

I. Constitutional Protection of Private Family Choices

A. Historical v. Modern Families

- i. Some of these are myths that are so common that they are part of our law.
 - a. **The extended family:** the family of nostalgia. A lot of these are myths to some extent that have been debunked. Infant mortality was so high, that even though people had lots of children, most of them died. Most people didn't live long enough to be grandparents.
 - b. This tends to be a white middle class model. These things may or may not have been true for other cultures and classes, such as slave families.
 - c. There is a change in nuclear families (two parents and their children).
- ii. Historically, the family was more public
 - a. The concept of privacy simply didn't exist. The single family home with bedrooms is new. Everyone used to huddle around the fire.
 - b. Sleeping was not private.
 - c. Now: There is a private sphere of family life. This means several things: you have a space that's yours that people ask to enter. You select who you want in the home. This is a modern development.
 - d. Privacy as meaning the government stays out is a very modern development.

B. History of the Right to Privacy

- i. Meaning of Privacy
 - a. *Griswold v. Connecticut*
 1. Birth control was not accepted. Women knew very little about sex education.
 - A) The impact of the lack of information was mainly on the poor. There is a way to evade the law if you have enough money.
 - B) Conn had the strictest laws. All the Planned Parenthood clinics closed in 1940. They had to attack the ban on contraception. A case had just gone up, *Poe v. Ullman* – where the SCt said it won't decide because no one had been prosecuted for giving out birth control. So they opened a clinic, ten days later, they were arrested. *Griswold* is the case that came out of that arrest.
 2. Law at issue: Any person who uses birth control is punished, and anyone who counsels people to use contraception is aiding and abetting them.
 3. Douglas opinion: finds the statute unconstitutional.
 - A) Constitutional ground of attack: **Substantive due process.**
 - B) The source of the right to privacy is in the *penumbra* (shadow) of the other Amendments – implicit in the rights given in the Constitution are other rights coming from them. Found in the penumbras of the First Am (right of association), Fourth Amendment (right to be secure), Third Amendment (prohibition on quartering soldiers), Fifth Amendment (self-incrimination), Ninth Amendment (unenumerated rights).
 - I) The Court says there is a constitutional right to privacy but has difficulty finding the constitutional source of the right to privacy.
 4. Concurring opinion: Right to privacy comes from the Ninth Amendment. There are unenumerated rights, and that's where it is.
 5. Marital status is critical to the outcome of the decision. They found the right to privacy inherent in the *marital relationship* (noble purpose). Married people have the right to make decisions about contraception.
 - A) The statute covers *use*, not sale. Enforcement violates privacy: the only way to catch them is for the police to search the sacred precincts of the marital bedroom. The idea is repulsive to the privacy surrounding the marital relationship.
 - B) Other states had rules about the sale and manufacture.

Facts:	Planned Parenthood workers charged criminally because they counseled married couples about birth control.
Analysis:	This law operates directly on the intimate relationship between H&W and their physician's role in one aspect of that relationship. The First Amendment doesn't protect family rights like the right to educate ones child specifically. However, there is a right to freedom of association as a form of expression. The First Amendment has a penumbra where there is a right to privacy from governmental intrusion. Various guarantees create zones of privacy, and the right to association is one of these zones.
Concl:	There is a constitutional right to privacy
Concur:	The Ninth Amendment protects rights not enumerated from governmental infringement.

b. *Eisenstadt v. Baird*

1. Bill Baird was a crusader who became a sex educator. He loved the media attention.
2. This statute regulated the *distribution* of contraceptives: couldn't give it away or sell contraceptives unless you were a pharmacist or a physician. Can only give to married couples with a prescription.
3. Constitutional ground of attack: **Equal protection**. Violates equal protection because it treats married people different from unmarried people. The right to privacy is *individual* – a married couple is made up of two individuals.
 - A) The Fourteenth Amendment proscribes equal protection: can't treat similarly situated people differently. These words come from interpretation of the constitution. Married and unmarried people were being treated differently.
 - B) Why not use privacy? The idea was still so new, there wasn't a lot of understanding or willingness to broaden it. There wasn't security about where it came from in the Constitution. Argument would be: If the right of privacy means anything, it is the right of the individual, married or not, to be free from governmental intrusion into the right to bear and beget children.
 - C) This case has been reinterpreted to also be a due process case.
4. *Eisenstadt* changed the idea of privacy in *Griswold*
 - A) Married couple → individual
 - B) Begetting → bear or beget
 - I) Why include "bear"? Might have envisioned that the right of privacy may be useful for abortion cases.
 - C) Privacy is spatial → privacy is about decision making.
 - I) *Griswold* is spatial: police in the bedroom.
 - II) *Eisenstadt*: gov't protection of intimate decision making.
 - D) In *Griswold*, the court wasn't particularly concerned with the state interest involved. When we talk about due process, we use means/end analysis. What was the objective, and was the means chosen appropriate.
 - I) In *Eisenstadt*, the court looks at the state interests and rejects them: health rationale, deterrent to fornication.

Facts:	Baird was convicted of exhibiting and speaking about contraceptives and for handing out vaginal foam to a woman. The SCt of Mass upheld the conviction for handing out the contraceptive. Mass. statute prohibits dispensing any contraceptives except to married couples with prescriptions.
Analysis:	If the statute impinges on fundamental freedoms under <i>Griswold</i> , it must be necessary, not just rational. The Court doesn't reach this question because the statute fails the lesser equal protection question. Court rejects the state's interests <ol style="list-style-type: none"> 1) the deterrence of premarital sex is not the purpose of the statute. The law

	<p>doesn't discourage married people from having extra marital sex, and it doesn't regulate distribution when used to prevent disease. Unwanted children cannot be the punishment for fornication. 2) Health cannot be the legitimate goal. Whatever the rights of individuals are to access contraception, the rights must be the same for married and unmarried people.</p> <p><i>Griswold</i> addressed the privacy of the marital relationship, but the marital couple isn't an independent entity. The right to privacy is the right of <i>individuals</i>.</p>
Concl:	<p>Providing dissimilar treatment for similarly situated married and unmarried persons violates the EPC.</p>

ii. **Roots of Privacy:** *Meyer* and *Pierce*

- a. Foundational cases for the right to privacy; it didn't begin with *Griswold*. We just didn't recognize these cases at the time as being the roots of creating the right to privacy.
 1. These cases didn't mention "privacy," but through their dicta about parents' right to make decisions about the upbringing of their children, they expanded substantive due process. These principles of family autonomy survived the Court's later repudiation of substantive due process.
 2. *Meyer* and *Pierce* were used in *Troxel* to strike down third-party visitation statute.
- b. *Meyer v. Nebraska*
 1. Facts: Teacher was tried and convicted for teaching a foreign language to a young student. The statute said: can't teach anything but English before eighth grade. The purpose of the statute was civic development, anti-German sentiment (WWI), and there are many German religious sects in NE at the time.
 2. Analysis: The law is unconstitutional.
 - A) It interferes with the liberty of the teacher (under the 14th Am) to teach, to do his job. If this was the end of the opinion, this wouldn't be a foundation for the right to privacy.
 - B) Also, it interferes with parents' right to engage teachers to teach their children. There is a natural duty of parents to educate their children. This is the first time the Ct said parents have a liberty interest in deciding about the education of their children.
- c. *Pierce v. Society of Sisters*
 1. Facts: Private schools challenge a law requiring children to attend public schools. The law is putting the schools out of business. They argue that this is a deprivation of their property rights.
 2. Analysis: The act interferes with the liberty of parents and guardians under *Meyers* to decide about the upbringing and education of their children.
 - A) It is significant that they said "upbringing" and not just education. Parents have a constitutional right to the upbringing and custody of their children. There is nothing in the Constitution about this specific right. It comes from *Meyer* and *Pierce* and how these cases interpret the 14th Am.
- d. Other roots of privacy:
 1. *Skinner v. Oklahoma* (invalidating as a denial of equal protection a statute that punished certain criminals with sterilization). Court applied strict scrutiny because the statute was a permanent deprivation of a basic liberty. But, earlier case: *Buck v. Bell* upheld compulsory sterilization of the mentally disabled. *Griswold* and *Eisenstadt* were about avoiding procreation – do they affect *Buck*?
 2. *Union Pacific Railway v. Botsford*: upheld denial of motion to compel plaintiff to submit to a surgical exam b/c the right to one's person is a right of "complete immunity."

C. **Abortion as a private choice:**

i. *Roe v. Wade*

- a. History of abortion: at common law, only abortion after “quickening” was criminalized. In the late 19th century, laws that didn’t distinguish before and after “quickening” began to disappear.
- b. P argued that the law was vague (not proper notice) and that it violated her right to privacy.
- c. Court says there is a fundamental right to privacy in making abortion decisions based in the right to *liberty* in the Fourteenth Amendment (not talking about penumbras). The right is not absolute and may be regulated by a narrowly tailored statute serving a compelling state interest. The interest in maternal health and potential life need to be accommodated. The court rejects the interest in discouraging illicit sexual conduct. These laws came from the social purity movement.
 - 1. Court draws a distinction based on pregnancy stages:
 - A) In the first trimester, it is up to the woman in consultation with her doctor.
 - B) Second trimester: the state may regulate in ways that are reasonably related to maternal health.
 - C) The state’s interest in protecting potential life becomes “compelling” at viability. The state may regulate and even proscribe abortion in the interest of protection of potential life.
 - I) Viability is the fetus can exist outside the mother’s womb.
 - II) There were other possible points: quickening (the mother is capable of perceiving the movement of the fetus). Blackmun doesn’t like this distinction. He doesn’t want to get into theoretical discussions about when life begins. “Quickening” is amorphous and a subjective standard.
- d. Only personal rights that could be considered fundamental may be considered in the right to privacy.
 - 1. *Strict scrutiny* of laws affecting fundamental rights: necessary to a compelling interest, narrowly tailored to address that right.
 - 2. *Intermediate scrutiny* for gender-based laws, laws about illegitimacy, poverty: SRIGO – substantially related to a an important governmental interest
 - 3. *Rational basis test*: rationally related to a legitimate governmental interest. You don’t need much to pass this level of scrutiny.
- e. **Evolution of the right to privacy**: Spatial (*Griswold*) → intimate decision making about contraception (*Eisenstadt*) → right to an abortion (Roe).
 - 1. Roe is a liberalization of the definition.
 - 2. Roe unleashed decades of states’ efforts to regulate abortion. This was a remarkable and unexpected decision.
 - 3. Family law was a place for state regulation, and *Griswold* was the first way the SCT got into the fray. *Roe v. Wade* came not long after.
- f. What right does Roe protect?
 - 1. Freedom to terminate the physical burdens of pregnancy? Freedom to escape reproduction?
 - 2. Alternatively, Court could have said that abortion is essential for gender equality.

Facts:	Roe, a single pregnant woman, challenged the Texas law criminalizing abortion except when the life of the mother is in danger.
Analysis:	Three reasons why abortion is criminalized: 1) to discourage illicit sexual conduct. 2) to protect the health of the mother. Abortion used to be dangerous. Now, however, at least during the first trimester, it is at least as safe as giving birth. 3) The state’s interest in protecting prenatal life. The state argues that a fetus is a “person” under the Fourteenth Amendment who may not be deprived of life without due process of the law. In all instances in the Constitution, the rights given to persons are recognized postnatally.

	<p>Medical, religious, etc. communities differ about when they determine life begins; it is not for the judiciary to say. Allowing abortion when the life of the mother is in danger would also violate the Fourteenth Amendment.</p> <p>There is a personal right to privacy, although it isn't explicit in the Constitution (<i>Griswold, Eisenstadt, Meyers</i>). The right to privacy is not absolute, and the state may regulate this right. The right is <u>fundamental</u>, and only a narrowly tailored compelling state interest may abridge it.</p>
Concl:	A state statute criminalizing abortion, except when the mother's life is in danger, without regard to the pregnancy stage and without regard to other issues involved violates the Due Process clause of the Fourteenth Amendment.
Dissent:	(Rehnquist): there is no right to privacy in abortion. It is not so rooted in tradition as to be a fundamental right. Society's views on it are changing and it is not universally accepted.

D. When Privacy rights Conflict:

- i. **Fathers' rights:** *Planned Parenthood v. Danforth*
 - a. The mother doesn't have to secure the husband's consent. It is the woman that bears the child. *Danforth* was based on *Roe v. Wade*: the woman and her physician have the say, and the state can't get interfere with that. The state can't delegate a power they don't have to the husband. The question of notification was still an open question until *Casey*.
- ii. *Planned Parenthood v. Casey*: Before viability, a law must create an *undue burden* (= substantial obstacle) on the woman to be invalidated.
 - a. Court reaffirmed the importance of viability. But rejected the trimester distinction in *Roe*.
 - b. Expressly permits, under the undue burden standard, some measures designed to persuade women to choose birth over abortion.
 - c. Struck down spousal notification requirement
 - 1. Merely notifying is an undue burden because of the greater risk of domestic violence – if a mother has to tell her husband, he might beat her.
 - 2. O'Connor is making a big assumption. She recognizes the fallacy in her argument – this isn't the biggest problem, and we don't know the exact connection. But, there is still a small subset of people involved. Most women tell their husbands, but if she doesn't, it is probably because of a fear of domestic violence. But there are many other reasons: it isn't his, against their religion, financial reasons. The nexus between the reasoning based on DV and the connection with women who want an abortion is an empirical leap.
 - 3. There isn't really a difference between notification and consent. Husband still has to sign the form saying that he was notified. She can always forge the signature, so it isn't hard to get around the provision. But O'Connor is bothered by the fact that a woman should have to go and tell her husband that she wants to exercise her right.

Facts:	PA has a law requiring a married woman to declare, under threat of criminal sanctions, that she informed her husband of her decision to under go an abortion before she can have it. Exception if she declares that she believes he will harm her, husband isn't the father, or if pregnancy was the result of spousal sexual assault reported to the police w/in 90 days. Her declaration is not immune from subpoena.
Rule:	The right to privacy = right of the individual to be free from unwanted governmental intrusion on fundamental matters like whether to bear or beget a child. (<i>Eisenstadt</i>)
Analysis:	<p>The constitutionality of legislation is measured by its impact on those it affects, so the fact that this law places no burden on most of the women who obtain abortions in PA does not save the law. In the fraction of cases where the law is relevant, it is a substantial obstacle that is an "undue burden."</p> <p>A husband has a deep and proper concern and interest. However, the pregnancy has a much greater impact on the woman, so that her liberty is doubly protected and</p>

	entitled to strict scrutiny of the law: the state is touching on the private sphere of the family and on her bodily integrity. The marital couple is not an independent entity but two individuals. This court has already struck down the requirement of a husband's consent in <i>PP v. Danforth</i> . A husband has no right to force his wife to advise him before she makes her personal choices.
Concl:	Requiring a woman to notify her husband before having an abortion is an undue burden on her right to make an abortion decision.
	The state has an interest in fostering marital communication and promoting the integrity of the marital relationship.

- iii. **Minor's Rights:** *Casey* upheld a 24-hour waiting period and one-parent notification requirement for minors, with exception for a judicial bypass showing that the minor is mature enough or an abortion is in her best interests.
- a. *Casey* says that minors have a right to an abortion but the right is more limited. Why? The peculiar vulnerability of children, less able to make mature critical decisions, important parental role in childrearing (*Bellotti v. Baird*).
 - b. Is notification the same thing as consent in terms of minors?
 1. Telling your parents that you are pregnant also means that you are telling them you are sexually active. Notification and consent are really the same thing for minors. It really isn't different.
 2. This case makes an assumption about childhood and the relationship to authority figures that is way off base.
 - c. Mature decision making: minors do seem capable of making these choices.
 1. Studies tell us that most minors 14 and older are able to make decisions pretty much like adults do.
 2. The image of children we're getting: they're vulnerable, they can't make decisions, and probably the real reason: the importance of childrearing and parent's having a say. You have to be mature to have an abortion, but you can be immature and raise a child.
 - d. Both *Bellotti* and *Casey* say that there does have to be judicial bypass: minor can show: she is mature, capable of giving informed consent, or that the abortion would be in her best interests.
 - e. Why doesn't O'Connor use the DV argument for children? She doesn't think minors have as many rights.
 1. Children have to get parental consent for medical procedures, tattoos.
 2. If parents have the right to control the upbringing of their children, they should have the right to control whether their child has an abortion (*Meyers and Pierce*).
 - f. Some states provide greater protection for minors' abortion rights in their constitutions than the federal Constitution.
 1. FL case (2003) and *Farmer* (2000) p 89 – recognizing a right to privacy in state constitutions. Many state constitutions explicitly recognize privacy as a right.
 2. **California codes:** page 372
 - A) *American Academy of Pediatricians v. Lungren* (Cal): healthcare providers challenged parental consent statute or judicial bypass. Court said it intruded significantly on the fundamental interest in privacy of minors, was subject to strict scrutiny under compelling interest test. State failed to show that it was necessary to protect child's health and preservation of the parent child relationship.
 - g. State limitations
 1. *Sexual activity of minors:* Some states require doctors to report to the state minors' sexual activity if a minor comes into a clinic for an abortion. This undermines the

judicial bypass exception, minors may be targeted by people who try to encourage them to have the child.

2. Infringements on abortions are far more subtle and indirect now.
3. About half of the JX have parental consent or notification laws.

h. Abortion funding:

1. SCT decided three cases (Maher, Beal, Poelker) about whether states that don't fund abortions for the indigent place an undue burden on the abortion decision. Court applied the rational basis test rather than strict scrutiny.
2. Court also rejected challenges to refusal to fund abortions necessary for health of the mother.
3. Federal legislation that prohibits use of federal funding for abortion for women in service or for service members dependants to have abortions abroad.
4. The problem of access is more subtle. Medical schools don't teach. Doctors who do it are retiring. The doctors aren't anxious to practice in this area.

iv. *Stenberg v. Carhart* (most recent SCT decision on abortion):

- a. **Facts:** banning partial birth abortion with no exception for health of the mother. The statute is challenged by a NE physician. "Partial birth abortion" isn't a medical term but a term used by anti-abortionists.
- b. **Analysis:** This procedure is sometimes safer for the woman. The state is not furthering an interest in human life because it is only banning a method of abortion. *Casey* requires exceptions for the health of the mother in regulating abortion, and the requirement can't be contingent on absolute necessity or certainty about endangerment. The statute has the effect of putting a substantial obstacle in the path of women seeking to abort nonviable fetuses.
- c. Court weakened the right to abortion decisions: it isn't fundamental, just a liberty interest. When we talk about a liberty interest, we can do **balancing** rather than strict scrutiny. *Carhart* made it appear that the measure may not be strict scrutiny, although we don't know what it is.
- d. Three controlling principles relying on *Planned Parenthood v. Casey*.
 1. Affirmed that **viability** is an important point at which states' rights attach
 2. The test is whether it creates an *undue burden* on the woman's right to terminate the pregnancy. **An undue burden is a substantial obstacle.**
 3. Must have an exception for the **health or life of the mother.**
- e. Compared to *Roe v. Wade*
 1. *Roe*: it is a fundamental right. The court in *Casey* and *Stenberg* doesn't characterize it as a fundamental right.
 2. O'Connor says that there is an interest in potential life throughout the pregnancy. This has real implications for the woman's right to have an abortion.
 3. *Casey* abrogates the difference between the first and second trimester. We are only talking about viability now.
- f. Usually when we talk about a liberty interest, we talk about balancing. This is very different from strict scrutiny of fundamental rights.
- g. Concurrence: States are free to redraft the statute more narrowly based on what the case indicates is wrong with the statute: *second generation statutes*

v. Current abortion limitation laws

- a. Congress passed a partial birth abortion ban (no protection for the life or health of the mother), it was signed by Bush, and suits were brought in three states to challenge it (NE, CA, and NY). Enjoined in CA and NY. NE pending.
- b. Fetal homicide legislation
 1. Unborn victims of violence act: Lacy and Connor's bill. The first time the federal government confers legal protection to the fetus. There has to be federal JX.
 2. States have fetal homicide legislation.

3. The importance of these statutes is what they mean for abortion freedom.
4. Children's health insurance (federal) recognizes fetuses
- c. Access to abortion and protesters: Freedom of Access to Clinic Entrances Act: There may be buffer zones within which protesters may not protest.
 1. Many states have similar acts. Criminal or civil penalties for the use of force or threatening.
- vi. Life and Death
 - a. *Cruzan*: Right to refuse medical treatment is a liberty interest subject to balancing.
 1. Facts: Cruzan is a woman in a persistent vegetative state. Her parents seek to have her removed from life support. MO requires clear and convincing evidence of the wishes of the person to refuse life support. Issue: does MO's requirement violate this liberty interest?
 2. Analysis: The Court assumes for purposes of this case that a competent person would have the right to refuse life saving medical treatment. A competent person has a constitutionally protected "liberty interest" (not fundamental, not subject to strict scrutiny, usually subject to a balancing test). Missouri has an interest in protecting and preserving life and may permissibly advance these interests by requiring C&C evidence of an incompetent person's wishes.
 3. Concurrence:
 - A) (O'Connor): The court doesn't decide whether a state must give effect to the decisions of a surrogate decision maker.
 - B) (Scalia): This is the state's decision to make and the states have always been allowed to prohibit suicide. There is no traditional right to suicide, so it cannot be a fundamental right.
 4. Dissent: (Brennan): If there is a liberty interest in being free from unwanted medical treatment, it must be fundamental. Why is the state more capable of determining the patient's wishes than her intimate family members?
 5. *Quinlin* finds a right to privacy and a right to die. (NJ state constitution).
 6. Later cases: Cruzan doesn't establish a constitutionally protected right to suicide.
 - b. *In re AC* (district court): Court must use substituted judgment for incompetent people.
 1. Facts: AC was a woman with cancer who became incompetent about 2/3 of the way through her wanted pregnancy. A c-section was required to improve the chances of the baby's survival but would shorten her life. The DC judge decided to order the c-section, balancing AC's rights with those of the state.
 2. Analysis: Courts can't compel a significant bodily intrusion in order to save the life of another. Fetus's right cannot be superior to hers. The court as a decision maker must substitute itself for the person. Should also consider the wishes of the family. If uncertain, may substitute what most people in the situation would want along with other factors like the mother's prognosis, the viability of the fetus, the potential result of the procedure on the fetus and the mother.
 - c. *Bush v. Schievo*: Florida case: her husband says she wouldn't want to live this way, the parents say she should be kept alive. The husband litigated it, the court said that it met the C&C evidence test and the judge entered an order to remove the tubes. The legislature passed a law that allowed the governor to override the court order and put the tube back in. Now, the constitutionality of the emergency legislation is before the FL SCT.
 1. The argument is that it interferes with Terry's right to privacy; it violates her substantive due process rights (*Quinlin*).
 2. Another argument is that it is a special law: you can't have a special law to apply only to one case. Violation of the separation of powers: another branch of government refusing to abide by the decision of another branch of government.

E. Limits of Privacy

- i. **Privacy vs. Morality**: *Lawrence v. Texas*

- a. *Lawrence* overturned *Bowers*. The facts in *Bowers* and *Lawrence* were similar. In each case, you had two men having sex in their own homes, and the police “stumble upon them.” Texas is one of a few states that prohibit same-sex sodomy only.
 - 1. In *Bowers* they framed the issue differently: is there a fundamental right to homosexuals to engage in sodomy.
 - 2. How do we know when there is a new fundamental right? by analogy, or by looking at history and tradition or the collective conscience. So then *Bowers* looked at history and tradition and the collective conscience.
 - 3. In *Lawrence*, we see that history and tradition aren’t so one-sided as it appeared in *Bowers*. Common law (prohibited any non-procreative sexual activity), state law (arbitrarily enforced; shaped by religious beliefs; discrimination, unfairness of these laws in practice – may have to register as sex-offenders; laws criminalizing sodomy are shrinking), Model Penal Code (law reform, suggested law), European human rights laws, English Wolfenden Commission.
 - 4. Stare decisis: It is not an inexorable command. *Bowers* is not correct and wasn’t correct then. This doesn’t involve minors or vulnerable people. This is about private conduct.
- b. The role of morality
 - 1. It isn’t controlling: it isn’t a legitimate state interest. Some people have religious beliefs and these are profound and deep convictions. SCT’s obligation is to find the liberty of all; we can’t mandate our moral code.
 - 2. O’Connor’s concurrence: moral disapproval is not a legitimate state interest. Desire to harm a group doesn’t satisfy rational basis review.
- c. Constitutional Grounds: **Due process**, liberty, privacy.
 - 1. Privacy is part of substantive due process. This is spatial privacy, AND the right to make individual decisions. It involves liberty of the person both in its spatial and more transcendent dimensions.
 - 2. **Equal Protection** grounds (O’Connor’s argument):
 - A) We can’t simply prohibit gay sex but allow heterosexual sex.
 - B) But the majority rejects it b/c the state could then just prohibit all sodomy. EP is a tenable argument, but it may leave it open to be drawn differently: we think this is so wrong, we want to base it on due process.
 - 3. *Romer v. Evans*: Colorado amended its constitution saying that you can’t have laws that protect people on the basis of sexual orientation.
- d. Same-sex marriage
 - 1. Majority: this case doesn’t involve recognition of relationships.
 - 2. Scalia says this implicates all laws having to do with sex: bigamy, prostitution
 - A) But, the main concern of the laws that Scalia mentions is protection of the individuals, where same-sex marriage is voluntary.
 - B) How does same-sex marriage flow from striking sodomy laws? *Lawrence* distinguishes spatial privacy in the home, and gay couples have the right to protection of their relationships. It definitely does flow.
 - 3. The court isn’t talking about fundamental rights.
- e. Standard of review: **Rational basis**. Why not strict scrutiny? They said it doesn’t even meet rational basis.

Facts:	two men convicted under Texas’s homosexual sodomy law challenge the validity of the that law.
Analysis:	Liberty protects people from unwarranted intrusion into a dwelling or other places. Freedom is more than spatial: it includes freedom of thought, expression, and certain intimate conduct.

	Liberty under the due process clause has a broad reach (Meyers, Pierce, Griswold). The court in <i>Bowers</i> considered whether there was a fundamental right to engage in homosexual conduct and found that there was not because of tradition. The question is really about the fundamental right to privacy. The appropriate question here is substantive due process, not equal protection. Sodomy laws have declined since <i>Bowers</i> and been undermined by SCT decisions (<i>Romer, Casey</i>). <i>Casey</i> confirmed that the Constitution protects personal decisions relating to marriage & family relationships. Sodomy laws are born of animosity toward homosexual individuals as a class.
Concl:	<i>Bowers</i> demeans the lives of homosexuals and is overruled.
Concur:	(O'Connor): Bases the argument on the EPC. Moral disapproval of a group cannot be a legitimate governmental interest. Texas argues that it is only discriminating against homosexual conduct, but it is also directing the law at homosexual people because of the correlation between the conduct and the identity.

II. Getting Married

A. Intro: The state intrudes on decision making even prior to marriage in two ways: 1) regulation of pre-marital controversies, 2) setting substantive and procedural restrictions on the right to marry.

B. Courtship & Marriage: Public and Private Dimensions

i. Courtship patterns

- a. Colonial times: very much regulation. There were laws allowing actions against suitors who didn't get parental permission to propose.
- b. Now, more private. Dating took courtship out of the woman's realm and into the men's world. Before: man came to woman's home, she decided who she would see.

ii. **Marriage Contract**. *Maynard v. Hill* (SCT): legislation recognizing divorce in Oregon.

- a. There are very few women, and Oregon was anxious to allow them to marry.
- b. Some people were very concerned about this: was this a state impairment of contractual obligation?
- c. Is marriage a contract or status? It is both: Contract b/c parties enter it and agree. Status because the state also has something to say about what the parties can do.

C. Premarital Controversies

i. **Breach of Promise to Marry**

- a. Hybrid tort/contract action.
- b. *Gilbert v. Barkes* (Ky)
 1. Issue: Should the BPM common law action be abolished?
 2. Action should be abolished because it is based on paternalistic ideas of women as not as knowledgeable, more vulnerable, protection of a woman's virtue. Other actions should still be available (IIED, fraud, breach of contract), but P doesn't qualify. IIED has to be outrageous and reckless.
 - A) In favor of abolishing the action: society's views of marriage and women have changed dramatically since the cause of action was developed.
 - B) Arguments against abolishing the action: Stare decisis compels retentions and there is no sound reason to eliminate it because it provides a remedy for injury – no b/c stare decisis will not control if the action has outlived its usefulness.
 3. The trend is to do away with the action.
- c. Issue of costs: The ring goes back to him, but she has to spend money on the wedding.
- d. Traditional defenses: physical and mental defects, unchastity of plaintiff, P's lack of love for D, mutual decision to terminate engagement.
- e. At common law and in a few states, false promise to marry can trigger tort liability for seduction.

ii. **Gifts in Contemplation of Marriage**

- a. Modern Trend: An engagement ring given in contemplation of marriage is an impliedly conditional gift that is a completed gift only upon marriage.

1. Man gets the ring back: This is very different from gift theory. A gift is an irrevocable transfer.
- b. Older Rule: Depends on fault. When the donor unjustifiably breaks the engagement, he may not recover the ring, but he is entitled to the ring if it is broken by mutual consent or unjustifiably by the donee.
- c. BUT: Montana rejected exception to traditional gift theory, citing all non-refundable costs that women bear (anti-heart balm legislation has a disparate impact on women).
- d. Gifts in contemplation of marriage:
 1. *Conditional gift theory*: conditioned on actual marriage
 2. *Fraud theory*: for donor to recover, donee must have misrepresented intention to marry, and donor relied on the misrepresentation.
 3. Unjust enrichment (quasi-contractual).
- e. *Meyer v. Mitnick* (Mich):
 1. Facts: P gave D an engagement ring that she refused to give back when they decided not to marry. They disagree on who caused the breakup. Issue: Should fault be considered when determining ownership of an engagement ring after an engagement is broken?
 2. Conclusion: court follows the modern trend that the ring goes back to the man.

D. Premarital Contracts

- i. Premarital agreements generally limit property rights in the event of dissolution or death.
 - a. Why do people enter these agreements?
 1. People want their children from a previous marriage to inherit.
 2. There is a high rate of divorce and you want to protect your assets.
 3. When people have different wealth levels, the wealthier one wants to protect his or her assets, especially in community property states.
 - ii. Legal treatment of prenuptial agreements: *Procedural unfairness* = disclosure, voluntariness. *Substantive fairness* = fair in the way we think of fairness.
 - a. Prior to 1970, agreements were violative of PP
 - b. Premarital contracts have two interpretations
 1. This is a contract and you can agree to anything. (*Simeone*)
 2. This is a special relationship: these are not strangers at arms length. We have to protect the more vulnerable party (*Greenwald*).
 - c. State's approaches:
 1. Look at procedural fairness only. Prenups are ordinary contracts (*Simeone*, Pa), gives deference to private ordering
 - A) Rests in part on the idea that spouses are on equal footing.
 2. Look at substantive and procedural fairness b/c these agreements need special protection. (*Greenwald*, Wisc)
 - A) Substantive fairness evaluated at entry and/or dissolution. Only evaluated at dissolution if a substantial change in circumstances.
 - I) Peoples' positions may change over the time of the marriage (children, different job, one became ill and couldn't enter the workforce).
 - II) The state doesn't want the spouse to become a public charge, so if one becomes unable to work, the agreement may not be enforced.
 3. Look at substantive and procedural fairness in the alternative, substantive fairness must be present before procedural fairness will be examined.
 - d. Uniform Premarital Agreement Act: look at S&P fairness, but high bar for substantive unfairness: must be unconscionable.
 1. Allows agreements to cover any matter, including person rights and obligations that doesn't violate PP or statute.
 - e. ALI: look at S&P fairness.

1. Rebuttable presumption of an absence of duress and informed consent when the agreement is executed 30 days before marriage AND they had counsel or were advised to have counsel and they had the opportunity to do so, and if one party didn't have counsel, the language has to be understandable.
 2. Substantive unfairness is would work a substantial injustice b/c of passage of time, children, unanticipated changed circ.
- f. California Family Code: you have to have counsel if you are waiving spousal support.
1. The Barry Bonds case said counsel was only one factor. Court assumes that if you read it you understand it. In response, the code was added. The interesting thing is that he didn't understand it either, but he did have attorneys.
- iii. Prenuptial agreement requirements
- a. *Duress*: Courts have been particularly resistant to duress argument. They say you can always call the wedding off.
 - b. *Disclosure*: Courts don't require specificity even though the requirements say full and detailed disclosure. A list of assets is sufficient, even without their worth.
 - c. *Representation*: Need only be informed of your right to have counsel.
- iv. *Simeone v. Simeone* (Pa): A premarital contract is like a traditional contract, and it can only be invalidated by traditional K principles.
- a. Facts: Wife signed a prenuptial agreement on the eve of her wedding. She seeks alimony *pendente lite* (during litigation). The agreement said there was full disclosure of assets, the parties viewed the agreement as fair, and that she understood her rights. The alimony was capped. She isn't saying the whole thing is unfair, only the cap.
 1. P argues: No full disclosure, duress, substantive fairness, procedural unfairness. She argues that she didn't understand it and wasn't adequately informed.
 - b. Analysis: Rejects substantive fairness requirements. The requirements were based on a view that women were in a weaker position. Women are no longer in this position and paternalistic assumptions have been abandoned. Traditional contract principles are sufficient to protect rights. Circumstances change throughout the marriage in ways that parties may not contemplate at the time of the agreement, but the agreement reflects an a decision to take this risk. There must be a full and fair disclosure of assets, but the fact that the agreement states that there was such a disclosure creates a presumption that there was.
- v. *In re Marriage of Greenwald* (Wisc): The agreement must be both procedurally fair and substantively fair (substantive at execution, but if substantial change in circ, also at dissolution).
- a. Facts: Josephine lived with Darwin as his housekeeper for many years. J wanted to marry D. D didn't want to get married because he was wealthy and wanted to preserve his estate. D finally agreed to marry, but only if his estate would not be affected. J reviewed the preup before signing it, was advised by D's counsel of her right to independent counsel and to a full disclosure of assets but she refused, and acknowledged that she understood the agreement.
 - b. The agreement is procedurally fair: J knew of his assets. She really wanted to marry him and didn't really care.
 - c. The agreement is substantively fair: This is fairness at the time of execution unless there has been a substantial change in circumstances, which here there has not.
- E. Substantive and Procedural Regulations of Getting Married**
- i. Constitutional Limits on State Regulation of Entry into Marriage
 - a. *Loving v. Virginia*
 1. Facts: The Lovings were married in DC because they couldn't marry in VA, then came back to VA to be with their families. They are convicted and sentenced to one year in jail, and their sentences are suspended on the condition that they can't come into VA together for 25 years. The VA law prohibits a white person from marrying another person who is not white (one of 16 states who had such laws barring either marriage or sexual relations.).
 2. Analysis: This is a denial of **equal protection** because it is invidious racial discrimination even though the law applies to people of all races. It prohibits marriage between certain people on

the basis of race. Equal protection requires that racial classifications be subjected to *strict scrutiny*. This is also a denial of **liberty** without due process. The right to marry is fundamental.

3. Notes:

A) The case goes on to a due process question. In constitutional law, you go after the narrowest principle and stop.

B) How far does the court intend the case to extend? The most narrow is that it only applied to racial classification (what people thought until *Zablocki*).

b. *Zablocki v. Redhail*

1. Facts: State statute prohibits non-custodial parents with child support obligations to marry unless they get a court order showing that they have met their obligation and the children aren't likely to become public charges. Any WI resident in this situation may not marry in WI or elsewhere, or their marriages will be void and they are subject to criminal sanctions.

2. Analysis: The due process argument in *Loving* was as important as the EP argument. This means that the regulation of right to marry is a denial of *substantive due process*.

A) The Court looks to *Loving* to find out what level of scrutiny to apply. Since it is a fundamental right under *Loving*, they apply strict scrutiny. But, **Reasonable regulations that don't directly and significantly interfere with decisions to enter marriage may be imposed**. Strict scrutiny is required for a direct and significant interference, but only minimal scrutiny is required for reasonable regulations.

I) What does it mean to "*significantly interfere*"? We can only figure it out based on the facts of the case and comparison to *Califano v. Jobst*: challenged a statute that said that you can't get social security benefits if you marry. It was upheld because it just made marriage more costly. *Zablocki* said you can't marry at all.

B) This statute doesn't meet strict scrutiny. State's interest in counseling parents and providing for the welfare of the child are important, but this regulation isn't necessary to this end. A "collection device" rationale can't justify the broad infringement on the right to marry. The state already has other ways of ensuring compliance.

3. Concurrence: (Stevens): Under this statute, a person's economic status may determine his eligibility to marry. This means that the rich may marry while the poor may not. This prohibition allows the custodial parent to marry but not the noncustodial parent. This statute violates equal protection.

c. *Turner v. Safley*: The right to marry is so important that it applies even when your rights are severely circumscribed.

1. Facts: Missouri prohibits inmates from marrying without the permission of the prison superintendent, and permission should only be given for compelling reasons. This is generally only done when there is a pregnancy or birth of an illegitimate child. Issue: Does the right to marry apply to situations where your rights are circumscribed?

2. Analysis: Inmate retains constitutional rights that are not inconsistent with his status as a prisoner and the legitimate penological goals of the system. Right to marry is subject to substantial restrictions but, many significant attributes remain: expressions of public commitment, exercise of religious faith, marriage is a precondition for many govt benefits. These remaining elements of the right to marry are sufficient to form a **constitutionally protected marital relationship in the prison context**. Court doesn't overrule case saying that life sentence inmates have no right to marry.

A) Regulation doesn't withstand the *reasonable relation test*. The restriction is not reasonably related to the state's penological interests: to prevent love triangles and promote self-reliance of female prisoners. Requiring refusal in the absence of a compelling reason sweeps too broadly.

ii. State recognition of other states' substantive restrictions

- a. *Rule of lex loci*: a marriage valid where performed is valid everywhere, but only if it would not offend the forum state's PP.
 1. Marriage evasion statutes are public policy statutes going to this exception. Only a few states adopted the Uniform Marriage Evasion Act.
 2. But, Restatement of choice of laws: the validity of marriage is determined by the state that has the *most significant relationship* to the spouses in the marriage.
 - b. *Full Faith and Credit*: Requires states to confer full faith and credit on the public acts, records, and judicial proceedings of sister states.
 1. Is marriage a public act, record, or judicial proceeding?
 2. Judicial proceedings (final judgment) require the most complete recognition. For acts and records, courts can use choice-of-law analysis, depending on its own PP.
- iii. **Substantive Restrictions**
- a. Types of restrictions. Bigamy, incest, age, (same-sex marriage): States have both civil and criminal statutes on these topics. If you commit bigamy, incest, same-sex sodomy (Cf. *Lawrence*), you can go to jail.
 1. Criminal consequences tend to be severe. Incest was 50 years at one time.
 2. Civil consequences: the marriage could be void or voidable. If you do enter the marriage, your marriage will be invalidated.
 3. Void vs. voidable
 - A) Bigamy, same-sex marriage, and incest (in most states) are void *ab initio* (doesn't exist): never valid, and may be challenged by the parties or a third party. Don't have to take any legal action to invalidate it. Its validity can be challenged in a separate proceeding not just an annulment. It can be invalidated even after death because it offends public policy.
 - B) Age is voidable (may be void): One party may challenge it (generally, but if it is an age challenge, sometimes parents can). If not disaffirmed, marriage stays valid. It may not be collaterally attacked: it may only be attacked in an annulment: it offends public policy less.
- Capacity to Marry: Valid marriage require both parties to have the capacity to marry.
- b. **Same Sex Marriage**
 1. *Goodridge v. Dept. of Health*
 - A) Mary Bonnato (GLADD) litigated the case. They also litigated *Baker*.
 - B) This is both a gate-keeping and a public records statute. P argued that there were no definitions, so it could be interpreted to allow same-sex marriage. Court said no b/c they interpret it consistent with the legislature's intent and according to the ordinary meaning of the term.
 - C) The case was decided on **equal protection**. The court uses *rational basis review*. The court says that this doesn't even pass rational basis review, so we don't have to reach the question of whether it meets strict scrutiny.
 - I) State argues that this promotes marriage. Marriage is all about procreation and raising children with two parents, one of each gender.
 - a) Children are being raised by same-sex couples, and marriage promotes commitment. We don't require married people to procreate.
 - b) Analogizes to anti-miscegenation laws & that this is a fundamental right. The right to marry means little if it doesn't include the right to marry the person of one's choice. The denial of this choice based on race is the same as the denial based on sex. *Lawrence* is important to this argument.
 2. After *Goodridge*:
 - A) Massachusetts legislature wanted to put in civil unions, but the court said no, this doesn't cure the constitutional problem. The court had stayed the judgment for 180 days for the legislature to take appropriate action.

- B) Then governor said that out-of-state couples couldn't marry there because of an old law that was enacted to prevent evasion of anti-miscegenation laws. Clerks not obeying this law could be criminally charged.
 - C) Legislature proposed a state constitutional amendment to limit marriage to heterosexual couples. It is pending: it had to be approved in two legislative sessions and then be approved by the voters. Couldn't go into effect until 2006. If this amendment passes, what happens to these marriages?
 - D) CA: domestic partners, HI: reciprocal beneficiaries, NJ: domestic partners, VT: civil unions.
 - E) Newsom permitted the clerk to issue marriage licenses to same-sex couples. Newsom said that CA law conflicted with the CA Constitution. In Mass, there was no definition of marriage limiting it to heterosexual couples (easier to prevail). CA has this explicit preclusion (passed once and then reaffirmed) – 1977 (civil code, then family code – created by the legislature) and 2000 (reaffirmed by the voters). CA SCT decided that Newsom exceeded his authority: an official can't decide not to abide by the law. There is a set of coordinated cases (4) in the lower courts.
 - F) Federal marriage amendment. Had to get 2/3 to move forward, and it was 48 to 50. Articles say that many people who oppose same-sex marriage won't support it because it interferes with states rights.
 - G) State constitutional amendments. These constitutions still have to comport with the federal constitution: *Romer v. Evans* – CO had a state constitutional amendment saying that laws couldn't protect people on the basis of sexual orientation. The SCT said this was a violation of equal protection because the only purpose was to target a group because of a single trait (animus).
 - H) There is a lower court opinion in WA state that permits same-sex marriage.
3. **DOMA**
- A) Passed following *Baehr* (Hawaii case) in 1996.
 - B) Provides a federal definition of "marriage" and "spouse." Why do we need a federal definition? Federal employees, any federal benefit, any federal law (tax, bankruptcy, etc.).
 - C) States are not required to give effect to same-sex marriages under the Full Faith and Credit Clause.
 - D) This statute has not been challenged yet. Why? No one has had standing. Now, we have standing because of the marriages in Massachusetts. Two residents of Massachusetts who marry in MA, and move to another state and try to get benefits would have standing to challenge it.
 - E) Is DOMA constitutional?
 - I) If you assume marriage is a record, it is a violation of Full Faith and Credit. But, Congress could suspend FFC. They never have, though. Marriage is supposed to be recognized by other states.
 - II) *Romer v. Evans* argument. DOMA singles out gays and lesbians and discriminates against them. This would also be the first time that Congress has used FFC to deny rather than grant rights.
 - III) There was a jurisdiction stripping law introduced to prevent the SCT from hearing cases involving DOMA.
 - F) Prohibitions on same-sex marriage and transgender people.
 - I) Transgender people may or may not have sex reassignment surgery. There have been a few cases involving a transgender person who marries, and there is a question of whether the marriage is valid.

- II) Some states use anatomy and some use chromosomes to determine the sex of the trans person for the question of whether the marriage is valid.
- c. **Incest**: may not marry within certain degrees of consanguinity (by blood) or affinity (by marriage)
 - 1. Rules varies by state.
 - A) Consanguinity degrees vary state to state. Some states allow first cousins. States vary on whether adoption counts. Parent, grandparent, sibling, aunt, uncle universally prohibited. RI excepts marriage solemnized among Jews within degrees allowed by their religion.
 - B) Affinity laws may be an in-law, may be a step-child. These are regulated even though there is no blood relationship.
 - 2. Consequences
 - A) Void ab initio in most states.
 - B) Degrees for civil and criminal liability may differ.
 - C) Criminal laws have withstood constitutional challenges arguing violation of privacy.
 - D) Many states have criminal sanctions for officials who knowingly give licenses to these couples.
 - 3. Rationale for these laws:
 - A) To prevent genetic inbreeding. There are really other things we can do. Maybe they don't want to have children. Maybe children of first cousins don't really have problems.
 - B) To protect vulnerable parties (younger family members).
 - C) It is anti-social: we want people to break out of the family; promoting marriage with outsiders.
 - D) Not upsetting the family.
 - E) Religious/biblical reasons (also reason for same-sex marriage).
 - 4. *In re Adoption of M* (NJ)
 - A) Facts: Couple adopted M. When M was an adult, father began a relationship with M and they had a child. Adoptive mother divorced father. M sought to vacate adoption by father so they could marry.
 - B) Rule: final judgment of adoption only set aside if in best interests of child and parents on showing of truly exceptional circumstances, taking all affected persons into account.
 - C) Analysis: Exceptional circumstances: M is an adult, the purpose is to allow M to marry and legitimate child, would clear up relationship of father to his natural child, would legitimize infant.
- d. **Bigamy** (having two spouses at the same time) and *polygamy* (having more than two spouses at the same time)
 - 1. Limitations:
 - A) For criminal sanctions, most courts require *intent*: entering the subsequent marriage(s) with the knowledge that the first is still valid.
 - B) *Enoch Arden Statutes*. Common law defense for bigamy for spouses who remarry in good faith in a belief that the other spouse was dead.
 - I) Named after the protagonist of a poem about a man involved in a shipwreck. He returned to find his wife had remarried. This doesn't happen as much anymore because of modern communication.
 - 2. Rationale:
 - A) Protect public records from confusion
 - B) Frustrate schemes to misrepresent illegitimate children as legitimate
 - C) Punish the public affront to the first spouse
 - D) Limit likelihood of desertion, nonsupport, divorce

3. Religious reasons aren't a defense.
 - A) There is a distinction between religious practices and religious beliefs and religious practices are outside of the First Amendment.
 - B) The state's reasons for having this policy are greater than religious reasons.
 - C) *Potter v. Murray City*: Govt can regulate religious practices to promote health, welfare. Essential to protection and preservation of marriage.
 4. *Conflict of laws questions*: some countries permit bigamous marriages.
 - A) A husband dies, wife tries to claim estate and finds out that he had a wife back home.
 - B) Recognition of these marriages depends on the purpose of the litigation: will often uphold for legitimacy of children, inheritance, but not for divorce. This works also for bigamous marriages not based on conflict of laws (Stanford professor case – he died, the three wives didn't know, who recovers when he dies?).
 5. **Putative spouse** – depends on the spouse's good faith belief in the validity of the marriage. If you really believe that you were validly married, you may be able to recover inheritance (equitable common law doctrine).
 6. Can we use *Lawrence* to attack bigamy and incest? *Lawrence* said that we can't mandate our moral code, citing *Casey*. But, could argue that there is an exploitative aspect of bigamy and incest.
- e. **Age** (usually 18)
1. Can still marry if younger, but have to get parental consent, or may need judicial consent. Age of consent may be younger if minor is pregnant.
 - A) At common law, age of consent was 7, but marriage voidable as long as either was too young to consummate the marriage.
 - B) Some states require premarital counseling prior to teen marriages.
 - C) Many countries allow marriage at younger ages.
 2. May be void or voidable.
 3. Rationale: maturity, promoting stability of marriages.
 4. *Moe v. Dinkins* (NY): Constitutionality of parental consent requirements
 - A) P argues liberty interest: Not a fundamental liberty interest. Minors can be treated differently because of their vulnerability, their inability to make critical decisions in an informed and mature way, importance of parental role in child rearing. Marriage is subject to much regulation.
 - B) Subject to *rational basis review*. Upheld under the state's *parens patriae* power. Law assumes parents will act in the best interests of their children. Distinguishes from abortion cases: here, minor must only postpone decision to marry.
- f. State of Mind Restrictions: **Fraud and Duress**
1. Annulment v. Divorce
 - A) Annulment declares that no marriage occurred because some impediment existed at the time of the ceremony. Divorce terminates a valid marriage. Since divorce reform the importance of annulments has decreased.
 - B) Procedural differences
 - I) *Relation back doctrine*: The decree of annulment goes back and erases the incidents of marriage since the beginning of the marriage.
 - II) Jurisdiction at either party's domicile, state where marriage celebrated, any state with PJ over the spouses.
 - III) Usually no spousal or child support, or division of property.
 2. **Fraudulent misrepresentation**: knowingly created through falsity so that the other will rely, they do rely, and they are harmed.
 - A) *Strict test*: Fraud has to go to the essentials of the marriage: prevents them from having sex or children.

B) *Less strict test*: materiality = “but for” test. I would not have married if I had known the truth.

C) Courts may have a higher standard for consummated marriages.

3. **Duress**: agreements to marry that are procured by force, fear or coercion are unenforceable.

4. Federal rules about marriage fraud:

A) To legitimate children.

B) Immigration – federal govt has tried to attack these sham marriages. Many argue that these statutes are an invasion of privacy.

5. *Radochonski v. Radochonski*

A) Facts: W had a relationship before the marriage. The relationship continued while the marriage was going on and she lied to H. W only married to get residency. H said he wouldn't have married her if he knew that this was all that she wanted. W seeks divorce, H counter-petitions for an annulment based on fraud.

B) Analysis: relies on strict test: Fraud has to go to the essentials of the marriage: prevents them from having sex or children. False representations of love and affection doesn't go to the essentials of the marriage.

C) Why seek annulment rather than divorce? Stigma of divorce. Religion – can't get divorced if you are a catholic. shorter residency period for annulment.

iv. **Procedural Restrictions**

a. Rationale: the State's interest in preventing fraud, preventing STDs, gathering statistics and making sure people getting married are not related.

b. **Licensure and Solemnization**

1. For a marriage to be valid you must have licensure and solemnization, and many statutes provide that the license expires after a short time.

2. A minister or other religious official can face penalties for not complying with all the requirements – like making sure the marriage license is turned in.

3. *Carabetta v. Carabetta*: Failure to comply with licensing statutes will not render the marriage invalid.

A) H&W had a valid religious ceremony but there was no marriage license. Had been married for many, many years and had kids together.

4. Most states have waiting periods between application and license. A few require a wait between license and ceremony

c. **Blood Tests**

1. VD statutes: not allowed to get married if you had a venereal disease and hadn't taken your course of treatment (disease is or may become communicable)

A) Wouldn't this be a violation of EP? This hasn't been challenged. It has been challenged on religious grounds but hasn't prevailed because it is a public health measure.

2. If you are HIV+, does this mean you can't get married? These laws have been repealed because they were a violation of privacy. There may be a state that has such a law, but usually it's just VD.

3. *Doe v. Dyer-Goode* (Pa): testing for AIDS without consent when gave blood for marital blood test.

A) Court found no invasion of privacy, lack of informed consent, breach of contract, negligence, or IIED.

B) Prof doesn't know that this is still done.

d. **Procedural Variations**

1. **Proxy Marriages**: at least one party is represented at the ceremony by an agent or proxy.

- A) Used a lot during war times. Proxy marriages are also favored among prison inmates. May be used to circumvent immigration laws b/c valid as long as marriage is valid in country where performed.
- B) California had its first marriage by proxy. Gov. signed a law recently allowing service members to marry.

2. **Confidential Marriage**

- A) Some parts of the marriage are confidential. And parts of the process are dispensed with. You don't have to get a marriage license or turn in a health form. The couple only has to file a certificate and it is kept confidential.
- B) If you are a celebrity you might want a confidential marriage. Also, confidential marriages protect people who are living together – in case the couple gets pregnant etc.

3. Other Variations

- A) A few states allow **Marriage by declaration** or **marriage by contract** where parties subscribe to a witnessed contract acknowledged by a judge.
- B) **Tribal marriages** according to Native American laws or customs recognized in some JX.

e. California marriage requirements

- 1. Two witnesses, and someone authorized by the state. \$ 84 fee. Each applicant must be given a brochure with information concerning possibility of genetic defects, DV, etc. (code book p 18)
- 2. Don't need a blood test anymore. This used to be a requirement to prove that you didn't have a venereal disease. No health certificate needed.
- 3. CA allows *confidential marriages*: allow people to dispense with some of the requirements so that not everything is part of public records (codebook p 19).

v. Informal Marriages

a. **Common Law Marriage** (curative doctrine)

- 1. Requires: 1) Capacity to enter a marriage, 2) present agreement to marry, 3) cohabitation, 4) holding out to the community as husband and wife.
 - A) Holding out is necessary to prevent fraud.
 - B) Usually no set time of cohabitation. But, length of stay in common law marriage JX may matter, depending on what the purpose of the suit is – if they are trying to get govt benefits, may not prevail based on a short stay.
 - C) Most states require C&C (not SC)
- 2. Under *lex loci*, other states must recognize common law marriages in other states.
- 3. **Co-habitation** usually means living together and having sexual intercourse.
 - A) Cases can't delve too deeply into this because of privacy concerns. Johnny Cochran case: has an affair during the marriage, divorced and lived with the woman, they had a child. They stopped having sex at one point, but still visited. When they separated, he argued that they didn't cohabit.
- 4. Arguments against: modern social conditions have eliminated the need, prevent fraud in transmission of property, protect marriage from immoral unions, confusion of public records.
 - A) UMDA has no position on validity of CL marriage.
 - B) Does privacy limit states' ability to abolish?
- 5. *Jennings v. Hurt*
 - A) Facts: William Hurt (married) met Sandra in NY and they started having an affair. The couple goes to South Carolina. He calls her his wife a couple times and tells her they are married before the eyes of God. SC recognizes common law marriage – NY does not.
 - B) Analysis: No common law marriage b/c there was no agreement to be married and b/c there wasn't sufficient evidence that Hurt or Jennings held themselves out to be married.

b. Putative Spouse Doctrine and other Curative Devices

1. **Putative spouse doctrine:** at least one spouse has a good faith belief in the validity of the marriage. (curative doctrine)
 - A) The good faith belief in the validity of the marriage is *at the time of the marriage*. However, the putative spouse doctrine is an equitable doctrine, so therefore the putative spouse *terminates if she loses the good faith belief* in the validity of the marriage.
 - I) Is suspicion enough to destroy the good faith belief? Not sure. It wouldn't be enough just that she suspected that he was cheating on her.
 - B) This was common when a husband would separate from his wife and then remarry, saying that he is single.
2. Palo Alto doctor died, and 3 women claimed to be his wife. The second two could try to claim that they were putative spouses. The third wife began to suspect his infidelity and hired a PI and filed for an annulment.
 - A) Wives #2 and 3: they have a pretty good argument because they believed they were married. Wife 3 suspected he was cheating on her, hired a private detective, and found out he was married.
3. **Marriage by estoppel** – some states.
4. Some courts hold that common law marriage will legitimize children, even if it is null and void.

III. Being Married: Regulation of Intact Family Members

A. Changing Nature of Marriage

- i. Relationships are more open in terms of communication today. Spouses didn't used to talk about sex, contraception, etc.
- ii. A quarter of minors who want abortions want them because they already have a child.
- iii. Women's common law disabilities (Blackstone)
 - a. *Coveture*: the woman's legal identity is suspended in the marriage and she takes the husband's legal identity.
 1. Husband has control over all her possessions, even her jewelry. She could only keep her necessary clothing.
 2. She didn't have the right to contract.
 - b. This continued until the middle 1800s. The Women's liberation movement was the second wave because there was an earlier movement so that women could have their own funds and the right to custody of their children. Married Women's Property Acts. We still see vestiges of these rules in community property states: the husband has the right to manage the property.

iv.

B. Roles and Responsibilities in Marriage

i. Marital Property Regimes

- a. Two different marital property regimes today: Community property & Common law
 1. *Community property* is more partnership oriented: what you bring to the marriage is your own, but everything made during the marriage is shared.
 - A) Community property states are mostly in the South and the West, influenced by the French and the Spanish. There are 9 community property states.
 2. In common law the acquiring spouse owns the property.
 3. Which regime is better for women? It seems like community property is b/c it recognizes the input of the stay at home wife.

b. Managerial Rules

1. Property *management* is changing to the person who owned it, or joint control. Most JX allow joint control.

ii. **Duty of Support**

- a. Common law duty of H to support W and for W to provide domestic services.
 1. Now gender neutral duty to support.
 2. Sometimes have family expense statutes that may spell out what spouses have to support each other in certain ways. Some statutes require adult children to support their parents, although some have exceptions (if they abandoned you).
 - b. Spouses have the duty to provide each other with **necessaries** (food, shelter, medical care, sometimes legal expenses: case-by-case determination).
 1. Many of these cases come up when a spouse dies, and then the hospital tells the other she is liable. Courts adopt one of three approaches:
 - A) Abolish the necessaries doctrine and hold only the debtor spouse liable for the debt.
 - B) Make the rule gender neutral, applying the rule equally to both spouses.
 - C) Impose primary liability on one spouse and secondary liability on another, requiring the creditor to exhaust the financial resources of one spouse before looking to the other.
 - c. **Doctrine of nonintervention.**
 1. Has created problems for battered women. Courts would not intervene unless she wanted to divorce.
 2. Why this doctrine? The court will not intervene to upset marital harmony. But if they are going to court, how much harmony is there? Also, the difficulties are *de minimus*.
 - d. Common law right to family privacy. This is another side of the privacy coin but different from constitutional privacy.
 - e. *McGuire v. McGuire* (Neb)
 1. Facts: W complains that H isn't providing for her. He had plenty of money; he was just cheap. She wants the court to compel her husband to support her during the marriage.
 2. Analysis: The court won't compel the H to support W while the couple is still married. This is the common law doctrine of non-intervention and also implicates the common law doctrine of family privacy.
 3. She could get a legal separation or divorce and file suit for spousal support. Usually the court has the power to order spousal support if there is legal separation. However, court are now much less willing to give spousal support now because of a presumption of self sufficiency.
- iii. **Names in the Family**
- a. Two ways to change name: judicially and through common usage (consistent non-fraudulent use).
 - b. **Wife's name**
 1. Woman may keep birth name as long as she proves consistent, nonfraudulent use of the name.
 2. Many states allow wife to resume her maiden name or another name after divorce.
 3. Many statutes allow H to resume name if it was changed/hyphenated.
 4. *Neal v. Neal* (Mo):
 - A) Trial court erred in refusing to restore W's maiden name at divorce, citing difficulty for child to have a different name.
 - B) Trial court erred in allowing H's petition to change name of son in absence of notice/
 - c. **Child's name**
 1. Child taking the father's name is the custom, and courts are resistant to allow mothers to have the same right.
 - A) This doesn't come up when there is a statute saying that the baby can have either mother's or father's name. But, there was a problem where the mother wanted a different last name, not hers or the father's.

B) Is there a constitutional right for mothers to name their children? There is a liberty interest in controlling the upbringing of your children. Is the right to name your children part of the right of care, custody, and control of your children? *Henne v. Wright* said no. If there is no history or tradition, how can you say it is fundamental?

C) *Henne v. Wright* (Neb)

I) Facts: Woman wanted to give her children last names of her choosing.

II) Analysis: No fundamental right to name child whatever you want. The statute rationally furthers state interests in efficient record keeping, and it is in the best interest of the children.

2. Sometimes parents who are married or not married argue about what to name the child.

Courts follow one of 3 tests:

A) Best interests of the child (most, CA)

B) Custodial preference

C) Preference for the status quo.

iv. **Employment**

a. Domicile v. residency

1. *Domicile*: presence plus intent to remain. Establishes legal relationship to the state.

A) Domicile is amorphous b/c it deals with intent.

B) Domicile is relevant to determine marriage validity, the award of a divorce, custody, adoption, tax liability etc.

2. *Residency* is where you live

b. *Bradwell v. Illinois*: The court announced the separate spheres doctrine – men and women are different and these differences make women unfit to practice law. Social differences meant that women shouldn't practice law.

c. **Nepotism**: *Ross v. Stouffer Hotel Co.*

1. Facts: Hotel had a policy saying that spouses couldn't work in the same department, and if they do, one will be asked to resign or transfer. Two massage therapists married. A year later, the ownership changed, and they enforced the rule. Each refused to transfer or resign.

2. *Marital status discrimination*. This would be a violation of civil rights statutes in about half the states.

A) Does the state have such a statute?

B) How does the state apply it? Some states apply it more liberally, and others apply it more restrictively.

I) The idea of these statutes was that women were being penalized in credit, housing, etc. when they were widowed or divorced. These statutes were directed at these problems.

II) *Restrictively* say it is only the status of being married or not, not to whom they are married.

III) *Liberally*: includes to whom you are married.

3. Other arguments:

A) Violation of fundamental right to marry. Generally not successful because it would only apply to state employees (state actor). Also, they already married, so it isn't a preclusion of marriage.

B) Title VII: marital status isn't included, but you could argue disproportionate impact on women. This may be hard to prove. Statistically, how do you prove that? The employer applies it equally, so you would have to show disproportionate impact: more women end up leaving.

4. Federal Anti-nepotism statute: prohibits public officials from appointing a relative to a position over which the official exercises JX.

5. Rationale of these statutes

- A) Businesses are attempting to ensure that unqualified relatives are not hired. But these statutes also ban qualified relatives from being hired.
- B) Married people bring their personal problems to work
- C) Employment of spouses promotes dual absenteeism b/c both want same vacation
- D) Working together to advance their own interests
- E) In an emergency situation, spouses may harm others to protect each other.

6. Criticism of these statutes

- A) Best candidate should not be passed over or fired b/c of marriage to an employee
- B) Willingness to hire couples will enable firms in lesser-known locations to hire the “star” spouse who would otherwise go to a large town.
- C) Personnel benefits for employee-spouses are less costly
- D) No-spouse restrictions violate public policy by encouraging cohabitation
- E) No spouse policies discriminate against women by leading to discharge of women who usually have less seniority than the men they marry.

v. **Parenting**

a. Pregnancy Leave

1. *Cleveland Board of Ed v. LaFleur* (SCT)

- A) Facts: Two school teachers who were required to leave 4 or 5 months before birth. They wanted to finish out the school year. They challenged mandatory leave requirements.
- B) Analysis: The court said that there was a violation of due process rights: terminated without a hearing. Irrebuttable presumption that every teacher who is 4 or 5 months pregnant is unfit to teach violates due process rights because there must be an individual inquiry.
 - I) Means-end argument. School had 2 objectives. The court asked if the means was proper for these objectives. These ends are legitimate.
 - a) Continuity of instruction. Giving advance notice is sufficient. Everyone has their 4th or 5th month at a different time in the school year, so this actually goes against continuity of instruction.
 - b) Ensuring fit teachers in the classroom. Can’t assume all women 4 or 5 months pregnant are unfit.
 - II) Court distinguishes between the two policies at issues.
 - a) Having to wait until the child is 3 months old is arbitrary. The other policy, requiring a medical certificate is an individualized inquiry.
- C) This case is really about stereotypes of pregnant women. There may be situations where pregnant women are not able to work, but this isn’t true for all pregnant women.

2. *California Fed Sav & Loan v. Guerra*

- A) Facts: The bank had a policy of terminating an employee who took leave if no similar position was available. The bank challenged the California statute that required her job to be available for her. This is a question of whether the statute is preempted by Title VII.
- B) Analysis: The court goes into the legislative history of the PDA. Congress intended not to limit pregnant women’s benefits: PDA was intended to be a floor and not a ceiling. The statute is not preempted because it is not inconsistent with the purposes of Title VII.

3. Pretext

- A) Downsizing, but the real reason is that they don’t think she’s going to do her job as well. These are very difficult to challenge.
- B) New mom discrimination. Employers know that they can’t discriminate based on pregnancy, so they wait until there is some condition of being a new mom and then fire them because they don’t want to travel as much, etc.

4. PDA

- A) Defines sex discrimination as pregnancy discrimination. The SCT had said that pregnancy wasn't sex discrimination, so the legislature amended Title VII to reflect that it was.
- B) Prohibits adverse employment discrimination for pregnancy and related medical conditions.
- C) It doesn't require pregnancy leave; it only requires that it be treated the same as disabilities. The PDA treated pregnancy as a disability. We don't look at it that way now.
- D) PDA was criticized as not going far enough b/c it treated pregnancy as a disability and only gave parental leave to women. PDA also didn't give parental leave for women after the birth of the child. The woman would have had to claim that she was disabled from the birth of the child and a lot of women didn't want to do that.

b. FMLA

- 1. It gives 12 weeks of unpaid leave if a family member suffers a serious medical condition or on birth/adoption of a child. Family can mean children, parent, spouse, adopted children etc.
 - A) There is a famous case of a state trooper who wanted to take a leave because his wife was ill after giving birth. The supervisor said that a man should only take a leave if his wife was "dead or in a coma."
 - B) It is gender neutral. It allows a man or a woman to take a leave for a family or medical reason.
 - C) Covers employers with 50+, and employee must have worked for a year
 - D) Employee must give notice that he is going to take the leave.
 - E) Expects certain high income employees.
- 2. Effects
 - A) Studies show little impact in terms of cost or disruption to employers.
 - B) There are firms that allow paternity leaves, but when men take them, they are denigrated for having done so.
- 3. California became the first state to give paid leave. Other states are exploring this option. This country is so far behind others in terms of family leave.
- 4. *Caldwell v. Holland of Texas* (Ark)
 - A) What is a "serious health condition" under the FMLA?
 - B) Court said that the key is whether continuing medical treatment was received.
- 5. *Nevada Dept of Human Resources v. Hibbs*
 - A) H took leave under the FMLA to take care of his wife. The company fired him when the 12 weeks was up. Issue: whether Congress could allow states to be sued.
 - B) Allowed abrogation of state immunity.
 - I) The Court said the FMLA is different than the ADA and the ADEA. Age and disability are viewed under a rational basis standard while sex discrimination is reviewed by a heightened scrutiny standard.
 - II) It was clear that congress intended for the FMLA to abrogate state immunity b/c what would be the point or the bite of the FMLA if it didn't?
 - C) The latest case abrogating state immunity is *Tenn v. Lane*: man couldn't get into the courthouse for his hearing because it was inaccessible. He had to crawl up the steps. SCT said that states could be sued under Title II of the ADA. The holding may be limited to essential state facilities.

c. **Breastfeeding mothers:** *Dike v. School Board* (5th Cir)

1. Facts: Woman wanted to nurse her child but there was a rule against bringing your children onto school grounds.
 2. Conclusion: This case finds that breast feeding is part of her *liberty interest*.
 3. There are many states that give some kind of protections to breastfeeding moms:
 - A) Exempt them from statutes prohibiting public nudity,
 - B) Affirmative right to breastfeed wherever mothers and babies are authorized to be
 - C) Civil rights remedies like for marital status, etc.
 4. We are very far behind on this. Many countries give much greater protection. The other problem is that we don't have good childcare in this country, either, so who can bring the baby to the mom to nurse during the day?
 5. Narrowed by *Shahar v. Bowers* (SCT) – overruled Dike insofar as it implicated strict scrutiny.
- d. **The Second Shift** by Arlie Hochschild (p 327)
1. Women take more care of the children and the housekeeping responsibilities. A new study confirmed it. Women really are managing childcare and household responsibilities more. Division may be somewhat voluntary because women may not trust men to do these tasks. More fathers need to voluntarily take on these tasks.
 2. In divorced families, men are forced into these roles more.
 3. The workplace is structured around the needs of men.

C. **Tort and Criminal Law**

i. Tort Actions Action Third Parties

a. **Alienation of Affections and Criminal Conversion**

1. *Alienation of affections*: 1) valid marriage, 2) wrongful conduct by D with P's spouse, 3) loss of affection and consortium, 4) causal connection between D's conduct and the loss of affection.
 2. *Criminal conversation*: strict liability for having sexual intercourse with another's spouse: only defense is consent of the other spouse and S/L.
 - A) *Hutelmeyer v. Cox* (NC): Ex-Wife brought an action against her ex-husband's new wife. Husband started sleeping with D. Court recognizes the action.
 3. Majority have abolished these actions w/ anti-heart balm legislation or by case law. Only 6 states recognize alienation of affection.
 - A) These actions are morality laws aimed at discouraging breakups. Is it effective? People don't know about it. It takes two, and how can you just blame one?
 - B) *Alternate theories*: after these actions are abolished, can try for other remedies, like IIED. Some cases permit these claims, but most do not b/c it is just a disguised suit for alienation of affection.
 - C) *Helsel v. Noellesch* (Mo, 2003): Abolished tort of alienation of affection.
 4. Courts often impose liability for mental health professionals' sexual relationships with their patients, but only the patient may bring this suit.
- b. **Outrageous conduct**: *Osborne v. Payne*: priest slept with W after H&W came to him for counseling. Court rejects this claim b/c it is like an action for adultery.
- c. **Loss of Consortium**: the bundle of rights in the marital relationship – affection, sexual relations, companionship.
1. Originally allowed a husband to recover for loss of consortium due to D's batter, assault, or imprisonment of his wife. Later it also covered negligence. Then, extended to W.
 2. *Rodriguez v. Bethlehem Steel Corp.* (Cal)
 - A) Previously spouse couldn't recover for injury of spouse b/c the courts were worried about double recovery and said that the husband's recovery should be enough b/c only he was harmed.

B) This case recognized that the spouse suffers distinct harm. And often the harm is economical as well as emotional.

ii. Tort Actions Between Spouses

a. **Interspousal Immunity Doctrine:** Can't sue your spouse. (common law doctrine)

1. Majority have abrogated these immunities or created exceptions (mostly by case law).

A) Goes back to the idea that the husband and the wife are one legal identity.

B) Even when immunity applied, actions for violation of *duty to disclose* STDs was allowed. Restatement of Torts has said that the spouse has the duty to disclose physical conditions that make cohabitation dangerous. Is a venereal disease such a condition?

2. Rationale: 1) married couples are more likely to collude and defraud insurance companies, and 2) allowing suits destroys domestic harmony. But if one spouse is suing the other, harmony is already destroyed.

3. How far does immunity extend? To parent/child relationship?

4. *Boone v. Boone* (SC)

A) Issue: whether interspousal immunity from personal injury actions violates PP

B) Analysis: Public policy is to provide married persons with the same legal rights and remedies possessed by unmarried persons. W may maintain an action against her husband based on the car accident she was in when he was driving.

5. *G.L. v. M.L.* (NJ)

A) Facts: W alleged that the husband transmitted genital herpes to her during their marriage.

Issue: whether sexual relations between spouses are marital or nuptial privileges, thereby entitling any sexual tort committed by one spouse on the other to interspousal immunity.

B) Analysis: There is a duty of care to one's spouse and the threat of physical harm cannot be excused. The marital privilege of sexual relations does not include immunity to personal injury suits between spouses based on the transmission of a sexual disease. The abolition of interspousal immunity applies to intentional tortious conduct as well as negligence.

b. **Wiretapping**

1. Eavesdropping to determine extramarital affairs raises two issues:

A) Whether there is interspousal civil or criminal immunity. (Majority says yes)

B) Whether the evidence is admissible in divorce proceedings.

2. Wiretap Act imposes strict civil remedies (LD and PD) and criminal penalties.

A) Similar state laws. The ABA has a model statute requiring that D know the action was illegal.

3. Why impose liability for interspousal invasions of privacy? A spouse can listen in on an extension line, so why not with a wiretap?

A) Bad idea to exempt these relationships. Look at other exemptions, like marital rape exceptions. But are these exceptions different?

B) Don't want to encourage protection of criminal activity. What kind of criminal activity? Adultery? Equates adultery with other criminal activity. The wiretapping is almost always about adultery. This is an offense against one spouse by the other, not collaborative criminal acts.

4. Wiretapping children's conversations.

A) Parental interceptions are justified because parents can violate their children's privacy to assure discipline and safety.

B) *Vicarious consent.* Mother could listen to father's and new wife's conversations with daughter because she was afraid they were abusing the daughter.

5. *Glazner v. Glazner* (11th Cir)

A) Facts: H tapped W's phone in the course of their divorce and recorded her conversations with 3rd parties. Issue: Is interspousal immunity an exception to Wiretap Act?

B) Analysis: It is clear from the language of the statute that it applies to "any citizen." The court may look at the legislative history even if the language is clear if the clear reading

would produce an absurd result. This is not an absurd result. The majority of the circuits have found no exception. Overrules 5th Cir case finding interspousal immunity.

iii. Domestic Violence

a. Intro

1. Characteristics: how dependent the women are financially and emotionally. Mainly women are battered, but men are battered, and there is same-sex battering.
 - A) Victims are ambivalent of bringing charges.
 - B) Batterer seems controlled in public.
 - C) Sometimes it isn't easy to figure out who is the aggressor (mutual restraining orders). There is a certain type of couple – conflict laden – where there is violence on both sides.
 - D) DV affects all socio-economic groups, including upper class women.
2. DV is intergenerational. Children learn that you hit those you love and then do it themselves.
 - A) Teenage dating violence. There is now interest on a federal level to teach teens about the symptoms/signals of DV.
3. Batterer profile. We have profiles of victims.
 - A) Lenore Walker was asked to testify to say that OJ didn't fit the batterer image. Judge refused to allow. Can't say that all batterers fit the pattern.
 - B) Batterers often don't have high sociability skills, etc.
4. Cycles of DV (Walker): Tension building, acute battering incident, contrition phase where batterer promises to stop. Then the cycle begins again.
 - A) The blow up is usually disproportionate to the provocation (because dinner is late)
 - B) Learned helplessness and passivity. The violence is not provoked by her.

b. **Battered Woman Syndrome:**

1. Why do we need to present BWS to the jury?
 - A) Explains why it would have been reasonable for her to act out even if he hadn't touched her that time; why she had a reasonable belief she was in danger and had to use deadly force.
 - B) A lot of times, the woman kills him even though the threat is not imminent. Also, the force is not proportionate to the threat.
2. *Hawthorne v. State* (Fla): She perceived him coming toward her before he touched her. She fired shots from five guns at him. She was much smaller and had been victimized before.
3. Criticisms of BWS
 - A) Promotes stereotypes of women as helpless
 - B) Inaccurately portrays women as mentally ill and hysterical
 - C) Fails to explain that victims respond in different ways
 - D) Disadvantages minorities
 - E) Provides special treatment to defendants in violation of equal treatment and antidiscrimination ideals
 - F) Use as a defense is subject to sexist applications by judges and juries

c. **Remedies**

1. Protective restraining orders. These are most common because not expensive like civil suits, and its hard to convince DA to prosecute with criminal charges.
2. Civil and criminal liability for assault and battery, IIED
3. Divorce: in some cases, you can sue for divorce on the grounds of cruelty in JX where they allow fault divorces.

d. **Duties of Law Enforcement**

1. Why would police treat these calls differently?
 - A) Often the women drop the charges and so the police don't want to go out when the women are just going to drop the charges. Evidentiary privileges prevent

prosecutor from compelling V to testify against spouse, although majority have DV exceptions to the privilege.

B) DV calls are the most violent for police. People have weapons, things have escalated, both of the spouses are angry and the intervener gets the brunt of both people's anger.

C) Man's home is his castle, women are just trying to scare their husband. Hard to tell what really happened, should be private.

2. *Fajardo v. County of LA* (9th Cir)

A) Facts: She called 911 and said that her ex-husband is on his way and that she thought he is going to kill her. They told her to call when he got there. He came 15 min later and killed her and 4 others. Family brought charges b/c of the treatment of DV threats as less important.

B) Analysis: This court says that lower court must determine if there is such a policy and if so, whether it has a rational basis.

C) This case is about trying to force law enforcement to treat DV more seriously. Now, there are police manuals that talk about the problem and how to respond. These lawsuits have had positive responses.

3. *Deshaney* (SCT case):

A) Child abuse case where a young boy was abused by his father. The social worker never took the boy out of the home. Eventually, he was beaten so badly that he became brain-dead. Mother sued the social worker authority. SCT said only if you take someone into a custodial relationship do you have to protect them. Because he was never removed from the home, the state had no obligation.

4. Limiting the ability to sue public agencies who protect the public had a devastating impact on DV cases against law enforcement.

A) The *due process* argument is very difficult to meet.

B) *Equal protection* is hard, too. Trying to prove there is a policy is hard if nothing is written down. Non-arrest policies violate EP:

I) Deny battered spouses the protection given to victims of strangers

II) Reflect a policy of sex discrimination b/c women are usually DV victims

C) *Balistreri*: had said that police had notice and obligation because there was a restraining order. But after *Deshaney*, said she could only argue on equal protection grounds.

5. *Mandatory arrest*: requires arrest once there is evidence of abuse. This is very controversial

A) Empowers the victim, equalizes women's position, reduces police injury.

B) Unclear whether it is an effective deterrent; may escalate the violence; difficult in a mutual combat situation; victim may be less likely to call if the batterer is going to go to jail.

e. **Marital Rape exemption**: exempts husband from rape if against his wife.

1. Woman gives consent by marriage, husband and wife have one legal identity.

2. Most of these exemptions have been taken away, but some states still have some form of special treatment: criminalizes a narrower range of conduct, less serious sanctions, special procedural hurdles.

3. *People v. Liberta* (NY) was one of the first cases that pointed out that it was unconstitutional to allow such an exemption. Most laws were changed legislatively, not by court cases.

f. **Property crimes between spouses**

1. Spousal abuse is a range of activities from hitting to homicide, stalking, property crimes, even killing the children to get at the spouse.

2. What about joint property? Can the batterer be prosecuted?

- A) Most courts have not addressed the issue, but courts have charged the batterer for damaging community property.
- B) A CA court found a wife guilty of vandalism for throwing a bottle through the windshield of her husband's car.

iv. Spousal Evidentiary Privileges

a. Types of spousal evidentiary privileges:

1. **Confidential communications**: privilege to exclude testimony about private communications between spouses in private, pillow talk.
 - A) Either spouse can invoke and exercise this absolute privilege.
2. **Adverse spousal testimony privilege**: privilege to exclude testimony regarding information given in the presence of third parties.
 - A) Only the witness spouse can decide whether to exercise the immunity and can't be forced to testify. (*Trammel*)
 - B) *Trammel v. US* (SCT):
 - I) Facts: H was using W as a drug courier. The wife was given a grant of immunity if she would testify against H. H argues the evidence should be excluded b/c they are married.
 - II) Analysis: The rule should be modified so that only the witness spouse can decide whether to exercise the immunity. This holding pertains only to the 3rd party communications privilege. This case left untouched the confidential communications privilege.
 - III) Now, there are different rules in state and federal courts regarding the two different privileges.

b. Rationale: protect marital relationship and marital harmony.

c. Most JX have a DV exception to the spousal evidentiary privilege.

d. Should the evidentiary privilege apply to parents and children?

e. Criticisms

1. The wife in *Trammel* wants to testify b/c she will get immunity. This case has been criticized because it looks like she wants to testify, but the government is, in a way, forcing her to testify in a way that will break up the marriage.
2. They were both engaged in criminal activities. Why are we going to protect this relationship? Their criminal activity isn't relevant to whether their intimate relationship should have worth. This marriage is still intact. This isn't a marital rape or wiretapping case.

f. *Crawford v. Washington* (SCT):

1. Facts: H&W planned to kill a man who threatened to rape the wife. They went to his house, the man and the husband got in a fight, and the man was killed. The husband claimed self defense and that he thought the victim had a weapon. Wife had made a statement that contradicted the presence of a weapon. Trial court admitted statement over her assertion of privilege, invoking hearsay exception b/c unable to testify due to privilege.
2. SCT reversed: Confrontation clause requires witness unavailability for out-of-court testimonial statements. In this case, both statements are fuzzy, so cross-x could have clarified.
3. One of the problems with this case is its implications, particularly for child abuse cases. *Snoden*: said that *Crawford* applied and threw out evidence of statements made by children to the social worker about the abuse.

IV. Alternative Families

A. Themes: Changing definition of family, the extent to which the legal treatment of alternative families does and should differ.

B. Communal Living Arrangements

i. *Village of Belle Terre v. Boraas* (SCT): Communal living is not a family for zoning.

- a. Facts: community of single family dwellings with a zoning ordinance that restricted residency to single family related by blood, marriage, adoption. The ordinance allows two unrelated people to

live together. The plaintiffs didn't fit that definition: there were six students living together. The students challenge the ordinance on the grounds of freedom of association, travel, privacy.

- b. Analysis: The court held that the statute passed *rational basis review*. There were no fundamental rights involved. The court says there were several rational objectives:
 1. *Overcrowding*. Why is this different when there may be many people in the same family living together? A number of college students would have more cars, friends. But so could 4 adult children.
- c. Dissent: Fundamental rights are involved (right to establish a home), requiring heightened scrutiny.
- ii. *US Dept of Agriculture v. Moreno* (SCT): Communal living *is* a family for food stamps.
 - a. Facts: These families were unrelated adults on public assistance. Married couple who takes in a young woman with emotional problems, unrelated adults living together.
 - b. Analysis: P argue that the food stamp law is unconstitutional in its restriction to related individuals under due process and equal protection. *Rational basis review* applies. Court finds no rational basis.
 - c. Why is this case come different from *Belle Terre*?
 1. The people here were poor and needed to band together. Similarly, there is animus against a group. What the court is saying is that the families in *Moreno* are more like families. Both cases uphold "family values."

C. Extended Family

- i. *Moore v. City of East Cleveland* (SCT): Related, extended families are families for zoning.
 - a. Facts: housing ordinance limited occupancy to a single family. A single family is narrowly defined. Grandmother, son, grandson, and a grandson from another son did not qualify. Argued that the ordinance violated due process.
 - b. Analysis: Court applied *rational basis review*. Court says that this doesn't achieve these goals, intrudes on privacy, slices deeply into family privacy. *Belle Terre* doesn't govern b/c this case deals with **the private realm of family life, which the state cannot enter** (*Belle Terre* governed only unrelated individuals).
 - c. Importance:
 1. Protection of family life and non-intervention
 2. Protection for the family is not just for the nuclear family be also for families that don't fit that mold, although this is a narrow conception of family still. This is a blood related family.
 - d. Notes:
 1. *Moreno* and *Moore* are similar: must have a familial characteristic. Court doesn't see such a familial characteristic in *Belle Terre*.
 2. Suggests that the white concept of extended families is a myth. In Europe, the nuclear family did predate industrialization. Most people didn't live long enough to be grandparents. It is more dominant in African American families. East Cleveland, an African-American community, wanted to define it and protect their own families.

D. Cohabitation: Unmarried Couples

- i. Traditional Response: Criminal sanctions
 - a. Unmarried couple living together could be prosecuted for co-habitation or fornication. Until recently, same-sex couples subject to prosecution for sodomy.
 1. These statutes were selectively prosecuted. *Bowers v. Hardwick*: anti-gay bias. Even in *Lawrence*: it was TX, it was an interracial relationship.
 2. There tended to be a reason why they were charged: landlord complaint who was trying to get rid of them. Sometimes it is a divorce and the ex is angry.
 3. These statutes are still on the books, even after *Lawrence*. The CA statute against abortion after *Roe v. Wade* remained on the books for 20 years.
 - b. MPC deleted cohabitation and recommends decriminalizing sodomy.

- c. Can argue that Griswold established a right to intimate association that protects familial-like relationships.
- d. *Dole v. Duling* (4th)
 - 1. Facts: A man and a woman challenged the statutes prohibiting cohabitation and fornication.
 - 2. Analysis: There hasn't been a prosecution for these crimes for over 100 years. Any threat of prosecution is theoretical and therefore the court cannot decide the issue.
- ii. Unmarried Couples' Rights Inter Se
 - a. Majority. Contract-based approach: *Marvin v. Marvin* (Cal, 1974): K between unmarried parties as long as sexual services are not expressly part of K.
 - 1. Facts: They had an oral agreement that she would give up her career and care for him, and he would support her for the rest of her life. If they had been married, should have had community property rights.
 - 2. Analysis: Rejects status view and adopts K view.
 - A) D argues that the K violates PP because of immorality. Court: is ok as long as it doesn't rest upon sexual services. Can't have meretricious contracts. Also, unclean hands: he is involved in this immoral relationship, too.
 - B) It would impair the rights of his former lawful wife. Court: wouldn't impair because her rights were already settled in a completed divorce proceeding.
 - C) K for marriage settlements must be in writing. Court: this wasn't a marriage settlement.
 - D) Breach of promise to marry actions have been abolished. Court: there is no claim for breach of promise.
 - 3. Holding not that generous. Everything about implied contracts was dicta. The court didn't acknowledge that the expectations of the parties might change over time or that the parties may not have the same expectations. Also, generalizations about their conduct doesn't necessarily show their intent.
 - 4. Express vs. implied contracts.
 - A) Implied-in-fact: infers contractual intent from the parties' conduct.
 - B) Implied-in-law: prevent unjust enrichment regardless of intent.
 - C) She pleaded a breach of express contract, and she amends to include an implied contract. On remand, said no implied contract, but they gave her alimony because of the footnote in *Marvin* that said there may be other equitable remedies. Then, reversed on appeal, saying that the court can't create new substantive rights. There is no basis in equity to give her an award. There is no equitable remedy here because there is no legally cognizable injury like breach of contract or unjust enrichment.
 - 5. Courts vary on whether homemaker services are sufficient consideration.
 - b. Use **community property** because divorce is no fault. (*Carey*)
 - 1. *Marvin* disapproved of this method b/c community property is just for marriage.
 - c. **Status-based** approach
 - 1. Treat certain couples as married if they met certain characteristics: lived together for a certain time, had children together, etc.
 - 2. Against: status based approach channels people into stereotypes about marriage. No way to opt-out and no notice. Brings us back to common law marriage.
 - 3. For: Couples don't think about what will happen when they break up. Assumptions based on their conduct may not be accurate. At least the status-based approach would bring more people within its purview.
 - d. Some JX refuse to recognize property rights between unmarried couples on PP grounds.
 - e. *M v. H* (Canada)
 - 1. Facts: same sex couple who had lived together, owned property together, and owned a business together. M. wanted support based on the Family Law Act.
 - 2. This is a *status based approach*. M. argues an EP violation (or the equivalent): you give married couples and unmarried heterosexual couples one way and us another.

3. Analysis: The statute clearly draws a distinction that prevents persons in a same-sex relationship from gaining access to court-enforced and -protected support systems.
 4. Is it a denial of equal protection for states to grant rights to same-sex couples but not opposite sex couples? Courts could say that heterosexual couples could marry. Other courts may say it is a violation.
 - A) VT civil unions are only for same-sex couples, but they also created reciprocal beneficiaries for opposite-sex pairs, not necessarily for couples. Mostly created for seniors to appoint someone to make medical decisions.
 5. ALI Principles of the Law of Family Dissolution: apply same rules to financial claims of domestic partners (same or opposite sex) as married couples on dissolution. DP: maintain a common household. Presumption if common household w/ children for requisite period, other status-based criteria.
- iii. Unmarried Couples, Third Parties, and the State
- a. **Bystander liability** and Tort recovery
 1. Minority. *Dunphy v. Gregor* (NJ): Unmarried partner may sue under bystander liability, considering the relationship of the parties and public policy
 - A) Facts: different sex couple engaged to marry who lived together. The woman was present when Gregor hit her fiancé with his car, fiancé died in the hospital. She sued for NIED (bystander liability).
 - B) Analysis: She may recover based on bystander liability. Unmarried couples may sue, considering the relationship of the parties and public policy.
 - C) Factors considered: duration, mutual dependence, common contributions, extent and quality of the shared experience, same-household, day-to-day relationship, how they related to each other. Each relationship must be judged on a case-by-case basis.
 - I) But, this seems to leave too much discretion – maybe the couple doesn't meet the traditional model of marriage.
 - II) What does mutual dependence mean? How do you determine emotional reliance?
 2. Majority. *Eldon v. Sheldon* (Cal) – no bystander liability for cohabitating couple
 - A) Refused to extend tort to cohabiting couple because it was too hard to enforce, extended liability too far.
 - B) But bizarrely, California recognizes the right of unmarried couples to contract. Why this contradictory position?
 - I) May not want to open the door to this tort recovery.
 - II) In K law, you only have two parties, but in tort liability, could be unlimited.
 - III) In *Dunphy*, they were engaged, which was fairly significant.
 3. *Loss of consortium*. Most courts deny recovery to parties who marry subsequent to injury, on ground that P knowingly married into the loss of consortium.
 4. Would *Lawrence* make a difference?
 - A) On the facts of this case, maybe *Lawrence* wouldn't make a difference. *Lawrence* suggests that there is a right to enter non-marital intimate relationships. It would seem that the state would have to recognize this. But, judge could argue, where do we draw the line.
 - b. **Employment**
 1. *Shahar v. Bowers* (11th Cir)
 - A) Georgia Attorney General (AG) withdrew job offer to a woman who had participated in a commitment ceremony with another woman. She sued on the grounds that it violated EP, substantive due process...
 - B) **Pickering balancing test** rather than strict scrutiny used because this is a govt employer. Court held that the state's interest outweighed her interest.

- I) Court looks at AG's judgment about how to run the office, public perception, loss of moral. Gives considerable deference to the AG. Court says it is enough that AG thinks it would negatively impact the office.
 - II) Court distinguishes *Romer* by saying that it wasn't an employment case and this is about *conduct*, not condition. This is just about her marriage.
 - C) Would this case be different after *Lawrence*? Court probably would apply a higher level of scrutiny. There is a better argument that the court should apply strict scrutiny, although the court in *Lawrence* wasn't clear about what level of scrutiny applies.
2. *MacGregor v. Unemployment Insurance Appeals Bd* (Cal)
- A) Facts: She lives with father of her unborn child, she moved to NY with him because he needed to care for his father. She wasn't able to find a job. The lower court said no unemployment insurance b/c no good cause for moving. Issue: Does a state have to extend unemployment insurance to cohabitants?
 - B) Analysis: There was good cause for her move because of the familial relationship. This case involved a parent-child relationship, so the court had no trouble saying that this was a family. Would the result be the same if they didn't have kids?
 - C) Note: New CA law allows domestic partners to move, but not unmarried opposite sex partners.
- c. **Health: *In re Guardianship of Kowalski*** (Minn)
- 1. Facts: Sharon was incapacitated in a car accident. Her lesbian partner and her father both wanted to be guardians. They exchanged rings, beneficiaries of insurance, had a house together. Guardianship was awarded to father. Karen told them about their relationship, and they denied visitation rights. Sharon's father wanted to withdraw as a guardian, but trial court awarded guardianship to a family friend rather than to Karen.
 - 2. Analysis: The standard for guardianship is the best interests of the ward. Karen has good interaction with her, equipped to care for her, great understanding of her physical and emotional needs. Family friend is a neutral party; family had threatened not to visit Sharon if she was with Karen. Karen is the only one willing and able to care for Sharon outside of the institution. Court says that Karen is the best guardian.
 - 3. Epilogue: Karen has a new partner, and they both care for Sharon in their home.
 - 4. The rights of same-sex partners are normally not protected in terms of medical decision making, can't get info, make decisions, or visit unless you are a family member.
 - A) A number of states have statutory provisions that allow an individual to execute durable power of attorney. Most people, especially young people, don't execute these documents.
 - 5. Why get married or partnered?
 - A) Presumption of parentage
 - B) Cheaper in terms of estate planning.
 - C) Tax benefits, but this depends on your income. But no taxes for domestic partners. Also, for federal law, must file separately because of DOMA.
 - D) Property rights. Easier division on dissolution or death.
- d. **Domestic Violence & Same-sex partners: *State v. Yaden*** (Ohio)
- 1. Facts: same-sex couple had lived together for 4 years. They had just broken up, but Yaden had kept personal belongings there and stayed there sometimes.
 - 2. Analysis: Cohabitation has two fact-specific prongs – financial support and consortium. Whether cohabitation exists depends on the facts of each case – case-by-case basis. Opposite-sex couples who cohabit are protected by domestic violence laws, and no reason to exclude same-sex couples.
 - 3. Legal treatment:

- A) Courts are less willing to see that there is a problem with same-sex domestic violence, although this case sees it as a problem.
 - B) Often courts give mutual restraining orders.
 - C) Some states have statutes that say you can't deny housing to victims of DV.
- e. **Familial Benefits:** Housing, Inheritance, Adoption
- 1. Rent Control. *Braschi v. Stahl Associates* (NY)
 - A) Facts: Rent control statute prevents certain people from being evicted when the tenant of record dies. Requires that the person be either a surviving spouse or member of the family who has been living there. Braschi was same-sex partner. The city argues that "family" should be limited to blood relatives.
 - B) Analysis: Braschi argues that he fits a functional definition of a family member. Court agreed, saying that the intended protection should not rest on fictitious legal distinction but on the reality of family life. This couple had power of attorney, joint credit cards, mutual beneficiaries of life insurance, known to friends and family as a couple.
 - C) How will we know what relationships qualify? Exclusivity, longevity, mutual reliance, daily family services, totality of the relationship, dedication, caring, self-sacrifice, emotional and financial commitment, the manner in which they have conducted their lives and held themselves out.
 - I) Problem with this is it might be too high a standard of proof – you might have an affair and leave but still be committed.
 - II) How are we going to determine emotional commitment? Look to whether there was a ceremony? Monogamous? Did they exchange rings?
 - III) *Braschi* was one of the first cases to adopt the functional definition of a family to include gay and lesbian families.
 - 2. Marital status discrimination. *North Dakota Fair Housing Council v. Peterson* (ND)
 - A) Facts: unmarried couple wanted to live together but landlord wouldn't let them b/c they weren't married. The couple filed a complaint of marital status discrimination.
 - B) Rule: There is a civil rights statute in ND that protects people from marital status discrimination in housing. But there is also a criminal statute that bans unmarried cohabitation that was not overturned by the legislature.
 - C) Analysis: The court tries to reconcile the two statutes, saying that not allowing unmarried people to rent isn't status but conduct. Court says it is ok to deny them the rental. Narrow interpretation of marital status: are you single, married, divorced, widowed.
 - D) Most states do not protect marital status, some explicitly exclude unmarried couples, and those that protect marital status, courts are split on whether it includes unmarried couples (Cal says yes, ND says no).
 - E) What if the landlords had said that it was against their religion?
 - I) There is a split of authority. Some courts do not allow that defense, including California, which interprets marital status very broadly to include unmarried couples.
 - 3. Inheritance. *Vasquez v. Hawthorne* (Wash)
 - A) Facts: Two men live together for 20 years. Vasquez makes a claim against Schwertzler's estate, claiming that he qualifies under the law regarding meretricious relationship. The law is very generous to unmarried opposite-sex couples, allowing inheritance for unmarried couples who live together. Vasquez argues that he should be treated the same as same-sex couples.
 - B) Analysis: To qualify as meretricious, must be stable, marital-like, and cohabit with knowledge that they are not married. Because same-sex couples can't marry, they don't qualify. Meretricious relationships only exist between parties that may legally marry.
 - C) What evidence would be helpful for Vasquez? Holding out. They probably didn't share any title, but that would help. Family photos. Exclusivity of the relationship. Where they slept.

- I) Holding out is tricky. It is important what different people think. The problem with this is that in some places, they may not want to hold themselves out for obvious reasons.
- D) Schwartzler's family claimed Vasquez was just a housekeeper.
 - I) Vasquez was disabled and cared for the home. His name wasn't on anything.
 - II) Inheritance and hospital visitation are key issues for same-sex couples and unmarried opposite-sex couples. Inheritance laws are even slower to change than hospital visitation.
- 4. Wills: *In re Will of Kaufman* (p 495):
 - A) Millionaire who lived with his partner. His partner handled all the business affairs. Robert had a series of wills, and in the last will, he gave most of it to Walter.
 - B) His brother challenged the will for undue influence and won. There was a letter with the will. The firm advised Kaufman to write an explanation of why he was leaving his money to Walter. It talked about how he was a mess before meeting Walter. The letter worked against him because it showed he was ill and susceptible.
 - C) Trusts can also be set aside on the grounds of undue influence.
- 5. Adult Adoption. *In re Adoption of Swanson* (Del)
 - A) Facts: Gay men together for 17 years tried to have one adopt the other.
 - B) Conclusion: Family court erred in denying the petition b/c all that is needed is consent and b/c adoptions made for economic purposes are acceptable.
 - C) Some states allow adult adoption.
 - I) But states may also inquire into what the purpose is. Estate planning purposes may be ok in some states.
 - II) NY says you can't adopt a same-sex partner because adoption has to have a parent-child relationship. But incest comes out of eugenics and there is not a danger of this. Also, adult adoption is not necessarily about parent-child relationship but instead the agreement between two adults to change their relationship.
 - III) Also, some states require best interests, even for adult adoption.
 - IV) May still be useful in JX that don't have domestic partnerships, but it is limited.

E. Parents' and Children's Rights in the Nonmarital Family

i. Abolition of illegitimacy

- a. It used to be that the child had rights *vis a vis* the mother but not the father. Illegitimate child was considered a son of no one: *filius nullius*.
- b. In *Gomez v. Perez* (1973), SCT said couldn't punish child for conduct of parents.
- c. Then, mother had **rights to support**, but had to establish paternity (filiation order).
 - 1. UPA used "presumed father" instead of illegitimate.
 - 2. *Clark v. Jeter* (SCT) S/L on paternity actions violate EP.
 - A) Facts: Father tried to dismiss the complaint b/c it was barred by the 6 year S/L. S/L for proving paternity b/c of fears about staleness of evidence. Mother argues EP.
 - B) Analysis: The court applies *intermediate scrutiny* (substantially related to an important govt. objective) b/c this is a case dealing with illegitimacy. S/L violates *equal protection* b/c the state's interest in ensuring that genuine claims for child support are satisfied and b/c scientific advances in blood testing have alleviated problems of proof.
 - 3. *Child Support Enforcement Act* required states to allow paternity actions to be brought until child is 18. *Family Support Act* made it retroactive to actions that had previously been dismissed.
- d. **Intestacy rights**. Cases in the 1960s and 70s, SCT invalidated discrimination on the basis of illegitimacy. But, SCT drew the line at intestacy rights at the end of the 70s.
 - 1. First case: can't deny recovery to child for wrongful death of mother, then can't deny right of mother to recover for wrongful death of child.

2. *Trimble v. Gordon*: Requiring marriage for inheritance violates EP.
 - A) Facts: Mother, father, child lived together. Father's sister wanted his car when he died. The mother asked for inheritance rights on behalf of the child.
 - B) Analysis: The law required that the parents had to marry and the father had to acknowledge the child in order for the child to inherit, and that the child could inherit from the mother. The mother had gotten a paternity order. The SCT said this was too high a standard and violated equal protection.
 3. *Lalli v. Lalli*: Requiring filiation order for intestacy doesn't violate EP.
 - A) There was no paternity order, but the father gave him permission to marry in a letter saying that he was the father. The law required a judicial order of filiation. SCT said requiring a paternity action was not an insurmountable barrier. SCT was worried about cases where they couldn't be sure about paternity.
 - B) Everyone was surprised by this case because the court seemed to be moving toward abolishing all distinction between non-marital and marital children.
 - C) But, the movement had already started and the UPA was adopted by every JX.
 4. *Uniform Probate Code*: permits a nonmarital child to inherit intestate from either natural parent if: judicial paternity establishment before death by C&C or UPA, openly treated child as his/hers, AND natural parent has not refused to support.
- e. Immigration: SCT rejected claim that there are different requirements for nonmarital children.

ii. Support and Paternity

a. **Establishing Paternity**

1. At common law, presumption of legitimacy for children of married women. Husband presumed to be the father (irrebuttable in many states).
2. *Jurisdiction*: must have JX over unwed father for paternity action. Theories:
 - A) Failure to support is a tortious act allowing extension of long-arm statute.
 - B) Breach of contractual obligation is "doing business."
3. *Plaintiffs*: Traditionally only brought by mother.
 - A) Increasingly, states allow action by child or child's representative.
 - B) Also, welfare agencies.
4. *Indigent defendants*: DP requires state to pay for blood tests to disprove paternity if he can't afford it (SCT). Father's and child's interest in accurate paternity establishment not outweighed by state's monetary interest in finding fathers.
5. *Standard of proof*: DP requires only preponderance of the evidence (SCT).
6. *Voluntary establishment of paternity*: Some states allow affidavit at hospital to create a rebuttable presumption of paternity.

b. *L. Pamela P. v. Frank S.* (NY)

1. Facts: Father doesn't want to pay child support. He argues that he was deceived by the woman b/c she said that she was using birth control.
2. Analysis: He could have used contraception. The child's rights are paramount and the child has a right to support. Also the court doesn't want to adjudicate the argument between the couple – would be intruding too much on the couple's privacy.
3. Notes:
 - A) Court even holds *underage young men* who were statutorily raped liable for support. Criminal or tortious acts by mother won't take away father's liability for support. But if the mother has to pay the tort damages, that diminishes her ability to support the child.
 - B) Parents can't contract away rights to child support.

c. **Uniform Parentage Act**: there was concern with welfare reform and a desire not to have the public paying for child support. The original UPA was very widely adopted.

1. UPA threw out the term illegitimacy and used the term "presumed father": married to the mother, attempted to marry the mother, married the mother after the child's birth,

established by conduct because he took the child into his home and held the child out as his.

A) UPA didn't really think that much about conflicting presumptions. It said to use logic and public policy, but they really didn't realize how many times this would arise. The law is resistant to saying that a child could have more than one mother and one father.

2. The UPA was revised in 2000. They took out the presumptions and said just blood tests. The people who worked in the field were very upset.

A) When mother favors adoption, father must register before birth or 30 days, unless he begins a paternity action before the court moves to terminate his rights.

3. The 2002 amendments have the holding out provision, but it has to be within the first two years of the child's birth.

A) The presumption is conclusive or rebuttable at the option of the states.

B) California is considering adopting it currently.

iii. Unwed fathers' rights

a. *Stanley v. Illinois* (SCT, 1972): Conclusive presumption of unwed father's unfitness on death of mother violates substantive DP.

1. Facts: Unmarried couple lived together for a long time. The statute said that when an unmarried mother dies, the children become wards of the state. Father challenged the provision as a violation of DP. He hadn't been shown to be unfit. Also argued violation of EP: treats unmarried mothers and unmarried fathers differently.

2. Analysis: Court decides it on DP grounds. Conclusive presumption of unfitness violates substantive due process. Presumption of unfitness is cheaper and easier, but this is insufficient when the interest at stake is the dismemberment of a father's family.

3. Note: At this time, the SCT was striking down many laws that treated illegitimate children differently.

b. **Biology plus test**: Unwed father is entitled to constitutional protection of parental rights as long as he is willing to accept the responsibilities of parenthood:

1. *Quillion v. Walcott*: Upheld adoption statute requiring only consent of mother for adoption unless father had legitimated the child by marriage and acknowledgement or by court order. Distinguished need of hearing in *Stanley* b/c of father's failure to ever have or seek custody.

2. *Caban v. Mohammed*: Statute allowing stepparent adoption w/o father's consent violated EP when father had lived with children.

3. *Lehr v. Roberston*: Upheld statute dispensing with notice for fathers of some nonmarital children. Statute required notice to putative fathers who had registered. DP doesn't require notice if bio father hadn't assumed any responsibility.

c. **Conflicting presumptions**: *Michael H. v. Gerald D.* (SCT, 1989)

1. Facts: Carole was married to an executive. She has an affair with the neighbor. She lives with the lover for a while with the child, and then goes back to the husband. The lover then wants to maintain a relationship with the daughter. Carole and Gerald (husband) don't want Michael to visit. They had earlier had blood tests and determined that Michael was the father.

2. Analysis: There is a presumption that the daughter is a child of the marriage. A child who is born during the course of a valid marriage is presumed to be a child of that husband. The presumption could be rebutted only by the husband or the wife under limited circumstances.

A) Father argues that the presumption violates his due process rights because he can't have his day in court. The court rejects this argument; there has not been a violation of substantive due process. The Court looks at how it would impact Husband.

B) SCT is concerned with marital harmony. To allow Michael to have his day in court would interfere with family's harmony; H was willing to take daughter in as his own.

V. Divorce

A. History

i. Divorce was very difficult to obtain. At the time Henry VIII, the only way to get out was if one spouse died.

- a. In the mid 1800s, in England, could get divorce on grounds of adultery.
- b. Divorce more common in US than in England earlier. Believed that this is the case because of the shortage of women.
 - 1. In NY, which was one of the slowest states, also only adultery.
 - 2. Some states: only legislative divorce.
- ii. There were waves of divorce, although it was not that common ever. It was still extremely difficult.
 - a. End of 1800s, at the time of Married Women's Property Acts, cry for divorce. Married women had no rights. Part of the movement for custody and divorce was that the law didn't give any redress for domestic violence.
 - b. Another cry for easier divorce in the 1950s.
 - c. California made no-fault divorce first.
 - 1. The movement was not aimed at making divorce easier to obtain but to create a system of courts that included marital counseling.
 - 2. Then, the legislature said this was too expensive and threw that part out. The reformers had hoped it would get people back together, but it actually made divorce easier.
 - 3. California influenced the rest of the country.
 - iii. Now, we call it dissolution rather than divorce because of stigma.
- B. Fault-based Grounds for Divorce**
 - i. Many states still have grounds for divorce.
 - a. Many states just added no-fault onto their fault divorce system.
 - b. Only about 15-16 states are pure no-fault states (including California).
 - c. If both fault and no-fault based grounds exist, judge may use discretion to select the most appropriate grounds.
 - d. Some states allow no fault if both agree but fault-based if they don't.
 - ii. Effects of a finding of fault
 - a. There are property issues: if he is at fault, he has to pay support.
 - b. No right to custody.
 - iii. **Adultery**: one of the most important grounds.
 - a. To show adultery: 1) opportunity and 2) disposition by C&C evidence
 - 1. At common law, crime of adultery could only be committed with a married woman. Then, double standard: wife had to show course of conduct, H only had to show a single act.
 - 2. Used to require intercourse, but needn't anymore.
 - 3. Corroboration widely required, but courts permitted circumstantial evidence.
 - 4. Also, may bring criminal charges.
 - b. *Lickle v. Lickle* (Md)
 - 1. **Facts**: She asked for divorce on the grounds of adultery. Mr. Lickle had a close friend who was a married woman. Wife accused him of having an affair. He appeals the finding of the divorce court, saying there isn't enough evidence.
 - 2. Court allows because there is enough evidence. Why does he fight this so hard? Doesn't he just want out of the marriage? He might not want the stigma.
 - c. Issues:
 - 1. Is adultery during a separation grounds for a divorce? Courts usually say this is sufficient.
 - 2. Online affairs: probably not because no sexual acts.
 - iv. **Cruelty**
 - a. Must establish:
 - 1. *Some danger to life or limb*. Many JX recognize mental and physical cruelty.
 - 2. *A single act is not enough*. Many states say there must be a course of conduct that is so severe as to create an adverse effect on mental or physical health.

3. Traditionally, physical abuse was required.
 - b. Cruelty goes by many names: indignities, cruel and inhuman treatment.
 1. May require a higher degree of cruelty if the marriage is long term. Why? If she's been in the relationship for a long time and accepted it, maybe it isn't so bad. Also, the idea is that the court is thinking about older women being on their own being able to support themselves. It is a patronizing idea.
 - c. *Muhammad v. Muhammad* (Miss)
 1. Facts: She went with her husband to a religious community. Women there had no rights, they only got one meal a day.
 2. Conclusion: Court found cruelty. Dissent said it was just the community, not the husband, so why grant the divorce? In a way, he was imposing it because he made her live in the community if she wanted to be with him.
 - v. **Desertion and constructive desertion**
 - a. *Desertion*: intent to desert without justification and proof that the co-habitation was actually broken.
 1. Separation and intent need not be contemporaneous.
 2. Some statutes require that desertion be voluntary.
 - b. *Constructive desertion*: conduct that justifies the other's departure. Intent not required.
 - c. Desertion may be a fault based ground or a defense.
 - d. *Reid v. Reid* (Va)
 1. Facts: She left the relationship. She was unhappy with their life, he was a workaholic. She said there was constructive desertion, he countered with desertion.
 2. Analysis: She went on a trip, came back and moved into an apartment. Then she filed for a divorce, which signaled to the court that she intended to desert. The court says that he is good provider, so they aren't going to fault him for not being there for her emotionally.
 - A) But, she argues that she left to show him that there was a problem in their relationship. This shows that she didn't intend to abandon. Couples who divorce are often on different pages. What she is trying to say is that she is unhappy and he isn't responsive.
 - vi. Other grounds: willful non-support of W by H; criminal conviction or imprisonment; drunkenness and drug addiction; impotence; insanity.
- C. **Fault-based Defenses**: recrimination, condonation, collusion, connivance, insanity
- i. **Recrimination** bars divorce when both are at fault.
 - a. Rationale:
 1. Should only get divorce if not at fault
 2. Protects wife's property rights
 3. Prevents people who are poor marriage risks from getting married again
 4. Deters immorality.
 5. But, Prevents dissolution of marriages that are most appropriate for dissolution.
 - b. *Parker v. Parker* (Miss)
 1. Facts: She owned a beauty shop, he scared away her customers by shooting at them, accused her of adultery. She could ask for divorce on the grounds of cruelty. She petitions for divorce. He defends with recrimination.
 2. Court suggested that recrimination is no longer a good defense b/c it perpetuates existing bad marriages.
 - c. If defense is abolished, should it still be retained to determine alimony?
 - ii. **Condonation**
 - a. A spouse who has once condoned a marital transgression is barred from using that transgression as a grounds for divorce.
 1. Grounds that may be condoned: adultery, cruelty, habitual drunkenness, desertion.
 2. Some courts limit condonation defense to adultery grounds.
 - b. Does condonation imply both forgiveness and the resumption of sexual intercourse?

1. In another case, the husband refused to withdraw the custody action, even during the attempt at reconciliation, showing he didn't forgive. He had sex with her. The court said that the act of having sex is enough even though he didn't say he forgave her.

c. *Haymes v. Haymes* (NY)

1. Facts: H moved out and had other affairs. She filed for divorce on the grounds of adultery. They tried to reconcile but it was unsuccessful. He said she condoned the adultery by having sex with him during the reconciliation.
 2. Analysis: Court refuses to adopt the view of some courts that one act of sexual relations will condone adultery.
- iii. **Collusion**: agreement to 1) commit a marital offense to get a divorce, 2) introduce false evidence of transgression that didn't happen, 3) suppress a valid defense.
- a. This is fraud on the courts.
 - b. If the court can prove collusion, it is a defense if one of the parties wants to set aside the divorce. This may happen if one of the parties didn't get the support or custody that she thought she would get.
 - c. What does this defense accomplish? All it does is prevent them from remarrying or makes them go to a more liberal JX to divorce.
- iv. **Connivance**: participation in or consent to the defendant spouse's wrongful conduct.
- a. Classic case from the 40s where the couple had a chauffeur. The husband suspected that the wife was having an affair with the chauffeur, and the husband made it easy for her to have the affair. The wife asserted the husband's connivance as a defense. Her defense prevailed.
- v. **Insanity**: Ground and defense (mental illness relieves D of liability for acts of marital misconduct)

D. **No-Fault Divorce**

i. Divorce Reform

- a. Ground of incompatibility was a precursor to modern dissolution.
- b. **California** was the first state in the end of the 1960s.
 1. Divorce granted if:
 - A) Irreconcilable differences (substantial reasons for no continuing marriage which make it appear that the marriage should be dissolved) that have caused the irremediable breakdown of the marriage OR
 - B) Incurable insanity.
 - 1) When the law was passed, they weren't sure how broadly courts would interpret irreconcilable differences and wanted to keep one ground.
 2. California's statute didn't address what would happen if only one party believed there were irreconcilable differences
 3. Some commentators thought that serious marital discord still sounded like fault, but it has turned out to be not like fault.
- c. **Uniform Marriage and Divorce Act** 1970, just after California.
 1. If the marriage is irretrievably broken (sounds like irreconcilable differences)
 2. More clear than CA. Two way to show:
 - A) Have lived apart for 6 mos +
 - B) Serious marital discord affecting the attitude of one of the parties.
- d. NY: added no-fault to the traditional fault-based grounds. This integration is common, but states do it all differently.
 1. NY doesn't allow unilateral divorce, where only one party wants it, unless the petitioner can show the other party is at fault. Makes divorce a little more difficult to obtain.
 2. NY allows living separate and apart, but they have to have a legal separation (court order) or a written agreement.

- e. Early on, unsuccessfully challenged on grounds of vagueness, impairment of contract, EP, freedom of religion.
- ii. Legal Problems Raised by No-Fault Divorce
 - a. Defining No-Fault
 - 1. **Appearance:** *In re Marriage of McKim* (Cal, 1972)
 - A) Facts: husband enters a default (meaning he won't contest it). Wife didn't appear at the proceeding because she didn't know she had to. The court said that it couldn't proceed without her.
 - B) Analysis: It doesn't say in the Family Law Act whether she had to be present, but it does say there has to be proof. The court says it can't be too easy to get a divorce. Exceptional circumstances would allow a party not to be present.
 - C) Current CA law:
 - I) No appearance necessary for an uncontested or default judgment of dissolution. Family Code § 2334.
 - II) § 2336: If proof is by affidavit, appearance is required only when reconciliation is reasonably possible, custody order in best interests of the child, proposed child support is less than what the noncustodial parent is capable of paying, or if would be in the best interests of justice.
 - D) California *summary dissolution*: Simple procedure that permits dissolution in a short period of time on mutual consent if the parties:
 - I) Have no children
 - II) Were married less than 5 years
 - III) Do not own real property
 - IV) Have debts totaling less than \$4000
 - V) Have no more than 25K in community property
 - VI) Waive spousal support
 - 2. **Unilateral divorce.** *Nieters v. Nieters* (Mo, 1991):
 - A) Held that divorce petitioner didn't meet the statutory requirement for unilateral divorce. This case reflects discomfort with unilateral divorce.
 - B) Many courts resist no-fault dissolution over the objection of one party.
 - 3. **Living separate and apart.** *Bennington v. Bennington* (Ohio)
 - A) Facts: W wants alimony only, not divorce. H wants divorce. She was paralyzed in an accident and keeps the house too hot. He lives in a van on the property. He continued helping her and was in the house a lot. Issue: whether he was living separate and apart when he was in the van. Rule: living separate and apart for 2 years is grounds.
 - B) Analysis: court says he was still performing marital duties, and it looked like they were still together when he lived in the van.
 - C) Courts & statutes take different views
 - I) Some say different bedrooms enough. But have to delve into the relationship a lot, not protecting privacy.
 - II) Some courts are stricter and require a mutual agreement to live at separate addresses. This can be a financial burden some couples can't shoulder.
 - III) Some statutes only care about the length of time (6 mos – 3 yrs)
 - IV) Some states require a longer period if there is no mutual consent to the divorce.
 - b. The Role of Fault
 - 1. **Fault-based defenses:**
 - A) Some states abolished them.
 - B) A few states still have them for legal separation or the role they play in spousal support or property division.
 - 2. **Joinder of tort actions:** *Twyman v. Twyman* (Tx) Joinder is permissible.

- A) Facts: Couple divorces after 16 years. She claims that H engaged in sado-masochistic bondage. She tried to join a tort action of infliction of emotional distress.
 - B) Conclusion: The court allowed the joinder but said that the court should be careful not to award double recovery.
 - C) Courts address joinder in three different ways:
 - I) Must be done separately
 - II) Must join them together.
 - III) Majority: Joinder is permissible but not mandated.
 - IV) May permit for personal injury torts but not economic torts.
 - D) Rationale: judicial economy, a lot of the same facts.
 - E) Against joinder: brings in fault to divorce through the back door.
- iii. Return to fault movement
- a. Maybe no-fault isn't good for children. People are worried about the effects of divorce on children, and it would be better if divorce was harder.
 - b. *Covenant marriage*:
 - 1. It is harder to get into and harder to get out of.
 - 2. Couple has to enter pre-marital counseling before marrying. couple agrees to special terms that make it harder to get divorced. May only get divorced after a statutory separation or proof of fault.
 - 3. Adopted in Louisiana, Arkansas, Arizona
 - 4. Fault grounds for covenant marriage: abandonment, physical or sexual abuse of children or spouse, commission of a felony, adultery.
 - 5. Not many people are doing covenant marriages. County clerks are encouraging people not to do it.
 - c. Criticism of no-fault
 - 1. Not sensitive to gender differences and issues. Was not done with a consciousness about women's concerns.
 - 2. Much harder to get spousal support
 - 3. Focused on a single standard when there are all kinds circumstances

E. Access to Divorce

i. **Economic Obstacles.**

- a. *Boddie v. Connecticut* (SCT): DP requires fee waivers for indigents seeking divorce.
 - 1. Facts: Filing fees and process fees keeping women on welfare from being able to afford divorce. Argued that it was a denial of procedural due process: keep them from having their day in court.
 - 2. Analysis: Court agrees that this is a denial of due process. The state's interest is not compelling enough. The state alone controls marriage and divorce, and petitioners have no alternative to dissolving their marriages. We have to have some way to allow indigents to avoid these fees.
 - A) If the state allowed common law marriage, there may be an alternative to getting in and out of marriages. Case said still had to offer divorce to indigents.
 - 3. *Boddie* raises the question of whether there is a constitutional right to divorce.
 - A) This gets back to substantive vs. procedural due process issue. This looks like a procedural due process case, but the Court seems to be saying there may be a constitutional right to divorce (substantive DP).
 - 4. Does *Boddie* guarantee other rights to indigents? Right to counsel in divorce actions? Other kinds of actions?

b. **Pro se divorce**

- 1. No fault divorce resulted in a diminished role for lawyers and the growth of pro se divorce.
- 2. Is this good or bad for clients? May need a lawyer when there is a lot of marital property, child custody issues.

- A) Pro se litigants are less satisfied with the terms of their divorces as their cases become more complex
- B) They are less likely to receive tax advice or information about ADR
- C) Many encounter difficulties that are never resolved.
- ii. **Marital status and employment:** *Littlejohn v. Rose* (6th Cir)
 - a. Facts: She wasn't rehired when she was getting divorced. She challenged it as a denial of her right to privacy.
 - b. Analysis: this is a violation of her right to privacy and liberty, relying on *Roe v. Wade*. Constitutional right to privacy that includes procreation and marriage. Buttresses the idea of a constitutional right to divorce.
- iii. **Jewish divorce:** *Aflalo v. Aflalo* (NJ)
 - a. This comes up in NY mostly. The husband has to give the wife a "get" so that she may remarry. The procedure takes place in the religious courts (Beth Din).
 - b. Facts: The husband refuses to give her a get. He says he believes they could reconcile. The real question is whether the court requiring the husband to give the wife a get violates the Free Exercise Clause. This is an entanglement issue, too.
 - c. Conclusion: court won't require it b/c of First Am.
 - d. NY has a get statute: requires the moving party to take all steps to release the other party before he can get a civil divorce. But this won't help Mrs. Aflalo because her husband wasn't the moving party. The legislature extended the statute in 1992: the court may consider any barrier to remarriage when awarding property and support.
 - 1. Is this constitutional? Still using a religious basis.
 - e. Some courts avoid the constitutional issue and look at the get contractually. Couple has to make an agreement. The husband promises to give her a get if they divorce. The court enforces it as a contract issue.

F. Role of Counsel

- i. Emotional Aspects of Divorce
 - a. Husband usually pays W's atty fees.
 - b. *Moses v. Moses* (Pa)
 - 1. Facts: Mr. Fox billed the H for W's attorney's fees, but he spent most of that time talking to her about her personal problems. He billed for a lot more than she got from it. All she got was a support award; the divorce wasn't even final. He eventually withdrew from the case. Husband challenged the fees as unreasonable.
 - 2. Analysis: The court reduced his fee. If you look at what a reasonable fee is under ABA regs, his fee isn't reasonable: time and labor, skill required, likelihood that it will preclude other employment.
 - c. Attorneys are often put in positions as counselors.
 - 1. What happens when the client takes up too much of your time. You could give your time without charge. Refer her to a therapist or another attorney. How do you say this? Many of my clients find seeing a therapist helpful b/c divorce is difficult. Limit conversations to the law.
 - d. Clients who have strong complaints about their lawyers:
 - 1. Difficult to know how clients really feel.
 - 2. Most women felt that their attorney's didn't care about their future well being or really explain things to them. But, if they do spend time on things other than the law, they are racking up the bills.
 - 3. There are a small number of cases where clients are so angry that they commit acts of violence.
 - 4. Clients get very emotional about family law issues.
- ii. Conflicts of Interest
 - a. Conflict of interest based on prior representation

1. Ethical standards say you can't use information from previous representation to a (former) client's detriment.
 2. But, can represent if other party consents after full disclosure.
- b. *Florida Bar v. Dunagan* (Fla)
1. Facts: atty represented the couple in their business. He then represented the H in the divorce and claimed that the husband was the sole owner of the restaurant. Used info from previous representation to W's disadvantage: he wrote a letter saying that she was being fired and should be arrested for trespass.
 2. Analysis: Dunagan argues that the issues were unrelated, but the court says they are. He also argues that he had her consent. No consent b/c she didn't even know about it until after she had retained her own attorney.
- c. **Joint representation**
1. Sometimes, a couple wants an attorney to deal with their divorce jointly.
 2. Very common for an attorney to represent both parties in property division negotiation.
 3. Joint representation
 - A) ABA: ok if the attorney reasonably believes that he can represent both of their interests and they give written consent after full disclosure of the risk. Have to tell them you will have to withdraw if any conflict arises.
 - B) Most JX don't like it.
 - C) California doesn't prohibit it outright, although it does have rules about (code page 100) conflicts in representation. Requires written disclosure and written consent.
 - D) Some states don't allow it at all.
- d. *Contingent fees* are generally forbidden in divorce matters. Based on PP concerns.
- e. Conflict of interest cases:
1. NY: can the firm represent a woman b/c someone in the firm had met with the husband years ago on an unrelated matter? Court said it was a conflict of interest.
 2. Was it a conflict of interest for a firm to represent successive wives against the same husband? Could have acquired confidential information from a previous spouse.
- iii. Sexual Ethics
- a. Sexual relationships with clients
1. Some JX ban outright because they assume it always affects representation. (minority). But, some of these allow it if they were already in a sexual relationship before the representation
 2. Some JX ban only if client shows that the relations impaired representation
 3. Some have no rules other than existing law:
 - A) Other remedies: contract or tort remedies. Malpractice, but would still have to show harm to the case.
 - B) Are existing remedies really adequate?
 4. NY limits the rule only to divorce attorneys, but isn't there emotional aspects to other cases.
 5. California was the first state to have rules against sexual relationships with clients: forbidding demanding sex as a condition of representation and if it causes harm to representation. Excepts previous sexual relationships.
- b. What rule is best?
1. If it was consensual? Isn't this paternalistic?
 2. It is an issue of professionalism.
- c. *In re Tsoutsouris* (Ind)
1. Facts: lawyer had a sexual relationship with a client. They break up, later she files charges.

2. Analysis: He argues that the relationship didn't impair the representation. The court said that it was improper even if it didn't. The court accepts the premise that there isn't really a defense because it always affects representation.

G. **Divorce JX**

i. Over P & D

a. SMJ: domiciliary and residency requirements

1. **Domicile**: have to have an intent to remain.

A) Get a job, place to live, driver's license, register to vote, etc.

2. **Residency** is where you live. However, in the divorce context, some JX regard them as the same thing. A *durational residence requirement* means you must stay in the state for a certain length of time before you can get a divorce.

3. Some states only require residence, some require durational residence and domicile.

4. *Sosna v. Iowa* (SCT)

A) Facts: Couple was married in Michigan. They lived in NY for four years. Couple separated and the W moved to Iowa. After being in Iowa for a month she filed for divorce. There was a statute in Iowa that said that a person had to be a resident in Iowa for a year to be able to file for divorce in Iowa.

B) Analysis: Court says that the durational residency requirement doesn't violate DP b/c it only delays access to the courts - it doesn't completely prohibit it.

b. **Unilateral (ex parte) divorce**. If no PJ over absent spouse but petitioning spouse meets domicile and residency requirements, court has in rem JX over marriage and can dissolve it as long as one spouse satisfies domiciliary requirements.

1. **Divisible divorce**: can't decide property/support rights of absent spouse.

2. This is different from the usual minimum contacts requirement for PJ.

c. **Full Faith and Credit**: States must recognize sister state's unilateral divorces, but forum state can reexamine the bona fides of the JX over the petitioning spouse, and if didn't actually establish domicile, no full faith and credit required.

1. *Williams v. North Carolina* (SCT, 1942&1945):

A) Facts: two cases that involved a NC shopkeeper and his clerk who went to Nevada, divorced their respective spouses, went back to NC, and married. They were charged with bigamy.

B) Williams I: States are required to give full faith and credit to another state's divorce decree.

C) Williams II: The determination of domicile by one state is not conclusive and may be collaterally attacked in another state. If NC finds that NV didn't have JX, NC doesn't have to give full faith and credit to the divorce decree.

d. **Bilateral divorce**: if court has JX over both parties, it can decide property issues.

1. Unilateral divorce can be collaterally attacked, bilateral divorce cannot.

e. **Notice**: Must give stay-at-home spouse notice.

1. Must give notice to the defendant that the divorce is pending. If the petitioner doesn't notify the defendant, the divorce decree isn't valid and can be challenged for lack of JX.

2. Must be Mullane notice: reasonably calculated to inform the party.

f. **Transitory presence**: presence is always enough to satisfy due process even if brief (*Burnham*)

g. During the fault based era, courts could refuse to recognize foreign divorces on *estoppel* grounds, or b/c of comity (discretionary, only if doesn't violate PP).

h. *In re Marriage of Kimura* (Iowa)

1. Facts: couple was married in Japan. H came to US on his own on a H-1 visa. He filed for divorce in Japan and couldn't go. Then he filed in Iowa, where he lived. W challenges the

state court's assertion of SMJ and PJ. She argues that Iowa has violated her due process rights by asserting JX. She has no minimum contacts with Iowa.

2. Conclusion: The court says that the JX was proper, and minimum contacts aren't required.

ii. Domestic Relations Exception to Diversity:

a. Federal courts can refuse JX in family law cases where a party is seeking divorce, alimony or custody.

b. Rationale:

1. There is a strong state interest in these cases.

2. It would clog up the courts with too many cases, and federal courts should be reserved for more important matters.

3. Family law varies from state to state.

4. Domestic relations was traditionally a matter of state law.

c. *Ankenbrandt v. Richards* (SCT, 1992): Limited Domestic Relations exception.

1. Facts: ex-wife brought an action in federal court regarding abuse of their child on the basis of diversity JX. She would have trouble establishing PJ in state courts.

2. Analysis: This isn't a matter involving divorce, alimony or custody; this isn't a case that fed courts bounce back to state court. It is a tort claim. The court narrows the domestic relations exception, permitting fed courts to adjudicate a broader variety of disputes as long as the party isn't seeking party is seeking divorce, alimony or custody.

VI. Financial Consequences of Dissolution

A. Intro

i. Issues: 1) Standards for the initial award of property. 2) modification and termination. 3) enforcement, 4) JX, 5) settlement agreements where the parties decide

ii. What were traditional bases for awarding property and support before no-fault? For property the tradition rationales were need, fault, and status.

a. *Fault* meant that innocent spouse would get property distribution.

b. *Need* – based on gender stereotypes. Women have more need than men b/c traditionally they were not working etc.

c. *Status* means that women who married rich men got more so she could be kept in the lifestyle to which she had become accustomed.

d. For support, also factored in *ability to pay*.

B. Property Distribution: Title Theory → Contribution

i. There are several methods of dividing property:

a. **Traditional title theory**: whoever has title of the property gets it. This was the common law approach, and no states follow it anymore.

b. **Community property theory**: treats the marriage as a partnership, and each party has an undivided equal interest in all property obtained during marriage. Exceptions for separate property.

1. May be split equally (California) or equitably

2. Separate property is property acquired by gift or inheritance or that you owned prior to marriage.

A) Most community property state treat income and appreciation of separate property as separate.

3. California also has quasi-community property – when couple has property in common law states, it will still be treated like community property.

c. Majority. Equitable distribution. Requires courts to take into account a number of statutory factors in determining what is the most equitable allocation of property between spouses. Many states adopt UMDA.

1. Equitable distribution states often treat the increase in value of separate property due to labor the spouse contributes during the marriage as marital. ALI would consider increase that is attributable to spouse's labor as marital.

2. Marital conduct may be considered.

3. *Ferguson v. Ferguson* (Miss)

A) Facts: wife mainly stayed at home and took care of kids. He made most of the money, had a retirement plan in his name, purchased most of the property in his name. Issue: is the court still going to abide by the title theory.

B) Analysis: The court rejects title theory and adopts equitable distribution. The court switches to equitable distribution because the title theory is unfair to the homemaker/non-working spouse because it ignores any non-economic contribution.

ii. **Uniform Marriage and Divorce Act**: Equitable distribution.

a. Alternatives:

1. The court, without regard to marital misconduct, shall equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired and whether the title in the name of the H or W or both.

2. Division of marital property only (most states)

3. Court distributes marital property first, then nonmarital property only if equity requires.

b. In apportioning, the court considers:

1. Duration of the marriage

2. Contribution of each spouse, including homemaker contributions.

3. Value of property

4. Economic circumstances

A) Amount and sources of income,

B) Employability and opportunity of each to acquire future income/capital,

C) Liability and needs,

D) Whether one is the custodian of the children,

E) Whether it is in lieu of or in addition to spousal support

5. Antenuptial agreement

c. Can consider the *dissipation of assets*.

1. H has a girlfriend, and some of the marital property went to gifts to the girlfriend. This is dissipation of the assets, and H is liable. If the W acts while the marriage is still ongoing, she can restore all of the dissipated assets to the community, but if she waits until after dissolution or death, she can only get half.

d. Courts generally allocate debts as well as assets.

iii. **ALI Principles of the Law of Family Dissolution**

a. A portion of the separate property held at the time of marriage will be *recharacterized as marital property* at the end of long term marriage (defined by the state).

1. Why? Fairness. Ups the ante of the property involved. This conforms to people's behavior: when you have been married for a long time, the concept of what is mine is mine doesn't hold true.

C. **Spousal Support**: Need, Self-Sufficiency, others

i. Modern theory is self-sufficiency.

a. This theory represents that times have changed and women shouldn't be dependent on their husbands. Women have opportunities in the work place so they don't need support for life.

b. Result of this movement is that very few spouses these days get spousal support or alimony, often called rehabilitative alimony. Very uncommon to find permanent alimony given.

ii. *Orr v. Orr* (SCT): cannot have gender-based support requirements.

a. Facts: The statute in question here requires husbands, but not wives, to pay alimony.

b. Analysis: Can no longer have gender-based awards of support b/c violates DP. Objective was to provide support to needy spouses and remedy past discrimination, which is

important, but the statute isn't narrowly tailored. Court holds individualized hearings anyway, so at that time court can look at need for spousal support on a gender-neutral basis.

iii. **UMDA**

- a. Spouse who seeks support has to lack property to support his or her need and has to show that she can't find a job. Or has to be person who has custody of the kids.
 1. Self-sufficiency is the objective.
- b. It hurts women and children b/c though we would like to think that women are equal to men in earning power, they are not.

iv. **ALI**: rationale of lost compensation

- a. Spouse makes compensatory spousal payments to the other spouse to compensate for losses that second spouse experienced during marriage
- b. Any loss attributable to child care responsibilities, any loss of standard of living are compensatory losses.
- c. Doesn't like alimony, but will compensate for losses if you were out of the job market, stayed home to care for the children.

v. Types of Spousal Support:

- a. *Temporary*: support during pendency of divorce proceedings
- b. *Permanent alimony*: awarded to spouses in long term marriages for the rest of their lives, very rarely awarded today.
- c. *Rehabilitative alimony*: support for limited period to acquire training and employment and become self supporting (UMDA)
- d. *Reimbursement alimony*: type of spousal support awarded where one spouse helped other through professional program during marriage. Compensates supporting spouse for education and training of other. (ALI)

vi. *Michael v. Michael* (Mo):

- a. Facts: H is the stay at home spouse. He cooks dinner and drops W off at work but doesn't do other domestic activities. She makes more money and their lifestyle improves. The trial court gives 75% of the property to the W and gave H no maintenance.
- b. Analysis: the trial court erred in not giving him rehabilitative maintenance. Court remanded for determination of what an equal distribution of property would be (doesn't have to be 50/50), b/c this allocation wasn't fair.
- c. Dissent says that since they didn't have children, he doesn't deserve more money.
- d. Notes:
 1. The usual gender roles are switched. The court characterizes what he did in a light that makes him seem lazy.
 2. Missouri follows UMDA to some extent, in that marital property is divided in a just manner, but it considers the marital conduct. This may have made a difference.

vii. *Rosenberg v. Rosenberg* (p 683)

- a. Facts: Children are all grown, and the court orders sale of the house. If the children were young, the court may not have made this order. The court ordered alimony until W remarried.
- b. Analysis: W argued that the property wasn't divided equally. Trial court didn't evaluate the increase of the husband's stock, which appreciated considerably during their marriage. Appeals court says it is separate property because the stocks were given to him prior to marriage. Interest on separate property is still separate. The stock went up on its own and not because of what he did.

D. Special Problems in Achieving Fair Dissolution

i. **Changing Circumstances**:

- a. Generally a material or substantial change in circumstances is required. Circumstances must have changed since decree was entered.
 1. Could be change in obligor's circumstances, obligee's circumstances, bankruptcy.
 2. Conventionally, there must be some amount of alimony, even \$1, to provide a basis for JX for modification. Some modern courts don't require the formality.

3. Short-term maintenance: recipient who hasn't achieved self-sufficiency during that period has the burden of seeking modification to extend the support.

b. Remarriage:

1. Traditional rule: terminates on remarriage.
 2. The marital settlement agreement often has a provision for remarriage. If its not in marital settlement agreement, often state law will determine that spousal support ceases on remarriage.
 3. Should cohabitation be treated like a marriage and create automatic termination of spousal support?
 - A) Parties cohabitating don't get same benefits as marriage partners, however if courts don't look at cohabitation, parties have an incentive to cohabit and not marry in order to continue to receive spousal support.
 - B) If cohabitation is included, then the question is what is cohabitation.
 4. *Keller v. O'Brien* (Mass)
 - A) Facts: W remarries someone who makes significantly less money than her ex husband.
 - B) Analysis: MA laws provide for modification of alimony awards, but doesn't precisely address whether remarriage would affect alimony. Why? A legislature seems to be saying that they want to decide on a case by case basis. The court adopts a rule that remarriage doesn't terminate the support automatically. But it makes a prima facie case that the support should end.
- c. Spousal support is traditionally modifiable upon proof of a material or substantial change in circumstances, while property awards are not modifiable.
1. With property we are looking backwards. Spousal support involves future payments; future conditions may change and that would effect spousal support.
 2. Also spousal support is subject to termination upon remarriage of recipient spouse or death of either spouse. Property settlements don't terminate.

ii. **Bankruptcy**

- a. In bankruptcy actions, awards that serve a support function are not dischargeable, while awards that don't serve a support function, however, are dischargeable.
 1. Bankruptcy Reform Act makes property obligations non dischargeable only if creditor spouse complies with strict procedural requirements. Even so, debtor spouse can discharge them if he/she can show it's needed for his/her own support, support of dependants or his/her business.
 2. Intent-function analysis: Court looks at the intent of the agreement and the effect and function of the obligation, not the title given by the court.
 3. Difference isn't always clear. Awarding the wife the house could be considered shelter. Increasingly courts are using property in a support function.
- b. Bankruptcy is a complicated area b/c it is decided on the basis of federal laws. But in family law area federal law may conflict with state law.
- c. *Deichert v. Deichert* (Pa)
 1. Facts: Divorce decree is finalized and then the husband declares bankruptcy. He lists on the bankruptcy form assets that have been awarded to his wife. H argues that all of the obligations under the divorce decree should be dischargeable.
 2. Analysis: The court uses the intent function test – look at both the intent of the parties and/or the divorce court and the effect/function of the obligation.
- d. Judicial liens
 1. *Ferry v. Sanderfoot*: wife didn't think husband would pay so imposed a lien on the house. Husband attempted to avoid the lien by filing bankruptcy and listed real estate as exempt homestead property. Court said no you can't use this bankruptcy provision to avoid the lien. Court decides you can only use provision on newly acquired property interests, so since he had property before the divorce he can't use rule. They use technical finding to make a policy based decision.

2. BRA changes Ferry so that debtor can avoid the lien only if it isn't alimony, maintenance or support.

iii. **Pensions and Employee Benefits**

- a. *Vested* pensions are not forfeited if employment terminates. *Non-vested* pensions do terminate.
 1. Majority: treats both vested and non-vested pensions as marital property subject to equitable distribution. Minority: only vested pensions are marital property.
 2. *Cohen v. Cohen* (Tenn): W has a right to unvested and vested pension rights. Rights shouldn't depend on how many years H has worked.
- b. *ERISA* – protects employee retirement benefits through comprehensive federal regulation of private pension plans. It expressly preempts state law
 1. Under the original ERISA spouses had limited rights to share in the employee's pension on dissolution. This was the anti-alienation rule.
 2. Retirement Equity Act remedied this by permitting a court to divide pension benefits in the same manner as other marital assets. EA provides for the enforcement of qualified domestic relations orders (QDROs) and removes such orders from ERISA's preemption scheme.
- c. *Pension valuation*
 1. Calculate employee spouse's marital contributions to the plan, plus interest, and award other spouse appropriate share of that amount.
 2. Calculate the present value of the prospective benefits and discount this for contingencies such as mortality and vesting. Give other spouse lump sum.
 3. Reserved JX approach: Court determines the percentage the spouse gets but retains JX for division later.
- d. *COBRA*: federal law that requires certain employers to offer continued medical coverage at group rates to qualified beneficiaries who would otherwise lose coverage after a qualified event. Divorce or legal separation is a qualified event.

iv. **Degrees, Earning Capacity, Goodwill**

- a. Majority: degrees, professional licenses, and enhanced earning capacity are not property and thus not divisible.
- b. Some courts use a flexible approach, dividing everything equitably.
 1. NY treats degrees as property b/c it is equitable to do so. Under this approach the supporting spouse should get an equitable portion of the property based on the present value of the enhanced earning capacity it affords the holder.
- c. CA approach to educational degrees
 1. CA uses a reimbursement theory for direct educational costs. Doesn't treat degrees as divisible assets. Court says that degrees are difficult to value and do not possess the common characteristics of property.
 2. There is a presumption that ten years after getting the degree the couple has started to enjoy the degree.
- d. ALI rejects treating earning capacity as divisible asset.
 1. ALI provides for compensatory payments to reimburse the supporting spouse for financial contributions made to education and training when it substantially increases earning capacity. Education must have been completed in specified number of years for this to work.
- e. *In re Marriage of Roberts* (Ind)
 1. Facts: Parties were married and husband went to law school while the woman worked. Then the couple separated right after he graduated.
 2. Analysis: Court says that the value of the degree is too uncertain so it will not be considered marital property and nor will an award of future earnings occur unless the other spouse qualifies for maintenance.

f. **Goodwill:** majority – goodwill is marital property only if it exists independently of the professional’s reputation.

1. Must also consider the value of the business separately to avoid double counting.

E. **Child Support**

i. **Obligations & Support**

a. Common law: father was primarily responsible for the support of his children.

b. Modern trend, both mother and father have a duty. Usually statutes say both have an equal duty. Parents have a duty to provide for necessities (common law) – food, clothing, shelter, plus what the court decides.

c. **Family Home:** in many cases, the home is the only significant asset.

1. Famous study: Women’s standard of living after divorce goes down 42%, and men’s goes up 78%. Couldn’t be replicated. May not be this percentage, but does seem to be true as a trend.

2. Treating the family home as child support: this idea took on incredible momentum.

ALI treats use of the family home as a form of additional family support.

ii. Guideline approach to determining support

a. **Types of guidelines:**

1. *Percentage of income:* only looks at the non-custodial parent’s income and how many children there are. Doesn’t take the custodial parent’s income into consideration.

2. *Income shares (majority):* combines the parental income, then both share the obligation in proportion of their income.

3. *Melson approach* (mostly not followed) – a judge who advocated for guidelines early on.

b. **Objective** is to provide for the child’s needs.

1. But is this subsistence support or more? Are we trying to equalize standard of living between custodial and noncustodial households?

2. What is the relationship to alimony? Supposed to be separate, but custodial parent’s standard of living will affect the child.

c. **History:**

1. Historically, used *discretionary standards* based on need and ability to pay

2. Then, UMDA suggested certain factors to be considered. But, still had problems with vague standards.

3. Impetus for federal legislation was increasing welfare recipients.

A) Some of the first federal legislation in family is in the area of child support. In 1980s, Congress began encouraging states to use guidelines to fix the amount that children should receive. The approach worked so well that Congress made compliance with guidelines a condition for receiving federal funds. This led to the modern approach: formulaic or guideline approach.

B) Welfare reform in 1996. Congress said every state had to have guidelines.

C) California was experimenting with guidelines in 1984, then reformulated to comply with federal law.

d. “Guidelines” are a misnomer: the guidelines are a **presumption**, not guidelines for discretion.

1. If the judge deviates from the guidelines, she has to give reasons.

2. Deviation from the guidelines:

A) If the obligor’s income is either too high or too low to be on the chart.

B) Three pony rule: no child, no matter how wealthy the non-custodial parent is deserves more than three ponies. Parent should be able to decide the standard of living for their child. Should be reasonable basis for more \$.

e. Discretion versus Guidelines: **advantages and disadvantages.**

1. Discretion was more flexible, allowed parties to work it out between themselves. But, parties can still reach agreements that can be stipulated to.
2. Guidelines help when parties can't work it out.
3. Discretionary approach isn't predictable, and leads to inconsistency, while guidelines are predictable and consistent.
4. Under the discretionary approach, more cases fell through the cracks. Awards are more likely when a presumptive amount is more or less required.

f. *Downing v. Downing* (Ky)

1. Facts: W filed a motion to increase child support b/c ex-husband's income had increased substantially. The commissioner reviewed the case and decided, based on state guidelines, to increase the support. The guidelines were based on the income shares approach.
2. Analysis: The court held that there was no evidence that the needs of the children had changed and that a large income does not require a noncustodial parent to support a lifestyle for his children of which he does not approve.

iii. Postmajority Support

a. Are parents obligated to pay for higher education?

1. Majority rule: support ends when the age of majority is achieved.
 - A) Majority used to be 21, but it was lowered after Vietnam b/c young people could be drafted but couldn't vote. This lowering resulted in a windfall for non-custodial parents.
2. Many states have adopted statutes to deal with this
 - A) Many just say that non-custodial parent has to continue to pay for high school if age of majority is reached.
 - B) Some states address the problem particularly, some apply it across the board, some apply it in the marriage settlement agreements.
 - C) Very recent statutes say that the kids have to talk to the non-custodial parent about where they want to go (have to consult). Have to show the non-custodial parent grades, proof that they are still enrolled.

b. Non-custodial parent is more willing to pay if she/he is more involved in the child's life. There is a surprising resistance of the non-custodial parent to pay, maybe because the parent feels less invested or may have another family.

c. **Private high schools**. The only way to make the non-custodial parent pay for tuition: part of marriage settlement or argue that it is a necessary.

d. **Constitutional challenges** to requirement of divorced non-custodial parent to pay for college when parents in intact families aren't required to pay. *Curtis v. Kline* (Pa)

1. This case found it was a denial of equal protection to require the non custodial parent to pay for college education when we don't require married parents to pay for their kids education.
2. Dissent says that the kids are getting a double whammy in that they had to go through the trauma of a divorce and have likely suffered financial hardship so they should get their college paid for.

iv. Modification of Child Support

a. Remarriage and New Families

1. Some states say that the second family should come first, and some say the first family should come first. Others say that the families should be equalized – one family should not take precedent over another.
2. *Pohlmann v. Pohlmann* (Fla)
 - A) E: H petitioned to reduce his child support obligation b/c he remarried and had three more kids, challenging the child support guidelines allowing review based on subsequent children only for increasing support.
 - B) A: The court applied the rational basis standard of review. Court says that it is assuring that noncustodial parents will continue to contribute to the support of their kids from the

first marriage. H failed to meet his burden of proving a permanent, involuntary, and substantial change in circumstances.

b. Employment Changes:

1. If it results in income reduction, does it warrant decrease in support obligation?
 - A) *Strict approach*: If the employment change is voluntary, no reduction in support.
 - B) ALI says it warrants decrease if the job change was *reasonable*.
 - C) *Good faith standard*: did he make the change in good faith? This could be a good standard, but it is susceptible to abuse.
2. *Antonelli v. Antonelli* (Va)
 - A) Lawyer makes lots of money at time of divorce. Then he has a change of heart and works for human rights. Goes to court and asked for a modification.
 - B) Ct follows the strict approach and makes no modification b/c the change was voluntary.

c. Automatic adjustment

1. Frequently, support becomes inadequate over time.
2. Family Support Act required state review every 4 years.
3. PROWRA gives three options: FSA process, cost-of-living adjustment, or automated adjustment.

F. Enforcement

i. Imprisonment: Criminal nonsupport and contempt of court

a. Criminal contempt v. civil contempt

1. Civil contempt: ordered to go to jail until you do what you are ordered to do. So supposedly you hold the keys to the jailhouse door b/c you can get yourself out.
2. Criminal contempt is a fixed sentence. Criminal contempt is contempt against the court and the fine is paid to the court.
3. The civil sentence can be indefinite. If you can't pay the child support you remain in jail. But in the criminal context the sentence is fixed and you will get out.
4. Part of the difference revolves around the idea that due process protection attaches to criminal contempt. Can be difficult to determine if a court is saying that the contemnor is liable for criminal or civil contempt.
 - A) Sometimes the question is whether the sentence is punitive or remedial – that is it trying to punish or force the person to do something.

b. If you can prove that you are unable to pay that precludes imprisonment for child support debt. But the standard is very high. Court pretty much assumes that if you are able to hold a job you can pay your child support payment.

c. Not paying child support is a federal crime.

1. *Child Support Recovery Act* (CSRA): criminalizes the willful failure to pay past due support. Past due support has to be determined by a court. A felony if unpaid for over 2 years or more than \$10k.
2. This raises constitutional questions – how is this related to commerce power (case striking down gun free school zones act)? Many courts have upheld it – payment of a debt is economic activity and commerce. At least one court has found it unconstitutional.

d. *State v. Oakley* (Wisc)

1. E: Father had nine kids and owed child support for all of them. The court was going to put the guy on probation. The conditions were that he couldn't have anymore kids unless he started paying the child support. Father claims that this term of his probation violates his right to procreate.
2. A: Court upholds restrictions. If he were in jail his right to have kids would have been restricted. Also said that his right was not completely restricted b/c if he started to pay he could have more kids.
3. This case implicates abortion b/c the man might force the women to have an abortion.

ii. Private to Public Responsibility

a. **Traditional Approach** left obligee to initiate judicial proceedings for enforcement.

b. **Congressional Intervention**

1. *AFDC* – aid for dependent children. If the father was absent, the state agency could go after him. Mother had to identify the father to get the benefits. The agency could go in her house anytime looking for the father. These cases were successfully litigated b/c of denial of civil liberties.
2. Congress extended the mechanisms used for AFDC families (Title IV-D cases) to other families (non-Title IV-D cases). At first, it was voluntary, then became mandatory.
3. Some states had systems for the father to voluntarily establish paternity at birth. PROWRA provided that if acknowledgement at birth, it has legal force.
4. Today: significant change:
5. *Income withholding*.
 - A) At first, there were lots of hurdles and this put a significant burden on the custodial parent.
 - B) Then, Congress required states to provide procedures for immediate withholding whether or not the obligor is in arrears unless one party shows good cause (medical needs), or there is an agreement between both parties.
 - C) Implementing income withholding: employer must comply with court order to pay up to 50% of disposable income to state agency. Employer is liable to the custodial parent, and the employer can't discriminate in hiring on the basis of child support record.
6. *PRWORA* (Personal Responsibility and Work Opportunity Reconciliation Act) (1996): established a national system to track obligors who don't pay. All employers must report new hires to state agency, which forwards the info to the fed agency.
 - A) *Tax refund interception*.
 - B) *Automatic liens* on assets.
 - C) *License and passport suspensions* (PROWRA): restricts licenses (professional, drivers) of obligors who have overdue support. Also passports can be denied or revoked. All states have to have procedures by which they report delinquencies to the feds.
 - D) PROWRA deals with many aspects of welfare, not just child support.
7. Remarkable that the fed govt would be so involved in child support enforcement. These methods have proved very effective.

iii. JX in Multi-State cases

a. How do we **find** the obligor?

1. Fed govt started the Parental Locator Service (PLS) – federal service that tries to find non-custodial parents who haven't paid. Uses social security numbers. The PLS isn't usually available to individuals. The DA or other law enforcement has to be involved, usually.

b. **PJ** over obligor

1. Depends on the long arm statutes of the state: minimum contacts, or single act?
 - A) The *Mahoney* type is drafted particularly for family law cases. Often the language of these statutes talks about if you lived at anytime in the state with the child that may be enough.
2. *Kulko v. Superior Court* (SCT): must have minimum contacts.
 - A) Facts: Both parents were residents of NY. They got married in CA during a 3-day stopover. They live in NY. They separate, he stays in NY with the 2 children, she goes to CA. She returns to NY to sign the separation agreement. She went to Haiti to divorce, returns to CA, and remarries. Daughter decides to live with mom, dad lets her go. Then, son wants to go. Unbeknownst to the dad, mom sends son a plane ticket. Mom wants child support.

B) PH: Dad makes a special appearance in CA and argues that he lack sufficient minimum contacts with the state. Trial court says that he sent his daughter there, availed himself of the protections of CA law.

C) Analysis: The SCT disagrees and says he didn't purposefully avail himself – basic considerations of fairness. He has no contacts with CA.

3. *State ex. rel. Mahoney v. St. John* (Wyo)

A) E: Kid was born out of wedlock in Wyoming. The father admitted paternity. Later, they married and lived together in Washington for nine months. Then the guy fled back to Wyoming. W brought an action for child support in Wash.

B) A: The court found PJ based on the fact that the guy had lived in the state with the child for a period of time.

c. **Federal legislation** regarding JX

1. First, *URES*A: principal means for establishment of child support. (1960s).

A) Two state system for enforcement: go to your state DA, then they determine whether noncustodial parent has to pay, then the other state starts a collection action. Custodial parent didn't have to go to the second state. Most states adopted it.

2. Then, *RURES*A: significantly amended.

A) Problems were that states adopted the act but didn't adopt it all uniformly.

B) Lack of uniform adoption led to double enforcement orders in different JX when parties moved again.

3. *UIFSA* replaced RURES A. Approved in 1992 and amended several times.

A) Procedures for establishing, enforcing and modifying awards.

B) Every state has adopted it (adoption conditioned on federal funding).

C) Most significant aspect: *Continuing exclusive JX for modification purposes*. Only one state could have JX.

D) Exceptions to continuing exclusive JX:

a) If no one lives in the state at all, no more JX.

b) If original state declines JX.

c) If no other state would have JX.

D) One order one time rule

4. *FFCSOA*: Full Faith and Credit for Child Support Orders Act

A) Incorporates many UIFSA requirements. States have to recognize orders that comply with requirements. Provides for continuing exclusive JX so long as child or any contestant is a resident unless exceptions.

5. *LeTellier v. LeTellier* (Tenn)

A) E: Issuing state lost continuing exclusive jurisdiction b/c neither party lived in the state that gave the order. Then mom made modification order in Tenn.

B) A: JX over the father was not proper b/c the UIFSA says that if the obligee is going to bring an action is has to be brought in the obligor's state and vice versa.

G. **Separation Agreements**

i. At one time, separation agreements were a violation of public policy – encourages divorce.

ii. Today, there is increasing recognition of “**private ordering**” – allowing the couple to decide for themselves. Enhances respect for the law, predictability.

a. In most states the only way to overturn these agreements is if they are unconscionable. In theory a fairly high standard is required to overturn these agreements.

1. ALI make presumptively unenforceable agreements that would substantially change the property right or compensatory payments otherwise due or when enforcement would substantially impair the economic well-being of the custodial parent or the spouse with substantially lesser economic means.

b. *Baldrige v. Lacks* (Mo): Rich husband. Attorney advised her to accept \$1 million. Court says that the attorney has to do more work.

iii. Enforceability of separation agreements.

- a. It matters whether the separation agreement was *incorporated* or *merged* into the divorce decree.
 1. If it is made a part of the decree, it is treated as any other decree provisions regarding modifiability, enforceability, taxation, dischargeability in bankruptcy. She could go after him for contempt if it is part of the decree.
 2. If the judge doesn't make it part of the decree, it is merely a contract. Can only sue for breach of contract, but this is harder.
 3. A few court consider these agreements contracts even if they are merged.
- b. UMDA treats custody, child support, and visitation as not binding on the court.

VII. Child Custody

A. Intro:

- i. Custody issues arise in guardianship, child abuse, adoption, divorce contexts.
 - a. Child abuse: if a parent abuses his or her child, his or her parental rights may be terminated.
 - b. Dissolution rationales
 1. Private dispute resolution
 2. Child protection
 3. Sometimes these two rationales are in conflict.
- ii. Effects of divorce on children
 - a. Affects relationships in adult life, views of married life, no strong relationship role models
 - b. Effects of divorce last well into adulthood.
 - c. What really was revolutionary: *Developmental factors that influence children's responses to divorce. Matters what age the child is at the time of the divorce.
 1. Preschoolers – regression, sleep disturbances, fantasies of abandonment.
 2. 5-8 – grief, fantasies of replacement
 3. preadolescents - anxiety, loneliness, anger
 4. adolescents - acting out, depression, suicidal, anxiety about having successful relationships.

B. Standards for Selecting the Custodial Parent

i. **Presumptions**

- a. When alternatives are equally good (or equally bad), courts will erect a presumption.
- b. *Tender years presumption*: children of tender years go to mother.
 1. What age that was varied: infants, toddlers, even as old as 7.
 2. Then, in the 70s, courts started to say that this violated equal protection.
 3. *Devine v. Devine* (Ala)
 - A) F: Couple divorces and mother is awarded custody of the two sons based on the tender years presumption.
 - B) A: Tender years presumption violates equal protection. Court points out that the tender years presumption is procedural and substantive.
 - I) Substantive b/c it mandates award of custody to mom when both parents are fit.
 - II) Procedural b/c the father bears the burden of proving the mother unfit.
- c. *Primary caretaker presumption*
 1. Only two states adopted it as a presumption, and this didn't last long. Many states now have it as a factor.
 2. How do they determine the primary caretaker?
 - A) Quantity of time
 - B) Who does most of the childcare? Who feeds, bathes, puts the child to bed, who does daycare or drives to daycare, doctor's appointments, homework, goes to school functions, who is the emergency contact.
 3. Critiques

- A) Quality, not quantity of the time is what matters.
- B) Interferes with the best interest: disregards the bond.
- C) One parent may spend a lot of time with the child, they may do it because they don't have a job.
- D) Punishes the parent who works more.
- E) Situations change, especially after divorce.
- F) Because it focuses on tasks, it works better with children of certain ages.

ii. **Best interests of the child**

a. Intro

- 1. Best interests is the prevailing standard.
- 2. Criticisms:
 - A) Not predictable, indeterminate results, fosters litigation.
 - B) Too subjective – you are using judge's values, which vary.
- 3. Some state define best interests as a list of factors: wishes of parents, wishes of child, child's adjustment to home, school, community. (UMDA)
- 4. *Nexus test*: don't look at conduct that doesn't affect the relationship with the child
- 5. ALI requires parties seeking a custody determination to submit a parenting plan.
 - A) If the parents can't agree to a parenting plan the court should award custody based on the allocation of caretaking responsibility prior to the separation.

b. **Constitutional issues** in custody determination

1. Race: *Palmore v. Sidoti* (SCT)

- A) E: Linda was married to Anthony. Both were white. They divorced. L had custody and started living with an African-American man, then they married. Trial court found the mother's lifestyle unacceptable to father and society, court gave custody to father.
- B) A: SCT says that private biases can't enter into custody determinations. The court doesn't specifically say that race can't be a factor. This essentially means that race can't be a determinative factor.
- C) Notes:
 - I) This case has been misinterpreted to mean that race can't be a factor.
 - II) It is difficult for the appellate court to determine that race was an impermissibly determinative factor. If judges are more subtle about their biases, it is harder to overturn on appeal.
 - III) Even though the mother won, the father kept custody. The child had been living with the father and the court didn't want to move her again.

2. Religion: *Abbo v. Briskin* (Fla)

- A) E: parents had an agreement to raise children as Jewish. Mother was Catholic, father Jewish, she converted to Judaism. Then, she had second thoughts and converted back to Catholicism. Trial court said she had to raise kid as Jewish,
- B) C: appellate court reversed under the First Amendment.
- C) Courts give considerable deference to parental agreements
- D) ALI: Prohibits considering religion except:
 - I) If religious practices present severe and almost certain harm to child (adverse impact – similar to nexus)
 - a) One parent telling the child that the other parent will go to hell
 - b) Religious community with harmful rules
 - II) Consideration limited to the minimum degree necessary
 - III) If necessary to enable the child to practice the religion that is already a part of the child's life.

c. **Fitness**

1. Sexual Orientation:

- A) Most states adopt the nexus test and have moved away from a per se rule. ALI adopts nexus test as well.

B) *DeLong v. DeLong* (Mo)

- I) E: mother was bisexual. Trial court awarded custody to the father because Missouri had a per se rule that if one parent was homosexual, the court would give custody to the other parent. Had to tell the children, she couldn't have anyone known to be a lesbian with her during visitation.
- II) C: Adopts the nexus test: only can consider if it has an adverse impact. Can't have a per se rule.

2. Careers:

- A) Gender bias: Maternal employment sometimes plays a role in the application of the best interests standard.
 - I) Courts have denied custody to mothers who were medical students, architects, nurses etc.
- B) Generally, the relative wealth of the parties is not decisive unless one parent is unable to provide adequately for the child.
 - I) ALI prohibits the court from considering parents' relative earning capacities or financial circumstances unless the parents' combined financial resources set limits on the custodial arrangements.

3. Domestic Violence:

- A) Used to have no role in custody determinations.
- B) There is now recognition that even exposure to DV is a form of abuse.
 - I) Most JX have presumptions against awarding custody to an abusive parent. What triggers application of presumption? Some require legal action, restraining order.
 - II) DV is a factor.
 - III) Batterer who murders a spouse is by definition unfit.
- C) Mutual acts of domestic violence: difficult for courts to deal with.
 - I) Courts are moving toward looking at who is the primary aggressor.
- D) Failure to protect: Women who is abused can also lose her children if she doesn't protect them from being abused. So this is another example of the victim being victimized by the legal system.
- E) ALI says that parents and the court share the burden of discovery – parents must disclose battering in the parenting plan submitted to the court and the court must have a process to identify abuse.

4. Physical disability:

- A) UMDA mandates consideration of mental and physical health of all individuals involved.
- B) Formerly, courts assumed severely disabled parents were per se unfit. Now, focus on effects of disability on the child.

iii. **Joint Custody**

a. History

- 1. Reflects recognition on the part of women and the state that fathers should play a bigger role
- 2. There was also a backlash to the women's movement: fathers' rights movement in the 70s. Gains women were making at the expense of fathers' rights.
- 3. In the 70s, joint custody thought very odd. Courts thought it was unmanageable, impractical, harmful to children
- 4. Today: children need and should have both parents in their lives.
 - A) California led the nation in joint custody.
 - I) Wallerstein was a moving force in the adoption of JC presumption, then she changed her mind about it being a presumption.

II) Some have criticized her, though, because she runs a counseling center and sees only highly contentious cases.

III) For a while CA had a presumption and then it abolished it.

b. Joint custody

1. *Legal custody*: both parents have joint power over decision making about medical care, schooling, etc.
2. *Physical custody*: joint decision making about day to day issues.
3. Even with joint custody, may look very much like the traditional model: may be with mother most of the time.

c. When joint custody is awarded

1. Courts must decide what weight to give: presumption, preference, or just an option.
Moving toward preference.
 - A) Some create a presumption of joint custody
 - B) Others have a preference for joint custody
 - C) Most common is making joint custody one factor in the best interests determination
 - D) Some states view joint custody with disfavor
2. Some courts used to say that both parents have to agree, but some courts award it even if they don't.
3. ALI: emphasis on *private ordering* – requiring parenting plans. Parents are more likely to follow it if they agree with it. Many states now require these. One thing the plans address is how disputes will be resolved.

d. When does it work?

1. Works well when in the same city.
2. Doesn't work when parents don't get along or one wants to move.
3. Doesn't work well with infants and toddlers

C. Noncustodial Parent Visitation

- i. Courts are extremely reluctant to take away visitation entirely because the parent-child relationship is constitutionally protected.
 - a. Court can order supervised visitation if the custodial parent is concerned about something.
May be an arm of the court, child protective agency, relative.
 - b. Relative supervision: may or may not be effective, depending on who the relative is.

ii. Restrictions on Visitation

a. Overnight visitation

1. When there has been physical or sexual abuse, overnight visitation is an issue.
2. Historically, restrictions on visitation were ordered for gay and lesbian parents – parent couldn't have members of the same-sex staying in the household while the children are visiting. These have been challenged on freedom to associate grounds. These have been successful only in the most recent years.
3. Common with substance abuse or child abuse.
4. Visitation often occurs on weekends, so churchgoing is an issue.

b. Termination of parental rights due to abuse may require C&C evidence.

c. *Hanke v. Hanke*: Dad was accused of abusing a stepkid. Court said that the visitation should be restricted but not totally denied.

iii. Denial of Visitation

a. **Child support & visitation:**

1. Courts are reluctant to deny visitation unless there is a severe threat of harm. There are other ways to get father to child support
2. These issues are extremely intertwined, although the courts like to look at them separately.
3. General rule: visitation isn't normally conditioned on payment of child support

A) Some courts may deny visitation for willful and intentional failure to pay child support that is harmful to the child (equated with neglect).

B) Payment may not be withheld because the custodial spouse interferes with visitation.

b. *Turner v. Turner* (Tenn)

1. E: Father didn't pay child support. Mother asks court to deny visitation to get him to pay support. Father asks for a reduction because he can't afford it.

2. A: Visitation isn't punitive and should not be conditioned on payment of child support. Father wasn't paying because he couldn't afford it – it wasn't intentional refusal.

D. Parent/Nonparent disputes

i. Grandparents. *Troxel v. Granville* (SCT)

a. E: Unmarried couple had kids, father had grandparents care for kids a lot. Dad dies, mother wants to limit visitation with the grandparents. Statute allows any interested person to petition for visitation and the court doesn't have to consider the parent's wishes. The trial court awarded visitation to the grandparents.

b. A: SCT says the statute is unconstitutional as applied. In some situations, the statute can be constitutional.

1. The statute doesn't give any deference to the fit parent's decisions. There is a presumption that if a parent is fit, they make decisions that are in the best interests of the child.

2. Mother has a fundamental right to the care, custody, and control of the child. This statute allows others, grandparents and courts, to make decision.

3. This statute allows *any* person to petition for visitation rights. Court says this statute is "breathhtakingly broad."

c. Implications for third parties who have stronger cases for visitation/custody than grandparents not clear.

1. We presume that the natural parent gets custody of children over non-parents.

2. *Painter*: mother dies, and father asks grandparents to care for the child, a few years later, the father remarries and wants the child back. Court gives the child to the relatives because the presumption for natural parents is rebuttable. A few years later, the boy wanted to live with dad, and grandparents let him go.

ii. Same-sex parents.

a. The presumption for natural parents breaks down in these cases.

b. *Alison D. v. Virginia M.*(NY)

1. E: Lesbian couple has a child, they share in the responsibilities. Child calls them both mommy. They split up when child is 2 years old, non-bio mom pays for mortgage on the house. After bio mom sold house (when child is 6), she stopped allowing non-bio mom to have contact with the kids.

2. A: Court said that non-parent was not entitled to visitation rights. Said that she didn't meet the definition of parent under the law.

c. ALI recognizes de facto parents and parents by estoppel, who are entitled to presumptive custodial responsibility, decision making responsibility, and access to medical and educational records.

1. *Parent by estoppel*: acts as a parent in circumstances that would estop the child's legal parent from denying parental status. May be created when:

A) Obligated for child support

B) Lived with the child for at least 2 years and has a reasonable belief that he is the father. OR

C) Has had an agreement w/ legal parent since birth or for 2 years to serve as co-parent, provided that this would be in best interests of child.

2. *De facto parent*: Person who 1) has regularly performed an equal or greater share of caretaking as the parent with whom the child primarily lived, 2) lived with the child

for > 2 years, 3) acted as a parent for non-financial reasons with the agreement of the legal parent or as a result of complete failure or inability of legal parent to caretake.

E. Children, Attorneys, Experts

i. Child's preference

- a. Approaches to child's preferences:
 1. UMDA requires consideration of child's interest (as a factor in BI)
 2. Some states say that they will take preference into account if the child is mature.
 3. Some states give deference to kids of particular ages.
 4. Some states give judges complete discretion.
- b. Older children: More likely to consider their wishes and more likely to consider these preferences to be dispositive
- c. Preference can be overridden if chosen parent is unfit.
- d. Judges feel uncomfortable finding out children's preferences.
 1. Where should the preference be taken – in open court? If not in open court, could raise due process rights.
- e. Maybe it isn't beneficial to children to ask what their preference is.
 1. Maybe children shouldn't be given this responsibility.
 2. Could interfere with relationship with other parent.
- f. *McMillen v. McMillen*: The court held that the express wishes of a child are not controlling in custody decisions but such wishes do constitute an important factor that must be carefully considered in determining the child's best interests.

ii. Representation for the Child

- a. Should child have an attorney?
 1. Appointment of the child's representative in custody disputes is generally at the court's discretion.
 2. Child must be represented if there are allegations of child abuse. There is a federal law mandating this representation.
 3. Few JX require that the child's representative be an attorney, but if the GAL isn't an atty, conversations with child aren't privileged.
- b. Role of attorney
 1. The attorney as *advocate* for what the child wants.
 2. Attorney as advocate for the child's *best interests*.
 3. Attorney could also be primarily a fact-finder/investigator for the court.
 4. Facilitator/mediator
 5. Some combination
 - A) Studies show that attorneys may characterize their representation as one way, but sometimes act in ways that are inconsistent with that role.
- c. Several states have standards for GALs.
 1. American Academy of Matrimonial Lawyers: should advocate for wishes of child who is "unimpaired." Children under 12 are presumptively impaired.
- d. *Leary v. Leary* (Md): Court awarded sole legal custody to W. H appeals on the basis that the trial court failed to instruct the children's counsel to her duties. Attorney's duty is to make a determination and recommendation after pinpointing what is in the best interests of the child.

iii. Role of experts: *In re Rebecca B.*

- a. E: Custody dispute in which both parents claimed the other was not fit. Both parents hired experts. Trial judge said that father was socially isolated and disregarded the expert testimony.
- b. A: Appellate court said that there were too many experts saying that the child should go to the father. Only the mother's expert said otherwise.
- c. Notes:
 1. Father's witnesses didn't have any neutrality – they were not objective experts. One of them was the father's therapist.

2. Note: father's expert was very famous and coined "parental alienation syndrome." The expert said that this term signified a parent's conscious or subconscious attempt to alienate the kid from the other parent. Social worker parroted the other expert.

F. Modification

- i. Standard for modification is higher than for initial awards of custody in order to ensure stability for the child.

- a. Majority: P has the burden of showing by a *preponderance of the evidence* that conditions since the dissolution decree have so *materially and substantially changed* that the *children's best interests* require a change of custody.

- b. A more liberal requirement requires only that modification serve the best interests of the child.

1. Do liberal modification standards threaten the constitutionally-based privacy of the post-divorce family unit?

- c. ALI: 1) substantial change in circumstances on which the parenting plan was based makes modification necessary to child's welfare OR 2) harm to the child.

1. Must be based on circumstances that were not known or have arisen since the order and were not anticipated.

2. Loss of income, loss of employment, remarriage or cohabitation, use of day care are not enough without a showing of harm.

- ii. Relocation

- a. Does the best interest standard provide sufficient guidance for relocation?

1. The trend in relocation cases favors decreasing the restriction on relocation.

2. Problem with best interests is that it lets in everything – would have been more helpful if the court had talked about specific factors the judge should look at in deciding whether to allow a relocation.

- b. ALI permits a primary parent to relocate with the child if that parent has been exercising a significant majority of custodial responsibility and has a legitimate reason for moving to a location.

1. Relocation justifies a change in custody only when it significantly impairs either parent's ability to exercise responsibilities under a parenting plan. Then, court can change plan while maintaining the same proportion of parental responsibility.

- c. California:

1. *Burgess* The court's decision in that case gave custodial parent presumptive right to relocate if it is for good reason.

2. Cal SCT retreated from *Burgess* in *LaMusga*: replacing presumption favoring custodial parent's rights with best interest determination, and courts must consider the impact on the noncustodial parent's relationship with the child.

- d. Joint custody poses a huge problem in relocation cases and it has not been dealt with.

- e. Constitutional considerations

1. Is preventing the custodial parent from moving an infringement on parental autonomy and family privacy? The right to travel?

2. It is always the custodial parent who is restricted and never the noncustodial parent.

- f. *Tropea v. Tropea* (NY).

1. Agreement had no-relocation clause. Trial court applied restrictive three step analysis:

- A) First, would the proposed relocation deprive the noncustodial parent of regular and meaningful access to the child? If not, the inquiry ends and the relocation is allowed.

- B) If yes, then a presumption that the move is not in the child's best interest is invoked and the custodial parent seeking to relocate must demonstrate exceptional circumstances to justify the move.

- C) Then the court will go on to consider the child's best interests.

2. Analysis: The relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on

what outcome is most likely to serve the best interests of the child. Serves neither the child's nor the parents' interest to view the relocation cases through the prisms of presumptions.

3. Test overruled by *Tropea* was the most restrictive.

G. Jurisdiction and enforcement

i. Traditional rule

a. Where child is *domiciled* or state with a *substantial interest* in the child's welfare could assert JX.

ii. UCCJA: Uniform Child Custody JX Act (1968)

a. Drafted to reduce jurisdictional competition and confusion and deter parents from forum shopping to relitigate custody.

b. Four alternate bases for a state to assert jurisdiction:

1. *Home state* of the child (state in which the kid lived immediately preceding the action)

2. If it is in the *best interests* of the child because the child or parents have a significant connection with the state AND substantial evidence in that state concerning child's care, protection, personal relationships.

A) This is not the best interest test we have seen before. This test is an evidentiary test – where is the state that has the best evidence.

3. Child is *physically present* in the state and has been abandoned OR it is necessary in an *emergency* to protect the child

4. No other state would have jurisdiction or another state has declined jurisdiction.

A) May decline if the original petitioner wrongfully took the child to another state or engaged in other similar conduct.

c. Prohibits simultaneous proceedings.

1. Courts were able to get around the UCCJA: determining the other case wasn't "pending," and determining that the other state didn't exercise JX in substantial conformity with the UCCJA.

iii. Parental Kidnapping Prevention Act (PKPA) (1980)

a. Federal legislation enacted to provide rules that would apply in all states. UCCJA didn't obtain the uniformity that was hoped for.

1. PKPA was also created to ensure that custody decrees issued by states asserting JX received recognition and enforcement in other states through full faith and credit.

b. Gives priority to the *home state*.

1. This was crucial in cases of parental abduction – doesn't allow abducting parent to create substantial contacts with a more liberal jurisdiction.

2. Other factors allow JX only when there is no home state that will accept JX.

c. PKPA provides for exclusive continuing jurisdiction in the decree granting state so long as a child or any party remains a resident there provided that they *properly* made a prior custody determination. Stricter than UCCJA on modification.

d. *California v. Superior Court (Smolin)* (SCT)

1. Facts: Very contentious custody dispute involving one party moving the children from state to state to avoid the other parent.

2. Analysis: The court discusses the Parental Kidnapping Prevention Act. CA had jurisdiction so that the father had valid custody but the court held that he should still be extradited to Louisiana to face kidnapping charges the mother brought against him.

iv. UCCJEA: Uniform Child Custody JX and Enforcement Act

a. Revision of the UCCJA intended to harmonize some of the differences between the UCCJA and the PKPA.

b. Provides for exclusive continuing jurisdiction in the decree granting state so long as a party to the original custody decision remains in that state.

1. Like PKPA, UCCJEA gives priority to home state.

c. *Eliminates the bests interests* language

- d. Restricts the use of *emergency jurisdiction* to temporary orders. Also specifies when courts should assert emergency jurisdiction.
 - e. UCCJEA expands the definition of child-custody proceedings: encompasses all custody and visitation decrees and includes those related to divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from DV (but not adoptions).
 - f. *Gilman v. Gilman* (Conn)
 - 1. Facts: Couple lived in MD and then CT. The child went to MD to visit his grandparents and the mother followed him there never to return to CT. The issue is which state has jurisdiction to hear the custody dispute.
 - 2. Analysis: The court applied the UCCJEA to find that MD was the child's home state b/c he had been there for six months and had lived there for the majority of his life.
 - v. **Enforcement remedies.**
 - a. Remedies to enforce custody determinations:
 - 1. Civil contempt and the writ of habeas corpus.
 - 2. Some states, such as Alaska, recognize a tort action for custodial interference: one who, with knowledge that the parent doesn't consent, abducts, compels, induces minor child to leave parent legally entitled to custody or to not return to that parent.
 - b. *In re Mendel* (Alaska)
 - 1. Facts: mother ignored the court's custody order and disappeared with her children. Her attorney was subpoenaed by the ex-husband and refused to answer certain questions on various grounds.
 - 2. Attys who become entangled in client's self-help efforts potentially face serious consequences.
 - A) Court ask court to hold attorney in contempt to force disclosure of other parent's whereabouts, or sue for malpractice.
 - B) Attorney-client privilege isn't absolute.
 - vi. **International child-abduction** is an increasingly big problem.
 - a. The *Hague Convention on the Civil Aspects of Int'l Child Abduction* provides for mandatory return of children under 16 to country of habitual residence and abstention of forum from adjudicating the custody dispute.
 - 1. Goal of this is to secure the return of children who are wrongfully removed from or retained in a signatory state and to return them to the country of their habitual residence.
 - 2. There are defenses available to the abductor:
 - A) If the abducting parent establishes that the child's caretaker was not actually exercising custody rights at the time of removal or retention or had consented to removal or retention
 - B) If the abducting parent establishes a grave risk that the return would entail physical or psychological harm to the child
 - C) If the court in the forum of the abducting parent finds that the child, who has attained an appropriate age and maturity, objects to the return.
 - b. Congress has also addressed int'l child abduction in the *International Parental Kidnapping Act*. It imposes criminal sanctions for wrongfully removing a child outside the US.
- H. **Adversary System vs. Mediation**
- i. Mediation is becoming popular in custody disputes. States provide for mediation in different ways:
 - a. CA requires mediation before parties can go to court with a custody dispute.
 - b. Some statutes encourage the parties to mediate as an educational tool
 - c. Some statutes provide for discretionary referrals by the court (majority)
 - ii. Mediation is good b/c it confers broad latitude on the divorcing couple to resolve such matters for themselves.

- a. Proponents of mediation say that it reduces conflict, increases cooperation, gives people more control over important decision in their lives and achieves these goals at a reduced public or private cost.
- iii. Arbitration vs. mediation.
 - a. In arbitration, have judge or an arbitrator. Law plays a bigger role.
 - b. Arbitration can be binding or non-binding, depending on what the parties decide.
 - c. Arbitration is more like the adversarial process, where the parties loss control.
 - d. Mediator's role is a facilitator, arbitrator is a decision maker.
- iv. *Mediator qualifications*:
 - a. For public mediators there are limits as to the amount of time the mediator can spend on a case. They are regulated by statute as to their qualifications.
 - b. Private mediators have no regulation and are not limited as to the amount of time they can spend on a case.
 - c. ABA realized that guidelines were needed.
 1. ABA was motivated to come up with guidelines b/c there were so many unanswered questions about professional responsibility. For example, sometimes a lawyer would set up shop with a therapist and they would co-mediate. Obviously this is a problem.
 - d. Co-mediation is frequent b/c it is commonly thought that wife should have a female mediator, and husband should have male mediator.
- v. *Domestic violence* and mandatory mediation
 - a. A handful of states require mediation, and CA is one of those states.
 - b. Mediation works best with people who have relatively equal power and ability to express their opinions. Mediator can protect the more vulnerable party in mediation, but not outside.
 - c. Needed to come up with ways to protect the abused person.
 1. Allowing mandatory mediation to be waived for extraordinary cause.
 2. Mediator needs special training,
 3. Separate mediation
 4. Mediation has to stop if one participant is threatened.
 - d. Level of proof varies from state to state. Sometime not much is needed, sometimes you need a restraining order.
 - e. The ABA does not recommend participation of the children – only in extraordinary circumstances should they be involved.
- vi. Tension between need for confidentiality in mediation and need for due process.
 - a. There is also an issue of the mediators neutrality being impinged by his being forced to give a recommendation.
 - b. *McLaughlin v. Superior Court (Cal)*
 1. E: CA statute says that mediator has to make a recommendation to the court if no agreement is reached. In this case, mediator was not allowed to be cross-examined. The father challenged this as a violative of the due process clause.
 2. A: The court agreed that if the mediator is going to give a recommendation to the judge he must be cross examined. Court said that the confidentiality had to give way to due process.
 3. Notes:
 - A) Many mediators still think this is a bad idea. No other state permits it. Recently a coalition of family law lawyers sought legislation to ban it. Takes mediator's time, more likely to be relitigated, takes away trust placed in mediators.
 - B) Why have this rule? Allow a neutral party to break the tie. Promotes judicial efficiency.