as conclusively presumptive evidence of that breakdown. It also calls for at least a three-month "cooling off" period between commencement of proceedings and final decree. This latter position is, of course, consistent with section 305(a) of the PR Draft. Finally, in language which would make a professional diplomat envious, it endorses the philosophy of the UMDA but indicates the Section's preference for its own draft.

However phrased, this policy statement undercut the Section's earlier intractable opposition to the UMDA.<sup>35</sup> Yet the differences with the PR Draft may not be all that significant. In choosing to recognize separation only as conclusive evidence of breakdown and not as its unbending test, the statement necessarily implies that other kinds of evidence would be admissible

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33. In his letter to the author, *see* note 27 *supra*, Judge Burdick alluded to the generally unfavorable press reaction to the ABA's rejection of the UMDA. In addition, the Council was made aware of the generally negative reaction to the Section's PR Draft expressed at the AALS Family Law Section meeting in New Orleans in December 1973.

34. The Family Law Section approves of the irretrievable breakdown ground as the most appropriate ground for the dissolution of marriage. It also agrees that where parties have lived separate and apart for a continuous period of 180 days or more and dissolution is sought there should be a presumption that the marriage is irretrievably broken. Further, the Family Law Section also agrees that no finding of irretrievable breakdown should be made until 3 months have elapsed after commencement of the proceeding. Finally, although the Family Law Section approves of the public policy considerations expressed in many of the provisions of the Uniform Act, it urgently recommends that any legislature considering divorce reform should give equal consideration to the alternative draft of the Family Law Section.

35. At least twice during the debate, officers of the Section pointed out the long-standing opposition to the UMDA and pleaded with the Council not to back down in the face of unfavorable press notices. They considered the policy statement proposed by Professor Foster such a backdown. The opponents of any change in position were strengthened in their resolve by the unanimous endorsement of the PR Draft by the Young Lawyers Section of the ABA on the day of the council meeting.

to establish breakdown as well. Thus the courtroom door is left ajar for proof of the respondent's fault if the parties have not lived separate and apart for more than 180 days. The two alternatives of the PR Draft are still there, but simply in a more submerged form. Fault evidence is, of course, inconsistent with no-fault reform.<sup>36</sup>

Shortly after the council meeting, the House of Delegates took up the amended UMDA. Apparently, the same adverse public relations that had stung the Family Law Section Council, as well as the Section's softened opposition and skillful lobbying by the NCCUSL, all had their effect. After spirited debate in which Earl Read, Jr., the President of the NCCUSL, argued that "irretrievable breakdown" is a term of art needing no further definition beyond that provided in the latest version of section 302(a)(2) of the UMDA and Judge Podell continued his opposition, the House approved the uniform act by a vote of 136 to 105.<sup>37</sup>

Thus, by a narrow vote, the forced reconciliation of the Family Law Section and the NCCUSL was effected. The importance of that reconciliation is clear. Those of us preaching the gospel of no-fault divorce reform are very much aware of the difficulty of convincing basically conservative state legislatures to adopt new and sweeping legislation in this field.<sup>38</sup> Certainly this task would have been immeasurably more difficult if two giants of the legal establishment set up conflicting cross pressures on the legislators. Fortunately, that danger now appears to be past.

#### IV. LESSONS TO BE LEARNED

There are some lessons to be derived from this dispute. First, in formulating proposed legislation, no one should be invited to participate in the formu-

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36. In fairness to the Family Law Section, it should be noted that neither the UMDA nor the statutes of the states adopting it expressly bar evidence of misconduct. See *UNIFORM MARRIAGE AND DIVORCE ACT* § 303(b), *as amended*, July 1973; *COLO. REV. STAT. ANN.* § 46-1-7(2)(a) (Supp. 1971); *IOWA CODE ANN.* § 598.17 (Supp. 1974); *KY. REV. STAT. ANN.* § 403.170 (1973). California and Oregon permit evidence of misconduct to show irreconcilable differences. See *CAL. CIV. CODE* § 4509 (West 1970); *ORE. REV. STAT.* § 107.036(2) (1973).

37. 42 U.S.L.W. 2414 (Feb. 12, 1974).

38. I have had first-hand experience in facing this difficulty. While testifying before the Judiciary Committee of the House of Delegates of the Maryland Legislature during the 1973 session in favor of H. 361, embodying the August 1971 version of UMDA, I received a respectful audience from the committee members and drew numerous questions about the Act, indicating their interest. It was clear, however, that the legislators were far from ready to follow the lead of such states as California, Colorado, Iowa, Kentucky, Nebraska and Oregon in enacting sweeping reform legislation. In the end, the legislature amended the existing divorce statute to shorten the periods of time needed for divorce on grounds of voluntary and involuntary separation. See *MD. ANN. CODE art. 16, § 224* (Supp. 1973).

lation unless those in charge genuinely wish policy input from the invitees. In this case, the Family Law Section was invited by the NCCUSL to establish a liaison committee for the wrong reason—to gain political support for the uniform act which would be promulgated. It is a counterproductive effort, as the Commissioners found out, to ask recognized experts to participate in the drafting of legislation and then ignore or refuse to solicit their advice.

Second, personal relationships play as large a part in the molding of public policy as do ideas and concepts. After discussing the problem with many of the participants in the dispute, there is no doubt in my mind that had the relationship between the Commissioners and reporter on the one hand and the members of the Family Law Section liaison committee on the other been a good one, no competing draft would have been prepared. Nearly everyone involved wanted progressive legislation but that goal was very nearly thwarted by the hostility of the two groups toward each other. The public interest in divorce reform would have suffered had not the ABA House of Delegates imposed peace.

Finally, the entangling alliances formed by private legal groups locked in battle may prevent compromises that are in their own interest as well as the interest of the public. The Young Lawyers Section of the ABA was apparently asked to endorse the PR Draft and thus to support the Family Law Section in its fight with the NCCUSL. Its unanimous decision to do so almost certainly prevented some of the UMDA opponents in the Section from changing their position even when it became clear that continued opposition could only be detrimental to the overall welfare of the Section. From the standpoint of personal relations, it is laudable that one not desert one's supporters, particularly where, as here, they take public stands in your behalf. But it is a serious question whether public policy should be molded in this way, even when the organization involved is merely a "private" one like the American Bar Association.