Family Law Outline – Professor Silbaugh – Fall 2010

Introduction

I. Family law is largely state law
II. Why would the government care about families/marriage?
    a. Maintaining stability – regulation around transmission of wealth
    b. States want to know how people are living in order to respond to their needs
    c. Economic interests
        i. State wants to protect its own purse – reduce the welfare state
    d. Social reproductive function
        i. Need good citizens – people who carry forth citizenship ideas
        ii. Need soldiers, teaches, workers
    e. Public morality
        i. State has some interest in monogamy or limited monogamy (sexual regulation)
            1. Traditionally: concerns about paternity and lineage – whose kids were whose
            2. Modern: public health concerns (i.e. STDs)
                a. Concerns about limiting sexual behavior in order to limit reproduction, and once there is reproduction, the state is concerned about ensuring the children are with their parents and the parents are providing for the children (i.e. making sure dependents have someone to depend on)
III. Coverture: Blackstone's approach to marriage and the status of women was based primarily on an economic rationale
    a. Women's legal identity's merged with men's in marriage, and this had very specific legal and social consequences
IV. The Relationship Between Families and the Law
    a. Public Law
        i. Ex: *Moore v. City of East Cleveland* (U.S. 1977): housing ordinance tried to limit the occupancy of a unit to members of a single family; Due Process challenge
            1. When a city undertakes such intrusive regulation of the family, the usual judicial deference to the legislature is inappropriate
                a. This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment
                    i. The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition
            2. Underlying issue is how you define "family"
                a. *Belle Terre* defined family as "blood, adoption, or marriage"
    b. The Evolution of the Right to Privacy
        i. Early Framework:
            1. Ex: *Meyer v. Nebraska* (U.S. 1923): struck down a state statute that barred teaching in the German language to children who had not yet reached the eighth grade; Court stressed the Fourteenth Amendment liberty interest of parents who wanted their children to study German
                a. Liberty interest includes the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience
            2. Ex: *Pierce v. Society of the Sisters* (U.S. 1925): overturned an Oregon statute that provided that parents could satisfy the state's compulsory education law only by enrolling their children in public schools; Court held that the statute

unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control

3. Ex: *Prince v. Massachusetts* (U.S. 1944): also recognizes family privacy – the custody, care and nurture of the child reside first in the parents

ii. Return to family privacy in the 1960s:

1. Ex: *Griswold v. Connecticut* (U.S. 1965): opinion is grounded in marriage and the marital bedroom, so the opinion is about a fairly limited right; use of contraception is being translated into something else – there is a privacy interest in the decision about whether to have children or not
    a. We deal with a right of privacy older than the Bill of Rights … privacy of the marriage relationship and marital bedroom
        i. Families are distinct and pre-political – basis for state not to intrude

<u>Entry to Marriage</u>

I. Marriage, generally
- a. Cohabitation in the 18th century was considered marriage
- b. Overtime, the law took a much stronger hand in the licensing of marriage and marriage become something formalized only when the state gave permission
    - i. Marriage is defined by the state and protected from intrusion by the state
- c. Marriage procedure: license **+** solemnization (a moment of publicly declaring that there is *mutual consent* <u>and</u> intention to be married)
    1. Hypo: a couple gets married to please their parents, but the person officiating is not licensed and they burn the marriage license when they get home → no marriage because there was no mutual consent or intention to marry
    2. Hypo: Britney Spears gets married foolishly (but no capacity issues) and then immediately gets the marriage annulled → no meeting of the minds, even look it looked like marriage
    - ii. Courts bend over backwards to find people married, especially if the problem is a technicality with the marriage license (i.e. if there was solemnization, licensing defects can be overcome)
    - iii. Presumption in favor of finding marriage, if there is doubt
    - iv. Need capacity to marry
        1. If someone does not have capacity to marry when they go through licensing and solemnization, but they later have capacity and do not take action to undo the marriage, then they've confirmed through their conduct that they in fact had an intent to marry
- d. Nature of marriage: civil/social vs. legal conception

II. Common Law Marriage
- a. Even without solemnization or a license, parties could contract a valid common-law marriage simply by (1) living together and (2) holding themselves out as married with (3) the mutual intention to be married; <u>and</u> (4) you have the capacity to marry (i.e. age, not already married)
    - i. Once formed, a common-law marriage is fully valid for all legal purposes and can only be dissolved through formal divorce (i.e. it is married – not a lesser form of marriage)
    - ii. Common law marriage is transportable
        1. So even though 12 jurisdictions recognize it, other states must respect the marriage because it is considered a valid marriage in one of those 12 states (i.e. full faith and credit)
    - iii. Common law marriage does not require a certain number of years
- b. Ex: *In re Estate of Hunsaker* (Montana 1998): Anne alleges that she was the common-law wife of the decedent, but the siblings of the decedent challenge this on the basis that the parties only considered themselves married when it was convenient; evidence to support a common-law marriage: engagement rings and wedding bands, grandfather clock engaged with their initials

(last name initial was "H," which suggests that she was using his name) and they proudly showed this clock to everyone who entered, they cohabitated, decedent called a lawyer to draft a will and make Anne the heir to his estate a week before he died; however, there is also evidence to suggest uncertainty about their status: filed single tax returns, kept separate bank accounts, relationship status on various forms conflict (perhaps decedent was trying to avoid certain legal consequences of being married) – but to the community they always held out and appeared married

i. Standard in Montana: the party asserting that a common-law marriage exists has the burden of proving:
    1. That the parties were competent to enter into marriage
        a. Main qualification of capacity is that you are not already married
        b. Other concerns: age, mental capacity, drunk, etc.
    2. That the parties assumed a marital relationship by mutual consent and agreement
        a. Private consent – meeting of the minds
    3. That the parties confirmed their marriage by cohabitation and public repute
        a. Public affirmation/holding out
            i. A common-law marriage does not exist if the parties have kept their marital relationship secret

c. Common-law marriage has pretty much come to an end these days
    i. Some states have legislation abolishing it (Massachusetts, e.g.)
    ii. There are not as many administrative burdens to get married as there once was-- more readily available
    iii. The administrative state is strengthened and knowing who is married becomes more relevant (bureaucratic reasoning)
    iv. To avoid the possibility of fraud (on third parties, e.g.)

III. The Right to Marry
    a. Ex: *Maynard v. Hill* (U.S. 1888): marriage is the most important relation in life and the foundation of the family and of society, without which there would be neither civilization nor progress, and because of this importance the state can be involved in regulating marriage (to a certain degree)
    b. Ex: *Loving v. Virginia* (U.S. 1967) (miscegenation): anti-miscegenation statute had equal protection and due process issues; anti-miscegenation laws were the last reminisce of the Jim Crow era; couple did not want to be criminally prosecuted for their interracial marriage (not an issue of them wanting Virginia to recognize their D.C. marriage – merely to be left alone); state claims the law is to preserve the racial integrity of their citizens, but the crime really only has to do with the racial integrity of whites; the Court rejects the state's equal application argument
        i. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men
            1. Marriage is one of the basic civil rights of man, fundamental to our very existence and survival
                a. There is a fundamental right to marry
                    i. Note: Court does <u>not</u> invoke tradition here (like they did in *Griswold*)
        ii. The Court ruled that the Virginia statute was both racially discriminatory under the equal protection clause and a violation of the fundamental right to marry, which the Court located in the due process clause of the Fourteenth Amendment
    c. Ex: *Zablocki v. Redhail* (U.S. 1978) (poverty): defendant was denied a marriage license in Wisconsin because he was in arrears for his child support payment, and even if he was not, his child would still be considered a public charge; state's interests are legitimate (i.e. to ensure that children are provided for), but the means are not because the statute interferes substantially with the right to marry (intermediate standard of review?)

i. **Reasonable regulations that do not significantly interfere with decisions to enter into the martial relationship may legitimately imposed** (i.e. state does have the right to regulate marriage)
    1. Case probably best understood as a poverty, <u>equal protection</u> case
ii. All justices are on board with the holding in this case, but there is a debate about whether there is a fundamental right to marry

d. Tension between:
    i. A set of views about marriage captured by *Griswold*, and possibly extended by *Lawrence*, that marriage is private – something that sets it beyond law's reach
    ii. *Maynard v. Hill*'s view that marriage is a contract between two parties and the state – a fundamentally public status that is regulatory

IV. Substantive Restrictions on Marriage

a. Incest has been prohibited in every U.S. jurisdiction since colonial times
    i. There is no universal agreement among the states about which family relationships qualify as sufficiently close to trigger the incest bar
        1. Many, but not all, states treat relations by affinity (i.e., by marriage) the same as relations by consanguinity (i.e., by blood)
            a. Likewise, most states treat relations created by adoption in the same manner as those created by blood
        2. States are split when it comes to the marriage of first cousins
    ii. Ex: *Smith v. State* (Tenn. 1999): the taboo against incest has been a consistent and almost universal tradition, and there is nothing to suggest a movement away from the historical treatment of incest; there is little that the prohibition against incest is directly reflective of the moral concerns of our society – **incest is a wrong against the public largely because of its potential to destabilize the family** (also concerned with preventing sexual jealousies within families; children associating outside the family; and genetic effects on children)
        1. Society is concerned with the integrity of the family because society cannot function in an orderly manner when age distinctions, generations, sentiments, and roles in families are in conflict
            a. <u>The state may legitimately proscribe against acts which threaten public order and decency</u>
    iii. Is taboo an adequate justification for outlawing incest?

b. Age
    i. Most states have a minimum age for marriage, with exceptions for minors with parental and/or judicial consent
        1. Ex: sometimes states allow minors to marry if the girl is pregnant, in order to legitimate the child

c. Same Sex Marriage: until 2004, no state permitted couples of the same sex to marry
    i. Early decisions reasoned that the constitutional right to marry simply had no application to same-sex couples because the very idea of marriage necessarily assumed a union of one man and one woman
        1. SCOTUS has never directly addressed the constitutionality of laws banning same-sex *marriage*, but has considered whether the right of privacy recognized in *Griswold* protects *sexual intimacy* between same-sex partners more generally
            a. Ex: *Lawrence v. Texas* (U.S. 2003): Bowers' (overruled here) statute made sodomy in general illegal, and Lawrence's statute makes only homosexual sodomy illegal – it looks like the state is more focused on the people, not the acts (i.e. "homosexual" is an intention to single out a group of people); standard of review is not clear, so we presume rational basis (with a bite?)

i. Kennedy tries to distinguish this moral legislation vs. all other moral legislation (ex: incest) – he is staking out a case for the fact that there is something special about intimate conduct between people of the same sex
    1. He makes a point about sex acts fitting into relationships and it being demeaning to suggest that they do not (i.e. we demean gay citizens by saying that sex acts are separate than the deep intimate bond we see in *Griswold*)
        a. The Court clearly protects love and intimacy, and what does love and intimacy mean without sex
            i. Love and intimacy are really the interests protected here, and sex is just a part of that
            ii. Intimate consensual sexual conduct is part of the liberty interest protected by substantive due process under the Fourteenth Amendment
    2. Moral disapproval of a specific group is not OK
        a. Cannot interfere for moral reasons – need to show some harm
ii. History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry … As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom
    1. Scholars disagree about the impact of *Lawrence*
        a. Some say fundamental rights no longer need to be deeply rooted
        b. Some say that *Lawrence* does not remove the deeply rooted requirement (Scalia, e.g.)

ii. Defense of Marriage Act (DOMA): defines marriage as between opposite sex partners for the purpose of federal law and federal marriage methods; therefore, a same-sex couple married under state law will not be recognized as married for any purposes of federal law, and no state shall be required to give effect to any other state's marriage of persons of the same sex (the general rule is that you must recognize another state's marriage even if you would not initially solemnize the marriage, unless it goes against some fundamental state policy, which over 40 states have expressed)
    1. When Congress enacted DOMA in 1996 it did not seem like they were taking anything away from anyone because there was no same-sex marriage anywhere in the country yet (i.e. when it was passed, same-sex marriage was still hypothetical)
iii. In 1993, Hawaii became the first high court to find that the prohibition on marriage between people of the same sex was subject to the state constitution's equal protection because it discriminated on the basis of sex
    1. Notion of sex equality
iv. In 1999, Vermont ruled that the state's restriction of marriage to opposite-sex couples violated the state constitution (*Baker v. State*)
    1. In response, the Vermont legislature enacted a statute permitting same-sex couples to enter into state-recognized civil unions
v. Ex: *Goodridge v. Dept. of Public Health* (Mass. 2003): the government creates civil marriage (uses "civil" to focus on marriage being an institution, a civil status) – while

only the parties can mutually assent to marriage, the terms of the marriage (who may marry and what obligations, benefits and liabilities attach to civil marriage) are set by the state; court cites *Loving* and *Zablocki* (fundamental right to marry cases), but **purports to apply rational basis review**, and concludes that the marriage ban does not meet the rational basis test for either due process or equal protection; court is conscious to affirm the state's interest in regulating marriage, but cannot impose this particular boundary

1. Department posits three legislative rationales, which the court shoots down
    a. Providing a favorable setting for procreation
        i. Marriage's primary purpose is <u>not</u> procreation
            1. Most heterosexual marriages do implicate procreation, but certainly not all
            2. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmartial child bearing and the creation of families by noncoital means
                a. Massachusetts actively promotes and supports same-sex couples having children
    b. Ensuring the optimal setting for child rearing (i.e. two-parents, one of each sex)
        i. Protecting the welfare of children is a paramount state policy, but restricting marriage to opposite-sex couples cannot plausibly further this policy – no evidence to support this interest
        ii. Court rejects notion that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children
    c. Preserving scarce state and private financial resources
        i. An absolute ban on same-sex marriage bears no rational relationship to the goal of economy
2. Remedy: **we construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others**
    a. Does not follow Vermont's initial approach to provide for civil unions (i.e. give legal/civil benefits, but not the marriage part) because argues that separate is not equal and that would stigmatize homosexual relationships
    b. Social contempt for a certain group is not a legal product – law cannot control the social aspects – law can only control legal aspects/benefits
3. Greaney (concurring): thinks the issue can be resolved using equal protection analysis (i.e. on the basis of sex discrimination) and analogizes to *Loving*
4. Reactions to *Goodrich* are mixed, and will need a federal ruling eventually due to the diversity of treatment among the states
5. Summary: The court found that there was no rational basis for denying marriage to same sex couples, particularly in light of prior state policy supporting parenting and adoption by same sex couples and prohibiting discrimination against same sex couples in other contexts
    a. It thus avoided any question of whether there is a fundamental right to marry under either an equal protection or due process analysis
    b. At the same time, the opinion recognized that the importance of marriage did not rest only in its legal benefits and burdens, but as much in its cultural and social significance

vi. Ex: *Perry v. Schwarzenegger* (N.D. Cal. 2010): CA decided that prohibition of same-sex marriage violated the CA Constitution; voters overturned this decision by amending the CA Constitution via the Prop 8 amendment; litigants in CA appealed the Prop 8 amendment, CA said Prop 8 was OK as far as CA constitutional law goes; *Perry* is litigants challenging Prop 8 under the federal Constitution
    1. Judge Walker made 80 findings of fact
        a. Coverture is over: there was a large legal infrastructure of sex roles in marriage, which could have been a justification for opposite sex marriage, but the infrastructure has ended and in its absence, the justification is gone
        b. Sexual orientation is real – it is a commonly understood identity
        c. Seems to conclude that marriage is about satisfying the adult parties to the marriage
        d. Social meaning of marriage is better than the social meaning of civil union
        e. Prop 8 makes GLTB feel second-class
vii. Ex: *Gill v. Office of Personnel Management* (D. Mass 2010): court speaks to DOMA and says that you cannot say marriage is something for the state to define, but then give a federal definition (i.e. between a man and a woman); federal government sought to advance four initial interests through DOMA but essentially disavowed the interests during litigation, and they articulated two new reasons:
    1. DOMA allowed the federal government to preserve the status quo as of 1996 (give consistency to/stabilize the definition of marriage)
        a. Court said the status quo is federal government abstention of the marriage realm, even in times where there have been inconsistencies with marriage (age, race, e.g.)
            i. Section 2 of DOMA expressly recognizes that marriage is within the states' powers
    2. DOMA is an incremental response to a new social problem that Congress may employ in the face of a changing socio-political landscape
        a. Court rejects this argument on much of the same bases as the first argument
    3. <u>Result</u>: DOMA violates the Equal Protection Clause of the Fourteenth Amendment

d. Polygamy is an ancient form of marriage with deep historical roots (unlike same-sex marriage which is protected under a theory of autonomy, rather than history)
    i. There are surely reasons to disapprove of the practice, but the legal system make illegal and illegitimate a social and cultural practice with extraordinarily deep roots
        1. The law is not simply acting as an impartial administrator of cultural family practices
        2. It is choosing among them in much the way it does with same sex marriage and interracial marriage
    ii. The Mormon Church no longer approves of polygamy, but there are rather large fundamentalist groups who are no longer members of the mainstream church because they believe that the Mormon Church rejected polygamy for political reasons and not for spiritual reasons
    iii. Ex: *Reynolds v. United States* (U.S. 1878): upheld the criminalization of polygamy against a claim that it punished religious conduct in violation of the First Amendment
        1. <u>SCOTUS reasoned that the Free Exercise Clause entitled polygamists to *believe* in polygamy as a tenet of their faith but not *to act* on that belief if the conduct would otherwise be in violation of social duties or subversive of good order</u>
        2. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law

3. Polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism

iv. Ex: *State v. Holm* (Utah 2006): D is "married" to three people and the third "marriage" is at issue; court holds that the term "marry," as used in the bigamy statute, includes both legally recognized marriages and those that are not state-sanctioned – the statute was intended to criminalize both attempts to gain legal recognition of duplicative marital relationships and attempts to form duplicative marital relationships that are not legally recognized (i.e. if it is marital in nature, it is marriage)
   1. D's Free Exercise Clause claim: **a state can burden an individual's right to free exercise so long as the burden is imposed by a neutral law of general applicability** (decided in *Reynolds*)
   2. D's claim under the Utah Constitution: Utah Constitution expressly prohibits polygamy, and this language is unamendable because Utah had to put it in their constitution to join the Union
   3. D's claim under the federal Constitution (liberty interest/due process): to deal with *Lawrence*, the court notes that despites it use of seemingly sweeping language, the holding in *Lawrence* is quite narrow, and SCOTUS went out of its way to exclude from protection conduct that causes injury to a person or abuse of an institution the law protects – in marked contrast to *Lawrence*, this case implicates the public institution of marriage, an institution the law protects, and also involves a minor
      a. Note that often bigamy statutes are used to protect minors because it might be harder to prove abuse without it (but it often easy enough to find abuse re: bigamy)
         i. This also draws the statute into *harm protection legislation*, versus being considered *moral legislation*
         ii. No intent is needed to be convicted of bigamy
   4. *Lawrence* does not decide this case because it is a holding limited to gays and lesbians

v. Note that litigants seeking same-sex marriage recognition want to separate themselves from this practice, and litigants seeking to stop same-sex marriage want to associate the practices
   1. Could distinguish same sex marriage and polygamy on the basis of: child abuse factor and polygamy is a practice, not a sexual identity
   2. Could also say that in the polygamy context, the state is trying to preserve the channeling function of marriage, which can still be preserved in same-sex marriages, but not in polygamy (or so the argument goes)

vi. Polygamy is also regulated to avoid marriage fraud (i.e. D having two wives and neither knows about the other)
   1. Bigamy used to be a response to the fact that divorce was not widely available
      a. But now that it is, bigamy cases are usually more pathological

V. Whether marriage and family privacy rights are grounded in equal protection or due process matters
   a. If we are looking at the right to marry through the Due Process Clause we think marriage is pre-political and there is an autonomy interest in family decision-making
   b. If we think marriage is rooted in Equal Protection, then marriage is a public benefit that needs to be provided equitable – not the notion that marriage is a private, individual institution
      i. Here we can think of marriage as serving a state purposes (versus a private, pre-political right)
         1. Stabilizing social reproduction
         2. Channeling social intimacy
            a. We know people are going to have sex and that will lead to children, so it is OK for the state to normalize parents living with their biological children

b. The more we support the notion of family as the proper outcome of reproduction, the more it makes sense for the state to protect the heterosexual reproductive structure
    i. This carries the day in the Hernandez case (?)

<u>During the Marriage</u>

I. Roles

a. Marriage in various ways protects role differentiation
    i. In the absence of role differentiation to some degree, it is hard to explain why we treat people as units, rather than individuals
b. We are moving away from a patriarchical model (i.e. coverture) and toward a more egalitarian one
    i. In the past generation, the law has facilitated women's participation in the workplace
        1. Ex: Family and Medical Leave Act (FMLA) of 1993: recognized the importance of having both mothers and fathers care for children – the <u>FMLA advocates hoped to promote a more gender-neutral allocation of work and family roles between parents, based on a belief that the law can and does significantly affect families by helping change gender expectations within the home</u>
            a. FMLA is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity
            b. "Family" is defined by legal relationships: related by spouse, parent, or child
c. Ex: Elizabeth Warren (2004): it can be more dangerous to have two income earners in a family because if you lose one then you can no longer support your dual-earner lifestyle (so the second wage does not turn out to be insurance, as we might think); but there is also a notion that a single earner is no longer an option with the way families fit into the economy; we now see marriage involving two breadwinners, so role specialization (i.e. one working, one at home) is not viable in the economy anymore [this is an exaggeration to make a point]

II. **Support Obligation** – something left over from coverture: at common law, the husband was required to support the wife, and he had the corresponding right to her domestic services (support-service exchange)

a. The support obligation puts the first financial responsibility on the family (as opposed to state or public resources)
    i. It privatizes dependence to the family, which protects the public
        1. Evidence of a public function of marriage
b. Ex: *McGuire v. McGuire* (Neb. 1953): couple has been living together as married for 30+ years, wife brings suit to have her husband pay for her "necessaries" (a car, clothing, home maintenance, food, e.g.), she is asking the court to ensure that her husband gives her suitable funds to pay for these items; court finds for the husband because the parties are living together as a married couple in the same house:
    i. "<u>As long as the home is maintained … it may be said that the husband is legally supporting his wife</u>," and this standard is satisfied as long as the wife is willing to live in the home with the husband
        1. Court suggests that the wife's order would have been granted if she was living separately and through no fault of her own (i.e. he is a bad companion and the living conditions were intolerable)
    ii. This case is the conventional understanding of the support obligation: <u>the obligation is there during marriage, but the parties cannot enforce is against one another during the marriage</u>
        1. There is a privacy point here

a. Basically, as long as you are living under the same roof, maintenance/support is satisfied and the rest is details for the couple to figure out
i. When a marriage still looks like a marriage, notions of privacy will trump enforcement of the right

iii. *McGuire* stands for the **nonintervention doctrine**

c. The one area where the doctrine of necessaries has real ongoing consequences concerns medical expenses
i. If one spouse's medical bills run into the hundreds of thousands, the impact of the necessaries doctrine is that the other spouse may not protect her assets from the devastating financial effects of her spouse's uninsured illness
1. This is true even if she explicitly refuses to assume financial responsibility for those debts in writing and in every way possible at the time the services are rendered

d. Alimony also speaks to the support obligation surviving divorce

III. Elective Shares

a. In community property states, regardless of what the will provides, the surviving spouse is entitled to one-half of the property accumulated during the marriage
b. In common law states, the surviving spouse may be entirely left out of the will
i. *But*, virtually all non-community property states have some form of the statutory elective share, which generally allows a surviving spouse to elect to receive one-third or one-half (depending on the jurisdiction) of the estate of the deceased spouse
a. The elective share typically applies to all property, not just real estate
b. The elective share is gender neutral
c. The elective share provides for full ownership, not just a life estate

c. The elective share is relatively grounded in the support obligation: the surviving spouse sees the estate as partly theirs because the marriage is considered an economic unit
d. Dicta: You can sometimes do better in divorce than in death (as far as property and asset allocation)

IV. Evidentiary Rules

a. Common law rule that married couples were not allowed to testify against each other or on behalf of each other in a criminal proceeding
i. *Funk v. United States* (U.S. 1933): Court abolished the testimonial disqualification in the federal courts, so as to permit the spouse of a defendant to testify in the defendant's behalf
1. *Funk*, however, left undisturbed the rule that either spouse could prevent the other from giving adverse testimony

ii. The <u>historical justification</u> for the "privilege" is the notion that the husband and wife were one (i.e. the husband)
iii. The <u>modern justification</u> for this privilege against adverse spousal testimony is its perceived role in fostering harmony and sanctity of the marriage relationship
1. Weighing the interests of rescuing a couple from having to testify against each other versus being able to admit valuable evidence
a. Allowing the privilege suggests that marriage is a more important consideration than getting evidence into court

b. Ex: *Trammel v. United States* (U.S. 1980): **overturns the privilege that allowed an accused to exclude the voluntary testimony of his spouse**; here, the modern justification does not hold up – there is no marital harmony to preserve (i.e. when one spouse is willing to testify against the other in a criminal proceeding – whatever the motivation – their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve)
i. <u>The existing rule is modified so that the witness-spouse alone has a privilege to refuse to testify adversely</u>
1. The witness may be neither compelled to testify nor foreclosed from testifying

c. Adverse Testimony (no longer protected) *vs.* Confidential Communications (still protected)
    i. Confidential communication privileges are set up to create an atmosphere of complete safety and trust so as to maximize honesty
        1. The confidential communications privilege survives divorce because of the notion that things said between spouses is so valuable to a marriage that we want a blanket rule
            a. Adverse testimony privilege does <u>not</u> survive divorce

<u>Tort Law</u>

I. Coverture barred interspousal tort suits because the married couple was considered to be one (notion that they cannot sue themselves)
    a. Bar was dropped for certain intentional torts (battery, murder, e.g.)
        i. Bar was dropped again for negligence cases
II. Most common intra-family tort is when two families members are in a car accident, one gets hurt and sues the other – no spousal conflict or marital discord, really just suing to get the insurance money
III. Permitting spouses to sue one another for emotional distress is a harder case
    a. States have differed in their willingness to allow spouses to bring IIED claims for marital cruelty
        i. Some courts have not hesitated to permit married persons to seek redress for a spouse's infliction of emotional distress
        ii. Some courts have been more wary of the encroachment of tort law on marital relations, particularly in divorce actions where a party may use tort claims for bargaining advantages
    b. **IIED:** (1) the conduct involved must be truly extreme and outrageous; (2) the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress; and (3) the conduct must in fact cause severe emotional distress
        i. Ex: *Feltmeier v. Feltmeier* (Ill. 2003): wife sued her ex-husband for IIED following a pattern of domestic abuse that began shortly after the marriage and did not cease even after is dissolution; D argues that this tort is ill-suited for a marriage because marriage is emotionally highly charged, emotional distress is part of the nature of marriage – a constant on and off fluctuation; the court here does not buy this argument (although some courts will, finding something special/unique in marriage circumstances re: IIED) and notes that there is clearly no marital harmony remaining to be preserved
            1. <u>Behavior that is utterly intolerable in a civilized society and is intended to cause severe emotional distress is not behavior that should be protected in order to promote marital harmony and peace</u>
            2. The court is not concerned about allowing this tort to cause excessive and frivolous litigation because the showing required of P is a sufficiently high threshold – a built-in safeguard
            3. The court is also not concerned that allowing this tort (to recover damages) would be redundant because an action for divorce does not provide compensatory relief for domestic abuse
IV. Tort Recovery Against Third Parties (i.e. protecting family relations against intentional disruption by outsiders)
    a. While most jurisdictions continue to provide recovery for loss of consortium, the trend is now strongly against "heart balm" recovery for intimate injuries
        i. **Heart Balm Torts** = so called because legal damages were meant to provide balm for the wounded heart
            1. Ex: criminal conversion; alienation of affection; seduction
        ii. Ex: *Brown v. Strum* (Conn. 2004): parties dated for two months after meeting online; D represented that he was divorced and looking to remarry and have more children; P claims D's conduct amounts to fraud and IIED (i.e. seduction and breach of promise to

marry); court notes that P cannot circumvent the statutory prohibition on heart balm actions by recharacterizing them as emotional distress or fraud claims; the decision bars emotional distress claims arising from intimate misconduct in dating, based on the legislature's desire to preclude recovery for mere contused feelings and sentimental bruises; the lawsuit itself exposes very intimate details or personal, private relationships and that is not a realm courts enter lightly

iii. Ex: *Helsel v. Noellsch* (Missouri 2003): P (wife) brings a suit against D (mistress) for alienation of affection alleging that D intentionally interfered with the marriage and caused it to fail; court holds that because alienation of affection is premised upon antiquated concepts (i.e. causes of action to vindicate the husband's property rights in his wife), faulty assumptions, and is inconsistent with precedent, the tort is abolished in Missouri

1. Faulty assumptions meaning that these suits are almost always motivated by revenge, not reconciliation, so there is no justification for preserving marriage and the family
    a. Also, the necessarily adversarial positions taken in litigation over intensely personal and private matters does not serve as a useful means of preserving the marriage
2. Eliminating this tort is evidence of a change in the notion of how we view marriage
    a. It would not have seemed weird 80 years ago to say that the public had a duty to respect the institution of marriage
    b. Today, however, we are more apt to characterize marriage as a private interaction … as well as affairs, free to have an affair if you choose

b. A few jurisdictions continue to recognize an action for breach of promise to marry
    i. Often because this tort involves real damages – expenses have actually been incurred

Non-Marital Adult Relationships

I. Marriage remains the normative status in law
    a. But there are a lot of different reasons why people remain unmarried: might be prohibited from marrying, might have ideological issues with marriage, might be just waiting or taking baby-steps towards marriage (most cohabitors, e.g., rather than being marriage objectors)
        i. Over the last 40 years, there has been a significant increase in the number of unmarried cohabiting couples because cohabitation has become more acceptable as an alternative to marriage (also because of contraception availability and the increase in divorce (i.e. people did not want to re-marry))
            1. Laws concerning cohabitation have changed markedly in recent years, reflecting society's growing acknowledgement of its frequency
                a. There is no uniformity between states on cohabitation issues, however
                    i. Note that 1/4th of cohabiting couples are same-sex couples and their status to the law is different than opposite-sex couples who are cohabitating
                    ii. Because at common law cohabitation was a crime, it is still a crime on the books in some states – but not a meaningful threat, especially after *Lawrence*

II. Intent (Contract-Based Agreements)
    a. Ex: *Marvin v. Marvin* (Cal. 1976): one of the earliest cases to recognize legal property and support rights arising from cohabitation ("**palimony**" and equitable distribution of property); parties entered into an oral agreement to combine their efforts, money, and property – she agreed to forgo a lucrative career in order to provide domestic services and he agreed to provide support – they also agreed to hold themselves out to the public as husband and wife (and these things did

actually occur during the relationship); the contract claim is there was a breach of a promise to support – contract is not written, only evidence is P's testimony

i. Court declines to broaden the definition of family (to include this relationship), so the Family Law Act does not govern here
    1. If the Family Law Act applied, P would have gotten half of the property accumulated during the marriage
ii. Courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services
iii. Implied promise based on course of conduct – by your actions we can deduce the content of an implied agreement (i.e. parties lived together according to how P explained their agreement and D kept supporting P for a year after their break up)
    1. So if the courts find there is an implied contract between cohabitants, they may impose post-separation obligations based on the implicit promises the couple made to each other through their conduct
    2. Court notes that they are not calling this common law marriage: we need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies
iv. Court can apply equitable doctrines (quantum meruit, e.g.)

b. Ex: *Devaney v. L'Esperance* (N.J. 2008): **cohabitation is <u>not</u> an essential requirement for a cause of action for palimony** (but it is a helpful factor), *but* **a marital-type relationship <u>is</u> required** (coupled with an expressed or implied promise to support) … here the court does not order palimony because the relationship was not sufficiently marital, more like dating, because they did not hold themselves out as husband and wife, among other things
    i. <u>Need</u>: a marital-type relationship
        1. To receive recognition in cohabitation cases, we will look to the details of the relationship and see how conventional they are
            a. But in marriage cases, people can get a license from the state to be a protected form and live however conventional or unconventional they wish
    ii. <u>Do not necessarily need</u>: cohabitation

c. Post-*Marvin* Jurisdictional Treatment:
    i. 1/3rd do what *Marvin* did: express and implied agreements are enforceable and there will be other equitable remedies available
        1. Broadly, court is willing to get involved
    ii. Some states so no equitable remedies
    iii. Some states require the contract to be express
    iv. Some states require the contract to be express and written
    v. Some states will give only equitable remedies, but no contractual remedies

III. Determining Property Rights *in the Absence of an Agreement*

a. When marriage ends, the spouses have claims against each other based on their status and, unlike the *Marvin* line of cases, need not plead the existence of a contract or an equitable claim
    i. The ALI recommends that where unmarried couples have cohabitated for a substantial period, the law should treat them in the same way that it treats married couples upon termination of the relationship
        1. ALI requires some legislative action (i.e. states actually have to adopt it), rather than just restating the law (which is more common for the ALI)
        2. §§2 and 3 provide for relief if the domestic partners have lived together in a common household for a certain duration (determined by the state)
            a. If you are determined to be domestic partners, then property is divided as if you were married (under the ALI) – not talking about alimony though
        3. §7 provides factors for those who have not satisfied the years requirement

a. Ex: representations jointly made to third parties, intermingled their finances, economic interdependence, assumed specialized or collaborative roles …
i. All of the factors suggest a course of conduct agreement
b. ALI's §7 factors are all relatively based on economic interdependence, and this is an attempt to modernize the justification for property distribution

4. ALI is *functional* (functionally are these people a family) rather than *formal* (marriage license = formality)
5. ALI, however, does not seem to provide an exit
a. After the period of years is satisfied, their relationship as domestic partners becomes a **status** (like common law marriage)
i. No longer contract/agreement based

ii. Ex: *Fleming v. Spencer* (Wash. 2002): Washington is the only state (like the ALI) to anchor property distribution on **status grounds** – not contract/agreement grounds
1. A meretricious relationship (means committed intimate relationship for this court) is a stable, marital-like relationship in which both parties cohabit knowing that a lawful marriage does not exist
a. **Factors to determine whether such relationship exists**:
i. Continuous cohabitation (career or education related absences are OK)
ii. Duration of the relationship
iii. Purpose of the relationship (i.e. marital-like?)
iv. Pooling of resources (demonstrates a marital-like commitment)
v. Intent of the parties

IV. Domestic Partnerships and Civil Union
a. Domestic partnerships and civil unions are each a relatively new status that grants unmarried cohabiting couples some or most of the benefits and rights of marriage
i. Civil Unions: just like a marriage, in so far as the state is in control of the benefits
1. Parties to a civil union get the benefits enumerated in the family code and common law for marriage
2. Civil unions in some states are limited to same-sex couples only
a. This might be because the states do not want opposite-sex couples, who have the option of marriage, to be allowed to choose civil unions rather than marriage

ii. Domestic Partnerships: generally the benefits are more enumerated (i.e. only certain benefits, unlike marriage and civil unions)
1. Generally it is municipalities/cities that confer domestic partnerships
a. Sometimes large private organizations recognize domestic partnerships (A&F, Microsoft, e.g.)

Divorce

I. Six divorces that a couple goes through:
a. Emotional divorce: the point at which the couple's marriage breaks down
b. Legal divorce: actual issuance of the grant of divorce
c. Economic divorce: settlement, funds, process of taking family from a unit to economically independent units
d. Co-parental divorce: parents working as independent single parents rather than as a unit working together
e. Community divorce: process of having schools, employers, etc., respond to the family as individuals rather than as a unit

f. Psychological divorce: when a person no longer thinks of themselves as a unit

II. Modern Grounds for Divorce
   a. In 1969, Governor Ronald Reagan of California signed into the nation's first statute providing for "no-fault" divorce
      i. By the mid-1980s, every state had adopted some form of no-fault system for divorce
         1. Most states simply added no-fault as an alternative route to divorce, while retaining the old fault-based system
            a. There are still reasons a party might prefer to seek a divorce on fault grounds
               i. Fault grounds are primarily: adultery, desertion, and physical cruelty
   b. Instead of seeking to identify the victimization of one spouse by the other, no-fault laws look simply to the fact of marital breakdown
      i. If a court finds that a marriage has suffered an irretrievable breakdown, that spouses have stopped cohabitating for a statutorily set time, or that the spouses have irreconcilable differences, it is empowered to dissolve the marriage, without assigning a specific cause for the collapse or blame between the parties
         1. No fault divorce dispenses with the need to prove fault, but often requires the spouses to live separately for a specified period before divorce may be granted

III. Irretrievable Breakdown: either or both of the spouses are unable or unwilling to cohabit and there are no prospects for reconciliation
   a. Ex: *Richter v. Richter* (Minn. 2001): husband is rejecting wife's attempt to get a divorce on the basis that there was no irretrievable breakdown – cannot just get "divorce on demand" – and that marriage is a contract and since he did not breach the contract, she should not be able to get out of it; husband refuses to testify, but the wife did testify that there was no prospect for reconciliation and there was indeed marital breakdown – **one person's testimony is enough to for fact finding re: irretrievable breakdown**
      i. A statute that requires proof of reasonable prospect of reconciliation and serious marital discord adversely affecting the attitude of one or both of the parties before a marriage can be dissolved does not allow "divorce on demand"
   b. Ex: *In re Estate of Carlisle* (Iowa 2002): a very exceptional case in which the court declined to find an irretrievable breakdown – case is distinctive because of the length of the marriage and the discord was economic; parties had been married for 65 years; wife hurt her hip and husband would not pay to repair because it was too expensive; wife moved in with daughter; husband testified re: no irretrievable breakdown, she is a good wife; court holds that there has not been a breakdown in the marital relationship to the extent that the legitimate objects of matrimony have been destroyed

IV. Exclusive No-Fault Regimes
   a. The Uniform Marriage and Divorce Act (UMDA) recommends that irretrievable breakdown of the marriage be the exclusive ground for divorce
      i. Nationwide, this is the minority rule
         1. Ex: Kentucky statute, pg. 440
            a. Purposes of the statute: (i) strengthen and preserve the integrity of marriage, (ii) promote the amicable settlement of disputes, (iii) mitigate the potential harm to spouses and their children
               i. Notion that we want to strengthen the institution of marriage and wash out the crappy ones, so easy exit could be seen as pro-marriage; and that if it is extremely difficult to get out of a marriage, then more people might forgo marriage altogether
                  1. These notions presume though that people even consider divorce and marriage exit at the time they decide to marry

b. No fault still requires a finding of irretrievable breakdown, but this is a low threshold

V. Mixed Fault / No-Fault Regimes
   a. Majority of jurisdictions simply added no-fault provisions to supplement their existing fault laws, so a party seeking a divorce may elect whether to proceed on fault or no-fault grounds
      i. Ex: Pennsylvania statute, pg. 441
         1. **Grounds**: (i) Fault, (ii) Institutionalization, (iii) Mutual Consent, (iv) Irretrievable Breakdown
            a. For mutual consent, there is no fact finding of irretrievable breakdown necessary – the consent of both parties is the finding of fact
               i. Waiting period 90 days
            b. Irretrievable breakdown = a unilateral divorce
               i. Waiting period 2 years
                  1. Opportunity to reconcile
                  2. Opportunity to transform a unilateral divorce to a mutual consent one (i.e. cooling off time)
                  3. Bargaining chip (i.e. if one parties ones to get remarried during this period)
   b. Why choose fault?
      i. Sometimes there is a financial benefit or incentive
      ii. Fault based cases are generally quicker
         1. Typically no waiting period

VI. A few states have attempted to reintroduce fault rules in the form of covenant marriage
   a. Covenant marriage is a voluntary choice made at the time of marriage licensing and requires fault before one party can exit the marriage
      i. This was a legislatively created doctrine aimed at reducing divorce
         1. Yet, as passed, even this anti-divorce reform allows for bilateral no fault-meaning no-fault agreed to by both spouses, if the couple will suffer a longer waiting period

VII. Annulment: we act like the marriage never even happened
   a. Distinct from divorce

Division of Property

I. Qs:
   a. How does marriage affect the ownership of property?
   b. At divorce, what property is eligible to be divided?
   c. According to what distribution rule do you divide this eligible property?

II. Property Regimes During Marriage
   a. Title Theory (42 states): the spouse who holds title to each asset retains ownership of it, and the person who holds the title to property has no legal obligation to consult with his or her spouse regarding the use or disposition of the property during the marriage
      i. All states that use a title regime during marriage currently require that marital property be subjected to "equitable distribution" at divorce
         1. The concept of "*marital* property" was created only for distribution purposes at the end of a marriage
            a. Marital property: acquired during the marriage
            b. Separate property: acquired before the marriage (and no comingling) or inherited, etc.
         2. Equitable distribution: distribution of property that is titled in one person's name to another person who does not hold title in the property (i.e. property does not necessarily stay with the title holder at dissolution)
            a. Separate property is not eligible for distribution

b. Community Property (8 states): each spouse has a present, vested one-half interest in all property acquiring during the marriage (i.e. owned jointly)
    i. Separate property usually includes property acquired by either spouse before the marriage, or during the marriage by gift, bequest or devise
        1. Note that one reason inheritance is undoubtedly separate property is out of respect for the person who the gift comes from
    ii. During the marriage, neither spouse may dispose of community property without the consent of his or her spouse – must consider the effect on the community (i.e. marriage)
    iii. Some community property regimes continue to apply community property principles at divorce (i.e. divide jointly)

III. Property Regimes at Divorce
  a. Equitable Distribution
    i. Ex: Pennsylvania, pg. 473
        1. Statute enumerates what marital property does not include
        2. Presumption – All real or personal property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership
  b. Community Property
    i. If the property was owned jointly during the marriage (i.e. the property belonged to the community), it will be divided jointly at divorce
    ii. Ex: California, pg. 473-74
  c. Hotchpot – Kitchen Sink
    i. Everything is available for distribution – all assets belonging to either spouse separately or to both spouses jointly are thrown into the pot and are up for grabs
        1. This approach eliminates legal disputes over the characterization of assets as marital or separate, but may exacerbate disputes over how to distribute the assets equitably
        2. This approach allows the court to do certain beneficial things in very unusual cases
            a. Ex: D is worth $30M and P is broke – at divorce, P does not need to get $15M for it to be equitable – court can distribute only a small amount of these assets to P
    ii. Ex: Connecticut, pg. 474-75
        1. The court may assign to either the husband or wife all or any part of the estate of the other
  d. ALI
    i. Provides for gradual recharacterization of separate property as marital in marriages of long duration
        1. No state has adopted this

IV. Characterizing Assets as Martial or Separate
  a. **A spouse's separate property may become marital property by either commingling or transmutation** – both doctrines create a rebuttable presumption of a gift to the marital estate
    i. Separate property becomes marital property by commingling if inextricably mingled with marital property or with the separate property of the other spouse
        1. If the separate property continues to be segregated or can be traced to its product, commingling does not occur
    ii. Transmutation occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property
  b. Ex: *Nack v. Edwards Nack* (Virginia 2007): parties reside in an equitable distribution jurisdiction; before the marriage, parties executed a valid pre-nuptial agreement that listed their separate assets before they entered the marriage and that specified their intention not to create marital property; disputed items: investment portfolio, Benz, Lexus, farm equipment/buffalo; husband alleges that the property is separate

i. Farm equipment/buffalo: **bought during the marriage with their joint checking account** – this is straightforward marital property, despite the fact that they claimed they did not want to create marital property, they did not act that way
ii. Lexus: separate property – it was **titled to him** plus the pre-nuptial agreement's intention not to create marital property; because it was titled only in his name, this is evidence of the parties expressing an interest in creating separate property; note that if the car was bought with common earnings, it may be deemed marital property
iii. Benz: separate property – it was **listed as husband's separate property in the prenuptial agreement** and he had it before entering the marriage; wife's argument that it is marital because she contributed money and labor to the car during the marriage was really just her transmuting the money (marital or her's as separate) to his separate property – transmutation = becomes property of the recipient
iv. Legg Mason Account: marital property – **when assets are combined by the contribution of one to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution;** the investment account was jointly titled (this fact pretty much kills his case)
1. Tracing issue: it is difficult to trace the various contributions into this account – she put some money in their from the joint account, he puts some money from a separate account into the joint account and then from the joint account into the investment account; wife also muddies the waters by claiming some of the money was a monetary gift to her from his parents
2. Gift issue: if he created this joint investment account because it was during a good portion of the relationship (and why wouldn't he put his wife's name on it), then the argument is that he transmuted his separate property into martial property by gift (we presume it was intended as a gift to her)
a. If something is transmuted by gift, it does not matter whether you can still trace the origins or not – it is deemed marital property
b. Gift can be expressed or implied
i. Ex: I inherit money from my parents, I get married, I use the money on a down payment for a house with my spouse – presumption is that the use of that money was a gift to your spouse

c. **It is possible for couples to endeavor to keep property separate by agreement, but the couple must act accordingly** (i.e. actually keeping their money separate, not hold title jointly)

V. Appreciation
a. Most states distinguish between ownership of separate property and ownership of any appreciation in the value of the separate property during the marriage
i. Ex: *Middendorf v. Middendorf* (Ohio 1998): statute mandates that when *either* spouse makes a labor, money, or in-kind contribution that *causes* an increase in the value of separate property, that increase is deemed marital property; however, if the evidence indicates that the appreciation of separate property is not due to the input of either spouse's labor, money, or in-kind contributions, the increase in value of the separate property is *passive appreciation* and remains separate property; here the court notes that passive forces such as market conditions may influence the profitability of a business, but it is the employees and their labor input that make a company productive
b. Two regimes:
i. All appreciation is part of the marital property
ii. Whether appreciation is part of the marital property depends on a **labor theory** of contribution
1. This requires a court to decide what constitutes labor
a. Ex: holding on to a valuable baseball card collection by keeping them in storage does not seem like labor, but you've made the affirmative

decision to hold on to them for whatever reason, so this decision to hold could be interpreted as labor during the marriage

c. Jurisdictions differ about when the marriage ends for purposes of continuing to acquire marital property
    i. Some jurisdictions regard as separate all property (an increases in value) acquired after the date of legal separation
    ii. Others continue to count as marital all property acquired until the date on which one party files for divorce, the trial is held, or the divorce is granted

VI. Homemaker Contribution
a. If the couple decided to forego the wife's market wages, her household contribution can be assumed to be worth at least as much to the couple
    i. Some support substantial alimony awards based on this idea that the opportunity cost for foregone wage labor must be the minimum, though not the maximum, value of her contribution to the household, or the spouses would have chosen to have her in the paid labor force, where she would have been of greater value to them
b. The ways that homemaker contribution can increase value and appreciation are relatively obvious (gives businessman more time, energy, etc.), but the amount of this contribution is hard to measure/determine
    i. Community property states say that the valuation does not really matter because the agreement to marry is an agreement to share (joint distribution)
    ii. Today, equitable distribution of all marital assets in title jurisdictions is the primary acknowledgement of homemaker contribution to the marital estate
        1. The homemaker spouse is entitled to a fair share of the assets, the argument goes, because she contributed to the accumulation of those assets even if she did not earn a wage
            a. High asset cases test this argument, but they are relatively rare
c. Potential valuation calculations
    i. The cost of replacing a homemaker's services with market labor
    ii. The lost opportunity costs borne by the homemaker by virtue of devoting her time to homemaking instead of market labor
    iii. Econometric models based on economic theory and statistical analysis

VII. Debts
a. Liabilities accumulated during a marriage are also marital property subject to division
    i. Liabilities include indebtedness created through borrowing (mortgage, car loan, e.g.), business debts, and obligations under contracts or judgments
b. Ex: *Sunkidd Venture v. Snyder-Entel* (Wash. 1997): wife is being pursued for a debt on an apartment the parties both lived in during the marriage, but she is alleging no liability because only her husband signed the lease extension; despite general presumption (*infra*), wife is claiming that the creditor cannot come after her separate property to satisfy a community debt (i.e. can only use community assets) – and this is the rule; note that because the husband is the signatory, creditors can go after his separate property; wife still loses on the family expense doctrine (*infra*)
    i. <u>General presumption is that a debt incurred by either spouse during the marriage is a community debt (if there was an expected community benefit</u>
        1. This presumption may be rebutted by clear and convincing evidence that the debt was not contracted for community benefit
        2. Key is whether, at the time the obligation was entered into, there was a reasonable expectation the community would receive a material benefit from it
            a. Actual benefit to the community is not required as long as there was an expectation of community benefit
        3. Creditors can *only* satisfy community debt with community property though
    ii. <u>Exception: Family Expense Doctrine</u>: spouses have an obligation to support one another re: the purchase of necessaries (housing, food, medical care, e.g.); so both spouses are

liable for family expenses, and this obligation **can be satisfied against either of the spouses' separate property** (regardless of who signed the debt)

VIII. New Property
- a. An increasing number of the valuable rights held by middle class individuals relate to things other than tangible property
    - i. Ex: a person's career, fringe benefits relating to a job (seniority rights, stock options, paid vacation and sick leave time), increased earning capacity, a possible future inheritance, a professional degree/license/goodwill
- b. Professional License: *Holterman v. Holterman* (N.Y. 2004): typical *O'Brien* story: I get married at 21 years old, I have only finished 7 ½ semesters of college because I decide to work to support my spouse while he finished college and goes to med school, a couple of months after he graduates med school we divorce – I left school to make an investment in his education and now I feel slighted because I did not get to reap the benefits of that investment
    - **i. N.Y. is the first and only court to treat a professional license as a marital asset, which is divisible at divorce**
        1. N.Y. tries to figure out what the difference in earning potential the degree delivered (i.e. between having a B.S. vs. an M.D.)
        2. Professional license is hard to value, which is a concern, but leaving this problem to be solved in an alimony award is also concerning because the husband does not have a lot of money right now (so award may be low) and she is young, so if she remarries, then the alimony will end, and she has been self-supporting so she is not a good candidate for alimony
- c. Stock Options: if an employee is paid with stock options during the marriage, those options are marital property
    - i. At the time of divorce we do not know the valuation of these stock options because that is dependent on when they are exercised
        1. Could value the shares and the options at the time of divorce (present)
        2. Could divide the option, but this must be approved by the employer
        3. Split deferral – whenever the option gets exercised, there will be a distribution
- d. Business Goodwill: the value of the community in your business (above and beyond the tangible assets)
    - i. Need to determine whether it is the *business'* goodwill (divisible) or *personal* goodwill (not divisible)
- e. Personal Injury and Disability Claims: generally follows labor theory – if the compensation is for something that happened during the marriage, then it is typically considered marital property and is divisible

IX. Equitable Distribution of Property
- a. Property distribution is a **final judgment**, not subject to modification after the divorce is granted, and **non-taxable**
    - i. These are reasons courts prefer to rely on property distribution rather than alimony, e.g., which is not final (i.e. on-going), taxable and subject to modification
- b. When a court divides assets, it might also need to assign value to certain assets if a payment needs to be made
    - i. There may be an asset (painting, vacation home) that cannot be equitably divided, so the court may give one person the asset and order that spouse to make payments to the other spouse
        1. If the spouse assigned the asset cannot make the payments, then the solution is to sell the actual assent and split the proceeds
- c. *Equitable* distribution ≠ *Equal* distribution
    - i. In theory, an equitable distribution is just that – equitable, fair appropriate, just, but not necessary equal
        1. The statutory factors can be sorted into two categories
            a. Some allude to the *needs* of the parties

b. Other allude to the *contribution* of each party to the acquisition of the property

ii. BUT, by in large (in practice), the default presumption is 50/50 and a departure from that will need to be justified

d. By statute or common law, each state provides a list of factors for trial courts to consider when dividing property at divorce
   i. Judges must consider all factors, but can put more or less weight on certain factors (discretionary) – case-by-case basis
   ii. Ex: Pennsylvania, pg. 516 – factors relevant to the equitable division of property are (without regard to marital misconduct):
      1. Length of the marriage
         a. Notion that the longer the marriage is, the more of a real community is has become, so we care less about unwinding finances (i.e. less about entitlement) and more about the promise/contract
      2. Any prior marriage of either party
      3. Age, health, station, amount and sources of income, employability, liabilities, e.g.
      4. Contribution by one party to the education, training or increased earning power of the other party
      5. Opportunity of each party for future acquisitions of capital assets and income
      6. Source of income of both parties
      7. Contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property
         a. Inviting the court to take into account how each party acted (spender, saver, contributor, non-contributor)
      8. Value of the property set apart to each party
         a. Might be able to shift marital property more towards the less wealthy one (to help eliminate alimony?)
      9. Standard of living established during the marriage
      10. Economic circumstances of each party, at the time the division of property is to become effective
         a. Especially concerned about tax ramifications
      11. Whether the party will be the custodial parent of any dependent minor children
         a. Most practical reason is to give the custodial parent the marital home
   iii. Ex: *Ketterle v. Ketterle* (Mass. 2004): wife has fragile mental health, husband won the Nobel Prize and case is focused on this increased earning potential (he is a future high-earner, post-divorce); on review, court is really asking whether the trial judge went diligently through all of the statutory factors; Mass. is a common law **kitchen sink jurisdiction**, but Mass. courts do still bother to think about what is marital and what is separate; husband objects to the disproportionate division of marital assets, but court notes holds that an equitable, rather than equal, division is the ultimate goal
   iv. **ALI** (pg. 529): concerned that family law is too discretionary and judges have too much authority to make whatever decision they want within an equitable framework – ALI is all about increasing predictable results; concerned that without predictable results, settlements will be discourages (in spite of the fact that family law in general is very pro-settlement)
      1. Distribution must be 50/50 and a court can deviate only for four enumerated reasons
         a. Note that the ALI does not treat debt with this same equal notion

e. How equitable is equitable?
   i. Penelope Bryan: the ideology of formal equality currently pervades equitable distribution and divorce law, but fact that wives have marginal workforce participation

in many marriages is largely ignored; so perceiving wives as the formal equals of their husbands fails to address the wife's financial needs at divorce and does a disservice to role specialization
    ii. Alicia Brokars Kelly: challenge in martial law is to reconcile the competing vision of partnership and individualism
    iii. Laura Rosenbury: there was great movement in the 1970s to really think about women's roles in the household and try to value this contribution, but that time has passed and role specialization to that extreme is a historical artifact since the vast majority of women are wage earners; therefore, the partnership theory of marriage reinforces traditional gender expectations, including the expectation of wifely sacrifice
    iv. Allen Parkman: we should just think about these people as acquiring debts during the marriage and needing to make up their debts

X. Hypo (HO)
  a. House: court will award to the wife because she is the custodial parent
  b. Vacation House (shared with wife's brother, Bruce): court will award to the wife because she is the only one with a contribution claim against Bruce
    i. Bruce owns presumably half, but the martial couple put money into improving and maintaining the house
      1. House was titled to the wife as a gift from the brother, but they put community money into the house so perhaps the house was transmuted from separate to marital property
      2. Husband might also argue that the appreciation in value of the home was martial
  c. Pension: court will award to the husband (easy)
  d. Painting: court will likely order a sale and split the profits
  e. Husband's Student Loan: court will give this debt to him to fulfill (easy)
  f. Degrees: court will consider the degrees, but will not consider a piece of property to be distributed because this is Penn. and only N.Y. does that
  g. Child Support is an easy figure to calculate because every state has a formula and guidelines

<u>Alimony</u>

I. Introduction
  a. Qs:
    i. Whether an alimony award is justified or not, and
    ii. If so, for how much and how long
  b. Historically, alimony was fault based
    i. Women were the only ones who received it, and only if they were innocent
  c. Support obligations represented an obligation between the parties, but also to the community so as not to create dependents
  d. Alimony is hardly ever awarded because the vast majority of people do not have a lot of money
    i. Additionally, women are largely becoming more self-sufficient
  e. Alimony is more likely to be awarded in long term marriages
    i. Additionally, when the woman did not work outside the home and where there were children
  f. Although the gender bias is formally gone, it is still present in practice – men are very rarely awarded alimony
  g. UMDA and ALI get rid of fault in the alimony consideration
    i. *However*, a majority of states have fault as something that can be considered in deciding whether to award alimony and in deciding the amount and duration
      1. But this does not necessarily mean that it *is* considered
  h. Alimony is <u>modifiable</u> (and varies state to state), whereas property distribution is final (and relatively equal state to state: 50/50), so courts prefer property distribution if possible

i. Ex: *Russell v. Russell* (Fla. 2004): court equitably divides the property – each gets ½ of the mortgage and ½ of the equity; then, court gives wife the husband's half of the equity as lump sum alimony, which gives the couple a clean break – no ongoing payments; property division must be equitable, but no requirement that alimony be equitable
    1. Florida alimony statute (pg. 561): alimony may be rehabilitative or permanent in nature; can be periodic payment or lump sum; can consider the adultery of either spouse

II. Justifications
- a. Fault-Based: traditional rationale for alimony may retain some validity
- b. Need-Based: examines the dependent spouse's needs
    - i. Notion of dependencies built into marriage
- c. Contract: analogizes marriage to a contractual relationship between the parties – the exact parameters of each party's obligations are not spelled out, but it is generally assumed that each party is willing to make some sacrifices as consideration for the benefits that party will receive from performance of the marriage agreement
    - i. Notion that the support obligation was by agreement
- d. Partnership: views marriage as analogous to a partnership, which is an agreement to share profits, assets, and debts – this view suggests that spouses have an implied agreement to work for the joint venture's benefit rather than for the individual's
    - i. Notion of a contribution theory: you made the role decisions and investments for the partnership, so the person who walks away with the big earning potential needs to make contribution back to the partnership
- e. Restitution: notion that when one spouse confers a benefit on the other, the benefit is conferred at the first spouse's expense, consequently, the other spouse's enjoyment of the benefit without compensation is unjust
    - i. Notion of unjust enrichment
- f. Reimbursement: a form and a justification for a time-limited award, which does not terminate upon remarriage or other cohabitation – designed to compensate one spouse for enhancing the other's earning capacity, typically through support for graduate or professional school (if the monetary contribution is made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits)
    - i. Notion of return on investment

III. Alimony Forms
- a. Temporary: support pending litigation – overwhelmingly based on financial need (no deep justification rationales)
- b. Rehabilitative: support is provided for a definite period while the recipient seeks to become self supporting (ex: education or training)
- c. Reimbursement: the spouse whose financial contributions during the marriage directly enhanced the other spouse's earning capacity is awarded compensation
- d. Bridge-the-gap (or limited-duration): provides necessary funds to bridge the gap between married and single status – that is, to meet identifiable, short-term support needs that are not expressly rehabilitative in nature
- e. Permanent, indefinite or periodic: support that will take effect from the final order of dissolution until either party's death or the recipient's remarriage
    - i. Courts award this type of payment if for whatever reason the dependent spouse cannot reasonably be expected to become self-supporting, or the resulting differences in the parties' respective standards of living would be unconscionably disparate
    - ii. An award of permanent alimony is the exception, not the rule
- f. Lump sum: a single payment not subject to modification (could be preferred if periodic payments cannot be implemented for some specific reason)

IV. Determining the Amount of an Award
- a. In most states, a statutory list of factors helps guide alimony decisions

i. Ex: *S.A.T. v. K.D.T.* (Del. 2004): parties were married for 27 years; husband is asking for alimony because he has mental health issues that affect his earning capacity; after going through the statutory factors (similar to those PA uses for equitable property distribution), the husband is awarded alimony based on need
    1. Delaware alimony statute (pg. 564): similar to the UMDA re: need, but explained in terms of dependency

b. **Income Equalization**: notion that it is inequitable upon dissolution to saddle a party with the burden of reduced earning potential and to allow the other party to continue in the advantageous position he reached through their joint efforts
    i. Basis: marriage is a moral and financial partnership of coequals
    ii. Ex: *In re Marriage of Reynard* (Ill. 2003): parties were married for 30+ years; wife was a teacher before she became a homemaker and a big contributor to her husband's political campaign; husband has greater earning potential; wife wants more alimony through income equalization
        1. Court looks at the parties income and needs, as expressed through expenses, and determines that this is not an appropriate case to equalize the incomes because doing so would adversely affect the husband's ability to meet his own needs
        2. Dissent thinks that the wife's contribution was so strong and the expectation was so strong that this is a case for income equalization
    iii. Income justification does <u>not</u> speak to *need*
        1. Rather, need speaks to expenses

c. It is not uncommon for courts to **impute** to people income they do not yet have (i.e. try to figure out a person's earning capacity if they made or make different decisions)
    i. Ex: wife was an RN and wants to quit work to home school her children – while laudable, many things change as a result of divorce and this may be one of them

d. In response to the unpredictability and inconsistency of apply various statutory factors, several states have promulgated formulas to help courts determine the amount and duration of alimony awards
    i. These practices vary, from mathematical formulas to limits based on length of marriage or amount of obligor's income
        1. Exs: page 574

e. **<u>UMDA</u>** (pg. 546-47): standard for alimony or maintenance awards focused on spousal <u>need</u> without regard to fault – so if you do not need it, you do not get it (no matter what the equities are)
    i. No Need = No Alimony
    ii. Once a spouse established need, the Act directs the court to consider several factors in deciding on the award's amount and length (earning potential and property, e.g.)
        1. Act reflects notions of self-support goals – preferring a quick rehabilitative period and then making a clean break

f. **<u>ALI</u>** (pg. 552-54): concept of compensatory payments to support the spouse who has incurred a <u>loss in earning capacity during the marriage</u> based on the greater responsibilities for the family
    i. To determine which spouse needs support, ALI abolishes any mention of fault and instead focuses on the difference in the spouses' financial standing
        1. §5.04: Compensation for Loss of Marital Living Standard
            a. Length of marriage + Disparity in income = Alimony award
                i. When you satisfy these two, you are entitled to a presumption of alimony
            b. §5.04(4): there is a substantial injustice safety valve
        2. §5.05: Compensation for Primary Caretaker's Residual Loss in Earning Capacity
            a. Presumption of alimony if you were the caretaker
                i. <u>Need</u>:

1. Marital, minority children, still living with the claimant
2. Claimant's earning capacity is substantially less
3. Claimant did substantially more than half of the care-giving

3. These two sections stand on separate grounds, so you can be granted an award on and either/and basis

ii. Key for the ALI is avoiding litigating too many things, too many details
1. Here, just look at the length of the marriage and income disparity – that is all you need for the presumption to stand
a. We will not look at minor details unless there is a showing of *substantial* injustice

iii. ALI does <u>not</u> consider fault
1. Exception re: dissipation of assets, if that is an issue

V. Enforcement
a. To enforce an alimony award, the recipient spouse may need to bring another lawsuit
i. If you are not receiving your alimony award, you need to go back to court to get an enforcement order every time
b. Private enforcement means:
i. Establishing a separate trust for alimony awards
ii. Requiring the payor spouse to obtain life insurance
c. Garnishment of wages is relatively common with child support orders, but not as much with alimony payments
i. More likely to get this if you have some affirmative reason to think that you will not get your periodic payments
d. Bankruptcy
i. Historically, alimony was dischargeable in bankruptcy
ii. In 1994, Congress said that alimony was not dischargeable if it was in the best interest of the parties
1. Required balancing through litigation
iii. In 2005, Congress said that <u>alimony is not dischargeable at all</u>
1. Removes the court's discretion

VI. Modification
a. Alimony awards are forever modifiable if there are changed circumstances
i. Courts recognize the need for modification, but they also make clear that changes in financial situation or physical health do not by themselves guarantee a right to modification
ii. Ex: *Martindale v. Martindale* (Tenn. 2005): mom was awarded rehabilitative alimony for seven years (until 2 ½ years after the youngest child enters first grade – notion that at that time she'll have time to go to school or get training); standard for modification here is **"a substantial and material change"** – here, that is one of the children's unanticipated learning disability; court modifies the alimony award until the youngest child graduates from high school
iii. Changed circumstance?
1. Payor loses his job or income drops substantially, by no fault of his own – can likely get a temporary reduction until payor's income comes back
a. If it is possible to replace that job or income though, court will impute income
2. Payor deliberately, and in good faith, leaves a high earning job to go to divinity school, e.g. – in practice, courts tend to be unsympathetic to a voluntary drop in income (even though it sounds like a substantial changed circumstance) and will likely impute his income to the amount he could be making

VII. Termination

a. At either parties' death
b. If the recipient gets remarried
    i. The thought is that the need is no longer present (but whether the need still persists is a fact inquiry)
        1. Notion that the new husband has the legal support obligation, whether he can meet that need or not
c. If the recipient cohabitates
    i. Notion that cohabitation is very similar to marriage
        1. Concern about creating an incentive to cohabitate (rather than re-marry) in order to collect alimony
    ii. Underlying assumption that the cohabitor is contributing to paying the expenses and reducing the need (but obviously this depends on the facts of each case)
        1. Regardless of whether the above is true or not, most courts do not care what the actual need is
            a. Likely sex component to this – it is offensive to have the payor's money flowing not just to the former spouse but also the new sexual partner (i.e. it is one thing to continue to support a woman, but it is another thing to support a woman when she is someone else's woman)

VIII. Hypo: Sally and Bob marry in 2005, after both have finished college. They move to a different city so Bob can work as a manager at a large corporation. Sally takes an entry level position as a sales clerk, expecting to leave the workforce in the next few years to start a family. However, Sally does not become pregnant and after four years of marriage, the couple is seeking a divorce based on irreconcilable differences
    a. This is a classic case of no alimony
        i. Most states apply a rule of thumb that if the marriage is less than five years with no kids and nothing else to influence the economic equities of the case, then alimony is not appropriate

IX. Hypo: Sally becomes pregnant after three years of marriage, and quits work when she nears the end of her pregnancy. Within the first year after the birth of their child, the couple decides to divorce
    a. Unlikely this will be a good alimony case
        i. ALI is backwards looking and will likely say that one year of child care will not adversely affect her earning capacity

X. Hypo: Jim and Nancy marry in 1998, when both are in their late twenties. Jim has built a solid career as a car salesman, and Nancy spent her years after college working in secretarial positions. After they marry, Nancy returns to law school and within the next five years, obtains a position at a law firm, substantially exceeding Jim's salary. After ten years of marriage, the couple divorces
    a. The advanced degree makes this tricky
    b. If the UMDA applied, the husband would not get alimony because he is not unable to support himself

XI. Hypo: Sam and Jill marry in 1984. While married, Jill returns to graduate school to receive a PhD, and Sam returns to law school. Initially, Sam works as a government lawyer and Jill works as a college professor. After a few years, though, the couple has five children, and Jill decides to teach part time until the children reach high school. The couple divorces after 25 years of marriage, with two children still in elementary school
    a. Equities are in favor of an alimony award: duration of the marriage + income disparity + children
    b. One might presume that Jill can easily go from part time to full time though because of her credentials, so maybe some form of temporary alimony is more appropriate then permanent alimony

XII. Summary:
    a. Length of the marriage will always matter
    b. Disparity of income will always matter
    c. Possibility of self-support at a respectable level will matter
    d. Fault will likely play some role (if allowed in the jurisdiction)

e. There is a lot of discretion with alimony awards
    i. Not a lot of horizontal equity from one case to the next

Premarital and Other Agreements

I. Private ordering is now a central feature of family law practice
    a. Parties may enter an agreement:
        i. Before the marriage → prenuptial agreement
        ii. After the marriage but before a marital breakdown → postnuptial agreement
        iii. When the parties are separating or otherwise contemplating divorce → separation agreement (most common)
    b. Ex: *Maynard v. Hill* (U.S. 1888): marriage is more than a mere contract – the consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change; the relation once formed, the law steps in and holds the parties to various obligations and liabilities
        i. Notion that the **state is deeply involved in marriage and wants to protect the institution of marriage** – speaks to a version of public marriage, social interest in marriage contracts

II. Historically: prenuptial agreements were seen as bad for the institution of marriage because they were contemplating the end of a marriage (in ways other than death)
    a. Post-divorce revolution: prenuptial agreements were not such a crime on the institution
        i. Divorce rate is hovering around 50%, so considering and planning for a divorce does not seem that radical

III. Courts have always been more reluctant to support support agreements than property agreements (and definitely unlikely to enforce agreements about child support or custody)
    a. Notion that property ownership is more of an equity, rather than an incident of marriage
    b. Whereas the support obligation is inextricably tied to marriage, so opting out of a support obligation is like opting out of the legal scheme of marriage
        i. Children are also viewed as essential to marriage, but the rationale behind not enforcing agreements about child support or custody is to protect the child

IV. Elements Required for Valid Prenuptial Agreements
    a. Many states have not adopted the UPAA (pg. 865), but have enacted similar laws to recognize and regulate premarital agreements
        i. The UPAA protects only against *unconscionability*, but other statutes and common law permit closer regulation by requiring that prenuptial agreements be procedurally and substantively fair
        ii. To be enforceable in most states, a prenuptial agreement must be (1) voluntary, (2) informed, and (3) tolerably fair so as not to offend public policy
    b. Ex: *Mallen v. Mallen* (Ga. 2005): husband told wife that if she left the abortion clinic then they would get married and he would take care of her; husband had wife sign a prenup, but just told her it was a formality; prenup provided for the wife to receive $2,900/mo. for 4 months and husband gets to keep all of the property; wife now challenges the prenup on fraud (i.e. his verbal promise to take care of her and nondisclosure) and duress (i.e. if she did not sign she would have been single and pregnant) grounds; court enforces the prenup – no fraud and insistence on a prenup as a condition of marriage does not rise to the level of duress required to void an otherwise valid contract
        i. Marital agreements must be in writing
        ii. Georgia law does not recognize a confidential relationship between engaged parties
        iii. Timing and access to counsel play a big role in premarital agreements – lack of either can suggest bad faith
            1. Husband provided counsel for wife, which helps, but counsel is ineffective if no time to negotiate or contemplate the agreement
            2. Here, wife and counsel negotiated the agreement, which suggests that through bargaining she got as much as she could (without him deciding not to marry

her), and because she negotiated, we sense that she thought choosing the marriage (and prenup) was in her best interest

iv. Standard:
1. Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts? (process)
2. Is the agreement unconscionable? (substantive)
3. Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable? (substantive)
    a. Wife alleges that husband's net worth increased by $14M during the marriage, but the court finds this was *not unforeseeable* at the time the agreement was entered into, so no changed circumstances

c. Ex: *In re Estate of Hollett* (N.H. 2003): husband wanted to get married because of love, but was not attracted to certain consequences of marriage (assets, support, e.g.); wife is attempting to set aside the premarital agreement because of duress, undue influence, insufficient financial disclosure, and lack of effective independent counsel; court deemed wife's signing of the agreement involuntary because of the timing issues (lack to consult with counsel, right before the wedding) and her vastly inferior bargaining position (age and sophistication)
    i. To establish duress – that the agreement was not signed voluntarily – a party must ordinarily show that it involuntarily accepted the other party's terms, that the coercive circumstances were the result of the other party's act, that the other party exerted pressure wrongfully, and that under the circumstances the party had no alternative but to accept the terms set out by the other party
        1. The timing of the agreement is of paramount importance in assessing voluntariness
        2. Premarital agreements that result from such a vast disparity in bargaining power must meet a high standard of procedural fairness

V. In addition to the general rules governing the enforceability of contracts, **prenuptial agreements must satisfy heightened scrutiny**

a. In most jurisdictions, the parties must enter the agreement voluntarily and with full knowledge of the meaning and effect of its terms, the parties must truthfully disclose their assets, and the agreement's terms must be substantively fair and equitable
    i. Voluntariness: most courts apply heightened scrutiny and often look to the timing of the negotiation, the role of counsel, and disparities in the parties' sophistication
        1. Some jurisdictions have mandatory minimum waiting period between signing the prenuptial agreement and the wedding
            a. In evaluating timing, many courts consider the nature of the planned wedding ceremony (notion of duress)
        2. All courts agree that meaningful access to advice of counsel is an important element
        3. Disparity in sophistication alone does not necessarily establish lack of voluntariness, but may be relevant in evaluating the coercive pressure created by timing or other circumstances
        4. Some courts require a party to understand fully the rights they are relinquishing
    ii. Financial Disclosure: courts widely agree that parties to a prenuptial agreement must fairly disclose to one another material information about their financial status and prospects
        1. Jurisdictions often disagree about precisely how much disclosure is required
            a. Part of the disagreement hinges on whether the parties are regarded as occupying a confidential relationship which triggers greater disclosure obligations
                i. If you have a confidential relationship, non-disclosure is the same thing as an affirmative disclosure

ii. If you do not have a confidential relationship, than your investigation duties are greater – need to verify
iii. Silbaugh: As a matter of fact, it is probably accurate to say there is a trust between the parties, which gives them a reason to not verify every claim the person they are about to marry makes

2. A few jurisdictions insist that each party must provide a detailed listing of assets and income
3. Most, however, take a more flexible view, requiring only that each spouse have reasonably clear general knowledge of the other's financial status (*Mallen*)

iii. Substantive Fairness or Unconscionability: jurisdictions differ about the nature and timing of this review – namely, the time at which the agreement's fairness should be measures, and how fairness should be defined

1. Ordinary contract law measures unconscionability only at the time of contract formation, and strict UPAA jurisdictions follow this approach with respect to prenuptial agreements
2. Other jurisdictions, as in *Mallen* and *Hollett*, consider also whether circumstances existing at the time of divorce would make enforcement offensive to public policy
3. **ALI** endorses a middle-ground position ("substantial injustice" – easier to meet than unconscionability), which would permit courts to deny enforcement because of changed circumstances during the marriage under only three limited circumstances
    a. More than a fixed number of years have passed (10, e.g.)
    b. A child was born/adopted
    c. A changed circumstance unanticipated at the time of agreement that the parties probably did not anticipate (either the change or its impact)
4. **UPAA**: *very* focused on the voluntariness provision
    a. If it is voluntary and it is fair, it is enforceable
    b. If it is unfair, but it is voluntary, it is enforceable (even if it is unconscionable, as long as there was good procedure)
        i. Notion of freedom to contract as long as it is not illegal and there was good procedure

VI. Provisions of Premarital Agreements

a. Modification of Child Support: parties may not contractually waive or limit the court's authority to award child support, or to ensure that custody or visitation arrangements remain consistent with the best interests of children
    i. §3(b) of the UPAA prohibits premarital agreements from adversely affecting the right to child support
        1. However, if the parents elect to bind themselves to more generous support obligations than the law requires, courts will ordinarily hold them to their bargain
b. Waivers of Spousal Support: less likely to be enforceable
c. Non-Monetary Contract Terms
    i. UPAA expressly permits parties to negotiate about at least some personal rights and obligations
    ii. Nevertheless, courts are extremely reluctant to enforce provisions dictating conduct during the marriage, including the division of labor, cohabitation, or sexual relations; restricting the right to seek a divorce, e.g.
        1. Likely these agreements will be unenforceable against public policy
    iii. Religion clause?
    iv. No child clause?

CHILDREN

Establishing Parenthood

I. Introduction
   a. Adults are independent, have agency, and can make consensual decisions
      i. Whereas children do not have the capacity to consent, are naturally dependent, and one of the government's primary functions (i.e. rationale for being involved in families at all is the social reproduction function)

II. Paternity
   a. Historically, illegitimate children had no rights to a relationship with their biological father
      i. Legal structures were established that reflected disparate treatment between marital and non-marital children
         1. Ex: *Weber v. Aetna* (1972): Court held that it is not OK that a state's workers' comp law gives marital children a right to benefits at the death of the father, but not non-marital children
         2. Today, however, state statutes still have disparate treatment regarding inheritance of a father's assets
            a. SCOTUS upheld this – can deny non-marital children intestacy succession
   b. **Marital Presumption**: at common law, a married husband and wife were presumed to be the father and mother of children born into the marriage
      i. Marriage guaranteed parental rights to the husband, and his paternity was virtually irrebuttable, absent proof of impotence, sterility, or his non-access to his wife for the relevant time period
         1. The function of the marital presumption was to hook a husband into paternal obligations – there was no way to prove who the father was, historically, and we did not want to create any illegitimate children
         2. The function of the marital presumption now is for family stability – notion is that it is more important to establish paternity than to get it right (i.e., we do not want people litigating paternity when the children are 10 years old)
            a. So if the marital presumption has a 2 year limitation to contest paternity, the father can get a DNA test when the children are 10 years old, but that will have no legal implications
            b. Uniform Parentage Act (page 304) gets rid of the *irrebuttable* presumption, but still maintains a marital presumption with exceptions
   c. Succession of SCOTUS Paternity cases
      i. *Stanley v. Illinois* (1972): Court struck down an Illinois statute that made children of unwed fathers wards of the state following the death of the mother, finding that Illinois had incorrectly presumed that all unwed fathers were unfit; Father argued that the statute was unconstitutional under a DP and EP challenge because it incorrectly assumed unwed fathers were unfit parents (DP) and that mothers are not unfit (EP, i.e., no rational basis for saying as a matter of presumption that an unwed father is unfit when an unwed mother is not)
         1. *Stanley* requires only that non-marital fathers receive procedural justice (i.e. a hearing right to show that he is a fit parent) concerning their parental rights
      ii. *Quilloin v. Walcott* (1978): biological father tries to block the step-dad's adoption of the children; Georgia statute required that only the non-marital child's mother approve the adoption; Father did get a hearing to say whether or not he thought the adoption was in the children's best interest (so procedural due process is satisfied), but father is asking for a substantive right to veto

1. Court held that *Stanley* did not require the state to grant biological father a veto because he had not shouldered significant responsibility for the child's upbringing (so no substantive right because he was a "bad dad")

iii. *Caban v. Mohammed* (1979): biological father wants to block the adoption of the children by the step-father and he argues that he satisfy any standard in *Quilloin* because he took substantial responsibility ("good dad"); EP issue because the mother is allowed to consent/veto, but father does not have a right to consent/veto
   1. Court held that the statute violated equal protection because biological dad's substantial relationship with his children was different from Quilloin's failure to act as a father
      a. **For equal protection purposes, a "good dad" is like any mom** (i.e. gives him the same rights that she has)

iv. *Lehr v. Robertson* (1983): biological father is trying to block adoption of the children by the step-father; biological father makes a substantive due process claim that as a parent the Constitution protects his relationship with the child since he is the biological parent
   1. Court held that **the biological relationship between a father and child does <u>not</u> warrant constitutional protection *unless* the father had developed a substantial relationship with the child**

v. <u>Summary</u>: need biology + substantial relationship (or signing the putative father registry, *infra*)
   1. Procedural hearing rights and equal protection rights (i.e. the same rights the mother has)
      a. But not necessarily liberty interest rights – not clear under these cases
   2. **Exception** (to biology + something): if another man enjoys the marital presumption
      a. *Michael H.* (*infra*) was a plurality, however, so leaves some open questions
         i. <u>Strength of the marital father is greater under the Constitution than a biological father, even if he steps up</u>

d. Establishment of paternity as a **right** to the father

i. Ex: *Michael H. v. Gerald D.* (U.S. 1989): Michael H. is the biological father, but the mother is married so California law has a *conclusive*, *irrebuttable* presumption the marital husband is the father (only exception is a blood test within 2 years); Michael H. wants to legally establish his paternity and claims that not doing so infringes upon the constitutional right of the child to maintain a relationship with her natural father; this case is a dispute between marriage (presumptive fatherhood) and biological paternity – which distinguishes this case from the others, which dealt with non-marital children
   1. Scalia: California law, like nature itself, makes no provision for dual fatherhood
      a. Scalia believes that preservation of the marital family/unity is a superior state interest
   2. Justice Stevens concurred in the judgment, but did not concur in the reasoning of the <u>plurality</u> (i.e. no majority), so *Michael H.* left states without clarity re: what rights their statutes need to grant to biological fathers
      a. Justice Stevens thought that Michael H. was owed something and he got that – procedure re: visitation rights (he had a fair opportunity to speak), but he is not owed a procedural right to claim he is the father

ii. **Uniform Parentage Act** provides for certain people to enjoy presumptions of paternity, but it is possible for two different people to enjoy the presumption of paternity at the same time
   1. (1) Michael had a presumption because he <u>held the child out as his own</u>, and (2) Gerald had the <u>marital presumption</u>

2. UPA allows a challenge of a sort that was not allowed under the *Michael H.* statute – allows a challenge within two years, so the harshness of *Michael H.* is not the norm anymore

e. Putative Father Registries
   i. Every state has one set up, although the various jurisdictions have different SOL
      1. Guys can go register after they have sex with a woman – do not even have to know whether she is pregnant or not, so even if she conceals the pregnancy
   ii. Could argue that registering is the dad's "plus" factor
      1. Registering is an act that overcomes mom's control – he can take the affirmative step to register without mom's input
   iii. Concern whether the average guy on the street is supposed to know that he can go register though

f. Establishment of paternity as an **obligation** to the father
   i. Ex: *Wallis v. Smith* (New Mexico 2001): contraceptive fraud case – parties agreed she would be on birth control, but she deceptively decides to go off birth control because she wants a baby; biological father, however, does not want parental rights or obligations, so he alleges that he is suffering and will continue to suffer economic injury (he does not contest that he has to pay child support because that law is too settled, but he does try to sue the mother for fraud because of the economic liability he now has to a third party, i.e. the child)
      1. <u>No jurisdiction recognizes contraceptive fraud or breach of promise to practice birth control as a ground for adjusting a natural parent's obligation to pay child support</u>
         a. The contract analogy fails because children, the persons for whose benefit child support guidelines are enacted, have the same needs regardless of whether their conception violated a promise between the parents (i.e. interests of the child trumps any agreement or fraud that occurred here)
            i. We will not re-enter the jurisprudence of illegitimacy by allowing a parent to opt out of the financial consequences of his or her sexual relationships just because they were unintended
            ii. We will not recognize a cause of action that trivializes one's personal responsibility in sexual relationships (i.e. if you do not want children, you are free and able to practice contraceptive techniques on your own)
      2. Hypo re: equal protection – what if mother sticks a pin through the condom?
         a. Nothing father can do to get out from under his obligations as a father, regardless of what the conception story is
   ii. *Wallis* does not completely rule out a tort cause of action in a sexual fraud case

III. Maternity
   a. The woman who gives birth to a child has been presumed to be the mother
      i. But the legal issues with establishing maternity have become more complex as artificial reproductive technologies have enable several women to contribute to maternity and as same-sex partners engage in mothering functions together
   b. Ex: *Johnson v. Calvert* (Cal. 1993): dispute between a married couple and a surrogate mother (who gives birth (so may have a biological relationship as the gestational mother), but is not genetically related to the baby because the zygote came from the married couple) → one mother has a claim to maternity based on giving birth to the baby and one mother has a claim to maternity based on genetics and intent … and this is <u>not</u> a dual motherhood claim case because these are competing claims (FN 8: does not preclude the idea of two mothers altogether, just not appropriate in this case)

i. UPA does not resolve this dispute because it does not provide for a tie-breaker or hierarchy of claims
    1. One mother has a claim to maternity based on giving birth to the baby
    2. One mother has a claim to maternity based on genetics and intent
ii. **When the two means to establishing maternity (i.e. genetic consanguinity and giving birth) do not coincide in one woman, she who <u>intended</u> to procreate the child (i.e. to bring about the birth of the child and raise it as her own) is the natural mother under California law**
    1. Analogous to a contract claim because there was an agreement between the parties and the surrogate mother changed her mind/had a change of heart
iii. Surrogate mother tries to make a constitutional claim under *Michael H.*, but the court held that she cannot get to the constitutional issue without first being deemed the parent
    1. <u>Only legal parenthood gives rise to constitutional rights</u>

c. Ex: *K.M. v. E.G.* (Cal. 2005): dispute is between two lesbian partners about what the intent and agreement of the parties was; K.M. is the **genetic** parent (i.e. egg donor) and E.G. is the gestational parent and is the one who **intended** to parent (so if these parties were complete strangers, E.G. likely would have won); K.M. signed a boilerplate contract at the clinic – issues surrounding this (i.e. did the clinic have a form for lesbian partners, did E.G. request this form, did K.M. think this form was just that – a formality – and despite it the parties knew what the agreement was)
    i. Court does not apply the law of anonymous donation (i.e. egg/sperm donor statute) to this non-anonymous donation case
    ii. Court distinguishes this case from *Johnson* because, here, their parental claims are not mutually exclusive
        1. K.M. acknowledges that E.G. is the twins' mother; rather she argues that she is the twins' mother *in addition to* E.G. … so need not consider their intent in order to decide between them
            a. According to this court, **the intent test should be limited to the *Johnson* situation** because whether there is evidence of a parent and child relationship under the UPA does not depend upon the intent of the parent
    iii. Holding: K.M. is deemed to be a mother to the child because of her <u>genetic relationship</u> with the twins and there was evidence of a <u>mother and child relationship</u> (they held themselves out as a functional family) – both of which the UPA recognize

<u>Child Support</u>

I. Source of the Obligation
    a. Children are entitled to the support of their parents (married, divorced, never married)
        i. Support obligation does not just entail money – you also have to care for your child (abuse and neglect law)
    b. Child support payments are made to the custodial parent for support of the child
    c. Child support orders are consequences of sexual behavior
        i. Ex: *State ex rel. Hermesmann v. Seyer* (Kansas 1993): dad is a minor (13 y/o), mother is dad's babysitter (17 y/o); welfare of the baby is the first concern – even though dad is still a child, when we prioritize, the baby gets a higher priority; as a legal matter we want to say dad cannot make decisions (i.e. this is a statutory rape case because he cannot consent to sex), but his inability to make decisions is not as bad as the baby's inability to make decisions – notion that dad did make some decision here
            1. Kansas Parentage Act specifically contemplates minors as fathers and makes no exception for minor parents regarding their duty to support and educate their child

2. *Hermesmann* demonstrates the strength of the parental support obligation in contemporary American law

d. Support Obligations of Persons Other than Biological Parents …
   i. **Stepparents**: the common law imposes no general obligation on a stepparent to support a stepchild merely because of marriage to the child's biological parent
      1. If a stepparent is held to have an obligation, the obligation ceases when the stepparent relationship ends … unless there is some super equity that trumps this presumption
   ii. **Persons *in loco parentis* and parents by estoppel**: has wide application in the area of child support
   iii. **Grandparents**: generally do not have a support obligation merely because of the grandparent-grandchild relationship
      1. A support obligation may arise only where the grandparent is the child's legal guardian or custodian, where the *in loco parentis* or estoppel doctrines would support the obligation, or where the grandparent has agreed to provide support

II. Extending the Obligation Past Minority
   a. Child support orders are enforced until the age of majority – 18 years old (used to be 21)
      i. However, there are great expenses between the ages of 18 and 21, so some states provide courts the ability to enforce negotiated agreements post-majority
         1. Even in the absence of an agreement to pay, at least 20 states have statutes authorizing courts to order that parents provide children support until graduation from high school and for at least some part of higher education completed within a few years thereafter
      ii. Statutes imposing post-majority educational support obligations on parents of divorced or non-marital children, but not on parents in intact families, raise ticklish questions → <u>it is a clear example of divorced parents losing liberties that are otherwise at the core of their constitutional rights as parents</u>
            a. Ex: *Curtis v. Kline* (Pa. 1995): dad brought an equal protection claim re: as a divorced dad he has a post-majority support, but a married dad would not be required to support post-majority; court invalidate the statute on equal protection grounds
            b. Ex: *In re Marriage of Kohring* (Mo. 1999): rejected the equal protection challenge on the ground that the state has a legitimate interest in securing higher education opportunities for children from broken homes, and that the statute rationally advanced that interest by requiring financially capable parents to support their children's higher education
               i. Notion that children of a divorce need a leg up because they have been disadvantaged in some way … because by in large if the parents were together they would be able to do more for the child
   b. Support for Disabled Adult Children
      i. Some states distinguish children who developed a disability when in minority or those who developed a disability post-majority
         1. Ex: *Hastings v. Hastings* (Fla. 2003): Fla. law: "This section shall not prohibit any court from requiring support for a dependent person beyond the age of 18 years when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority"
         2. Distinction might speak to notice re: parenting ending at majority, so if a disability is post-majority parents have no notice/anticipation of paying for the disability

III. Determining the Child Support Amount

a. A federal mandate provides that states must create a starting presumption about what an order should be and then can deviate from there depending on the circumstances of the case
    i. Federal government's interest in moving states to guidelines has to do with a concern that there were not enough child support payments
        1. Ultimately, the government is protecting the dollars coming out of its social welfare programs
    ii. Federal mandate instructs the states that their guidelines need to be evidence based towards expenses and need to be reviewed every 4 years
b. Guidelines are established with reference to the practices of intact families (i.e. how much money do intact, normative families spend on child rearing)
    i. The savings vary of course since it is always cheaper for two to live than one
c. Regimes
    i. <u>Income Shares</u>
        1. Formula takes into account both parents' incomes
            a. Every state has a different standard re: what counts as income, but typically all very broad (i.e. almost anything you can think of is income)
        2. Grounded in two principles: (1) that both parents living apart have a legal obligation to support the child in accordance with their respective means, and (2) that the child should receive the same percentage of joint parental income the child would receive in an intact family
    ii. <u>Percentage of Obligor's Income</u> (substantial minority of jurisdictions)
        1. Based on only the noncustodial parent's income and determines that parent's support obligation based on the number of children to be supported
            a. Completely blind to the custodial parent's income
        2. Makes the most sense when you have a custodial parent and a visitation parent
    iii. <u>Delaware Melson Formula</u>
        1. Primary support allowance → look at the combined incomes and set aside an amount of money the parents need for their own support (which the court cannot touch – i.e. no child support obligation until the needs of the adults are met))
        2. Providing for the child's primary support needs → then figure out what the subsistence needs of the child are and allocate that between the parents
        3. Standard of living allowance → whatever money is left over is a standard of living adjustment divided between the parents and children (reflects a notion that your kids are entitled to a higher standard of living if you earn more)
d. Imputing Income
    i. Courts generally can impute income for unemployment or underemployment
        1. Determination of how much to impute turns on the obligor's earning capacity
e. Seek-Work Orders
    i. Seek-work orders direct the obligor parent to search for employment to produce or add to income
        1. Ex: *In re Marriage of Dennis* (Wis. 1984): father owns very little; court ordered father to use good faith efforts to apply for work in at least ten places per month – order did not direct him to accept any particular employment offer
            a. The seek-work order is a means of trying to establish what his income is (could be) for the purposes of child support amount determination (i.e. if he can find a job at a certain salary, that will be the basis of his child support order – whether he takes the job or not)
f. Deviating from the Guidelines Amount
    i. By congressional mandate, states must apply a rebuttable presumption that the guidelines amount is the correct amount of child support payable by an obligor parent

1. A court may deviate, either upward or downward, but may do so only on a written or specific finding on the record that the guidelines amount would be unjust or inappropriate in a particular case

ii. Courts appear to have a fair amount of discretion in most state's guidelines to deviate
   1. Ex: Kentucky (page 610)

iii. Some courts deviate from the guidelines based on "parenting time"
   1. For example, where the noncustodial parent enjoys extended overnight visitation, typically more than 30% of overnights
   2. There is a concern, however, that this might wrongly influence custody battles

g. High-Income Obligors

i. Guideline amounts generally reflect the notion that the child is the beneficiary of the parent's good fortune (rather than on the philosophy that they reflect a floor of needs)
   1. This notion gets pressed, however, when you have a super high income obligor

ii. Ex: *Smith v. Stewart* (Vermont 1996): parties knew dad's income fluctuates a lot, so the initial order provided for the order to be re-calculated each year; dad is appealing an upward modification that extrapolated the highest percentage of the chart (19%); court allows this

iii. Accounting is generally <u>not</u> required
   1. Notion that how to spend child support money is a custodial parent's decision to make and accounting may use money to control parental decision making (undermines custodial parental decision making rights)
   2. Ex: *Smith v. Freeman* (Maryland 2002): "A custodial parent of a child whose noncustodial parent is extremely wealthy will inevitably reap some benefits. If the wealth of the father justifies the child's residence in a well appointed home in an upscale neighborhood, with a large screen TV and a playroom, as well as luxurious vacations, the child obviously cannot live in the house alone or travel by herself"

iv. Approaches:
   1. In a significant number of jurisdictions, courts **extrapolate** the guidelines upward, as the court did in Stewart
      a. These courts have concluded that the guidelines establish percentages generally applicable regardless of the parent's income
      b. Under an extrapolation, high-income parents pay the percentage assigned to the uppermost level of incomes stated on the schedule, even though their incomes are higher than that level
         i. The support amount is subject to any deviation according to criteria state in the applicable statute or rule
   2. Some states presume that the guidelines' highest award amount is the proper amount in high-income-obligor cases, but permit courts to deviate from that mount based on the parties' standard of living and the child's needs
      a. Ex: *State v. Hall* (Minn. 1988): court affirmed a $1,000/month child support award where the obligor's (Daryl Hall) income was $1.4M/year; court was faced with the top end of the guideline scale and they determined that the top of the guideline was the legislature's declaration that a child's needs are not normally higher than that amount (so opposite result of *Stewart*)
         i. Note that this case was unusually stingy
   3. Some states determine the child support obligation by applying common law standards, such as those codified in §309 of the UMDA, which consider generally the child's needs and the parent's ability to pay

IV. Modification

a. A child support order defines only the parent's *present* obligations

i. The order may remain in force for nearly two decades or more, unless a parent seeks modification based on changes over time in the child's needs or the parent's ability to pay
    1. A parent may seek downward modification of the amount he or she must pay, or upward modification of the amount the other parent must pay

b. Compare:
    i. UMDA: "… may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms *unconscionable*"
        1. UMDA really values finality
    ii. Most states permit modification of child support on showings short of unconscionability
        1. Many states (Iowa, for example) require that the movant demonstrate a *substantial* (or material) change of circumstances in the child's needs or the parent's ability to provide support
            a. A material change is the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently
                i. **Examples of circumstances** (Iowa): changes in employment, earning capacity, or income; receipt of an inheritance, pension, or other gift; changes in medical expenses, number of dependents, or residence; remarriage

c. Determining Whether the Change in Circumstances is Substantial
    i. Loan/Debt: *In re Marriage of Nelson* (Iowa 1997): mom is requesting an upward modification; dad alleges that he cannot afford to pay the upward modification because his monthly expenses and law school loans are more than his monthly income; this modification was to bring the old order in compliance with the guidelines (because initially parties agreed to a lower amount) and the court gives a very strong presumption to this; court treats dad's request as a downward departure from the guidelines, which they exercise much more caution with (than an upward modification); court is willing to put dad in a dire situation in order to not deviate downward from the guidelines because child support is that important
        1. Loan repayment does <u>not</u> constitute a substantial change in circumstances
            a. Court suggests dad restructures that debt
    ii. Parent's lost or changed employment
        1. Courts may grant downward modification of child support obligations, at least temporarily, while the affected parent seeks reemployment (if change in circumstance is a good faith loss)
        2. The court may deny downward modification where the obligor parent's criminal behavior or other wrongdoing leads to unemployment
    iii. Parent's remarriage or other obligations to a new household
        1. Today, courts disagree about whether, and if so how, a parent's obligations to children of a new family may affect the support entitlement of children of an earlier family
            a. Tradition is: "**First in time, first in right**" – decisions create a preference for children of the first family (in the sense that new children do not impair the prior obligation)
                i. Notion of state's interest in assuring support for these children
                ii. Estoppel: you knew you had these obligations when you went and had more children
                    1. Child support is a fixed cost, not dischargeable
            b. Other decisions, however, hold that obligations to children of a new family may work a change in the obligor's financial situation sufficient

to warrant modification of an order relating to children of the first family

d. Imputing Income on Modification
    i. Ex: *In re Marriage of Pollard* (Wash. 2000): mom is not earning an income because she decided to stay at home with her second family/new children; court knows how much mom could be earning/how much she is worth on the market, because she just decided to leave work; court decides to impute that former income to her because her change in employment status was voluntary
        1. This court decides that being a homemaker is not considered "gainful" employment
            a. Court is not ignoring the economic value of staying at home and caring for the children, but notes that she is not free to unilaterally make this decision given that she has a support order to a prior family in force (i.e. cannot make changes and just forget about the obligations to the first family)

e. Bradley Amendment
    i. Idea that you cannot discharge the past obligations
        1. If you did not pay it formally, it is not considered paid

V. Enforcement
a. Factors that contribute to better cooperation in payment:
    i. Parents were once married
    ii. Parents reached an agreement, rather than litigating over one
    iii. Visitation is available
b. The states' failure to enforce child support obligations led Congress to enact the Family Support Act in 1974, which created the Child Support Enforcement Program that provided for each participating state to designate an agency ("IV-D") to help custodial parents locate nonresident parents, establish paternity where necessary, and establish, enforce and modify child support obligations
c. Federal law requires custodial mothers receiving public assistance to cooperate in good faith with the state in paternity determination and collection efforts unless good cause for non-cooperation is established (when securing support is contrary to the child's best interest – DV, for example – or child was conceived by rape or incest)
d. Criminal prosecution was historically the means used to enforce payment
    i. This is not very useful though because people cannot earn any money in jail
        1. Only useful if you think the person is hiding assets, e.g.
e. Wage withholding has been the most effective way to collect child support payments
    i. To do this, though, the employer must have a payroll system (i.e. obligor must have regular work, rather than sporadic/contingent work)
f. Possible civil remedies: withholding privileges and licenses (ex: drivers, recreational, professional)
g. Stigma Campaigns: theory that we can prevent child support avoidance by stigmatizing it
    i. Ex: creating most wanted obligor posters, contacting employers, mass shaming events
    ii. Built into these campaigns is the notion that non-obligor can pay, but are choosing not to because they do not want to share their money, e.g.
h. Defenses:
    i. Estoppel does not work very well in this context, unless the recipient parent does something incredibly malicious (hiding the child, e.g.)
    ii. Laches are generally not allowed for delay either

<u>Child Custody</u>

I. Introduction

a. The three most important factors contributing to a child's healthy adjustment to divorce are (1) the reduction of parental conflict, (2) the presence of a well-functioning custodial parent, and (3) regular contact with the non-custodial parent
b. Since we've removed fault from family law disputes, a lot of the moral outrage between couples breaking up is re-routed to custody (i.e. I can't say you were a lousy spouse, but I can say you are a lousy parent)
c. Generally, there is no status quo to preserve
    i. In litigation, if we are not sure which side should win, we just preserve the status quo
        1. In child custody disputes though, the family was living together and will not return to that status quo
d. Most parents reach custodial agreements without judicial intervention
    i. 90% of custody arrangements are resolved by parental agreement
    ii. Even when parents dissolving their relationship reach a private agreement concerning child custody and visitation, the agreement does not become effective until a court approves it
    iii. Private bargaining takes place in the shadow of the participants' predictions about the resolution the courts would likely otherwise impose
e. Custody
    i. Physical: I have the child
    ii. Legal: I have the decision-making authority
    iii. Joint legal and/or physical: the more modern development is to give physical custody to one parent and split legal custody so they can share in the decision-making

II. Parental Rights
a. We generally think that a fit parent gets custody because it is always in the child's best interest for a fit parent to get custody – this is the idea at least, may or may not always be true
    i. Custody disputes are grounded in constitutional law emanating from the *Meyer-Pierce* line of decisions
        1. These cases are used for support/by analogy because the constitutional cases were about whether you deserved to be recognized as a parent (rather than whether you should get custody)
b. A fit parent is generally favored over any non-parent
    i. Ex: *McDermott v. Dougherty* (Maryland 2005): custody dispute between the father (a merchant marine) and the maternal grandparents; mom is unfit because she is a drunk and in jail; child has been living with maternal grandparents for ~4 years – speaks to continuity for the child; but dad has not been an absent dad (visited, constantly litigating for custody), child's preference has been expressed to see dad, and this is the biological dad; court is concerned that granting custody to the grandparents will punish dad for working, which is something we want to encourage
        1. <u>As a matter of law, fit parents have a higher right to custody than "better" non-parents (i.e. than anyone other than another fit parent)</u>
            a. **Best interests of the child is the standard we apply between two fit parents, when we do not have the automatic tie breaker** (i.e. parents first)
        2. Court clearly says that it can still look at the best interests of the child and remove the child from a fit parent – under *exceptional circumstances*
            a. <u>Factors for finding exceptional circumstances</u>:
                i. Length of time the child has been away from the biological parent
                ii. The age of the child when care was assumed by the third party
                iii. The possible emotional effect on the child of a change of custody

iv. The period of time which elapsed before the parent sought to reclaim the child
v. The nature and strength of the ties between the child and the third party custodian
vi. The intensity and genuineness of the parent's desire to have the child
vii. The stability and certainty as to the child's future in the custody of the parent

b. The requirements of dad's employment, so long as he makes suitable living arrangements for the child when he is away, does not constitute an exceptional circumstance where the court will remove a child from a fit parent to a third party

c. *McDermott* distinguishes among at least three kinds of child custody disputes:
   i. <u>Disputes between two legal parents</u>
      1. Typically decided by best interest of the child
   ii. <u>Dispute between one or two parents on the one hand and a third party on the other</u>
      1. Typically favor a fit parent over any non-parent
   iii. <u>Disputes where the state challenges parental custody based on alleged abuse or neglect</u>

III. Tender Years
   a. Once courts had to choose between parents seeking custody, a number of presumptions evolved in many jurisdictions
      i. One was that children of "tender years" – infants and very young children – should be placed with their mother, unless she was unfit to care for them
         1. Children beyond the "tender" age were placed with the parent of the same sex
   b. Tender years was a doctrine that allowed courts to easily determine custody and avoid litigation
      i. It was a story about age and gender
   c. Beginning in the 1970s, state courts began to hold that the tender years doctrine violated emerging constitutional law concerning gender equality
      i. Today, all 50 states have rejected the tender years doctrine
   d. Children who live with only one parent following divorce remain far more likely to live with their mothers than their fathers
   e. Census data indicate that children who live in a single-parent household are four times more likely to live with a single mother than a single father

IV. Best Interests of the Child
   a. Courts and legislatures have long used the term "best interests of the child" to describe the standard that should govern child custody decisions
      i. Many observers have asked whether the best interests standard is a euphemism for unfettered judicial discretion
         1. *Painter v. Bannister* illustrates the range of factors a court can use to assess a child's best interests, and the lack of guidance the best interests standard provides for assessing those factors
   b. Ex: *Painter v. Bannister* (Iowa 1966) (most taught best interest case): custody dispute between a father and maternal grandparents; mother died; child is 7 years old; a few months after mother's death, father asked the grandparents to take care of the child – a year and a half later, father remarried and indicated that he wanted his child back; to determine custody, the court uses a straight best interest evaluation
      i. Parent vs. Non-parent: court does say there is a presumption of parental preference, but this does not appear to play a huge role
      ii. Dad gave grandparents custody after mom's death: created an opportunity for them to develop a relationship with the child; could suggest through dad's conduct that he was admitting the grandparents were more fit to raise the child
         1. Concern though that both were traumatized by the event and we do not want to discourage people seeking help from family

iii. Court notes that there is a large difference in ways of life and value systems between the two parties, but that it is not their prerogative to determine custody upon their choice of one of two ways of life within normal and proper limits
    1. Court does end up comparing the lifestyles, *but* says it is because it is relevant to the best interests of the child
        a. <u>Best Interest Factors</u>:
            i. Parental preference (over any third party)
            ii. Mom's preference expressed in her will
            iii. Age of the grandparents
            iv. Employment/financial stability
            v. Religion/values
            vi. Educational opportunities
            vii. Community respect
            viii. House (quality, style, culture), e.g.
iv. Expert testimony: doctor testifies to attachment (that the child is attached to the grandfather as a father figure) and makes a connection between this attachment and the child's progress socially and developmentally
    1. Note the risks of social science (especially in the 1960s)

V. Psychological Parent
- a. The psychological parent, or primary caretaker, presumption has been one of the most important bases for decision-making in child custody cases over the past quarter-century
- b. Goldstein, Freud, and Solnit criticized the best interests of the child standard for failing to provide sufficient guidance to courts, failing to achieve certainty of outcome, and failing to ensure that the child's needs remained in the forefront of the decision-making process
    - i. Their work on custody emphasized four foundational principles
        1. The psychological parent model, which they acknowledged was difficult to define
            a. <u>You only need one, so the law needs to figure out who it is and given them all of the authority</u>
                i. They are against joint legal custody and forced visitation
                    1. Visitation is OK if the custodial parent decides it is OK (i.e. not court ordered)
        2. The child's need for continuity of relationships, surrounding, and environmental influence
        3. Emphasis on the child's sense of time, characterized by urgency and the need for quick resolution of legal disputes
        4. Replacing the "best interests" standard with the "least detrimental alternative"
            a. The specific placement and procedure for placement which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is his psychological parent
    - ii. Note that experts and psychologists are freed from the constraints of legal standards – and this could be a good or bad thing
        1. They are not concerned with who the legal parent is (i.e. about biological attachment)
            a. In psychiatry it is about who the psychological parent is
- c. Ex: *Garska v. McCoy* (W. Va. 1981): **custody will be decided by giving custody to the parent who has been the child's primary caretaker**, rather than on the basis of child's best interests; West Virginia thought they were going to start a movement, but no other states followed as explicitly as West Virginia did

i. Court noted that parents might use custody improperly as a coercive weapon in divorce proceedings, that determining relative fitness of two equally suited parents can be a near-impossible judicial task, and that the law needs a clear standard that couples can rely upon when negotiating a settlement
    1. Solomon concern: the one who really is the primary caretaker is so desperate to get custody that she will not risk it, so in order to avoid litigation she will give up anything – and these things given up might have been in the child's best interest to have
        a. The primary caretaker presumption is thought to avoid the Solomon concern

d. Primary caretaker presumption has the beauty of doing what it is the parents thought was best before they started behaving strategically during litigation
    i. Primary caretaker presumption defers to the parents: it purports to do what they thought was best during the marriage (i.e. if during the marriage they thought it was best that one person would be doing more of the caretaking, then this presumption just replicates that)
    ii. But, we also know that when you are apart, you are not going to be able to replicate what you did when you were together
        1. Divorce changes a lot (primary caretaker may be forced into the market, e.g.)

VI. Contemporary Interpretations of Child's Best Interest
- a. UMDA: provides a non-exclusive list of factors the court should consider
    i. The wishes of the child's parent or parents as to his custody
    ii. The wishes of the child as to his custodian
    iii. The interaction and interrelationship of the child with his parent or parents, his siblings, e.g.
    iv. The child's adjustment to his home, school, and community
    v. The mental and physical health of all individuals involved
- b. ALI: departs from what the law has traditionally been
    i. The court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions
        1. Very much time based and proportional (unlike *Garksa* which just said whoever does the most gets full custody)
            a. This is a little more value neutral than the psychological parent inquiry
    ii. ALI is really focused on giving us presumptions so as to reduce litigation
        1. Want to give predictable outlines that rely on fact determinations (i.e. looking back on actual facts – things that happened) and drain the value judgments out of the analysis
    iii. Downside: an obvious secret bias towards mothers
        1. This is a way of managing the transition from the tender years world to the formal equality world
- c. Michigan: list of illustrative factors to consider
    i. (a)-(c): emotional attachment/psychological parent
    ii. (d)(d): continuity questions – not just the stability of the parent
- d. California: can consider anything that is relevant – open ended standard
    i. There is an alcohol and substance abuse provision

VII. Factors in Determining Best Interests
- a. Gender Roles/Careers
    i. Ex: *Young v. Hector* (Fla. 1999): mom is a lawyer, dad was an architect and now works on and off (including leaving for 14 months to search for gold); mom remained constant over the long term as the primary caregiver (middle of the night test) and is the most financially stable; dad is with the kids after school because the mom works long hours – but do not want to punish mom for being a career woman; court asked dad why he was

not working since the family was in debt and they had a nanny – many people thought this was inappropriate because if the genders were reversed likely would not have asked such a question

1. Parties never agreed that dad would stay home, dad does not appear to be fulfilling the homemaking role since there is a nanny
    a. Mom's parental judgment is that dad would be more useful to the family if he was in the workplace – evidenced by the fact that she maintains a nanny
    b. Consider the role reversal – would we want an explicit agreement or would an implicit agreement that the mom stay home suffice
        i. When the roles are reversed, we may expect more of an explicit agreement and here we have evidence of the contrary

ii. Ex: *Ireland v. Smith* (Mich. 1995): a trial judge shifted custody of a three-year-old child of teenage parents to the father when the mother enrolled in college and placed the child in day care because judge reasoned that the grandmother would do a better job of watching the child than a stranger (i.e. day care); trial court was reversed on appeal – 61 amicus briefs on behalf of the mother filed

1. We do not want to disincentivize parents from doing what is best for their children in the long run (i.e. being educated and financially stable)
2. Custodial parent gets the freedom to make decisions
    a. Day care is just such a decision

b. Domestic Violence

i. Ex: *Wissink v. Wissink* (N.Y. 2002): dad was abusive to mom, but was an ideal father to his daughter – way move involved that mom – daughter realized this and preferred dad; daughter denied or minimized dad's DV; trial court decision to award custody to dad is remanded because court should have considered the DV factor more seriously (appeals court is elevating DV higher on the list of important factors); appeals court wants the trial court to really figure out on remand whether daughter knew the DV was happening and how it psychologically affected her (what does it mean psychologically if a child prefers an abuser)

1. On remand, Silbaugh thinks it is going to be really hard for dad to keep custody, absent some really interesting explanation

ii. <u>Minority Rule</u> (N.Y.): DV is just a factor/consideration

iii. <u>Majority Rule</u>: DV is a rebuttable presumption that being with the batter is not in the child's best interest –it jumps the queue over anything else court is going to weigh

1. It is the answer unless party overcomes the rebuttable presumption threshold (which is generally pretty high)

iv. Three ways a court might consider DV and nonetheless award custody (i.e. minimize it)

1. Did not occur
2. Was not repetitive
3. Was not serious

v. **Friendly Parent Provisions**: require courts to consider which parent is more likely to encourage close contact with the other parent

1. These provisions pose special problems in families where a pattern of domestic violence exists
    a. Violent parents often speak to their children and to the courts in glowing terms of shared parenting, promising a harmonious future despite past violence
        i. If an abused parent strenuously objects to shared parenting, he or she may appear recalcitrant and unforgiving in court, while the violent parent presents an image of contrition and loving good will

c. Sexual Behavior
    i. Ex: *Zepeda v. Zepeda* (S.D. 2001): mom was spending her days at home in sexual chat rooms and had an extramarital affair in the family home while the child was sleeping; no harm to the child proven, so mom gets primary physical custody with certain conditions on an interim order (i.e. no men in the apt when child is there, no internet except for work); notion with conditions, which limit personal freedom, is that party would prefer interference with freedom versus losing custody (ex: no smoking in the house or car is commonly ordered)
        1. Standard: did mom's misconduct have a harmful effect on the child – was it clear that the child was ever exposed to this conduct
    ii. UMDA standard: The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child
        1. Court could go two ways
            a. No reason to hear the story unless you pair it with evidence of harm
            b. I'll hear the story, pass judgment, but conclude no harm to the child
    iii. Michigan standard: The court should consider the *moral* fitness of the parties involved
        1. A direct invitation to ask a character question about the party based on conduct
        2. *Moral* harms can be considered "harm"
    iv. Sexual Orientation
        1. **Nexus approach**: the court may not deprive a parent of custody unless the parent's sexual orientation causes, or will cause, harm to the child
            a. Behavior is only relevant if it is connected to harm to the child
            b. Embraced by the UMDA
        2. ***Per se* approach**: places much greater emphasis on sexual orientation by creating a presumption that a GLBT parent should not have custody of a child
            a. GLBT are unfit parents *per se*
            b. Minority of jurisdictions
        3. **Middle ground approach**: does not view a parent's sexual orientation as determinative, but may presume that a parent's homosexuality will adversely affect eh child to some degree
            a. Presumption that GLBT parents are detrimental to the child, but the presumption can be overcome
        4. *Note that if the jurisdiction considers moral influence (ex: Michigan), then the analysis may be different*

d. Race
    i. Ex: *Palmore v. Sidoti* (U.S. 1984): white father is fighting for custody on the basis of changed circumstances because the white mom is cohabiting (and later married) a black man; trial court awarded custody to the dad because the wife's lifestyle is unacceptable to society and that will cause hardship to the child
        1. SCOTUS: society may have prejudices, but we cannot rule as a matter of law around society's prejudice
            a. **Court recognizes the societal prejudice and that there could be harm to the child, but the law cannot give effect to private prejudices**
                i. Court frames this as an adult/societal interest that is higher than an inquiry into the child's best interests
            b. Court could have said that the lower court just mischaracterized the child's best interests (i.e. outside pressure might not be such a bad thing, especially when we are standing up for right), but rather they held that courts cannot rule explicitly on the basis of race
    ii. Apparently this was a narrow holding, because a lower court manages to say that they can give custody to dad so long as they ground it on something other than race

1. Ex: *Parker v. Parker* (Tenn. 1999): trial court was affirmed, despite the fact that it admitted expert testimony who said that in contrast to the situation in large cities, in this case it may be harmful for a child to be raised in an interracial household because of small town views; appeals court accepted the trial court's statement that race did not play a part in its decision to award father custody, but rather it was the factor that is it wrong for anyone to have a relationship with her employer (which the mom did, employer was black)

e. Siblings and Religion
   i. Ex: *Arthur v. Arthur* (Ohio 1998): family with four children, whose lives are based around the church (dad worked for the church, children go to the church school); dad files for divorce and pulls away from the church – wants out of the whole lifestyle; lower court splits physical custody – mom is the residential parent for the two girls, dad is the residential parent for the two boys; this was not based on gender, but rather that the boys want to play competitive sports and the non-religious school provides that (expert testified that the boys have distinct needs from those of the girls)
      1. *Pater v. Pater* (Ohio 1992): **a parent may not be denied custody on the basis of his or her religious practices unless there is probative evidence that those practices will adversely affect the mental or physical health of the child**
         a. It is common in most states to give special deference to religion, so <u>unless you can show harm</u>, the court will not decide one religion over the other (Free Exercise Right)
            i. A court does more to avoid engaging religious conflict than any other conflict
   ii. Siblings: ordinarily, courts say keeping siblings together is a factor, but <u>not</u> a presumption or even a weighted factor
      1. Siblings are typically divided if they are step- or half-siblings, if there is an age gap, if they have not lived together, or if they are not very close
      2. Why keep siblings together: continuity, shared experience about the stress of divorce, source of support

f. Experts → should be independent – approved by both parties – should not be hired and aligned with one party

VIII. Child's Preference

a. Most states follow the UMDA's approach of requiring courts to consider a sufficiently mature child's custody preference, but leave questions about maturity and the weight of the mature child's preference to judicial discretion
   i. If a child is 14 years + (aka high school), a <u>cleanly expressed</u> child's preference is dispositive (99% of the time)
   ii. Ages 10-13: preference is extremely important in practice
   iii. Ages 6-9: preference can play a role
   iv. Ages 0-6: preference not that relevant

b. Why might an older child's preference be relevant:
   i. As a practical matter, it is difficult for a court to order a child to do something (i.e. notion that high school children are stubborn and if they have a preference, no much the court can do about it)
   ii. Court may find the indeterminacy of child custody troublesome, so a court can wash its hands of the parents' conflict by way of child's preference
   iii. Older children may be the best fact finders – have the most access to dirty laundry
   iv. Court can avoid using state values by deferring to the child's preference – idea is that the child knows what his best interests are (agency argument: reason to respect child's preference)

c. What might get in the way of a child cleanly expressing a preference:
   i. Child does not want to hurt the other parent's feelings
   ii. Child might feel guilty for choosing

iii. Child might be emotionally damages/not thinking clearly/confused (substantive concern)
1. Might not know what is in his best interest
2. Might chose on irrational bases

d. Courts have traditionally used two primary methods of ascertaining a child's preferences
i. An appointed guardian *ad litem* (may be a lawyer or a layperson)
1. GALs may perform various roles:
a. Fact-gatherer
b. Advocate for the child's best interests
c. Advocate for the child's views
d. Some combination of roles
2. May have a concern that GALs are not restrained by traditional due process rules, etc., when they fact find (i.e. get to know facts that might not be admissible during litigation – hearsay; may make a recommendation on a personal bias – race, gender, etc.)
a. Procedural concerns
ii. Interviewing the child *in camera*, usually promising the child confidentiality
1. Benefit: privacy from the parents
2. Concern: parents' due process rights – parents have a right to rebut the child's testimony
a. *Myers v. Myers*: it is enough to let the appellate court look at the *in camera* interview, but not let the parents (i.e. it is enough if someone can look at it: attorney, parents, appellate court, e.g.)
b. But proceeding is supposed to be about the child, and not the parent

IX. Joint Custody
a. Historically, there has been a radical disapproval of joint custody, but visitation has been permitted as long as the custodial parent OK'd it
b. Trend is now towards joint custody
i. Evidence that suggests ongoing contact with both parents is good (i.e. children can be attached to more than one parent)
ii. 100% the norm to have joint legal custody – really acknowledges the significance of both parents, without diminishing the authority of the custodial parent to make day to day decisions
1. But joint physical custody is not as frequently awarded (has increased, but not the norm yet)
iii. Many courts have held (and experts agree) that the most important criteria for an award of joint custody are the parties' agreement and their ability to cooperate in reaching shared decisions in matters affecting the children's welfare
iv. An ABA study concluded that in 2008, twenty-two states and D.C. have presumptions favoring joint legal custody
1. In many states, however, the preference or presumption applies only when both parents request joint custody
c. Who does joint custody serve:
i. Parents: joint custody is a natural outflow of role egalitarianism that we've achieved in so many other ways – fairness issue
ii. Children: joint custody speaks to the fact that children may have a strong attachment to both parents, whether one is considered the primary caregiver or not
d. Jurisdictional Treatment:
i. Maine: encourages judges to award joint physical custody even if only one parent requests it, unless the judge can explain why the arrangement would not be in the best interests of the child (not quite a presumption, but encouraged)

ii. California: presumes that a joint custody award is in the best interest of the child when both parents have agreed to share custody (not specified whether statute means legal or physical)
iii. District of Columbia: rebuttable presumption that joint custody is in the best interest of the child
iv. Iowa (modified): so long as it is reasonable and in the best interest of the child, courts should make the custody award that will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents
    1. This was thought to modify Iowa's longstanding disapproval of joint physical custody

e. Possible Joint Physical Custody Arrangements
    i. Week on and a week off
    ii. 5/2 = mom gets custody Monday & Tuesday, Dad gets custody Wednesday & Thursday, and then they alternate weekends
    iii. Bird-nesting: children stay at the house and parents are the ones that switch on the 5/2 schedule, e.g.
        1. Not common at all
        2. Most people immediately feel that it would be intolerable to ask parents to trade houses on a weekly basis, but that it what joint custody arrangements ask of children
            a. It is for this reason that some argue joint physical custody meets the needs and rights of parents better than those of children
            b. Perhaps children really are more flexible and adaptable than adults, or perhaps they are not but lack the power to control their level of stability

f. Ex: *In re the Marriage of Hansen* (Iowa 2007): joint physical custody is at stake here; there is some notion that the parties do not bargain or communicate well – mom acquiesces to whatever dad says; joint physical care arrangement was 6 months with mom, then 6 months with dad, plus liberal visitation (this is not very common at all); **court notes that Iowa's notion that joint physical care is strongly disfavored except in exceptional circumstances is subject to reexamination in light of changing social conditions and ongoing legal and research developments**; this case does not support joint physical custody because mom has been the primary caregiver, but dad is granted liberal visitation and joint legal custody
    i. At the present, the available empirical studies do not provide a firm basis for a dramatic shift that would endorse joint physical care as the norm
        1. <u>All other things being equal, we believe that joint physical care is most likely to be in the best interest of the child where both parents have historically contributed to physical care in roughly the same proportion</u>
        2. Conversely, where one spouse has been the primary caregiver, the likelihood that joint physical care may be disruptive on the emotional development of the children increases
    ii. Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child

g. Ex: *Nicita v. Kittredge* (Conn. 2004): parents agreed to joint legal custody, but primary residence is with mom; parents pretty much dispute everything – both parents have some underhanded behavior; court continues joint custody (kids liked the arrangement and both parents were good parents), but they likely should have pulled the triggered and decided joint custody was not working; court decides that mom will have decision-making authority re: religion and can choose private school if she pays for it, parents will still have to discuss big decisions, parents cannot say bad things about each other, parents can only communicate via email and not sarcastically; chances of parties coming back to court after this order: 100%
    i. This court essentially micromanaged everyday decisions
        1. Courts are now aware that micromanaging orders are essentially failures

a. They often require parents to go through parenting and post-divorce classes, but the efficacy of these programs have not necessarily been proven to be effective
b. Liberty/privacy/intervention concerns if courts write highly detailed orders

X. Post-Dissolution

a. Visitation – trend towards calling visitation a parenting plan, e.g.

i. Visitation is generally thought to be the right of any fit non-custodial parent, and is also believed to promote health child development

1. Parents generally have a right to visitation with their children unless visitation would be detrimental to the best interest of the child

ii. **UMDA**: non-custodial parent is entitled to reasonable visitation unless the court finds that visitation would seriously endanger the child's physical mental, moral, or emotional health

1. The UMDA standard for denying visitation is much more restrictive than the "best interests" standard that applies to custody (i.e. do not need to have fitness in the sense that we think of "fit" for making custody determinations)
    a. Notion that fitness is optional if we can impose effective conditions of the visitation

iii. If the option is to deny visitation or to try and control a perceived risk, then courts strongly prefer to put conditions on the visitation

iv. Visitation is concerned with a non-custodial parent's established right as a parent to visit their child

1. Standard does not ask anything about the child's best interest (in the custody sense)
2. Child does not have a right to force visitation on a parent that does not want it, but adults can force visitation on a child
    a. Visitation is a right that non-custodial parents can choose to exercise or not
        i. Children do not have a mirror image right though

v. Visitation Frustration: *Usack v. Usack* (N.Y. 2005): mom petitions the court to relieve her of child support obligations because dad is frustrating visitation by successfully turning the children against their mother; court does relieve the mom of her duty to provide child support – and this holding is wrong as a matter of law – **almost every court has a long standing practice of <u>not</u> giving any order that does a child support-visitation trade off**

1. Why would mom ask for this?
    a. Threatening to withhold financial support is the only play that she has left to get access to her children
        i. She understands herself as still parenting through these support payments, so she is using this order as leverage
    b. She may be trying to get revenge/retaliating
    c. She may feel like she is no longer getting anything out of this relationship, so she does not want to parent through child support any longer
2. Other possible remedies:
    a. Contempt order
    b. Modify visitation order to provide for more detailed specifications
    c. Order extra make-up visits
    d. IIED
    e. Change custody (very rare)

vi. Third-Party Visitation: *Troxel v. Granville* (U.S. 2000): dad lived with his parents, so children lived with the paternal grandparents on the weekends during dad's visitation

time – no doubt dad had visitation rights because he was the biological parent; dad committed suicide, so grandparents no longer were able to see the kids during his visitation time; grandparents are not claiming to be de facto parents, but rather are requesting visitation solely based on their status as grandparents; mom agrees to allow the kids to visit with the paternal grandparents, but wants to limit the visitation to once a month; trial court orders more visitation than mom wanted pursuant to a **Washington statute that said *anyone* can petition for visitation** and then the court will consider whether visitation by that person will serve the best interests of the child; mom brings suit that this statute is unconstitutional against her due process rights because it interferes with her liberty interest to control and care for her children (i.e. she is the custodial, decision-making parent, so she should be able to decide who her kids will visit)

1. Court passes on the primary constitutional question: whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation
2. Court rules this statute unconstitutional because it is overly broad as applied to this case because it unconstitutionally infringes upon mom's fundamental parental right
    a. Court was disturbed by the fact that no weight or deference appears to be given to the parent's judgment
        i. Some deference does need to be given to the fit parent (not saying absolute control, though) re: who can see their child
    b. Court was also disturbed by the fact that the trial court judge appeared to place the burden on the fit mother to disprove that visitation would be in the best interest of her children
3. Note that all 50 states have some form of a grandparent visitation statute (AARP legislation)
    a. Grandparent statutes are different than the statute at issue in *Troxel*, which essentially allowed *anyone* to petition for visitation, because the statute explicitly contemplates visitation by grandparents

vii. *De Facto* Parents: a key difference between the grandparents who sought visitation in *Troxel* and the former partner who seeks visitation is that the former partner usually must convince the court that she is not a third party at all, but a parent who deserves legal recognition

1. Ex: *V.C. v. M.J.B.* (N.J. 2000): V.C. is seeking joint legal custody and visitation as a *de facto* parent; M.J.B. (legal and biological mom) is claiming V.C. is interfering with her liberty interest to the care, control and custody of her children, and that V.C. does not have standing to be in court; court determines that **V.C. is a psychological parent and affords her regular visitation**; court does not grant joint legal custody because during the pendency of this litigation (4 years), V.C. has not been a part of the children's legal decision-making process
    a. Once a third party has been determined to be a psychological parent to a child, he or she stands in parity with the legal parent
        i. Custody and visitation issues between them are to be determined on a best interest standard
            1. According to this court, under ordinary circumstances, when the evidence concerning the child's best interest is in equipoise (as between a legal parent and a psychological parent), custody will be awarded to the legal parent – visitation, however, will be the presumptive rule

b. *De facto* parenthood test (common test, but not everyone uses):
    i. (1)Legal parent's consent – this makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child (and without such a requirement, a paid nanny or babysitter could theoretically qualify for parental status)
        1. If a legal parent lets someone else in a psychological parent, then they have voluntarily forfeited the absolute right of control, care, and custody of their children
            a. The legal parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child, however, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority, the exercise of which may create a profound bond with the child
    ii. (2) Petitioner and the child lived together in the same household
    iii. (3) Petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development (financial or otherwise)
    iv. (4) Petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature

2. ALI:
    a. A ***de facto* parent** is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and (ii) regularly performed a majority (or at least as much as the legal parent) of the caretaking functions for the child, with the consent of a legal parent to form a parent-child relationship
    b. A **parent by estoppel** is an individual who
        i. lived with the child for at least two years and had a reasonable, good faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief; and, make reasonable, good faith efforts to accept responsibilities as the child's father after the belief no longer existed (i.e. mom told him it wasn't his baby when they were divorcing)
        ii. lived with the child since birth, holding out and accepting full and permanent responsibility as a parent …
3. UPA: recognizes as a parent a person who lives with the child during its first two years of life and openly holds out the child as his or her own
4. How other courts handle *de facto* parent claims:
    a. Michigan: equitable parenthood doctrines apply only in the context of marriage
        i. Will only use *de facto* parent claims for traditional parent by estoppel cases

b. North Carolina: a third party can get visitation rights if he or she establishes that they are a psychological parent, but court will not call this third party a parent (not giving the third party the status of a parent)
c. Maryland: expressly refused to recognize *de facto* parenthood, and held that a third party's claims to custody or visitation must be decided under the "exceptional circumstances" doctrine (*See McDermott v. Daugherty*)
d. Texas & Utah: third parties have no standing to bring claims re: custody and/or visitation

b. Modification
   i. Because of the state's *parens patraie* interest in the welfare of children, courts retain jurisdiction over custody and visitation matters until the child reaches the age of majority
      1. To modify a custody arrangement, a trial court in most states must find (i) that circumstances have changed *substantially* since the original decree was entered; and (ii) that the change in custody will serve the best interests of the child
         a. The substantial changed circumstances usually speak to the custodial parent (i.e. not changes with the non-custodial parent)
      2. Some states require *exceptional* changed circumstances
      3. Some states allow parties to come back at any time
      4. Some states allow parties to come back only after a certain statutory time frame (2 years, e.g.)
   ii. Relocation is the most common custody order modification issue
      1. States have taken a variety to approaches
         a. Some worked from a presumption that a move was in the child's best interest
         b. Other worked from the opposite presumption – that a move was not in the child's best interest
      2. A general rule of reasonableness has emerged
         a. Most moves will be allowed as long as there is practical, economically feasible way of allowing the nonmoving parent to maintain a reasonable amount of contact with the child
         b. Some courts do a cursory examination of the moving parent's reasons for the move as well
      3. Ex: *Fredman v. Fredman* (Fla. 2007): mom is the primary residential parent; dad has liberal visitation; parents have joint parental responsibility under their marital settlement agreement; mom is seeking to modify dad's visitation order; dad is seeking an injunction to stop her from modifying the order; **court found that mom's proposed substitute visitation schedule would be adequate under the standard, but that the relocation would not be in the best interest of the children** (court cites no showing that the move would improve the children's school, family, or home life – kids are not particularly better off in Texas and there are things in Florida that are good for the kids (dad & dad's extended family, e.g.))
         a. Mom raises a constitutional *right to travel* claim – court responds that mom does have the freedom to move, but she just cannot take the children with her
            i. A family that is intact has the freedom to move, even if it is not in the child's best interest, but a non-intact family does not share that decision-making freedom

b. Mom raises a constitutional *right to privacy* argument – court responds that the fundamental right to privacy is equal between the father and mother
    i. <u>When the parties agreed to shared parental responsibility, mom does not have a reasonable expectation of privacy to decide in what state her children live, with respect to dad, although she would have a reasonable expectation of privacy as to a third party</u>
c. Mom raises an *equal protection* challenge (i.e. she has to petition for relocation and he does not, even if his leaving would impair the visitation schedule or not be in the best interests of the children) – court responds that **custodial and non-custodial parents are not similarly situated, so there is no equal protection issue**
d. This court is focused on the child, rather than whether mom is acting in good faith
    1. Note that some states do still focus on the legitimacy of the move though
e. <u>Test</u>: neither parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests; rather, each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court
    i. **Standard**: whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent
    ii. **Factors to consider**: the relocating parent's quality of life, the other parent's ability to maintain a meaningful relationship with the child, and the child's best interests
f. Note: Silbaugh thinks this case is unusual because there is no presumption one way or the other, rather it is decided on a case-by-case basis
    i. It restricts her right to move, rather than explicitly saying she is free to move as long as she relinquishes custody (i.e. mom decides to be with the new husband and be the visitation parent, rather than the custodial parent)
        1. The infringement on mom's rights does not feel as great if she gets to make the decision

4. Qs:
    a. Who is moving away?
        i. Custodial parent – depends on how the jurisdiction handles relocation (presumption move is OK for good faith reasons, e.g.)
        ii. Non-custodial parent
    b. Does the moving parent have joint custody?
        i. Joint physical – hard to move away
        ii. Joint legal – depends on how the jurisdiction handles relocation presumptions
    c. Does the moving parent have, if needed, a good reason to relocate? (remarriage, job, closer to your own family, education, e.g.)
5. Glannon Article: no predictability as to whether a court will permit relocation
    a. Less than ½ of the time, petitioner will be able to move
    b. 90% of these cases involve mothers with custody

Adoption

I. Adoption is a relatively new, statutory creature
    a. A child may not be adopted unless a court enters an order decreeing that the adoption complies with the act and is in the best interests of the child
    b. Standing: *Adoption of M.A.* (Maine 2007): unmarried same-sex couple are foster parents to two children and they file a joint petition for adoption, but since they are unmarried the court is not sure whether the statute bars their petition or not – does this couple have statutory standing to adopt; statute permits filing by married couples (two married people, jointly) or an unmarried person (singular); **court found sufficient statutory authority to let this same-sex couple adopt**
        i. Statutory Construction: statute is ambiguous – no limiting adverbs or clarifying words in the statute, which could have been in there if legislature wanted ("solely", e.g.)
        ii. Legislative history: nothing to suggest that this couple could not adopt
        iii. Purpose of adoption law: best interests of the child are furthered by permanence (vs. keeping them in foster care)
            1. **Permanence** is a value, but it is balanced against the notion of **rehabilitation** of the parent-child relationship (i.e. if child remains in foster care, might be able to rehabilitate the parent and reunite)

II. Adoption involves two critical steps
    a. Birth parents relinquishing their parental rights
    b. Adoptive parents accepting them (and court approving)

III. Adoption is the legal equivalent of biological parenthood
    a. A valid adoption permanently extinguishes the parent-child relationship between the child and both biological parents and creates in its place a new legal relationship between the child and the adoptive parents
        i. *Except* in a stepparent adoption, or in an adoption by a parent's nonmarital partner in states that permit such adoptions
        ii. *Sometimes* we allow natural parents some very, very limited rights – but this is by agreement only

IV. Adoption situations
    a. Parents make a decision that they cannot parent (newborn context)
    b. Parents have their parenting rights removed from them because of misconduct as parents – or the state convinces them that this is going to happen, so parents relinquish their rights

V. Approximately half of the state allow a "second-parent adoption" (i.e. same-sex partners)
    a. Typical to apply to reproductive technology cases where the second parent in a lesbian couple is not biologically related to the child and the other partner is
    b. This means that in over half of the states gay and lesbian families can form legal relationships with children when they are co-parenting them, but in only five states can these same-sex couples get married
        i. Explanations?
            1. Parenting children is something that really needs to happen, so maybe there is not time to be moralistic when immediate permanency is the goal
            2. Marriage might be more wrapped up with morals than parenthood
                a. Parenting revolution was sleepier than the gay marriage debate, so perhaps that explains why people associate morals with marriage more than parenting rights

VI. Foster Parents Adopting
    a. Traditionally there was a presumption against foster parents as adopters
        i. Part of the assumption was that a foster parent is not a legal relationship and do not want foster parents to get confused and think there is a legal parent-child relationship
        ii. Purpose was also to discourage development of emotional bonds between foster parent and child while the agency sought to reunify the child with the biological family or to find a permanent adoptive placement

iii. We also do not screen foster parents the way we do adoptive parents, so do not want a presumption that foster parents are the best ones to adopt a child

b. In the past though, courts have refused to enforce no-adoption agreements where adoption by the foster parents was in the best interests of the child (i.e. if there is a strong bond formed)

c. Because foster care has a lot of kids in it and they are typically needy and difficult to place, we have developed a little more permissiveness towards foster parents as potential adoptive parents

VII. Relatives Adopting

a. In theory, states do not have general presumptions in favor of kin

b. In practice, they are very deferential to the fact that relatives often take care of kids whose natural parents cannot step up

i. So courts will tend to prefer kin over a third party stranger, in practice, if the child has a relationship with that relative

VIII. Intermediary

a. Agency adoptions: norm across the 20th century

i. The agency is the intermediary between the birth parents and the adoptive parents

ii. Agencies do need to comply with the law, but they can impose their own criteria via their screening and qualification process (people under 35, Catholics, married couples, e.g.)

iii. Home studies are more detailed/lengthy than with a typical independent adoptions

b. Independent adoptions: recent shift towards more independent adoptions (majority of U.S. adoptions)

i. Unconventional adopting parents might prefer if they want to avoid the agency screening (maybe they are over 35, same-sex, e.g.)

ii. Fees can be involved in independent adoptions, but the fees must fit within an enumerated list and an accounting is required

IX. Third Parties

a. Some states explicitly permit third party intermediaries to assist a birth parent in locating prospective adopters and in arranging for the actual physical transfer of the child

i. These states supposedly hold intermediaries to strict accounting requirements for their fees and expenses

1. Without strict accounting, lawyers may be disbarred for baby-selling accusations if they place out

b. Other states permit private placements by parents, but prohibit unlicensed intermediaries, including lawyers, from engaging in "child-placement" activities

i. Even in these states, however, it is considered appropriate for lawyers representing prospective adoptive parents to advise them on how to locate a child, and for lawyers representing birth parents to advise them on how to evaluate prospective adopters

c. Baby selling: all states have enacted statutes prohibiting baby selling and baby brokering

i. The policy is that **adoption should not be a commercial transaction for profit**

ii. Ex: *State v. Brown* (Kansas 2001) (baby selling): this is a straight baby selling case (for $800 and a cell phone); concern that the child's best interests might be ignored if action is taken purely for profit – no quality screening in the placement – only concern was how much money could be had

1. If birth mother went through an agency, she likely could have gotten more money

a. Legitimate reimbursement expenses: reasonable legal fees, actual medical expenses of the mother, actual medical expenses of the child, reasonable living expenses of the mother which are incurred during or as a result of pregnancy (rent, clothing, cell phone, TV, e.g.)

i. Will need an accounting

iii. Judge Posner Article: argues that a regulated free market in adoptable infants would serve the best interests of the children involved

1. He argues that a regulated free market for adoptable infants would serve the best interests of the children involved
    a. He still supports agency screening and court approval
2. Basically, if you allow a free market, you get rid of the black market/gray market exchange

X. Consent Requirement
- a. Requirement of Informed and Voluntary Consent: the general rule is that on a petition by persons with standing to adopt, the court may not proceed unless consents to adoption have been secured from all persons with a right to give or withhold consent
    - i. The required consents do not complete the adoption, but merely enable the court to order the adoption in the best interests of the child if it concludes all other requirements have been satisfied
    - ii. Knowing and voluntary consent generally must be secured from both biological parents
        1. No state lets a birth mother relinquish her rights while she is pregnant
        2. Birth fathers, however, can relinquish their rights during a pregnancy
    - iii. A birth parent may execute a *specific* consent (authorizing adoption only by particular persons named in the consent), or a *general* consent (authorizing adoption by persons chosen by the agency, authorized intermediary, or the court
    - iv. Consent is not required from a biological parent who has died, who a court determines is incompetent, whose parental rights have been terminated by consent or court order, or who has abandoned or neglected the child for a specified period
    - v. The right of unwed fathers to withhold consent to an adoption can present particularly thorny questions
    - vi. Because valid consent to adoption may terminate the parent-child relationship, statutes prescribed formalities designed to emphasize to the biological parent the gravity of consent
        1. In almost all states, consent must be in writing
- b. Notice of the adoption proceeding must be provided to persons whose consent to the adoption is required
    - i. The adoption act, however, may also require notice to other persons, who may have the right to address the court concerning the best interest of the child, but who do not hold the right to veto the adoption
- c. Revoking consent: in many states, the biological parents' consent to adoption may be revoked within the first few days after execution, or within the first few hours or days after the child's birth
    - **i. The court may then have authority to determine whether to permit revocation in the best interests of the child**
        1. Note that adoptions take 6 months to a year to be formalized – this is a limbo period where birth parents might change their mind

XI. Open Adoption
- a. In an open adoption, the child has continuing post-decree contact with the biological parents or other relatives
    - i. In recent years, the shortage of readily adoptable children has helped encourage open adoptions based on agreements between biological parents and adoptive parents
        1. The shortage has provided leverage to biological mothers who seek a future right of contact with the child before consenting to a private-placement adoption
- b. Ex: *Adoption of Vito* (Mass. 2000): **a judge may order limited post-adoption contact, including visitation, between a child and a biological parent where such contact is currently in the best interests of the child** (despite lack of an agreement between the parties); judicial exercise of equitable power to require post-adoption contact is not warranted in this case, however, because there is little or no evidence of a significant, existing bond between Vito and his biological mother, and no other compelling reason for concluding that post-adoption contact is

currently in his best interests; Vito has formed strong, nurturing bongs with his pre-adoptive family (i.e. this adoption process is still pending, not finalized) and the record supports little more than speculation that post-adoption contact will be important for his adjustment years later, in adolescence

i. Rationale for allowing judge to order post-adoption contact:
    1. To help transition the child between the families
    2. To help child with his racial identity (if it is a interracial adoption)
ii. Note that some courts will not enforce open adoption agreements – holding that adoptive families can terminate the agreement whenever

XII. Records

a. Confidentiality legislation today is grounded in the policy determination that closed records serve the interests of all parties to the adoption
    i. The biological parents can put the past behind them, secure from embarrassment, and sometimes shame, arising from the adoption itself and perhaps the circumstances of the pregnancy and birth
    ii. Adoptive parents can raise the child as their own, free from outside interference and fear that biological parents might try to "reclaim" the child
    iii. The adoptee avoids any shame from out-of-wedlock birth and can develop a relationship with the adoptive parents

    … And, the argument goes, all of these reasons serve a state interest in encouraging persons to participate in the adoption process
b. Some movement towards unsealed records
    i. Belief in the right of someone to know their biological/genealogical roots
    ii. Sometimes for health reasons
    iii. Driving force: even in the most highly conventional adoptions, eventually adoptive children develop curiosity
        1. And sealing records may unnecessarily deprive these people of their records
c. Some states have adoption registries

XIII. Transracial/International Adoption

a. Practice during the first half of the 20th century was for agencies to attempt to re-create natural families by matching adoptive children to families based on race, height, etc.
b. During the civil rights movement a practice developed of white families adopting black children
c. In 1972 the National Association of Black Social Workers condemned transracial adoption as cultural genocide
    i. This report was <u>very</u> influential and almost all adoption agencies rejected cross-placing children by race
        1. Concern that children belong in their community of their ethnicity/race
        2. Concern that children might feel racially isolated and deprived of their racial identity
        3. Concern that children of color might be a white family's second choice (whether this is true or not)
        4. Concern that adoptive families may have a rescue fantasy
            a. Elizabeth B.'s response is that there may be a rescue fantasy with international adoptions, but families who adopt from these countries abroad feel forever connected and concerned about that country, and this is a good thing for all children
        5. A community cannot survive people raiding and raising its children
d. Race is still considered an acceptable factor in adoptions
    i. Concerns about the child having a strong racial identity promotes agencies to ask whether the adoptive family is capable of nurturing a transracial identity for the child
e. Many more children of color are available for adoption than white children
    i. It is also true that communities of color adopt at much higher rates than white people – but not enough to overcome the disparity in the number of children available

f. The Howard M. Metzenbaum Multiethnic Placement Act (MEPA) was a federal funding statute that sought to *encourage transracial adoption* by ending the practice of matching adoptive parents with children of the same race
    i. **MEPA prohibited states and private agencies from delaying or denying an adoptive placement solely on the basis of race**
        1. As amended, the MEPA prohibits private and public child placement agencies from denying any person the opportunity to become an adoptive or foster parent, or from delaying or denying the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child
    ii. **MEPA expressly excepts the Indian Child Welfare Act (ICWA) from its provisions**
        1. ICWA recognizes tribal identity and mandates that you must race match
            a. ICWA strictly prohibits the placement of Native American children off the reservation
            b. The contrasting treatment of African American and Indian children can be justified, legally, because Indian tribes have separate sovereignty in America and African Americans do not

XIV. Religion
- a. Sometimes agencies involved in rescuing children from war-torn counties, e.g., rescue not just out of a desire to save the children's lives, but also to save the religion
    i. So courts allowing this religion-matching is a little quid pro quo for doing this dangerous work
- b. One case noted that you can deny an adoption based on a parent's religious placement intent, but not if it is not the parent's religion

Assisted Reproductive Technology (ART)

I. Terminology
- a. Artificial Insemination: implanting sperm into the mother – either from a sperm donor or from the husband
- b. In Vitro Fertilization: collect eggs from the woman and sperm from the man, and fertilization takes place in vitro in a laboratory – the resulting preembryos are implanted into the woman
- c. Surrogacy
    i. Genetic Surrogacy: the surrogate contributes her egg to conception (uses AI)
    ii. Gestational Surrogacy: the surrogate is not genetically related to the child (uses IVF)
        1. This is the modern day norm now because parentage claims are much easier to determine (i.e. if surrogate has no genetic connection, parentage claim is not as strong)
            a. Surrogacy agreements now almost always stipulate that the woman who carries the baby cannot also donate the egg

II. Use of ART has been increasing because:
- a. Infertility rates are relatively high
- b. People often want their own genetic child
- c. Adoption is becoming harder

III. Common law does not provide any standards for ART because the concept is so new
- a. This means there is a lot of uncertainty about how ART cases will unfold – no predictability
    i. Areas of law we might try to access/analogize ART to:
        1. Procreation decision-making cases (*Griswold*, *Eisenstad*, *Roe*, e.g.)
        2. Paternity/Support cases
        3. Child custody/Child welfare cases (i.e. best interests of the child)
        4. Adoption law and practices
        5. Contract law (consent + intent)

IV. One standard that has developed is anonymity of sperm donors

a. If you go through a sperm bank and use anonymous sperm, the assumption is that the donor will remain anonymous
    i. Parties can agree to contract regarding identity release when the child is an adult
b. This looks like it is borrowed from adoption law
    i. Might be stigmas around sperm donation (doing it for the money?)
    ii. Might be trying to deceive the world about who the child's genetic makeup, so we let the genetic father remain private
    iii. Might be a concern that if we do not allow anonymity there will be a shortage of sperm donors
    iv. Have similar curiosity issues about children who become adults and what to know about their biological parents

V. Delaware Parentage Act (adopted the Uniform Parentage Act)
a. A donor is <u>not</u> a parent of a child conceived by means of ART
    i. "Donor" does not include a husband who provides sperm, or a wife who provides eggs, to be used for ART by the wife
    ii. A man who provides sperm for, or consents to, ART by a woman as provided in §8-704 with ***intent*** to be the parent of her child, is a parent of the resulting child
        1. Remember: Intent standard from *Johnson v. Calvert* (surrogate mother situation)
b. Do not need a clinic to be covered under this Act
    i. Act applies to the turkey-baster method (i.e. no medical or clinical intervention)
c. This Act only covers pregnancy by means *other than sexual intercourse*
    i. If you are a sperm donor by sexual intercourse, you are subject to the paternity/support cases
    ii. <u>Lack of sexual intercourse puts you in the "intent" zone, *but* if you have sex we do not care what your intent was</u>
d. Act does not appear to distinguish between anonymous or known donors
e. §8-705 provides for the martial presumption
    i. Exceptions:
        1. Within 2 years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and
        2. The court finds that he did not consent to the ART, before or after birth of the child
f. Del./UPA is fairly comprehensive, but not everyone has adopted this

VI. What if ART results in more health risks to children than normal/natural pregnancy?
a. Could argue right to procreative freedom is just as strong in both cases
b. Clinics do have some screenings, but they are not obligated to do any screenings
    i. We do not regulate these intermediaries as much as we might think we should
        1. Contrast this to adoption and the screening process there
            a. Adoption context we are concerned about the best interests of the child
            b. ART context we are concerned about the person trying to conceive … so the analysis is different in that regard

VII. To develop a body of law for ART, someone needs to propose the regulation
a. Some very influential religious institutions disapprove of ART because they consider the harvesting of multiple eggs only to use a few at a time and then freezing or discarding the rest is analogous to abortion … so they are not going to do it
    i. The Catholic Church wants to get rid of it – not to regulate it
b. Medical facilities can just regulate on their own and choose to do so, or not, whenever they want
c. State legislators likely just prefer to let the courts deal with any issues that develop on a case-by-case basis rather than getting involved
    i. Notion that they might prefer neutrality … especially if some of their other initiatives are supported by the Catholic Church, or anyone else that disapproves of ART

VIII. Situation: private sperm donation (non-anonymous that occurs outside the context of an institutional sperm bank) effected through clinical rather than sexual means
    a. Ex: *Ferguson v. McKiernan* (Penn. 2007): mom had an affair with sperm donor and after their romantic relationship ended she talked him into donating sperm so she could get pregnant; she said he would not have any parental commitments; she listed her husband as the father on the birth certificates; mom went to the State first to support these kids, but the State said the kids have a dad, go find him for support
        i. Trial court decides the case is governed by the paternity/support cases
            1. This is similar to a contraceptive fraud case – "I will not seek support from you," but five years later she does and this is not an anonymous sperm donation so biological father should pay child support
        ii. Penn. Supreme Court does not impose child support and analogizes this case to an anonymous sperm bank donation – says there is no legally sustainable difference for treating this case differently
            1. Concern that we are essentially letting mom sign away the child's support rights, but that the court is doing so in order to protect certain practices (i.e. sperm donation)
            2. "Assuming that we do not wish to disturb the lives of the many extant parties to anonymous, institutional sperm donation, we can only rule in Mother's favor if we are able to draw a legally sustainable distinction between the negotiated, clinical agreement that closely mimics the trappings of anonymous sperm donation that the trial court found to have existed in this case and institutional sperm donation, itself
                a. Where such a distinction hinges on something as trivial as the parties' success in preserving the anonymity they took substantial steps to ensure, however, we can discern no principled basis for such a distinction"
        iii. Silbaugh: court could have distinguished this case on the basis of anonymous vs. non-anonymous or oral agreement vs. written, counseled contracts
            1. This would have imposed child support while still protecting the practice of sperm donation
        iv. Result under the UPA:
            1. There would be a presumption against paternity: "A donor is not a parent of a child conceived by means of ART"

IX. Ownership Disputes
    a. Ex: *In re Marriage of Witten* (Iowa 2003): married couple decided to try IVF – had several sets of eggs frozen and made a few unsuccessful attempts during the marriage; at the time of divorce, wife wants custody of the eggs because she wants to have a genetic child of her own and will allow husband to be as involved, if at all, as he wants; husband is willing to donate the eggs to another couple but does not want the eggs implanted in her; the parties signed a contract that the clinic will not release the eggs unless both parties approve; because taking any action would be taking action against someone's wishes, the court decides to just leave the embryos frozen until the parties can come to an agreement
        i. Contract appears to govern this case (although the court does not admit this)
            1. It is a tie-breaker between the two parties' interests and it really helps the husband
        ii. Ultimately court uses a balancing approach to decide the eggs should stay frozen
            1. As a matter of law, it is not something for the court to decide – we need the <u>mutual consent</u> of both parties and without mutual agreement the embryos will stay in limbo (wife paying for the storage)
                a. Embryos are fundamentally distinct from chattels – *whoever created them has to agree on the outcome*

i. So even if the parties had a contract that said at the time of divorce the wife can use the eggs, if husband changed his mind and brings a similar claim, this court would apply the same outcome → balancing/contract not determinative

iii. Court decides this is <u>not</u> a custody case – these fertilized eggs are deemed not to be children so there is no best interest analysis necessary (court decides this by consulting the statute and deducing legislative intent)

1. Dicta: if the statute did decide the embryos were children from the time of conception, then embryo destruction is out of the question and the agreement between the parties and the clinic would likely be void because this is a child welfare/custody case, so wife might win out because she wants to carry them

X. Posthumous Children

a. If the father dies during the pregnancy, the general rule is that he is still the father and the child has an inheritance right to his estate

b. If the embryo already exists, the clinic where it is stored typically has a contractual provision about what do in the situation of a party's death

i. This document is not a will though – it just says something about the party's intention, which can be important when interpreting wills

c. Only a handful of states have enacted some version of §707 of the UPA: "If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if ART were to occur after death, the deceased spouse would be a parent of the child"

d. Concern about letting children conceived from ART inherit and unsettling estates

XI. Surrogacy

a. The fact that surrogacy contracts are not enforceable does not mean that people do not still write them

i. It is a way to set expectations between the parties in advance so everyone knows how to behave (ideally)

1. Dicta: because the agreements are largely unenforceable, risk that payment clause might not be enforced if intended parents do not pay

b. Jurisdictional Treatment:

i. A number of states have enacted surrogacy legislation

1. Other states, however, continue to avoid such legislation because of the ethical, religious, and moral questions that would arise during debate

ii. Among the states with legislation, no one approach has achieved unanimity

1. Some states deny enforcement of surrogacy agreements in all circumstances
2. Other states deny enforcement only where the surrogate is compensated
3. Some states have exempted surrogacy agreements from baby-selling statutes
4. A few states have expressly made unpaid surrogacy agreements lawful
5. A few states permit surrogacy only where the intended mother is infertile
6. Some states restrict who may act as a surrogate and require advance judicial approval of the agreement
7. Some stats presume that a child born to a surrogate mother is the child of the intended parents and not the surrogate
8. Most states with surrogacy legislation permit only married couples to hire surrogates, thus excluding gay and lesbian individuals and couples

c. Some surrogate concerns are about the inevitable income disparity – a class exploitation point

i. However, this could be managed through compensation

1. Notion that money undoes the balance of power

d. **Genetic Surrogacy** → *In re Baby M* (N.J. 1988): Stern couple wants to have children, but wife has MS and pregnancy may exacerbate the MS, so the couple hires a surrogate for $10K (for her troubles, not for the actual baby); surrogate threatens to commit suicide if she cannot see the child, so the couple decides to let her see the child and long story short, she refuses to return the

child; baby stays with the surrogate mother for the first four months of her life, but is eventually returned the Sterns because surrogate is so unstable; court decides that this is indeed a baby-selling agreement because it does not give the surrogate mother any ability to change her mind (opt out/rescind); court determines that the surrogate mother is the legal/biological mother, but custody is granted to Mr. Stern, the legal/biological dad

i. Contract parties: Mr. Stern (genetic father), Mrs. Whitehead (genetic mother), Mr. Whitehead (relinquishes his presumptive parental rights to overcome the marital presumption)
    1. Mrs. Whitehead agrees to do what is necessary to terminate her parental rights, but court holds this provision unenforceable because she is not an unfit parent – cannot terminate a fit parent's rights over their objection
        a. Also the notion that she can have a change of heart because of the experience of carrying the baby for nine months (just like adoption)
    2. Mrs. Stern is not in the contract to avoid any baby-selling issues because she has not been screened as a fit parent and she has no common law rights in the child since there is no genetic relation
ii. Court thinks this agreement has a best interest problem because the parties are deciding custody without reference to the best interests of the child
    1. Court holds that the parties cannot contractually change their parental rights
        a. But note that parental rights cases are not best interest cases – you have the right to your parental connection, status, visitation without regard to the best interests
iii. "We find no offense to our present laws where a woman voluntarily and *without payment* agrees to act as a 'surrogate' mother, provided that she is <u>not</u> subject to a binding agreement to surrender her child"

e. **Gestational Surrogacy** → *J.F. v. D.B.* (Penn. 2006): married couple were the intended parents; gestational carrier agreed she would not form a parent-child relationship, but she did and had a change of heart – but no biological connection to the child; there is no dispute about who is the legal mother: the egg donor, who does not care to enforce these rights at all; intended mother wants the egg donor's parental rights enforced because the couple trusts her more to relinquish the baby; <u>court decides that experience of carrying the baby for nine months does not allow gestational carriers to change their mind because they should know better that the baby they are carrying is not theirs and has no genetic connection</u>
    i. In this case the pregnancy happened earlier than expected and the clinic did not provide the hospital with the court order re: release baby to the biological father (no permission needed from gestational mother)
        1. Therefore, the hospital mistakenly released the baby to the gestational carrier because they obviously presumed whoever gave birth is the mother of the baby
    ii. **Court decides that gestational mother does not have any rights because she is a third party** and there needs to be clear and convincing reasons for a child to be placed with a third party over fit, natural parents
        1. Although this case is about determining parentage, the court notes that the gestational mother does not even have standing to ask for custody because she is a third party (no genetic connection)
            a. She is <u>not</u> a biological mother, legal mother, or in loco parentis (because the father did not give her permission to work in loco parentis and biological parent's consent is required)

<u>Broad Principles:</u>

- What is in a child's best interest?
- What harms are at stake for the child?
- What adult interests are at stake?

- What evidence do we have?
- What presumptions do we have?

Remember, DOMA defines “marriage” for *federal law* purposes