A BRIEF HIISTORY OF NO-FAULT DIVORCE

The existence of no-fault divorce has ebbed and flowed throughout history. Contrary to what today's divorce industry has claimed, fault-based grounds for divorce are not ancient, obsolete, and outdated; nor are the no-fault laws innovative, new or modern. The history of no-fault is not a linear progression, but a cyclical phenomenon that can be traced from at least the time of ancient Rome. Marriage in ancient Rome was a strictly monogamous institution. A Roman citizen by law could have only one spouse at a time. The practice of monogamy distinguished the Romans and Greeks alike from other ancient civilizations, in which elite males typically had multiple wives.

1st Century BC – 3rd Century AD

Emperor Augustus was acutely concerned with stabilizing social relationships during his reign. In the 1st century BC, he, apparently believing that husbands and fathers were not doing enough to punish adultery, promulgated a law changing adultery from a matter for private settlement into a crime. The law against adultery made the offence a crime punishable by exile and confiscation of property. Fathers were permitted to kill daughters and their partners in adultery. Husbands could kill their partners under certain circumstances and were required to divorce adulterous wives. Augustus himself was obliged to invoke the law against his own daughter, Julia, and relegated her to the island of Pandateria. The Augustan social laws were badly received and were modified in 9 AD by the lex Papia Poppaea, which still attempted to encourage and strengthen marriage but did so by providing adultery as a lawful ground for divorce.

It was not long after this that divorce laws weakened such that the practice of no-fault divorce became prevalent. So much so that Seneca the Younger greatly lamented the fact that marriage in his time had become a joke. His rebukes were scathing but to the point. According to Seneca, women numbered the years of their lives by the number of their husbands – they "divorced to marry and married to divorce". He viewed no-fault divorce as an instrument for "legalized" adultery, which decayed the public morality and virtue of Roman society.

The Muslim practice of "Triple Talaq" was a practice developed in the 2nd century by which a Muslim man could legally and unilaterally divorce his wife without cause by proclaiming three times consecutively the word "talaq", the Arabic word for "divorce". This could be in spoken or written form. The practice of Triple Talaq is still practiced to this day, but was recently ruled "unconstitutional" by the Supreme Court of India in 2017, and criminalized by India's Parliament in 2019.

By the 3rd century, many in Rome were having serious reservations about the ease with which people could get out of a marriage. Some were concerned about the impact divorce was having on children, but others simply felt that society had a vested interest in preserving existing relationships and objected to the idea that a husband or wife could dissolve a marriage when there was no compelling reason.

Late in his reign, in 331 AD, Constantine the Great issued an edict imposing serious penalties on unilateral divorce except in certain circumstances. This law did not affect divorces that were

agreeable to both partners, but rather imposed penalties on those who procured a divorce unilaterally without a substantial cause.

Again, over time, these divorce laws loosened and throughout the time of the Byzantine Empire, divorce had been easy to obtain. Either spouse, man or woman, was free to end their marriage for any reason or for no reason at all, and "fault" entered the picture only in determining what happened to the dowry and prenuptial gift. While Emperor Constantine had tried imposing financial penalties as did other emperors after him, these experiments were ultimately short-lived. From the time of Constantine on, divorce laws were subject to considerable variation depending on time and place.

6th Century

The Code of Justinian was introduced in the 6th century by Justinian I, Emperor of Byzantium. Justinian was particularly interested in family law and made great efforts to abolish no-fault divorce completely, including mutual no-fault divorce. A husband was given lawful authority to kill his wife and her lover if he caught them in the act of adultery. The Justinian decrees were the most restrictive of all, but these too were eventually repealed several years later.

9th Century – 16th Century

Under the Holy Roman Empire, divorce was nearly impossible to obtain. The Roman Catholic Church was also advancing the view that celibacy in monasticism was a superior path toward obtaining a higher spiritual state than that of marriage and family life. As a result, marriage in the early 16th century was viewed with some distain. The Protestant Reformers reacted strongly to this with their own teachings on marriage, divorce, sexuality and family life. While Martin Luther viewed marriage as both secular and holy, he ultimately taught that marriage is a civil matter and that the state, not the church, should regulate marriage. As a result of the Protestant Reformation, marriage slowly became subject to the jurisdiction of secular authorities and divorce became available under limited circumstances.

In 1534, King Henry VIII pushed through the Act of Supremacy. The Act made him, and all of his heirs, Supreme Head of the Church of England. This meant that the Pope of Rome no longer held religious authority in England, and Henry VIII was free to divorce his wife Catherine, which was the intention and sole purpose of his secession from Rome. The newly created Church of England exists today only because the King of England wanted to divorce his wife but was barred from doing so by the Roman Catholic Church.

The Roman Catholic Church during the Counter Reformation formally identified marriage as one of its seven sacraments at the Council of Trent in 1563.

17th Century – 19th Century

The 1646 Westminster Confession (of marriage and divorce) stipulated two grounds for divorce: adultery and willful abandonment.

Divorce was not allowed in colonial America until the Massachusetts Bay Colony and its Puritan government legalized divorce in 1629. The first divorce in the United States happened in 1638. Rather than conducting judicial proceedings through the courts, divorces were granted through a bill of divorce through the legislatures. In the early to mid-1800s, changes were made to the State Constitutions which expressly placed the jurisdiction to grant divorces under the judicial branch rather than the legislative branch. This provision is typically referred to as the "prohibition on special laws granting divorces." The purpose of moving divorce from the legislature to the judiciary was twofold: (1) as divorce was becoming more commonplace, the legislature was overwhelmed with the caseload and preferred to legislate general laws that could be adjudicated through the courts, and (2) bills for divorce were considered to be "special laws" or "private laws" tailored to specific people and their specific circumstances, thus making divorce actions arbitrary. Rather than public law regulating marriage in a standardized way for the general population, it had been the role of politicians to determine whether to grant a divorce to a married couple, and if so, on what grounds. The constitutional change of jurisdiction for divorce is most exemplified in New York's State Constitution which reads, "nor shall any divorce be granted otherwise than by due judicial proceedings." In other words, this provision and its parallel in other constitutions is meant to avoid the arbitrariness of divorces that had taken place on a cause-by-cause basis (via the legislature) and instead tried to provide stability, predictability and limitation regarding divorce on a case-by-case basis (via the court) and in accordance with equal treatment and uniform application under the law.

Several of the framers of the prohibition on special laws granting divorce felt that legislative acts of divorce meant the end of marriage as a civil institution. "A full and complete control of the [marriage] relation in the legislature, to be exercised at its will, leads inevitably to this conclusion… a relation essential to organized civil society might be abrogated entirely. Single legislative divorces are but single steps towards this barbarism which the application of the same principle to every individual case… would necessarily bring us upon." (Thomas McIntyre Cooley). The primary concern was that even though marriage ought to be a public concern regulated by public authority, its regulation was controlled by private interests in the legislature which was beholden to the whims of arbitrary decisions and to the political process as opposed to the legal process.

19th Century – 20th Century

India has created several different family codes based on major religious population groups. It introduced the Christian Divorce Act (1869), Christian Marriage Act (1872), Muslim Marriage/Divorce Act (1937), Secular Marriage/Divorce Act (1954), and Hindu Marriage/Divorce Act (1955). While these family codes do not recognize the direct jurisdiction of religious authorities to regulate domestic relations, what this does is incorporate these religious provisions into India's civil code and requires the courts to be overseen by religious magistrates. Most religious sects do not have a no-fault provision for divorce. The Muslim Code allowed for "triple talaq", the legal equivalent of unilateral no-fault, until 2017. The Secular code does allow for no-fault divorce, but only by mutual agreement.

Up until 1918, Russian law recognized the right of religious authorities to control marriage and divorce. The Russian Orthodox Church considered marriage to be a holy sacrament, and divorce

was almost impossible under its jurisdiction. It was permissible only in cases of adultery (witnessed by two people), impotence, exile, or unexplained and prolonged absence. While pre-revolutionary jurists had attempted throughout the late 19th century to reform Russia's strict laws on marriage and divorce, they achieved little success until the Communists took power in 1918 and no-fault divorce was introduced into the Russian Family Code for the first time. The 1918 Family Code eliminated the validity of religious marriage and gave legal status to civil marriage only, and created a network of local statistical bureaus for the registration of marriage, divorce, birth, and death previously administered by the Church. The newly introduced family code established [unilateral] no-fault grounds for divorce at the request of either spouse. It abolished the juridical concept of the "illegitimacy" of children; and if a woman could not identify the father of her child, a judge assigned paternal obligations to all the men she had sexual relations with, thus creating a "collective of fathers." Because Russia's family code of 1918 proved to be so disastrous and directly led to the destabilization of Russian society, family law reforms were initiated in 1926 and 1936 to curb the ensuing social ills of widespread poverty, alcoholism, incarceration, and abortion that resulted from familial disintegration. To this day, Russia has not fully recovered from the harmful social policies implemented by the Communist regime as it continues to have one of the highest divorce rates in the world.

Since Lebanese independence in 1943, it has not been possible to obtain a civil marriage. Marriages in Lebanon are traditionally performed through a religious authority, depending on the religious sect. Issues of child custody and divorce in Lebanon are generally decided in religious courts under religious law. Thus, Lebanon lacks a civil code regulating personal status altogether, and so relies on 15 separate religious-based status laws and courts for the 18 recognized categories. Each religious sect follows a distinct set of personal status laws for matters related to marriage, divorce, custody and inheritance. As a result, married couples are treated differently based on their religion, but because of the initial voluntary act of marriage, it is understood that no discrimination occurs by subjecting related issues of status to religious authorities. Those wishing to have a civil marriage must marry outside the country. Lebanon differs from India in two major ways: (1) Lebanon does not offer the option of civil marriages, while India does. (2) Because of this, Lebanon has not incorporated religious laws into its civil code as India does, and thus relies exclusively on religious courts for matters of domestic relations.

Leading up to the 1960s, California would begin pioneering efforts that would soon receive acclaim from a national group of lawyers – the National Conference of Commissioners of Uniform State Law – whose self-imposed job was to set the standard for state laws. Governor G. Brown officially became involved when he established the *Governor's Commission on the Family* in the spring of 1966. His stated goal was to make "a concentrated assault on the high incidence of divorce in our society and its often tragic consequences." At the conclusion of its work, the Governor's Commission had two main recommendations, one of which was to change the current divorce laws by eliminating the concept of *fault*. Assemblyman James A. Hayes deserves to be recognized as the champion of California's no-fault divorce law because of his absolute determination and self-serving interest to see it through to completion. The final version of the bill was passed on July 23, 1969, and Governor Ronald Reagan – ironically, a conservative Republican, signed it into law on September 4, 1969. Some believe Governor Reagan had no idea what he was signing – and that if he had, he would have vetoed it. Still others, the more cynical types, point out that Reagan was the first U.S. President to be divorced and perhaps had self-

interested motives of his own. The California no-fault bill of 1969 wiped out all of California's previous grounds for divorce and replaced them with a sole standard for divorce – "irretrievable breakdown of the marriage".

Most people believe that state legislators write their own laws. But, most laws are designed at a higher level – by a national group made up solely of lawyers from the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL is comprised of only lawyers who, in addition to writing laws that affect their livelihoods, are also setting public policy. Many of the lawyers involved in setting family law policy are current or former divorce attorneys in their private practices who profit[ed] directly from representing clients in divorce and post-divorce proceedings. During a Texas committee hearing on a bill for the repeal no-fault divorce ("insupportability"), opponents admitted to acting as the "lobbying arm" on behalf of the Family Law Section of the State Bar Association. The evidence is clear that attorneys who practice family law become the politicians and judges developing and sustaining family law policy in a way that benefits themselves and their colleagues. Since marriage is treated as quasi-public and quasi-private, it is in the interest of family lawyers to control public policy in a way that benefits their own private interests, namely their source of income.

By first peddling no-fault to mean 'by mutual consent' but then changing the meaning to 'unilateral', most people in California were so confused by what had taken place that they were not even aware of this slight-of-hand – in spite of the warnings coming from the few who objected. One of the hazards of *'the law'* is that few people truly understand how it works – what the legal terms really mean or how different concepts fit together and are applied. Within fifteen years of California's bold breakthrough in its no-fault legislation, all states would have some form of no-fault divorce. The vast majority would have unilateral no-fault. The states who still had the old fault grounds on their books would soon replace them with some form of the "irretrievable breakdown" standard, and there would be no state that would be truly safe for marriage.

21st Century

In 2010, New York introduced *unilateral* no-fault divorce for the first time. This provision was the first change in divorce law since 1966 when New York had introduced no-fault divorce by mutual agreement. Other states have made similar changes and are continuing to do so.

Until 2017, Muslim men in India were able to end their marriages by saying the word "talaq" – Arabic for "divorce" – three times. This method of divorce was available only to men, but it exhibits the same structure of the unilateral no-fault divorce practice found in the West. In a 3-2 vote, the Indian Supreme Court panel declared unlawful the provision that had allowed Muslims this provision of instant divorce. Although Western media interpreted this ruling as a victory for women's rights and gender equality, the Indian Court did not strike triple talaq down because it discriminates between men and women. Instead, the Court concluded that triple talaq was "not integral to religious practice and it violates constitutional morality". They said it was arbitrary to allow one party to "break down marriage whimsically and capriciously." In 2019, India's parliament followed up by passing a law that makes the Muslim practice of triple talaq (instant divorce) a criminal offence. Although Western NGOs and mainstream media have praised the repeal of instant unilateral divorce in India, they continue to defend the same practice in the West

despite the reasoning given by India's Supreme Court that unilateral instant divorce creates an arbitrary and whimsical standard which renders marriage legally unstable.

On April 6, 2022, there was a significant change in divorce law for England and Wales. It was the first change in 50 years. The changes mean that instead of needing to prove the other party is at fault, there is now no requirement to identify a fault-based cause of action for divorce. Moreover, it is a completely digital process. Prior to this, no-fault divorce in the UK was unavailable.