

FAMILY LAW OUTLINE

I. Private Family Choices: Constitutional Protection

a. Evolution/Meaning of Privacy

- i. The right to privacy is court created, justices reaching to all different sources to find it b/c it isn't actually in the constitution. They seem to feel it is fundamental but can't explain why.
 1. *Griswold v. Connecticut* – Ds were convicted of assisted married couples with getting birth control. *Held*, the specific guarantees of the Bill of Rights have penumbras which help to give them life and substance and which create *zones of privacy*. The right to marital privacy falls within this zone of privacy.
 - a. At this point ct is talking about spacial privacy of the bedroom, could be narrow holding suggesting ban on mfr okay. Eisenstadt gives it much broader meaning.
 2. *Eisenstadt v Baird* – D was arrested for dispensing contraceptives under state law that distinguished between married and single people. *Held*, state may not discriminate between persons on the basis of marital status in regulating the distribution of BC. (no rational basis, pregnancy not punishment for premarital sex so no need for state interest examination)
- ii. Within right of privacy is recognized sense of pluralism and right for families to make certain decisions without interference.
 1. *Meyer v Nebraska* – P challenged statute restricting teaching of foreign language. *Held* violates DPC, State can't infringe on fundamental rights of individuals.
 2. *Pierce v Society of Sisters* – appeal from upholding of state law requiring children to attend public school. *Held*, violates DPC, states can't unreasonably interfere with the liberty of parents to direct the upbringing and education of children.
- iii. Moving from Penumbras of Privacy to Liberty as Fundamental Right:
 1. *Roe v Wade* – *held* abortion statute without regard to pregnancy stage and without recognition of other interests of the mother is violative of the DPC of the 14th amendment.
 - a. Right to privacy includes the right to make decision about abortion, but the right is not unqualified and must be considered against important state interests → trimester test
 - b. Consequence of labeling the right 'fundamental' is that it gets strict scrutiny, and state can't pass compelling interest test
- iv. Real question in all cases is what is the definition of 'liberty'? Cases give us some idea what is included but in the end, no firm rules...a lot of questions are just morality. But some sense that there is a realm protected by liberty that the state has to stay out of.

b. Burdens on Privacy

- i. *Stenberg v. Carhart* – challenge to statute banning partial birth abortions. *Held*, unconstitutional b/c it placed an undue burden on a woman's decision to obtain a previability abortion (procedures not defined well in law, cut into other forms too). Ct uses "undue burden" test – softening of standard from *Roe*.

- ii. Note: funding cases – okay for gov't to express preferences through funding, just can't create undue burden. Parallel to Meyer/Pierce – can make choices about kid's education but state doesn't have to pay for private school.
- iii. *Planned Parenthood v Casey* – rejects the trimester framework of *Roe*, finds that “undue burden” exists if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion.. state can still enact regulations to further the health or safety of a woman but cannot put obstacles in the path of her exercising her right.

c. Limits / Balancing of Privacy

- i. **Right to Die** – though patient has a right to forego or terminate life saving procedures, State may establish procedural safeguards in order to properly balance the state's interest in preserving life. Court distinguishing between individual liberty and privacy of the family to make choices.
 - 1. *Cruzan v. MO Dept Health* – MO required the family of comatose P to prove by clear and convincing evidence that the individual had expressed a desire not to continue medical treatment. *Held*, Const. does not forbid a state requirement that the wishes be proved by clear and convincing evidence.
- ii. **Individual bodily autonomy upheld** - in virtually all cases the woman should decide what to do. If she can't give an informed consent, then her decision must be ascertained through the substituted judgment.
 - 1. *In re AC* – Appeal to order authorizing hospital to perform C-section on AC who was dying of cancer and had not consented, in an effort to save her unborn child. *Held*, pregnant woman cannot be compelled to have a C-section over her objections, even if it is in the best interests of the child.
- iii. **Same-Sex intercourse statutes**
 - 1. *Bowers v Hardwick* – *Held*, no constitutionally conferred fundamental right to engage in consensual homosexual sodomy (narrowly construed question, not looking at overarching right of privacy).
 - 2. *Lawrence v Texas* – overrules *Bowers*. This time court looks more expansively at individual liberty question and says the issue is whether the petitioners are free as adults to engage in the private conduct in the exercise of their liberty under the DPC of the 14th Amendment. *Held*, *The heart of liberty is the right to define one's own existence...beliefs about these matters do not define the attributes of personhood when formed under the compulsion of the state.* The right to liberty under the DPC gives the full right to engage in conduct without intervention from the government. The statute furthers *no legitimate state interest* which can justify intrusion into the personal and private life of the individual.
- iv. In all of the privacy/liberty cases, look at continuum of state/individual rights and interests and how they are balanced, sometimes the state has more and sometimes the individual wins.

II. Getting Married

a. What is Marriage?

- i. Marriage can be seen as a contract, religious function, social relationship. How we define it changes our view of how it should be handled. Has dual nature as both contract and status in our society.
 - 1. *Maynard v. Hill* – Marriage is something more than a mere contract. Other contracts may be modified, restricted, enlarged, or released upon consent – but marriage is different. It is more like a social relationship, like parent and child. (!)
 - 2. Today moving more towards contract status – freely negotiated bargains – but not completely.

- b. **Breach of Promise to Marry** – Nationwide trend is to abolish BPM as a cause of action.
 - i. *Gilbert v Barks* – case abolishes breach of promise to marry as a common law claim in KY. Statute is no longer useful in today’s day and age..paternalistic and sexist.
 - ii. *Anti-heartbalm statutes* were enacted to get rid of BPM. Cts didn’t want to engage in deciding these personal issues. Can still try for contract damages for \$ expended for wedding, etc. or IIED.

- c. **The Engagement Ring – who gets it. Competing theories here.**
 - i. Older rules – when an engagement has been unjustifiably broken by the donor, the donor shall not recover the ring but if it is mutual or unjustifiably by the donee, the ring should be returned to the donor
 - ii. Modern rule – b/c ring is an inherently conditional gift, once the engagement has been broken the ring should be returned = no fault
 - 1. *Meyer v Mitnick* – P and D broke up before wedding and D would not return the ring. Held, engagement ring is a conditional gift and must be returned to the giver if the marriage does not occur because fault is irrelevant in determining ownership.
 - a. This is the modern trend b/c courts do not want to determine fault in the breakups – not their job.

- d. **Premarital Agreements**
 - i. Previously, courts would not enforce premarital agreements b/c of fear they would encourage divorce. Today, increasingly popular, signaling freedom to contract in marriage.
 - 1. *Simeone v Simeone* – Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their prenuptial agreements (treats like an ordinary contract).
 - 2. *In re Marriage of Greenwald* – Court must consider the terms of the agreement from the parties’ perspective at the time of its execution and take into consideration the parties’ freedom to contract.
 - 3. Court Requires:
 - a. Procedural fairness
 - i. Full disclosure-financial info, what you’re giving up
 - ii. Voluntariness – think about timing, how voluntary
 - b. Substantive fairness
 - i. How parties allocated resources

- ii. Sometimes considered at the time of the agreement, others at the time of divorce
- 4. Court notes that a marital agreement cannot be invalidated simply because it provides for an unequal property division.

e. State Regulations on Getting Married

- i. State has some ability to regulate marriage, but their powers are not unlimited notwithstanding the 14th amendment.
 - 1. *Loving v Virginia* – white man and black woman, res. of VA, went to DC to marry and were found guilty of evading VA antimiscegenation statutes. *Held*, the freedom to marry a person of another race resides with the individual and cannot be infringed by the state. Equal protection demands that racial classifications be subject to the strictest scrutiny..and freedom of choice to marry cannot be limited by state interference.
 - 2. *Zablocki v. Redhail* – P argued state statute prohibiting person with a child support obligation from marrying without a prior court order violated EPC and DPC. *Held*, A state statute denying a fundamental right to marry must be supported by important state interests and be closely tailored to effectuate such interests in order to be constitutional. The state int. in enforcing child support is important, but it cannot be linked to a deprivation of the fundamental right of marriage.
 - 3. *Turner v Safley* – State regulations allowed prison inmates to marry only under compelling reasons, with State approval. *Held*, there is a constitutionally protected marriage relationship even within the prison context. The decision to marry is a constitutionally protected fundamental right that is not removed by incarceration.
- ii. State has more ability to regulate when the marriages involve incest, bigamy, etc.
 - 1. Bigamy raises free expression of religion issues. If question of morality, whose morality? Court substitutes theirs?
 - a. *Potter v. Murray City* – P police officer was fired when it was learned he had a plural marriage. *Held*, state prohibitions against plural marriages do not violate the constitutional guarantees of the right to the exercise of religion and the right to privacy.
 - 2. Arguments against incest:
 - a. Want children to look outside the home for relationships, helps build society. Also concerns about genetic problems, morality, inter-family strife and order in society. But have to make sure it passes *Zablocki* test of rational purposes and closely tailored regulations.
 - i. *In re Adoption of M* – adoptive father and daughter had a romantic relationship and wished to marry, so they wanted the adoption voided. *Held*, in exceptional circumstances, final adoption orders can be set aside when it is in the best interest of the child. (Court seems more intent on the legitimacy of their future relationship and their child than their past legal status).
 - 3. Age restrictions have been upheld for policy reasons...though SC has made clear that age restrictions must be the same for men and women.

- a. *Moe v Dinkins* – P, a minor, argued that a state statute requiring parental consent for minors to marry was unconstitutional. *Held*, a state statute regulating marriages involving minors must be rationally related to a legitimate state interest. But the state has an interest in protecting minors from immature decision making and preventing unstable marriages.
 - i. Note that the court has no problem depriving const. right to marry b/c they are minors. “Peculiar vulnerability” of minors requires protection.
- b. Also a reminder that marriage is a contract and there has to be some minimum threshold of maturity to enter into it.

iii. Other Policy Concerns

1. **Annulment** – more attractive than divorce b/c no child or spousal support, etc.. because it’s like the marriage never happened. To obtain an annulment, many courts require there be a fraud that goes to the essence of the marriage. Public policy is so strong for preserving marriage whenever possible so courts tend to apply a very strict test for the fraud.
 - a. Usually the fraud has to do with the ability and willingness to engage in sex and have children.
 - b. *Radochonski* – P continued an affair after lying to D to get him to marry her so she could get residency. H sought an annulment b/c the marriage was a ‘fraud’. *Held*, affairs and lies are not frauds as to the essence of the marriage. P’s actions do not fall into line with earlier ‘fraud’ annulment cases and besides evidence showed D knew about the fraud but married her anyway. No annulment.
2. Any reason to still have annulment today? With the equitable doctrines in place for post-breakup, even though won’t have support, it might be close as to division. Most people want annulment for religious or personal reasons today (or to avoid stigma of divorce). With institution of no-fault divorce, less reason for annulment today.
3. **Procedural Issues**
 - a. Most states require licenses for true civil marriages (as opposed to purely religious ceremonies). But the policy favoring validity of marriage is so strong that sometimes the marriages will be found legit without the procedures being met.
 - i. *Carabetta* – marriage was religiously observed but no license was obtained. *Held*, unlicensed ceremonial marriage is not void unless the governing statute explicitly declares unlicensed marriages void.
 - l. these cases often arise after parties have been acting on the assumption they are married, no reason to declare otherwise now.
 - b. Many states at one time also required blood testing for STDs and other diseases. Now, not as often. Cost was too high to justify small number of positives. This also reflected assumption

of premarital sex, intervening then might be too late; also getting away from automatic marital-procreation link.

- i. *Doe v Dyer-Goode* – P brought suit resulting from D's subjecting P's blood to an AIDS test without consent. P loses on all grounds, no invasion of privacy when he already agreed to submit to blood test generally, no publication of test results, loses on negligence too.

4. **Common Law Marriage**

- a. Common law marriage has four elements: capacity to enter a marital contract, present agreement to be married, cohabitation, and holding out to the community as husband and wife.
 - i. *Jennings v Hurt* – P brought suit against D seeking court's declaration of a common law marriage. Here, there was not enough evidence to support the beliefs of the individuals as to their "marriage". P also could not prove they held themselves out as H and W. Not to mention H was still married to someone else. Court reluctant to declare a marriage without convincing evidence.
 - ii. Main reason for 'holding out' requirement is to prevent fraud.
- b. **Other 'curative' devices** – all demonstrate how far states are willing to go to recognize, legitimize, and encourage marriage.
 - i. **Putative Spouse Doctrine** – recognizes the marriage of an individual who participated in a marriage ceremony in good faith, in the belief that a valid marriage took place, and in ignorance of an impediment making the marriage void or voidable (for example a preexisting marriage).
 - I. UMDA says: Putative spouse acquires the rights conferred upon a legal spouse, but if there is a legal spouse or other putative spouses, right acquired by PS do not supersede the rights of the others.. ct has to apportion property and support among the claimants as appropriate.
 - ii. **Confidential marriages** - couples cohabiting can get marriage license, but have it sealed so no one can know when they were living together
 - iii. **Proxy marriages** – esp. in wartime, allowing another to stand in the place of the spouse

5. **Same Sex Marriage**

- a. So many rights depend on marital status, gay marriage v. important current argument as to the current status of marriage and rights in our society.
 - o *Goodridge* - Ps, same sex partners with lengthy committed relationships filed suit alleging violation of provisions of the MA constitution based on their inability to be married in MA. Ct: question is whether the Commonwealth may deny

the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. Ct concludes it may not. Compares to Loving... denial based on a single trait..right to marry means nothing if can't marry who you want.

- Seem to focus on individual liberty and due process rights and a little EPC by saying that central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. Civil marriage isn't just about procreation...it's about **exclusive commitment**

Grounds you could base challenge on:

- liberty (due process)
 - Zablocki test - does it directly and substantially interfere with right? Does the state have a sufficiently important state interest, and does this restriction serve only that interest?
 - Counter argument – Zablocki says there can be reasonable restrictions on marriage by the state.
- Gender Discrimination (equality) – discrim to base the right on the sexes of the people involved.
 - Intermediate scrutiny under fed test, under some state constitutions actually gets a higher standard of review (ex – Hawaii, which has an equal rights amendment)
- Sexual Orientation (equality) – is the mere classification itself discrimination?
 - Counter- a lot of the history of the state ERA can find legislative debates that say the amendments would never require same sex marriage.
 - Can you distinguish this from Loving? In Loving the only explanation possible was white supremacy. Can we make a similar argument here? The reason marriage has required one male and one female – probably procreation ?
 - Sexual orientation is not triggered to get a special standard of review.. b/c they are not a protected class.. so rational basis would be enough.
 - But if you can show something's sole basis is animus or hostility then get more protection... Here, can they show any real reason other than hostility?
- Common benefits clause (equality)
 - Vermont had a clause that said that the government was established for the common benefit, protection and security of the people... notion that gov benefits are for everyone and we don't have distinct classes of people (enacted as anti-nobility)
- Kids (equality)

- Marriage involves benefits not only for the adults involved but also for the children. Children of married adults have benefits that children of unmarried adults do not.
- Shouldn't punish children for parental conduct for which they have no control.
- Source: *Plyler v Doe* – says children of illegals have right to public education b/c not their fault what their parents did.

b. So what is marriage as we understand it? Ct says it is the union of two persons as spouses, to the exclusion of all others. I think it is different things to different people. Some very religious experience, others for friendship or convenience, or to be parents... but you can distill it down to the common denominator, which is the joining of the two people as a unit legally and excluding others. Also idea that marriage evolves... it has changed from woman being property, easier divorce changed it, etc.

c. *Goodridge* left open for the legislature the question of the remedy. So one possibility is the state can just gender-neutralize the marriage statutes (like using 'spouses' instead of male/female terms). Or, the state could get out of civil marriage entirely... have a purely secular system that gives rights and benefits to couples and have religious marriage too... or have Civil Unions for SS couples..but that might create a second class of citizens..

i. *In re Adoption of Swanson* - One partner adopting the other to circumvent the restrictions on recognition of SS couples. Cements the family relationship to allow inheritance. Different laws in different states. NY does not allow.. DE does.

d. **Conflict of laws issues** - Ct rejects the argument that expanding the institution of marriage in MA would lead to interstate conflict. Ct says that the Federal system allows each State to be a 'laboratory' and have different family law regimes. But what does that mean for a couple who marries in one state and moves or travels to another? Rule is that state doesn't have to recognize if that would violate state's strong public policy (ie coming from VT to MO). That does create problems b/c status and relationships change as you cross state lines.

III. Being Married: Regulation of the Marriage

a. Regulation Themes:

- i. Privacy – to what extent does marriage create a line the state can't cross?
- ii. Gender and gender roles – traditionally, family law was a collection of rules that specified responsibilities for women and men. What is left of gender roles in marriage? After trend in equality doctrine towards gender neutrality, then what about SS marriage?
- iii. Unity vs. Individuality – at common law, husband and wife were one, and the one was the husband, who spoke for both. To what extent has decreasing role of gender in marriage affected this idea of the marital unit?

b. Roles and Responsibilities

i. Duty of Support

1. *McGuire v McGuire* – D refused to give his wife any funds other than for groceries, even though he had money. *Held*, living standards of the family are the concern of the household, not the courts. Courts cannot interfere and order support payments while the parties are still married. P needs to leave her husband then bring suit for support.
 - a. This case represents the intersection of two common law doctrines – duty of support – husband was supposed to provide for wife, and Nonintervention – ct will not intervene into an ongoing marriage.

c. Marital Property Regimes

- i. common law approach – husband and wife own all property separately. During marriage, property belongs to the spouse who acquired it.
- ii. community property approach – each has a ½ interest in any property acquired by the efforts of either spouse during marriage.
- iii. Today:
 1. 3 facially gender-neutral rules have emerged:
 - a. extension of separate property philosophy to link management to the source of earnings (sole or individual management)
 - b. joint control (requiring the consent of both spouses for community property transactions)
 - c. Equal control (either may manage community property regardless of the source of earnings or without securing the other's consent. Most community property jurisdictions follow this one.
 2. Uniform Marital Property Act – imposes a rule that a spouse acting alone can manage and control marital property held in that spouse's name alone, that not held in the name of either spouse, and that held in the name of both spouses in the alternative. Spouses must act together with respect to marital property otherwise held in name of both.

d. Naming

- i. Today, naming decisions left up to individual. Can change name judicially or common law – just consistently, non-fraudulently, use husband's name.
 1. *Neal v Neal* – P sought a divorce and requested her maiden name be restored and given to her baby as his surname. *Held*, there is a common law right to a change of name, regardless of marital status.
 2. *Henne v. Wright* – P wanted to give newborn the last name her other children had, which had no connection to the P or her child (she just liked it). *Held*, there is no constitutionally protected right to privacy which covers the right of a parent to give a child a surname to which the child has no legally recognized connection.
 - a. No fundamental right → rational basis.. easy for State to pass (welfare of children, efficient record keeping, connection between child and one legally recognizable person)

e. Married Women's Rights

- i. **Domicile** - traditionally, woman's domicile was that of her husband. She was like a child or insane person, b/c her domicile was assigned by law and not by choice.

Practical reasons-husband was the breadwinner, he could move for a job and she would go with him... This only changed in 1988 when it was held women could have a domicile separate from her husband.

f. Employment and Leave

i. Statutory Discrimination based on Marital Status –

- I. *Ross v Stouffer Hotel* – P was terminated b/c she would not follow Co. policy against working in same hotel as spouse. *Held*, state law prohibits discrimination by reason of marital status in employment. Split in the circuits on this issue, some say it is not *being* married, but *who* you married.

ii. Family and Maternity leave issues

- I. Think about pregnancy as ‘perfect proxy’ for “real differences” doctrine b/c all pregnant people will be women. Are there reasons for gender-based discrimination in these cases?
 - a. *Cleveland Board of Education v LaFleur* – teachers were required to take 5 month non-paid maternity leave. *Held*, mandatory maternity leave may only be upheld if it does not needlessly or arbitrarily infringe upon the teacher’s freedom of personal choice and family life in violation of DPC and if the district can assert a legitimate state interest in support of the rule.
 - i. Overly restrictive rules burden the exercise of liberty. The strict restrictions do not achieve the school’s stated goals
 - ii. Irrebutable presumption doctrine – not fair to generalize something that should be determined individually.
 - b. *Cal Fed v. Guerra* – CA enacted a law requiring employers to permit pregnant workers to take a leave of absence of up to four months with guaranteed reinstatement. P took leave and was not reinstated. P sought to have the law invalidated as inconsistent with the Federal Pregnancy Discrimination Act (PDA). The PDA prohibits ERs from discriminating on the basis of sex and specifically includes pregnancy discrimination as being discrimination on the basis of sex. *Held*, this law is not inconsistent with the PDA. The PDA provides a basic level of protection *under* which states can’t go – if they choose to provide more protection that is okay.
 - i. Note PDA does not mandate preg leave, it just requires it to be treated like other conditions.
 - ii. Employer can extricate itself from dilemma of having to give reinstatement benefits to pregnant people but also having to treat everyone the same under fed law, by giving more benefits and protection to other workers.

2. FMLA

- a. Act solves the special treatment-equal treatment debate by treating men and women the same. Reduces employer’s incentive to treat all the same by getting rid of all protections.
- b. Situations that trigger leave – birth of child, caring for child (lumps together giving birth and parental care), caring for spouse

or close family member with a serious health condition, serious health condition of the employer themselves

- c. Congress was trying to accommodate work and family responsibilities with the FMLA. Trying to reconcile the female entrance into work world and care inside the home.
- d. *Caldwell v. Holland of TX* – P was fired by D after she called in sick to take her son to the emergency room. *Held*, this firing violated the FMLA's provisions for taking time off work to care for a seriously ill family member. (had to pass 2 part inquiry as to the period of incapacity (over 3 days) and subsequent supervised, continued treatment for the same condition).

3. Individual work arrangements

- a. *Dike v School Board* – P teacher chose to breastfeed and made arrangements for child to be brought to school to be fed. School ordered her to stop nursing at school. P claimed the board interfered with her constitutionally protected right to nurture her child. *Held*, decision to breastfeed is a fundamental liberty interest protected from state interference. Remanded to determine whether the regulations further a sufficiently important state interest and are closely tailored.
 - i. This case forces us to face the fact that there are real biological differences between males and females, yet making laws with respect to those differences, can cause discrimination based on giving special privileges and can seem unfair. For example, if ER makes exceptions to the “no family visitors” rule for a new mother, couldn't a new father object and say he'd like to bond with his child?
 - ii. Also note differences between gov. as employer and gov. as rulemaker.. possible school could be stricter as just an employer.

g. Torts Claims

i. Alienation of Affection

1. Question whether AA actions make sense today.. with understanding of why marriages fail.
2. Message is that marriage is important and protected by the state and others should not interfere.
3. Elements of claim for alienation of affection:
 - a. Wrongful conduct of the D
 - b. Loss of affection or consortium
 - c. Causal connection between the wrongful conduct and the loss of affection or consortium
4. *Jones v Swanson* – P's wife had affair with D.. P claimed AA and was awarded 900k. *Held*, Evidence of infatuation may be entered to prove absence of wrongful conduct or lack of causation, but it doesn't obviate a D's wrongful conduct → *Ps can recover even when the errant spouse was a willing if not co-equal participant in the affair*. Reduced the damages based on wife's pre-affair conduct, but still let judgment stand.

5. *Osborne v. Payne* – couple went to priest for marital help, priest had affair with W, and H sued P for IIED. *Held*, ordinary adultery can rise to the level of IIED where the victim can establish the existence of a special relationship.
 - a. Note that claims like this can be used in Js that don't allow alienation of affection anymore, but they are more difficult elements to prove.

ii. Loss of Consortium

1. *Rodriquez v. Bethlehem Steel Corp* – P was paralyzed in a work accident at 22. His wife quit her job to care for him, and they sued for loss of consortium. *Held*, spouse may recover for L of C. One who negligently injures an adult can foresee that the victim will be married, and the damages are no more speculative than any other area of damages.

iii. Interspousal Immunity and Evidentiary Privileges

1. Trend has been to abolish interspousal immunity for tort actions. At common law, it was not possible to sue spouse b/c they shared the same legal identity. However, many Js have abolished or provided exceptions to interspousal immunity.
 - a. *Boone v Boone* – W was injured in an accident by H, the driver. W sued H for her injuries. *Held*, immunity would violate public policy. Will not create marital discord b/c one spouse can provide insurance through a court judgment for his spouse that he could not otherwise provide for. Against justice to hold wife precluded from recovery based on marital status.
 - b. *GL v ML* – W sued for personal injury claims after H had affair, contracted herpes, and continued to have sex with her. *Held*, marital privilege of sexual relations does not include immunity to personal injury suits between spouses based on the transmittal of a sexual disease.
 - i. Ct: any privacy issues were destroyed when he had an affair – can't simultaneously breach marital contract and claim nuptial protection.
 - ii. Can read into this case a compelled sharing of information between spouses, help avoid the danger (duty of care)
 - c. *Glazner v Glazner* - P and D were divorcing and D put wiretaps on the phone without wife's knowledge. Wife claims violation of Title III which prohibits *anyone* from wiretapping w/out knowledge...Ct: language is clear, makes no distinction between married and unmarried persons or between spouses and strangers... no exception for interspousal wiretapping either explicitly in the text or implicitly in the leg history.
 - d. **Marital Exemption for Rape**
 - i. Privacy/ Governmental intrusion arguments advanced in support of continuing, but probably fail.

- ii. *People v Liberta* – D was indicted for rape and sodomy of wife, and claimed his acts were protected under the statutory marital exemption for rape. *Held*, marital exemption lacks a rational basis in violation of EPC, and it distinguishes between married and unmarried men. Where statutes distinguish on the basis of marital status, there must exist a rational basis for the distinction. There is no rational basis supporting the statutory differentiation between marital and nonmarital rape.

e. **Privilege against adverse spousal testimony**

- i. Traditionally only could admit spousal testimony with consent (this pertains only to testimony about criminal acts and communications made in the presence of third persons, *not* the independent rule protecting confidential marital communications.)
- ii. *Trammel v US* – P sought a reversal of his conviction on the ground that his wife had been allowed to give voluntary adverse testimony against him. (court had allowed her to testify as to anything except confidential communications between herself and P). *Held*, the witness spouse alone holds the privilege against adverse spousal testimony. She can be neither prevented from nor compelled to, testify.

h. **Domestic Violence**

i. **Expert Testimony**

1. ET is allowed when it is necessary to help other people understand learned helplessness, inability to leave, etc...that to others outside might not be understandable behavior at all.
2. Courts that have considered the admissibility of this type of evidence have analyzed it to see whether it meets three basic criteria:
 - a. The expert is qualified to give an opinion on the subject matter
 - b. The state of the art or scientific knowledge permits a reasonable opinion to be given by the expert and
 - c. The subject matter of the expert opinion is so related to some science, profession, business, or occupation as to be beyond the understanding of the average layman.
3. *Hawthorne v State* – expert allowed, but have to determine their expertise and qualification to give opinion. This kind of testimony is necessary to enable the jury to understand Ds mental state at the time of the offense
 - a. Because self-defense statutes were written with barroom brawls in mind, often BWS cases don't fit those molds and hard for people to understand without expert testimony.

ii. **Police Action**

- I. Domestic violence calls historically treated differently b/c of lack of cooperation in pressing charges, reluctance to get involved in family disputes, calls often less serious than others.
 - a. *Fajardo v. County of LA* – 911 dispatchers failed to send police after a DV emergency call. P was murdered and relatives sued for giving lower priority to DV calls. *Held*, DV calls cannot be assigned lower priority without proof that they are consistently less serious than others. Reversed to determine if there was such a policy, and if so, whether it had a rational basis.

IV. Alternative Families

a. Government Acceptance of Living Arrangements

- i. *Village of Belle Terre v. Boraas* – P challenged constitutionality of a zoning ordinance which limited residents of single family dwellings to persons related by blood, marriage, or adoption or to no more than two unrelated people. *Held*, state police power is not limited to the elimination of unhealthy conditions, it can create zones where family values and quiet neighborhoods can prosper. Ct: having boarding houses, frat houses, and the like presents urban problems of traffic, parking, and noise. Having quiet neighborhoods is a legitimate guideline in land use.
 - I. Here, question of under and over inclusiveness...families can have much more noise and traffic than just 3 working adult roommates. But court says it is rational and narrowly tailored anyway.
- ii. *US Dept of Agriculture v Moreno* – Food stamp program was modified to only allow use by households of related persons. *Held*, in order to be upheld under the EPC, the gov must show that the classification furthers a legitimate gov interest. Here the classification is irrelevant to the purposes of the statute, and only thing found in leg history was the prevention of “hippie communes” from participating. Invalid.
- iii. *Moore v City of East Cleveland* – city ordinance limited occupancy of living unit to members of a single family, and limited that definition severely. D lived with her two grandsons and was convicted of violating ordinance. *Held*, unconstitutional.. *this ordinance slices deeply into families and selects certain categories of relatives who may live together*. Choice of relatives to live together may not lightly be denied by the State. The constitution prevents East Cleveland from standardizing its children and adults by forcing all to live in certain narrowly defined family patterns.

b. Cohabitation

- i. Consider the impact of Lawrence on cohabitation laws – was that case only directed towards SS couples, or was it broader? Seems to be a broader statement b/c they are talking about the privacy in the home. Adding Eisenstadt and Lawrence together seems to say the end of cohabitation statutes has come...but there’s no direct decision that says this.
 - I. *Doe v Duling* – P brought an action challenging the constitutionality of a VA anti-adultery statutes prohibiting fornication and cohabitation. Court: not concerned that the unenforced statute may escape the attention of the political process... This issue should be decided by state legislatures, not federal courts.

ii. Attaching legal rights to cohabitation

1. Generally, can't disallow contracts just b/c people are living together without marriage.. so contracts end up standing in for some of the protections of legal marriage.
2. Goes back to contract/status/relationship debate over what marriage is. Court is going to look to parties' reasonable expectations and try to make divisions that allow people to come out of relationships fairly.
 - a. *Marvin v Marvin*- P claimed that she was entitled to share in the property that she and D had acquired during the time they lived together, asserting their meretricious relationship gave rise to a division of property, and also that they had an oral agreement to share their property. *Held*, can't base agreement on the sexual relationship (against public policy to contract for illicit sex), but can sever the parts of the K that explicitly pertain to providing sexual services. Court further **holds** that express agreements will be enforced and that in the absence of an express agreement, the cts may look to a variety of other remedies in order to protect the parties' lawful expectations
 - b. *M v H (Canada)* – same sex couples who had a relationship of some permanence must be afforded same benefits as to division of property – have to treat people equally or violate (equivalent of EPC) otherwise “the human dignity of those involved in same-sex relationships is violated”.

3. Housing and Cohabitation

- a. *Braschi* – protection of NY rent control statute – cited often as quintessential case of extension of protections to non-legal family. Case is famous for language: “the intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.” Court uses functional test to determine relationship. SA says they would never do this to a married couple and some wouldn't pass; I think that's okay, they *aren't* married, need some way to ensure they aren't just roommates.
- b. *ND Fair Housing Comm v Peterson* - Question whether one can use their own moral beliefs to refuse to rent to unmarried couples, or whether they are protected under the fair housing acts that makes it illegal to discriminate based on marital status. But there is also a statute in the state prohibiting cohabitation before marriage. (seems like that statute might not stand after *Lawrence*?) Ct says, the two statutes can be harmonized... still unlawful to be openly living together without being married and still unlawful to deny housing based on marital *status*, being married or single, etc. It is not unlawful to deny housing to an unmarried couple seeking to openly live together.

c. Limitations on Unmarried Parents' Rights

i. Questions of Policy:

1. Is marriage the only, or best, way to ensure paternal involvement?

2. Is the law more focused on finding the right father, or just 'a' father?
 3. Is it equally illogical or unjust to disadvantage adults as a way to try to influence their behavior, as the court thinks it is unjust to disadvantage the children of illegitimate relationships.
- ii. *Stanley v. Illinois* – P lived with woman for 18 years but they never married, so when she died, state declare their three illegitimate children to be wards of the state. *Held*, all parents are constitutionally entitled to a hearing on their fitness before children are removed from their custody, and denying a hearing to a particular classification of parents is violative of the EPC.
 - iii. *Michael H v Gerald D* – P had an extramarital affair that resulted in birth of daughter; he sought visitation rights but state law provided a conclusive presumption of paternity in favor of the husband for children born during the marriage. *Held*, it is a legit state interest to promote the stability of the marital, nuclear family.. to grant P visitation would create dual parenthood inconsistent with policy of parental rights.
 - I. concern seems to be for the stability and welfare of the child, not the rights of the parent.
 - iv. **Difficulties of same- sex couples having nonmarital children**
 - I. When using ART, difficult sometimes to make legal determination of who should be legal parents.
 - a. *Kristine H v Lisa R*- SS couple had artificial insemination and stipulated to 'joint legal parentage'. After separation P sought to have J revoked b/c can't stipulate parentage and the child had no biological connection to D. Ct: stipulation is void, but parentage could be found under Act. Court finds that the Act contemplated two legal parents, regardless of sex.
 - i. Note here it is good for child to have 2 parents.. unlike concerns in Michael H of confusing child and taking away someone else's rights.
 - ii. Parent by Estoppel concept – other parent would be estopped from denying parentage of other because they lived together and accepted the services as parent.
 - iii. Parenthood based on intent - Basing parentage on planning and intent does offer ability to equalize by gender and the roles in raising the child...which can't be done if it's based only on genetic analysis.

d. **Support Rights of Nonmarital Children**

- i. SC has wiped out most laws treating illegitimate children differently.
- ii. Uniform Parentage act replaced most of the state laws that were invalidated. UPA does not contain a legitimacy-illegitimacy distinction... it introduces the status of a presumed "parent and child relationship" that operates regardless of the parents' marital status. It applies to those children who have been received by the father into his home and "held out" as his children or have been acknowledged in writing by the father.
- iii. *Clark v Jeter* – PA had adopted a six year SOL on paternity actions seeking support of illegitimate children. *Held*, disparate treatment of support actions based on legitimacy are subjected to heightened scrutiny not amounting to strict scrutiny. Statutes must give the child a reasonable opportunity to seek support

and they must be substantially related to the state's interest in preventing stale claims. This one doesn't pass EPC.

- I. court trying to balance between incentivizing marriage and treating child fairly.
- iv. *L. Pamela P v Frank S* – D challenged child support order when the child was born b/c of P's misrepresentations about use of BC. Ct: Sorry Frank, D had chance to avoid procreation entirely but he did not...this does not allow him to avoid child support..her treatment of him does not constitute a constitutional violation.
 - I. note Courts are extremely reluctant to excuse duty of child support. Once biological paternity is shown, you're liable.

V. Divorce

a. Fault-Based System – have to be both innocent and injured under FBS

i. Traditional Grounds for Fault:

1. cruel and inhumane treatment – traditionally, verbal abuse not enough, but in modern cases, psychological harm works, particularly if it is documented.
2. adultery
3. desertion – or constructive desertion-made it so difficult they had to leave.
4. insanity

ii. Traditional Defenses:

1. Condonation – by attempting to reconcile you forgive or condone the previous faults. Disfavored b/c you want to encourage reconciliation.
2. Recrimination – other spouse committed fault themselves. Policy question though b/c obviously the marriage is falling apart.
3. Collusion
4. Insanity

iii. Criticisms of the Fault system:

1. Bears no relation to the actual condition of the marriage, has to be based on something else. The more the two people know they want to be apart, the less they can be – if both parties agree to divorce, it's collusion – it's a punitive system.
2. Poor were disproportionately punished b/c didn't have means to find a "way out".

b. Other conceptions of divorce: (think about ideal system)

i. Consent – but that might be too easy, have to think about children. State has an interest in making divorce hard b/c of interest in stability, children.

1. But why is marriage so easy then? Should be a contract you can get out of...state doesn't ask how much you love each other when you get married, shouldn't ask how much you hate each other when you want a divorce. Should be more restrictions going in and less coming out.

ii. Breakdown – some states have adopted this standard

1. Uniform Marriage and Divorce version – has living apart time standards, provides a waiting period, separate procedures for contested cases to make those harder
2. IA has breakdown standard w/ counseling – some effort at reconciliation
3. Combined grounds – NY – fault + no fault

- iii. Covenant marriage – LA, can use fault system only, or “marriage lite’ – dissolve for any reason (decide which you want when you get married)

c. No – Fault Divorce

- i. All states offer some form of no-fault divorce. The standards differ, generally there will be dissolution based on irreconcilable differences, or that plus showing that the parties have lived separate for some time, and/or there is a serious breakdown in the marriage.
- ii. *In re Marriage of McKim* – P appealed from TC’s denial of petition for dissolution on the basis that she did not appear personally and the testimony of husband was not sufficient to support a finding of irreconcilable differences. Ct: TC must require the petitioner for dissolution of a marriage to personally appear and testify at the hearing, unless the court permits the proof to be made by affidavit in exceptional circumstances.
- iii. *Nieters v Nieters* – Wife appealed from TC’s decision on the basis that the evidence was insufficient to sustain the court’s finding that the marriage was irretrievably broken after considering all the evidence. *Held*, When one party denies that a marriage is broken, the court must find one of 5 fault situations.. if not then can separate for 24 months and then get dissolution
 - I. so if can’t get consent, can’t prove fault → can’t get immediate dissolution. Is this really no-fault? Punishes person who wants divorce, they have to be the one to move out for 2 years.
- iv. *Bennington v Bennington* – held that a couple is living “separate and apart” when there is a cessation of the marital duties and relations between the wife and husband (H was living in van in the driveway, but still cooking for wife-not separate and apart.)
- v. *Twyman v Twyman* – P added an action for IIED to her divorce petition; court allowed it to be joined with divorce suit. Kind of brings fault in the back door.

d. Arguments for and against unilateral divorce:

- i. Provides disincentives for the decisions we make, like staying home with kids, when spouse can suddenly get rid of you
- ii. State wants to promote commitment (but that is a personal choice)
- iii. Does easy, unilateral divorce as an option promote marriage (not good marriage, but marriage – should that be the state’s goal?)
- iv. Easier to see as unilateral if you look at marriage as contract – you can get out of it whenever you want, you just have to pay the damages.

e. Access to Divorce

- i. *Boddie v CT* – P challenged state’s procedural requirements such as court fees which restricted access to a divorce claim. *Held*, court fees violate the DPC. **DPC** means there must be meaningful opportunity to be heard, unless there is an overriding state interests. Key seems to be that divorce can *only* be obtained by going through this court process – no alternative.
 - I. this case seems to suggest some substantive rights to divorce (does that mean state *has* to allow divorce)
- ii. *Littlejohn v Rose* – Deprivation of employment based on marital status violates the constitutional right to privacy..and this includes not hiring b/c someone is divorcing or divorced.

- iii. *Aflalo v Aflalo* - Wife sued for divorce, and husband did not want a divorce and refused to provide her with a "Get" (a Jewish bill of divorce). Wife sought a court order requiring H to cooperate with the obtaining of a Jewish divorce upon the threat of having his visitation rights curtailed. Q: can the courts force through their mandates someone to abide within religious practice/law? Ct: civil courts cannot disturb the decisions of religious tribunals or interpret religious law or canons.

f. Divorce Jurisdiction

- i. Divorce jurisdiction is super important. Once you get the decree can get it recognized anywhere. If you can't undermine jurisdiction, the fact that one state has more liberal divorce laws doesn't get you anywhere.. *No public policy exception to fair faith and credit*. But it is possible to attack collaterally for lack of J.
- ii. *In re Marriage of Kimura* - Parties were married in Japan but had lived apart for many years. Husband moved to the US to practice medicine. He became a pediatric surgeon in Iowa City. H filed a petition for dissolution in district court. W was served in Japan. W filed a preanswer motion contesting the DC's J. DC concluded that H satisfied the residency requirements and granted the dissolution. W appealed on the basis that Iowa's assertion of J over H violated her DP rights.
 - 1. Ct: Ct has the authority to grant a dissolution of marriage decree so long as the petitioner is domiciled in the state.
 - 2. J to grant such a dissolution is not to be tested by the minimum contacts standard of *International Shoe*.
 - 3. H meets domiciliary requirements. He resided in the state for one year and no evidence the residency was not in good faith or for the sole purpose of obtaining a divorce. H sufficiently demonstrated that he was a resident of Iowa.
- iii. Rule here is that a valid ex parte divorce can be granted at the one spouse's domicile. This rule holds regardless of the complete lack of contact of the other spouse.
- iv. *Sosna v Iowa* - After being separated from her husband in NY, W moved to Iowa and sued for divorce one month later. Iowa court dismissed the divorce petition for lack of J, finding that husband was not a resident of Iowa and wife had not met the residency requirements. Wife contends that the requirement of one year's residence is unconstitutional b/c it 1) discriminates against those who have recently exercised their right to travel to IA and 2) b/c it denied a litigant the opportunity to make an individualized showing of bona fide residence and therefore denied such residents access to the only method of legally dissolving the marriage
 - o Ct: it is constitutional to require a one year residency to get a divorce
 - o Other durational residency requirements were different b/c didn't have the same important state interest – IA has the interest of wanting those getting divorced there to have some attachment to the state, and to protect from future collateral attack.
 - o Additionally, not being completely deprived of divorce, just have to wait a year.

g. Role of Counsel in Divorce

- i. Have to uphold state laws – if client comes in and doesn't want to wait requisite period, cannot advise them to go to another state.
- ii. An attorney in a divorce proceeding who expects to be paid by the opposing party has a duty to control excessive demands on his time by the dependent spouse. (*Moses v Moses*).
- iii. Lawyer may not ethically represent one spouse in a divorce action against the other spouse after the lawyer previously represented both spouses, unless the lawyer obtains the informed consent of the nonrepresented spouse. (*Florida Bar v Dunagan*).
- iv. Representing both sides in a no-fault divorce: MS law says atty cannot represent both parties in a no fault divorce, MT law says that you can represent both if it is obvious he can adequately represent each and has made full disclosure. This is probably a bad idea.. no divorce is completely “friendly” and it is just setting you up for a conflict of interest.

VI. Child Custody

a. Child Custody Generally

- i. Joint Legal Custody – means you have decision making responsibility, Physical Custody – means you have residential responsibility only. Without joint legal custody, physical custodian would make all decisions about upbringing.
- ii. A lot of ways to split the ‘custodial pie’ – bird’s nest system, child stays and parents switch (requires a lot of cooperation), sole legal with visitation, joint physical, etc.
- iii. Pros and Cons of joint custody:
 - 1. Pros: increases chance child will have relationship with both parents, eases pain of loss b/c child still gets to see both, F more likely to pay child support if child is still involved in his life
 - 2. Cons: creates instability for child being raised in two different settings, goodbyes are hard, child may be used as pawn, forces two people who don't get along to work together-prolongs adversarial feelings.
- iv. Today, disputed cases are decided according to “Best Interests” standard
 - 1. problem is, it isn't really a standard, and judges often are substituting their own moral judgments-very subjective, fosters litigation
 - 2. But court is supposed to take into account specified factors to help
- v. For a change to be made, something new has to have occurred, and the change has to be found to be in the best interests of the child.

b. Selecting the Custodial Parent

- i. Today, use best interests standard, used to use the “Tender Years” Presumption
 - 1. *Devine v Devine* – P appealed from grant of custody to mother based on ‘tender years’ presumption, arguing the presumption was an unconstitutional gender-based classification in violation of EPC. *Held*, the “tender years” presumption is an unconstitutional gender-based classification in violation of EPC.
- ii. Race cannot be factor in court’s placement of child.
 - 1. *Palmore v Sidoti* – child was removed after mother married man of another race. *Held*, court cannot justify a racial classification as a basis for removal of a child from the custody of its natural mother.
- iii. Religion:

1. *Troxel v Granville* – P Grandparents petitioned for visitation over the protest of the mother. Ct: statute unconstitutionally infringes on the mother’s fundamental parental right... the statute is too broad b/c it allows any third party to subject any decision by a parent concerning visitation to state-court review. *There is a presumption that fit parents act in the best interest of their children...usually no reason for state to interject itself into the private realm of the family.*
2. *Alison D v Virginia M* – P petitioned the court for visitation with the son of her former same sex partner (D was inseminated, P has no biological connection). Ct: child’s parent has the exclusive right to the care and custody of her child...the statute does not include nonparents, even if they have developed a relationship with the child.

e. Child Custody and Court Proceedings

i. Jurisdiction

1. Under the Parental Kidnapping Prevention Act (PKPA), custody proceedings take place in child’s “home state”
 - a. the state in which the child lived with his parents or a parent for at least six consecutive months prior to the commencement of suit.
2. PKPA provides that full faith and credit have to be given to child custody determinations if the state follows these “home state” jurisdiction guidelines.
3. Note that these are different jurisdictional requirements than for divorce, and financial divisions, so different slices of the action can take place in different states.
4. Jurisdiction tends to stay with the original Jurisdiction, to prevent seizing the child and running to more favorable place. More likely to be witnesses and evidence in the new home, but this way make sure only one court is making decisions at a time, no competing decrees.
 - a. *Smolin*- A court may not consider the merits of the criminal charge when they get an extradition request (so even though he had custody and hadn’t really kidnapped her as M claimed, still gets extradited, which sucks)

VII. Financial Consequences of Divorce

a. Financial Consequences:

i. Division of Property

1. theories:
 - a. Contribution
 - b. Expectations
 - c. Fault

ii. Spousal Support

1. theories
 - a. reasonable needs
 - b. fault

iii. Child Support

iv.

b. Achieving a Fair Dissolution

- i. Spouses can be awarded what is considered 'fair and equitable' based on a number of factors.. can do a 50-50 split, or consider the types of assets being split, or consider a list of relevant factors.
- ii. ALI proposals want to replace discretion with rules – mathematical formulas to be applied. ALI says after a certain period of time, spouses stop thinking about property separately... so rules say that longer marriage goes on, larger fractions of previously separate property become part of other spouse's.
- iii. Note that important consequences rest on what is alimony and what is division – like finality vs. modification, and bankruptcy proceedings.
- iv. **Changed circumstances:**
 - 1. *Keller v O'Brien* – recipient spouse's remarriage does not automatically terminate alimony, but makes a prima facie case requiring the court to terminate alimony absent proof by the recipient spouse of some extraordinary circumstances warranting its continuation.
 - a. Based on the rationale that it is "illogical and unreasonable" for a spouse to receive support both from a former and a current spouse absent extraordinary circumstances...the new spouse assumes a duty of support upon marriage
 - 2. *Deichert v Deichert* – Bankruptcy code provides that a discharge does not discharge an individual debtor from any debt to a spouse, former spouse or child for alimony, maintenance or support in connection with a separation agreement, divorce decree, or property settlement.

c. Alimony

- i. Today we have alimony as equitable remedy for spouses who stayed home during marriage with children, also for rehabilitation to let spouse return to mkt. Also designed to address the spouse seeking alimony's "reasonable needs" if they don't have sufficient property, including marital property, to provide for their reasonable needs, AND the spouse is unable to support herself through appropriate employment or is the custodian of a child whose circumstances make it appropriate that the parent not be required to seek employment outside the home.
- ii. Different theories as to whether should be done on a mathematical formula basis (gives bright line rule and predictability, but no room for individual determination) or on a discretionary basis to achieve fairness – approach used can change the outcome immensely.
- iii. Alimony survives on a case by case basis.
 - 1. *Orr v Orr* – state statutes which impose alimony obligations on only one sex are unconstitutional.
 - 2. *Michael v Michael* – Maintenance should be utilized as a means of providing support for an economically dependent spouse until spouse is self-reliant.
 - 3. *Rosenberg v Rosenberg* – Marital property is all property acquired by the spouses during the marriage, including stock appreciation in retirement funds. Where funds are partly marital and partly nonmarital, the property retains the same character as its source

d. Most Valuable Assets – Division

- i. Most valuable and most contested assets are the family home and pension/retirement funds.

1. The Family Home

- a. A lot of discussion over division of the home, which is generally the biggest asset of the couple and if it is given to one spouse then there needs to be something comparable in \$\$ to compensate the other – so usually needs to be sold. But arguments for keeping children in the house, and for helping the custodial spouse. In MO ct has to look at desirability of keeping children in the same home.

2. Retirement Funds

- a. *Ferguson v Ferguson* - A spouse who has made a material contribution toward the acquisition of property titled in the name of the other may claim an equitable interest in such jointly accumulated property incident to a divorce proceeding. When separate retirement plans for each spouse are not in existence, it is only equitable to allow both parties to reap the benefits of the one existing retirement plan, to which both parties have materially contributed in some fashion. (some theories that the money was invested when it could have been used by both spouses, or that the W stayed home which allowed H to work and receive the pension, etc)
- b. *Cohen v Cohen* – Marital property includes both vested and unvested retirement benefits that accrue during the marriage. Uses deferred compensation theory, it's her income too.
- c. valuation methods – different ways to calculate, including present value calculations that subtract for statistical probability that spouse will leave his job, which reduces the value. Can also use deferred distribution method – court determines the spousal shares by a percentage or formula at the time of divorce, but retains jurisdiction, delaying the division until the spouse receives the payments. This is discouraged b/c it frustrates finality.

3. Academic Degrees –

- a. *In re Marriage of Roberts* – degree does not constitute marital property subject to division upon divorce. Can take into account new earning potential and sacrifice/contributions to get the degree, so that helps a little.

4. Tax Implications –

- a. Whether or not pmts are considered property or alimony does affect their tax consequences. If recipient was getting alimony, that counts as income and is taxed. Similarly, the payor can deduct for what he pays. By contrast, transfers of property don't create a gain or loss to be recognized.

e. Child Support

- i. Purposes/Objectives of Child Support – theories vary:
 1. ensure child is adequately cared for
 2. support to full extent possible
 3. equalize standards of living
 4. create fairness for the children
- ii. Hard to calculate without consensus on what we're trying to achieve

iii. Differing guides:

1. Federal Advisory Panel on Child Support Guidelines recommended that both parents share responsibility, parental subsistence needs should be considered (but child support should virtually never be set at zero), child support should cover a child's basic needs while allowing enjoyment of a parent's higher standard of living, each child has an equal right to share in a parent's income, guidelines should not create economic disincentives for remarriage or work.
2. ALI lists 9 general objectives including child's ability to enjoy a minimum decent standard of living but also a standard not grossly inferior to that of the child's higher income parent, protection from loss of important life opportunities, fairness to parents, etc

iv. ** States now must develop mathematical guidelines in order to remain qualified for federal funds.

- v. *Downing v Downing* – child support payment amounts are set at levels designed to meet the realistic needs of the child – “three pony rule” – no matter how wealthy the parents, no child needs three ponies.

vi. No right to child support post-majority:

1. *Curtis v Kline* – statute that distinguishes between children of married and divorced, separated or unmarried parents for the purpose of authorizing a court to order the parents to provide equitably for the post-secondary educational costs of the child is unconstitutional under the EPC of the 14th amendment.
2. Most states do not authorize post-majority educational support.
3. Depends on view of child support how you feel about these cases. This is an example of a rule that was trying to keep child from being punished, not getting opportunities they would have if Ps hadn't divorced. But *legally*, no way to order P to pay when no requirement for regular parents to pay for education.

vii. Which children have to be supported?

1. *Pohlman v Pohlman* - Ct: requiring a noncustodial parent to continue supporting children from a first marriage at the same economic level after that parent remarries and becomes obligated to support more children from the second marriage is constitutional
2. But some states actually have the reverse, “second family first”... determine need of current family and use what's left for support pmts.
3. Raises *Zablocki* issues, can't keep people from forming new families based on prior children/commitments.. but not fair to either set of children to have others pampered while they live in poverty.

viii. Changed circumstances

1. Voluntary job change:

- a. *Antonelli v Antonelli* – Party seeking change in child support has the burden of proving beyond a preponderance of the evidence a material change in circumstances justifying modification of the support obligation. In this case also had to show change wasn't due to a voluntary act, which it was.

procreate. Though right is a fundamental interest, the condition of his probation is narrow and can be fulfilled if he merely complies with the law. (contrast with Zablocki)

5. All of these problems multiply when working between more than one state...then you have jurisdiction problems too.

x. Jurisdiction

1. Jurisdiction gives us the rule of 'divisible divorce' - J to dissolve marriage is where the petitioner is domiciled / J for child custody is the child's 'home state' / J for financial matters, child support, property, etc, have to have in personam jurisdiction over both parties.
2. Js have tried to use longarm statutes, reciprocal enforcement, etc.
 - a. Uniform Reciprocal Enforcement Support Act (URESA) – parent could go to prosecuting atty who would forward the complaint to the corresponding atty in the other parent's jurisdiction to get enforcement. But this didn't work very well, it was a complicated procedure and the state had a conflict of interest in denying its own citizen \$ needed to support people in that state.
 - b. *Kulko v Superior Court* - P and wife, residents of NY, were married in CA on a brief stopover. After their separation, wife moved to San Francisco. The kids lived with P during the year but mother in CA during vacations. When daughter expressed desire to live with mom, P bought her a plane ticket and sent her there. Later, the son also went to live there, but he went on a ticket that mom bought him. After both children were living with her, mother sought to modify the child support judgment and be awarded full custody. P appeared specially, and moved to quash service because he was not a resident of CA and lacked 'minimum contacts' with CA to warrant personal jurisdiction being asserted.
 - Ct: this does not meet 'minimum contacts' of International Shoe.. allowing a child to spend time with mother is not 'purposely availing of benefits and protections' of the J.
 - Basic considerations of fairness dictate that NY should be the proper forum, even if they do have to use CA law.
 - *State ex rel Mahoney v St John* – court used Uniform Interstate Family Support Act to exercise personal jurisdiction over a nonresident b/c the resident had lived within the state with the child for some time. So service is good in another state and the state he lived in before can get personal J over him. Using a weird long arm – no tortious activity in the state, but lived in family relationship in the state.
3. *Letellier v Letellier*
 - Ct: under the UIFSA, a state has no jurisdiction to modify child support orders issued by another state that has lost its continuing exclusive jurisdiction, unless the petitioner for the modification does not reside in the state in which they seek the modification.

- If a resident could petition in his or her own state to modify the order issued in the other state, this would be inequitable and work a hardship on the nonresident responding party.
- Nothing in the FFCCSOA indicates an intent to preempt the UIFSA
- Under the FFCSOA, a state has jurisdiction to modify an out of state support order only when the petitioner registers the order in a state having personal and subject matter jurisdiction for the purpose of modification.
- Under the UIFSA Tennessee courts do not have SMJ to modify the DC support b/c the mother is a resident of TN → reversed
- UIFSA goal is to consolidate all support into one J at a time. J lies in the J that issued it, unless all parties have left the J (really the same rule as with child support).

f. Separation Agreements

- i. At one time, any agreement that seemed to take the risk out of divorce would be violative of public policy b/c it encouraged divorce.
- ii. UMDA, state statutes began providing affirmative policies to promote the amicable settlement of disputes.
- iii. Autonomy and private ordering now considered higher value than judicial paternalism. Also relieves the court of burden of dealing with these cases if the parties can figure it out on their own.
- iv. Court can decide whether terms are unconscionable, and then void those agreements. Some courts will just rubberstamp, others will look closely at the terms.
- v. Under ALI principles, presumptively unconscionable when they substantially change the property rights otherwise due, when enforcement would substantially impair the economic wellbeing of either a party with custody of the children or a party with substantially fewer economic resources than the other.
- vi. MO statutes provide exceptions for the custody, care, support of the children – parties don't have same freedom to make decisions over those matters.
 - I. Public policy argument – even in this era of autonomy still need protective power over children.