# NO-FAULT DIVORCE

## *The Case Against Repeal*

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# Executive Summary

The Texas Legislature has recently been presented with House Bill 93 ("HB 93"), which aims to eliminate no-fault divorce for individuals seeking a divorce without the consent of both parties.[1]

This paper refutes every argument made by supporters of the bill, showing why no-fault divorce is an appropriate and necessary option for the dissolution of an unsustainable marriage. The best argument against HB 93 is the history of fault-based divorce itself, which demonstrates the bill's flaws in spades. Fault-based divorce neither lowers the divorce rate, nor alleviates the effects of divorce on children. There is no contractual or constitutional right to stay married over the objections of one's unhappy spouse, nor any "due process" right to defend oneself against the claim that the marriage has failed. Moreover, the legal and constitutional objections to fault-based divorce have no basis in law, policy, or logic. In fact, the proposed change to no-fault divorce raises more concerns than it addresses.

History shows that the fault-based system of divorce, in which one spouse must be proven to have committed a particular type of marital misconduct against an innocent spouse, was an utter failure. It induced spouses to engage in collusion and perjury and invited lawyers and judges to be complicit in this unseemly system. Because people bound and determined to divorce will find a way to do so, the fault-based charade made a complete mockery of the judicial system. Beginning in the 1970s, judges and lawmakers readily accepted no-fault grounds, which allowed a decree of divorce based on a lengthy period of separation or proof that the marriage had become unworkable, as a way to finally offer a dignified and honest divorce process.

The introduction of no-fault grounds has not led to more divorce, but rather to more efficient divorce. In fact, the national divorce rate has fallen from around 23 divorces per 1000 married couples in 1979 to less than 17 per 1000 in 2005. Moreover, 95% of those divorces have settled out of court. This system has freed couples from the adversarial and contentious nature of fault-based divorce, as well as from the artificial placing of blame on a single act of misconduct when marital failure is almost always due to a complex set of factors. The no-fault system is less stressful for children whose parents are in the process of getting a divorce. Time and time again, studies have found children of high conflict marriages actually benefit from divorce, and that higher rates of stress on children before and during parents' divorce have longer lasting effects.

Supporters of this bill ostensibly seek to reinforce the sanctity of marriage, yet one of the key arguments in favor of HB 93 is that a marital union is nothing more than a contract that cannot be breached without mutual rescission. This is a gross oversimplification of the law, as well as an insult to the history and tradition of marriage itself. Moreover, the proper characterization of marriage is not open for debate. The Supreme Court settled this argument in 1888 when it held in *Maynard v. Hill* in no uncertain terms that "marriage is not a contract," and this precedent has been reinforced again and again both in the current Court and in state courts across the country.

The Supreme Court has also repeatedly articulated that constitutional procedural due process concerns—raised by supporters of HB 93 as a reason to require an all-out battle in court over the grounds for divorce—do not arise unless there is a deprivation

of a recognized and protected legal right. In the context of a civil marriage there is no legal, much less fundamental right to force another individual to stay married. No court or legislature in this country has ever found a right to hold another person hostage in a marriage against their will, and such right is not articulated in the state or federal constitution. Moreover, because the Supreme Court has found that all citizens have a fundamental right to access a legal divorce, HB 93's proposal to place heavy burdens and impediments in the way of individuals seeking a divorce raises serious constitutional questions in regard to substantive due process. The Court views the fundamental freedom to marry as coequal to the freedom to divorce, and therefore, attaining a divorce must be available to all people equally.

Clearly, the arguments made in support of HB 93 have little or no rational support in logic or law, and, in fact, the bill contravenes society's collective belief that divorce should be accessible to all through a peaceful, honest, time-efficient, and economical process. Returning to the futility of having to blame one partner when a relationship fails is at best pointless, and, at worst, it places unhealthy stress on all members of the family, especially the children, as their parents are forced by the state of Texas to fight it out in court.

HB 93 should not be enacted into law.

## I. INTRODUCTION

House Bill 93 was introduced this Legislative session by Texas State Representative Krause. HB 93 proposes to amend Texas divorce law to limit the use of no-fault divorce by allowing it only when both parties consent to the divorce.[2] In its original iteration, the bill banned no-fault divorce altogether. In response to opposition, the bill was amended to allow no-fault divorce, but only with mutual consent. For reasons that will be discussed in this paper, both versions of the bill are unacceptable.

Under current Texas law, there are six fault-based grounds for divorce: cruelty, adultery, conviction of a felony, abandonment, living apart for over three years, or confinement to a mental hospital.[3] Texas law also provides one no-fault ground for divorce: insupportability. This ground permits a court to grant a divorce "without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation."[4] This ground, in effect, permits a court to grant a divorce based on a finding that the marriage is dead, regardless of whether either spouse committed a particular, enumerated type of marital misconduct. Under the proposed bill, a spouse who wishes to divorce a partner who wishes to stay

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married would be forced to prove one of the fault-based grounds in order to obtain a divorce and orders related to property, support, or child custody.

In a hearing before the Texas House of Representatives Juvenile Justice and Family Issues Committee, the proponents of this bill presented several arguments that ostensibly support a return to fault-based divorce in Texas. The key arguments seem to be that in the past the fault-system worked well; that no-fault divorce is a violation of constitutional guarantees of due process; that marriage is a contract that cannot be unilaterally rescinded by one party; and that fault-based divorce is better for children.[5] Most of the supporters who testified in favor of HB 93 have had a spouse leave them for another person, or are upset by being forced to pay child support, and they are now seeking someone or something to blame. They have therefore focused their personal frustrations on the repeal of no-fault divorce, arguing that an unwilling spouse should be forced stay with them and "work on the marriage."[6] As disappointing as marital dissolution can be, these personal experiences do not justify an overhaul to the state's divorce laws that intentionally repudiated a failed system. Moreover, the arguments offered in support of the bill, rooted in emotion rather than law or logic, conflate correlation and causation in ways that make very little scientific or legal sense.

This white paper will examine the arguments in favor of HB 93 and refute each one. In particular, this paper will argue that the fault-based divorce system was unworkable and extremely unsuccessful for both the parties involved and the judicial system itself; that there is no evidence to prove that fault-based divorce is any better for children; that marriage is not a contract of any form; and that no-fault divorce does not violate the U.S. Constitution and, indeed, abolishing it raises more constitutional concerns than it addresses.

## I. DIVORCE: THEN AND NOW

Divorce controversy is as old as this country. The legal process of attaining a divorce and society's view of divorce have both changed dramatically over the centuries. In line with those changes, traditional and cultural norms related to the family and marriage have evolved to meet a world where resources are more easily available and transferable, and we have come to value more significantly an individual's right to happiness and personal satisfaction.

### A. The History of Divorce

American divorce law originated in England, where the only way to obtain a divorce until 1857 was through an act of Parliament that would dissolve a particular marriage.[7] These parliamentary divorces were uncommon, and, when they did happen, were obtained only by the very wealthy or the politically connected.[8] The United States followed suit, making divorce difficult if not impossible to obtain and generally available only through private legislative acts to dissolve particular marriages.[9] By the late 1700s, some American states were passing divorce laws and implementing a judicial form of divorce—the type of divorce we have today.[10] Eventually, every state passed a law to permit judicial divorce.

These early laws allowed only fault-based divorce. "Divorce proceedings took an adversary form.

Whoever filed for divorce, . . . had to prove the other party guilty of committing some act—adultery, desertion—that by law was 'grounds' for divorce. The moving party, . . . had to be innocent."[11] A decree of divorce was a reward for an innocent spouse who had suffered a particular form of marital misconduct that the state legislature believed sufficient to justify dissolution. Typical grounds included adultery, desertion, cruelty, neglect, imprisonment, or impotence depending upon the state.[12] There was a brief wave in the early 1900s during which some states expanded the available grounds to include faults such as "conviction of certain crimes, homosexuality, insanity, and drug addiction."[13] A few states even experimented with grounds such as "unhappiness." But the more flexible grounds did not last, as most states returned to a stricter list within a few years.

Because fault-based divorce was cast as a remedy for an innocent spouse, legislatures and courts recognized defenses to divorce. These defenses had the effect of allowing a court to deny a petition for divorce despite proof that the defendant-spouse had committed an articulated type of marital misconduct.[14] For example, a defendant could defend against divorce with proof of "connivance, where the guilty party demonstrated that the other consented to the commission of marital fault, and condonation, where the guilty party could demonstrate that the offended spouse conditionally forgave the marital fault."[15] The defense of recrimination imposed a type of "clean hands" requirement; "if either party could show that the other had committed a fault, then neither could obtain a divorce."[16] Collusion was also grounds for denial of divorce on the court's own motion, if the court believed that the parties had simply agreed to divorce.[17] Despite these defenses, however, most divorces were granted without meaningful contest as couples increasingly colluded to attain a divorce the state did not want them to have. "Every study of divorce in the period, in every jurisdiction, found collusion to be the norm."[18] Studies show that in 1932 only 13.3% of divorce cases were contested[19] and by 1945 studies from some states showed that 65.2% of divorces were completely uncontested with actual litigation resulting in less than 10% of all divorce cases.[20]

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guilty and the other playing innocent, while acrimonious couples that could not cooperate in such a charade were forced by courts to stay legally married. "The main element was simply collusion, between husband and wife, and among husband, wife, lawyers, and judges. . . . A minor industry sprang up, churning out imitation adultery and genuine perjury."[21] In New York, which limited its grounds to adultery, "collusion was an open scandal. . . . and manufactured adultery" was especially common.[22] Lawyers would arrange for photographs to be taken of their clients in compromising positions[23] and some even went so far as to hire young women who "would admit on the witness stand that they knew the plaintiff's husband, then blush, shed a few tears, and leave the rest to the judge."[24]

In other states, with more permissive grounds, couples seeking divorce did not have to go to such great lengths, but the premises were just as contrived. In states that allowed abandonment as a ground for divorce "the allegation was made 'over and over again' that defendant 'just packed up his (or her) clothes and left.'"[25] In states where cruelty was a cause of action, husbands simply did not show up in court, and the divorce would be "granted by default, on the evidence given by the plaintiff."[26] Additionally, because the grounds for divorce varied by state, people who lived in states with more restrictive grounds would simply travel to more relaxed areas to get a "quickie" divorce.[27] At this time, "judges had to be aware of what was going on in front of their noses. Yet the system flourished, and the divorce rate grew steadily."[28] In 1860 there were only 7,380 divorces, but sixty years later, in 1920, there were 167,105 divorces.[29] "The overwhelming majority were collusive and consensual, in fact if not in theory. The legal system winked and blinked and ignored."[30]

By the mid 1900s, "it was clear to everybody that the system of divorce was fake: 'a solemn if silly comic-melodrama,' 'beneath the dignity of the American court'; a system that 'cheapens not only the tribunal but the members of the legal profession who are . . . involved.'"[31] People's ideas about marriage were changing, expectations were rising, and marital disappointment was thus more common. Many more couples were wanting to divorce and were unhappy with a restrictive system that controlled how they were able to end what they considered to be a very personal and private relationship. While in the midst of a painful divorce, couples would have to create massive lies, and even in situations where the parties had committed acts that provided fault-based grounds for divorce, husbands and wives

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were having to degrade themselves by airing all of their most intimate issues in court and on the public record.[32] Courts tried to avoid these types of painful and embarrassing situations by granting divorces as quickly and easily as possible, and by "the 1960s, ninety percent of divorces on fault grounds were granted without contest."[33]

During this time, social scientists and psychologists were also coming to new understandings about relationships and marriage; interpersonal romantic relationships were intricate and dynamic, and when they ended, it was completely inaccurate to simply point the blame at one partner. "More complex conceptions of human psychology led people to understand divorce as stemming not from one factor but from a variety of complicated circumstances affecting both parties."[34] However, most were unsure of exactly what to do about the situation. How could the law accommodate the needs of those who wanted a simpler and less expensive means to end their marriage, while still protecting their individual legal rights and those that wanted to reinforce the sanctity of marriage and protect the ideal image of the family?

In response to these growing concerns, legislators in California began looking to reform their state's divorce laws. They embraced "the philosophy of the Report of the Governor's Commission on the Family," which found that a new law was in order, one that would "allow the therapeutic process of the Family Court to function with full effectiveness . . . [and] require the Court to inquire into the whole picture of the marriage." [35] Therefore, legislators studied and developed this new law with an eye toward reducing some of the absurdities that had begun to pervade the existing system of fault-based divorce. The proposed replacement was "therapeutic" divorce, in which "a judge should have authority to deal with the entire human drama that lay behind a bill of divorce, and that skilled professionals should be attached to the court to help him."[36] Accordingly, with a plan that was designed to "foster reconciliation rather than to ascertain culpability,"[37] California passed the first no-fault divorce law in 1970.[38] Politicians and judges in California were certain that this new type of divorce could save close to ninety percent of divorces in that state,[39] and in fact, "[e]ach stage of no-fault divorce litigation was designed to convert the divorce action into a conciliation procedure. . . . the very process of stalling divorce-minded partners was an integral component of therapeutic divorce, premised on its belief that slowing the divorce process would dissuade many couples from seeking to dissolve their marriages."[40]

The only problem with this new type of idealized divorce was that it did not work. Judges were not willing or equipped to delve into the intimacies and strife of each individual marriage, and courts did not have the capacity to provide the type of in-depth social services that were required.[41] Moreover, all of these additional services cost money and made this new type of divorce very expensive both for the couple and for the court system,[42] and the legislature had not provided for a way to fund any of the recommendations that might have made therapeutic divorce a reality. Soon the unmanageable ideals of

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"therapeutic" divorce had fallen by the wayside, but no-fault divorce was here to stay. People liked this new system that was both easier and cheaper, and judges liked that it allowed for a more honest legal process.[43] More and more states began to see the advantages of no-fault divorce and began overhauling their fault-based systems; by 1985 every state had some form of no-fault divorce on its books.[44]

States implemented no-fault divorce in a variety of ways. Some states completely eliminated fault-based grounds for divorce and replaced them with a no-fault standard, while others simply added no-fault provisions to their existing grounds.[45] Colorado, for example, replaced all of its fault-based grounds for divorce with the "irretrievably broken" no-fault standard.[46] After only no-fault grounds were adopted there in 1971, Colorado courts noted the change as positive because the previously relied upon fault-based grounds,

> subjected the parties to "humiliation, hypocrisy, sometimes perjury, and needless hostility of having to testify to one of the prescribed grounds . . . the old law encouraged spouses whose relationship had deteriorated to perjure themselves in order to obtain divorces when neither party had actually committed acts enumerated by the statute as grounds for divorce. Furthermore, the fault-based system, involving the need for one spouse to 'prove' the other 'guilty' of one of a number of wrongs, induced a bitterness that only aggravated the trauma already present in the breakup of a family unit. . . . In attempting to increase the availability of divorces to estranged spouses, the legislature recognized that public policy does not encourage keeping two people together once the legitimate objects of matrimony have ceased to exist.[47]

Other states, like Massachusetts, kept their no-fault grounds such as adultery, impotency, and desertion[48] while adding a no-fault option.[49] Texas, just like many other states, kept its fault-based grounds[50] but added "insupportability" as a no-fault option.[51] Like similar standards in other states, "insupportability" serves as a proxy for marital breakdown. A marriage that has become "insupportable" should be dissolved.[52]

## B. Modern Marriage and Divorce

As states adopted no-fault divorce provisions, they experienced slight upticks in the divorce rate. These increases were short-term, however, reflecting some pent-up demand that had built up in a system that made divorce difficult.[53] But divorce rates stabilized quickly after the adoption of no-fault. Today, "the national divorce rate has fallen, from about 23

divorces per 1,000 married couples in 1979 to under 17 per 1,000 in 2005.[54] Additionally, more and more couples now choose to divorce amicably with no need to fight it out in court. Almost half of all divorcing couples no longer even need to hire an attorney to complete their divorce, and, even in more complex divorce cases, they may only consult with an attorney once or twice while working out most of the details themselves.[55] Even when couples do decide to hire an attorney to facilitate their divorce, most want to avoid going to court if at all possible. Currently, ninety-five percent of divorces settle by agreement out of court, as almost all modern couples wish to save themselves the time, money, and stress of litigation.[56]

Divorce patterns reflect social change more than legal change. Society's perceptions of divorce have changed enormously. For instance, in 1962, only 51 percent of women surveyed held that divorce was the best solution when marriage problems could not be resolved, but by 1977, 80 percent of women agreed with that statement.[57] Studies reveal that Americans have "become more tolerant of alternatives to conventional patterns of marriage and childbearing," and social scientists believe many of the changes in the family and marriage are due to a "cultural shift toward an emphasis on autonomy and personal growth."[58] Decisions related to family life have become "matters of personal choice in which individuals [make] decisions based on a calculus of self-interest and self-fulfillment."[59] These social changes do not mean that Americans value marriage less. Quite the contrary. One of the reasons people pushed for easier divorce laws was to pave the way for a second, happier marriage.

## II. Fault-Based Divorce, Like High-Conflict Marriage, Is Hard on Children

In the hearing on HB 93, many of its supporters argued that no-fault divorce has negative effects on children in a variety of contexts. In their arguments, the proponents of the bill asserted a number of "facts" based on alleged "statistics" including that children of divorce have more trouble in school, both behaviorally and academically; are less likely to graduate from high school or attend college; have difficulty in future intimate relationships; and have a higher chance of being incarcerated.[60] One of the witnesses who testified in support of the bill even went so far as to assert that no-fault divorce is the sole cause of remedial education in the public school system.[61] Some of these arguments are so baseless that they do

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not warrant consideration or a response. Correlation is not causation. It makes no sense to argue, as supporters did, that the number of prison inmates with divorced parents proves that their parents' access to no-fault divorce caused their criminal conduct.

Moreover, many of the "studies" that generated the underlying statistics have proven to be misleading. Take, for example, Judith Wallerstein's research for her book entitled "The Unexpected Legacy of Divorce," which is often cited in arguments against no-fault divorce, but which has now been exposed as flawed in many areas.[62] She studied over a hundred children for a period of twenty-five years during and after their parent's divorce. From those studies, she handpicked only seven participants to write about in her book, and then used those "ideal" cases to make wildly unsupported generalizations about the long term effects of divorce.[63] Conducting studies about the effects of divorce that actually yield accurate results is virtually impossible "because you have no way to compare these families to the alternative. For example, you can't compare the same family getting divorced while also not getting divorced. The closest you can come is to compare a family who divorces and another family who stays intact. There are [many] factors . . . that distinguish these families such as culture(s), ages of children, socio-economic status, degree of tension in the home, and on and on."[64]

Due to these types of complexities, many studies reach opposing conclusions with varied results, leading researchers to find that "the mechanisms by which marital disruption affects children are not well understood."[65] However, more and more researchers are focusing on divorce "not as a single event, but rather as a multistage process of family change."[66] This is because many times the marital conflict began years before the divorce actually took place, and the level of conflict varies widely between families. Additionally, children are all different, and some have behavioral issues that were manifesting symptoms long before any divorce process began. "Consequently, any effects of divorce on children may reflect not only the stress of the breakup and its aftermath, but also dysfunctional family processes, marital conflict, or children's problems that preceded the breakup."[67] Consideration of the longitudinal nature of divorce and taking into account children's behavioral problems years before the divorce process began has allowed researchers to conclude that "some of the observed effects of divorce are attributable to characteristics of children and families that predate the disruption."[68] Researchers, in other words, do not know exactly when children begin to be affected by marital conflict as opposed to divorce, and generally speaking, even after children have been through a divorce they begin to adjust both emotionally and behaviorally within a few years of the crisis.[69] In fact, some recent studies demonstrate that divorce may not affect children's behavior much at all with trends showing that boys are generally much more affected than girls, who may show no measurable disruption in behavior.[70] For example, one study tested children in several skill areas before and after their parents divorced. The results led the researcher to conclude that "improvements were nearly as common as were decrements. . . . [a]nd across all outcomes, the most

common response to divorce was no change at all."[71]

Additionally, many studies have shown that children benefit when their parents divorce if the marriage was one with a high level of conflict.[72] The research in this area is fairly consistent and shows that "children are better off in divorced single-parent families than in two-parent families marked by high levels of discord."[73] These results are reinforced by the fact that other studies, which have looked at the mental health effects of stress on adults in many types of life transitions, other than divorce, show that the higher the level of stress was prior to the transition, the greater the effects are afterwards.[74] However, all things considered, "many previous studies have failed to find significant differences between offspring raised in divorced and intact families,"[75] and although, many studies have confirmed that divorce has some type of negative effect on children, these effects are generally very modest in scope and severity.[76] Moreover, researchers are now correlating other factors, such as the socioeconomic status of the child's parents, to be more important indicators that a child will suffer from negative emotional or mental effects after divorce.[77]

All told, scientists have a long way to go before they really understand the effects of marriage and divorce on children. Clearly, the effects of divorce are difficult to study as scientists have to follow a child all the way into adulthood, and children handle situations and emotions in very different ways across the board, with some being highly affected by divorce while others display no effects at all. The one clear thing that may be inferred is that it is not in a child's best interests to see their parents in a high-conflict relationship that places extra stress on the entire family. Forcing parents to fight it out in court, assigning blame to one another before a judge in a fault-based divorce would certainly increase the stress and conflict of the family unit, including the children of that family. Either way, unhappily married people are going to seek out divorce—history makes that indisputably clear—and returning to a fault-based system is not the solution to reducing the overall effects of divorce on children.

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## III. MARRIAGE IS NOT A CONTRACT

Another argument that proponents of fault-based divorce passionately assert is that marriage is a contract, and no-fault divorce is therefore a breach of the non-consenting spouse's right to enforce that contract. However, this is a gross oversimplification of the law and something of an insult to the history and tradition of marriage itself. Moreover, this is an argument that was actually settled by the Supreme Court in 1888 when it stated in so uncertain terms that "marriage is not a contract."[78] The Court went on to explain the many ways in which marriage is a legal status or an institution rather than a contract.[79]

While a marriage does require consent from both parties at the outset, the customary "I dos" creates a legal relationship between the two parties that is very different from that of a contractual arrangement.

> [C]ontracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. . . . When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract.[80]

Contracts have termination dates at which point either they must be renewed, or they will come to a natural end. Obviously, the intent of marriage, especially in the eyes of those who oppose a right to unilateral divorce, is that is should be a commitment that lasts a lifetime. Additionally, contract rights are negotiated by the parties to that contract, but the rights of marriage "are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties."[81] A contract can be dissolved by the mutual consent of both parties to the contract; whereas, a marriage can only "be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved."[82] The Court also directly addressed divorce and its relevance in the law pertaining to marriage as a unique legal act completely separate from any similar act in contract. The Court said that "marriage, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. . . . deriving both its rights and duties from a source higher than any contract, . . . uncontrollable by any contract. . . . no more a contract than 'fatherhood' or 'sonship' is a contract."[83]

Moreover, Texas courts, including the Supreme Court of Texas, have consistently reinforced the U.S. Supreme Court's holding that marriage is not a contract. In *Grigsby v. Reib,* the Supreme Court of Texas reinforced the Court's prior holding in stating that, "[m]arriage is not a contract, but a status created by mutual consent of one man and one woman."[84] The Court of Appeals of Texas in *Saltarelli v. Saltarelli* called marriage not a contract, but "a status created by the mutual consent of two people."[85] In that case, the court then went further, stating "[f]or this court to hold that marriage is a contract which must be kept in force until a breach

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in that contract occurs would in effect force one of the parties into indentured servitude for the life of the contract."[86] In *Trickey v. Trickey*, the Court of Appeals of Texas reiterated that marriage is not a contract and observed that forcing two people to stay married when one wanted to end the relationship would be in effect a form of cruel and unusual punishment to the unhappy spouse.[87] Additionally, in *Waite v. Waite*, the Court of Appeals of Texas defined marriage as "an institution" and clearly not a contract, as the rights to its creation and dissolution are proscribed by the Legislature of the State and not by the parties themselves.[88] This list could go on and on as courts nationwide have consistently affirmed the Supreme Court's view that marriage is not a contract.[89] Obviously, the precedent speaks for itself in clearly establishing that marriage is a legally created designation with rights and obligations beyond those of any contract. Contract law principles are simply irrelevant to divorce.

## IV. NO-FAULT DIVORCE DOES NOT VIOLATE DUE PROCESS

Supporters of this HB 93 have also argued that no-fault divorce violates the Due Process Clause. Their arguments distort legal concepts that in actuality do not work together under the current U.S. legal and judicial system. In the hearing, a key supporter appears to assert a mishmash of factors and elements from three different types of due process: procedural due process, substantive due process, and criminal due process.[90] Divorce is clearly a civil proceeding where the factors and elements of criminal due process do not apply, and so, this argument can just be disregarded.[91]

The Fifth and Fourteenth Amendments together "provide that neither the United States nor state governments shall deprive any person 'of life, liberty, or property without due process of law.'"[92] Procedural Due Process is the actual process that the government must follow and it "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[93] Substantive due process is quite different from procedural and goes to the actual substance of rights inferred from the Constitution. It "asks whether the government has an adequate reason for taking away a person's life, liberty, or property. In other words, substantive due process looks to whether there is a sufficient justification for the government's action."[94] Neither of these rights are violated by a law that permits no-fault divorce.

### A. No-Fault Divorce Does Not Violate Procedural Due Process

Procedural due process is infringed when an individual's life, liberty, or property rights have been taken away without the applicable legal process, such as without having a hearing or without knowledge of the charges against them.[95] The very foundation of procedural due process lies in the deprivation of a recognized right without due process of law, and without a deprivation of a "protected right" there is no right to due process at all.[96] No court or legislature in this country has ever found a right to force another

human being to stay married against his or her will, and such right is clearly not articulated in the Constitution. In fact, many Texas courts have made clear statements affirming this obvious conclusion. In *Gowin v. Gowin*, the court noted that "this great and requisite institution was never intended to be, and is not, a prison house for the incarceration, during life, of unfortunate spouses,"[97] In *In re Marriage of Beach*, the court concluded that the "[h]usband's assertion that a spouse has a legal duty to reconcile is utterly without merit" there is no "legal duty upon a spouse to reconcile."[98] And, in *Saltarelli v. Saltarelli*, the court noted that it absolutely "could not force Mrs. Saltarelli to live with" Mr. Saltarelli and she would be granted a legal divorce even though "he wanted the marriage to continue."[99]

Additionally, there are many laws where state power overrides procedural due process, for example, laws that impose state taxes. The Supreme Court has clearly articulated that "[g]eneral statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard,"[100] and "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits."[101]

It has long been established that the regulation of marriage and domestic relations is a power that belongs almost exclusively to the states.[102] It makes sense to reason then, if states have the power to regulate marriage then they also have the power to regulate divorce, and in fact, the Supreme Court confirmed this right in 1877 holding, "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."[103] Therefore, each state makes law regulating the legal act of marriage and the legal act of divorce. The state proscribes the way in which people can enter into marriage and clearly dictates the procedure for exiting a marriage. Every state in the United States has used this power to adopt some form of no-fault divorce by a specific state statute, and each state has also created a legal avenue for its citizens to obtain a divorce.[104] The legal act of marriage is a state granted status, not a right, and the state can clearly end that status in the way it so chooses.[105]

Moreover, with regard to state divorce laws, the Supreme Court firmly established that what is required to satisfy constitutional procedural due process is that there are provisions in such laws allowing for the parties to have notice and an opportunity to be heard by an impartial decision maker.[106] In Texas, the petitioner is required, after

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filing a divorce petition with the court, to have the divorce papers served or delivered to the other party in the case,[107] therefore meeting the notice requirement. Also, in all cases the couple has the opportunity to choose whether or not they want their case to be heard before a judge,[108] thus granting the parties an opportunity to be heard before a neutral decision maker. By creating these procedures for the dissolution of marriage, the state has clearly satisfied the demands of procedural due process.

It is important to address some other arguments that have been made in this regard. Because no-fault divorce statutes remove any assignment of blame, they also eliminate the need for defenses to divorce. Some people have argued that this robs them of a right to make a defense against the divorce itself. This, however, makes no sense. First of all, as discussed above, procedural due process does not ensure a right of every citizen to defend themselves in court in the context of a civil divorce proceeding. In fact, there is no need to "defend" themselves because they are no longer being blamed for the marriage's failure. Second, as also discussed above, it is clearly within the power of state legislatures to structure divorce proceedings as they so see fit. Lastly, it would be virtually impossible for a court to assess whether or not a marriage is unsupportable, as that would require the court to delve into the private sphere of each individual marriage and make subjective judgment calls on every aspect of an imperfect human relationship. As we learned during the time of "therapeutic" divorce, courts simply do not have the expertise, time, or resources to complete this type of analysis. Justice Robert J. Muller captured the sentiment perfectly when he was faced with this type of argument:

> Those supporting passage of the legislation . . . generally applauded the fact that a no-fault based divorce would lessen litigation which they described, accurately in this Court's view, as time consuming and expensive for all, including the judiciary. . . . Clearly the tenor of such support, as voiced to and by members of the Legislature, was with an expectation that the allegation, in and of itself, would not be subjected to the rigors of any defense, any motions, the requirement of any testimony and certainly not the scrutiny of any fact finder.[109]

Consequently, because there is no need to establish fault, it is clear that a divorce must be granted equally to either party upon their testimony as to the facts.[110] Moreover, one Texas court even stated that forcing a husband to stay married after he testified, and the court found, that "the marriage had become unsupportable because of a discord and conflict of personalities [would] constitute cruel and unusual punishment and actually place one of the spouses, in effect, in a prison from which there was no parole."[111] Therefore, both parties do not have to believe that their marriage is so broken as to be unsupportable; "the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation."[112]

## B. A Return to Fault-Based Divorce Violates Substantive Due Process

Rather than resolving violations of procedural due process, which do not exist, this bill actually raises the potential for new violations of substantive due process. Substantive Due Process is the belief that there are fundamental rights embedded in the concepts of "life, liberty, or property" that laws cannot constitutionally restrict.[113] In other words, some liberties are found to be so fundamental that "the government cannot infringe upon them unless" they pass the highest level of judicial review, which is known as strict scrutiny.[114] In *Boddie v. Connecticut,* the U.S. Supreme Court established that all citizens have a fundamental right to access the legal divorce process and that laws that restrict this right will be found unconstitutional.[115] *Boddie* emphatically demonstrates that "[d]ivorce actions have been granted greater protection compared to other types of actions because of the special status of marriage in our society."[116] In this case, the Court found laws that financially burdened an individual's right to obtain a divorce to be a direct violation of substantive due process. The Court expressed great concern over the fact that state imposed fees would place financial blockades in the path to divorce. The Court recognized that the state creates the legal avenues for marriage, and so states must provide a remedy to its citizens who wish to end that legal relationship. The remedy of attaining the fundamental freedom of divorce must be available to all people equally. The freedom to marry is coequal with the freedom to divorce in the Court's view. As it explained, "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.[117]

Then, in *United States v. Kras*, the Court distinguished the legal right to divorce as fundamental. Unlike the case in *Boddie*, the Court in *Kras* found fees related to accessing a bankruptcy proceeding to be constitutional. The Court found the interests in *Boddie* to be more fundamental based on the fact that the "judicial forum in *Boddie* touched directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. . . . [which] on many occasions we have recognized the fundamental importance of these interests under our Constitution."[118] The fact that the Court clearly sees the two causes of action as totally separate and distinct in their level of importance, "demonstrates the Court's willingness to treat divorce with more protection than other rights."[119] Moreover, in *M.L.B. v. S.L.J.*, the Court reinforced its prior holding solidifying access to divorce as a fundamental right and even directly calling it such saying that central to its "decision in *Boddie* was the fundamental interest at stake."[120]

Under the liberty prong of the Fourteenth Amendment, the Court has also recognized a fundamental right to privacy that has shaped its views on matters related to the family and individual autonomy.[121] Encompassed in the right to privacy, the Court has found a right to marital privacy

specifically, which guarantees individuals the fundamental right to choose to marry.[122] In doing so, the Court moved away from seeing the family as one private identity[123] and instead recognized "doctrine that focused directly on individual choice and that elevated to constitutionally protected status a wide range of individual decisions regarding marriage, parenthood and procreation."[124] For instance, in *Loving v. Virginia,* the Court confirmed a fundamental individual right to marry the person of your choosing.[125] A long line of privacy cases make clear that the sphere of privacy found in the 14th Amendment's liberty interest includes individual rights that allow a person to control their own personal autonomy, including a right to legally control whether they stay in a marriage.[126] As the Supreme Court stated in one case, "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion."[127]

In *Loving v. Virgina,* the Court firmly established the right to enter into a marriage with the person of your choosing as fundamental,[128] and similarly, the right to exit a marriage if you so choose can be inferred from the Court's precedent and its broad definition of rights related to individual autonomy. Further, in *Zablocki v. Redhail,* the Court struck down a law that restricted individuals with unpaid child support from receiving a marriage license as an unconstitutional infringement under the Due Process Clause.[129] "*Loving* and *Zablocki* read together suggest that an individual's freedom to leave a marriage that is not fulfilling, and thereby to become eligible to remarry, is a valid corollary to the constitutionally protected right to marry and right of privacy. Both the decision to marry and the decision to divorce involve intimately personal decisions about with whom one wishes to share his or her life."[130] The Court in *Zablocki* specifically calls the law at issue there an unconstitutional restriction on freedom of choice in marriage. Certainly, like the plaintiff in that case who was trying to enter into a second marriage, restrictions on the right to divorce burden an individual's right to future relationships. "Using the group of spouses who will wish to obtain divorce without the consent of their husband or wife as the controlling sample, it is clear that requiring a spouse to prove fault is unnecessarily intrusive and substantially limits his or her ability to make choices about the marriage."[131] A return to fault-based divorce would only serve to revive a system that has been proven not to work, and therefore, would not further any legitimate interests the government has in preserving marriage. In fact, as was clearly evidenced in the above historical analysis of divorce, fault-based

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divorce did not actually encourage couples to stay married; instead, the need to prove fault, caused couples to openly and flagrantly disrespect their marriages and themselves in front of the court while making a mockery of the judicial system with blatant perjury.

Being forced to air all of the private and personal drama involved in a failing marriage is an attack on the type of dignity and personal autonomy the Court has fervently protected. In *Carey v. Population Services International,* the Court stated that in relation to marriage it had never "marked the outer limits" of the right of privacy in "personal decisions related to marriage."[132] Here the Court addressed an individual right to contraception as "among the most private and sensitive."[133] Like that right, the decision to end a marriage is likely among the most private and sensitive of decisions that may be made in an individual's life. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Court stated that intimate and personal choices related to family life are "central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[134] Then, in *Obergefell v. Hodges,* the Court reaffirmed the importance of dignity and autonomy in personal choices related to marriage when it found that the liberty interests found in the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[135] Clearly, the right to divorce is within these types of fundamental rights confirmed by the Court. The ability of individuals to leave a marriage while keeping their dignity intact by not having to reveal personal moments and intimate secrets to a court is central to the right to divorce overall; and being able to choose to leave a marriage with some semblance of respect is a right that enables individuals to define their own concept of life, their very existence, their personal identity, their personal belief system, and their autonomy.

A return to fault-based divorce would also place an unacceptable burden on a woman's right to safely divorce an abusive spouse. Concerns about the requirement of women to testify against their abusive husbands under the fault-based system were clearly articulated by the New York court shortly after that state adopted no-fault grounds as a positive reason for the statute's enactment. The court noted that "[f]or victims of domestic violence, the requirement to prove fault and engage in extensive litigation in what is already a traumatic and dangerous situation

*If adopted, this law, with its return to fault-based grounds, would place undue burdens on a woman's ability to escape from an abusive marriage.*

adds an additional burden for women and children caught in domestic abuse situations."[136] Although the court has never specifically recognized a fundamental right to divorce, it has recognized a fundamental right to abortion and relied on the Due Process Clause to invalidate a law that placed an undue burden on a woman's ability to exercise her right in situations of domestic abuse. In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Court found that a law that required a woman to get the consent of her husband in order to terminate a pregnancy to be an undue burden on her fundamental right; therefore, that law was stripped out of the statute as it was found unconstitutional under the Due Process Clause.[137] The Court stated, "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."[138] The Court went on to note the pervasive nature of domestic abuse in modern society.

> Studies reveal that family violence occurs in two million families in the United States. This figure, however, is a conservative one that substantially understates (because battering is usually not reported until it reaches life-threatening proportions) the actual number of families affected by domestic violence. In fact, researchers estimate that one of every two women will be battered at some time in their life. . . . Women of all class levels, educational backgrounds, and racial, ethnic and religious groups are battered. . . . Wife-battering or abuse can take on many physical and psychological forms. The nature and scope of the battering can cover a broad range of actions and be gruesome and torturous.[139]

A woman's choice to leave a marriage is just as personal and private a decision as the choice to terminate a pregnancy, which has been identified by the Court as fundamental. Similarly, if adopted, this law, with its return to fault-based grounds, would place undue burdens on a woman's ability to escape from an abusive marriage. A supporter of HB 93 argued in defense of this law that issues with domestic violence would only come into play in what he termed "exceptional cases," insinuating that this return to a fault-based system would only place a burden on a few women and that this imposition would therefore be outweighed by a state's interests in preserving marriage overall. Cases involving women in domestic abuse situations would be the outliers, or the exceptions

to the rule, so to speak. This is flatly belied by data on the prevalence of domestic violence in marriage. Moreover, as the Supreme Court recognized in *Casey*, even if a rule prevents only a few women from leaving a dangerous and potentially lethal marriage, the denial to those women could still constitute an unconstitutional and unacceptable burden.[140]

## VI. CONCLUSION

The arguments made in support of rolling back no-fault divorce have little to no rational support in logic or law, and in fact, the bill goes against society's collective belief that divorce should be a peaceful, honest, time-efficient, and economical process. Therefore, the bill should not be passed in Texas.

***The arguments made in support of rolling back no-fault divorce have little to no rational support in logic or law, and in fact, the bill goes against society's collective belief that divorce should be a peaceful, honest, time-efficient, and economical process.***

# End Notes

1 H.B. No. 93, 2017 Leg., 85th Sess. (Tx. 2017) (presented for enactment).

2 H.B. No. 93, 2017 Leg., 85th Sess. (Tx. 2017) (presented for enactment).

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4 Tex. Fam. Code Ann. § 6.001 (2012).

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