**Family Law**

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6. **Introduction**
	1. Big theoretical questions
		1. What is a family/marriage? What is an adult familial relationship?
			1. Traditional vs. functional family.
		2. What is the big deal about family/marriage? Why does the state care?
			1. Family is connected to the home=privacy, refuge from everything else including the state.
			2. “Family is the building block of society” (Reproductive, educate citizens)
		3. Why do we need family law? Why not let the other bodies of law take care of these issues?
			1. Power imbalances
			2. Privacy – family generally private so we need a special body of law to protect it.
			3. Families are unique and this uniqueness takes them out of the realm of other areas of law.
			4. Channeling function – want to encourage certain families/marriages
	2. History of family law (Demos, *Images of the American Family, Then and Now*) (155)
		1. 3 major legal revolutions in family law:
			1. Women’s Rights: Initially Hs owned Ws and had all legal power. States then gave Ws the right to property, K, and enter the legal profession... Today there is gender symmetry but many aspects of family law have residuals of this bilateral tradition.
			2. No-fault divorce (started in late 1960s): spouse seeking divorce would have to show that s/he was completely innocent and other spouse was completely at fault, so serious that the state would let you out of marriage.
			3. Recognition of same-sex marriages.
		2. Increasing federalization of family law = another possible revolution.
		3. Demos: Myth of family’s golden past – every generation thinks the previous generation had it right; thinking there’s a crisis that foundation of marriage is falling apart, and change is bad. But if this is just a myth.
			1. Cavanaugh: We should adapt family law to focus on care-taking, not marriage
	3. **Rule of Celebration**
		1. Doctrine
			1. Comity: a state will recognize marriage that took place in another state.
			2. Rule of Celebration: if the marriage is valid in the place where it was celebrated the state will give comity to the relationship.
				1. Two exceptions:

There is positive law that expressly prohibits the marriage.

The marriage is against natural law **or public policy**.

* + 1. *In re May’s Estate* (BB) (NY 1953)
			1. Issue: Should NY be forced under the rule of celebration to recognize a RI marriage b/w uncle and niece, a relationship that NY views as incestuous?
			2. HOLDING: As there is no positive law that expressly prohibits the marriage and the marriage is not against natural law/public policy, NY must give comity to RI marriage.
				1. They acted like they were married for 40 yrs. They were a functional family and the Ct should acknowledge reality.
				2. BUT need to draw line somewhere, otherwise you will invalidate the channeling function.
			3. Dissent: Marriage abhorrent and violates natural law – also, they were evading NY law by marrying in RI!
			4. Note: NY now has comity - solemnizes marriages from other states.
	1. Carl Schneider, *The Channeling Function in Family Law* (47) [See Attack for more!]
		1. 4 functions of family law
			1. **Protective** (of weaker party from abuse and violence)
			2. **Facilitative** (organize families easily, without bunch of Ks)
			3. **Arbitral** (resolve disputes)
			4. **Channeling** –effects:
				1. Happier/better marriages.
				2. Divorce? Separation from bed and board?
				3. Incentives to be better informed prior to marrying.
1. **What Is a Family?**
	1. Traditional vs. functional family
		1. **Traditional** **family**: blood (may look at the proximity), marriage, and adoption.
			1. Allows for easy identification of family
			2. Less intrusive than functional approach – don’t have to investigate relationship
		2. **Functional** **family**: looks to a # of different factors (see *Braschi* below)
			1. Approach values substance over form; treats people who act like a fam as a fam.
			2. This approach is not about marriage; it’s about family members.
	2. *Village of Belle Terre* (SCOTUS 1974) (28) [TRADITIONAL]
		1. Facts: Statute says that if related by blood, marriage, or adoption you may have as many people as you want living in a house. If not, can only have 2 people per house. 6 college students living together sued.
			1. **Traditional** def of family: 1 or more people living together related by blood, marriage or adoption.
		2. HOLDING: Zoning ordinance is Const’l.
			1. Right to ass’n not violated - only prevents *living* w/ person (you can still *associate* w/ them).
			2. Zoning rule falls w/in police power and is accomplishing its goals in legit way (ex: not using race).
		3. Dissent (Marshall): Zoning ord affects rt of ass’n and rt to privacy. Intrudes on private realm of family. Law can’t effectively limit who lives together based on the different classes (married vs unmarried) of people. Law is both over-and-under-inclusive.
	3. *Moore v. City of East Cleveland* (SCOTUS 1977) (1118)
		1. Facts: A more specific housing ordinance than *Belle Terre* (proximity of relationship matters). Grandma has grandkids living w/ her from 2 dif. children, a violation of the ordinance.
		2. HOLD (plurality): Ordinance is illegal as it slices deep into the family.
			1. Ordinance = prioritizing some families over other families.
			2. Family should be defined in the broad sense (ie not just the “traditional nuclear family”)
			3. Does not undercut *Belle Terre* – these are blood relatives, not unrelated college students
		3. Concurrence (Marshall): the fact that they act like a family is what is important (**Functional**).
		4. Dissent: No con’l right to live w/ grandkids.
	4. *Penobscot* (Maine 1981) (32)
		1. Facts: Statute only allowed family members to live together. Family was defined as blood, marriage, or other domestic bond. Proposed group home for retarded persons rejected.
		2. HOLDING: Not a family (zoning decision upheld).
	5. *Glassboro* (NJ 1990) (34) [FUNCTIONAL]
		1. Facts: Students lived in a house, splitting expenses and cooking together. The statute includes a group acting as one housekeeping unit.
		2. HOLDING: This is a family – fits under “functional equivalency” classification provided by statute.
		3. Contrasting *Glassboro* & *Penobscot*: (1) students cooked, ate & cleaned together, (2) mixed resources. Also, (3) different statutes/Jx’s.
			1. These two cases cited for adopting a **functional definition** of family
	6. *Braschi* (NY 1989) (15) [FUNCTIONAL]
		1. Facts: Gay couple living together, the one holding the rent-controlled apt dies. Statute allows family member living in apt before tenant’s death to stay. Surviving partner evicted.
		2. HOLDING: For partner (eviction improper). Ct takes **functional family** approach, looks to # of factors:
			1. Exclusivity, longevity of relationship
			2. Level of emotional and financial commitment
			3. Manner in which parties conduct their lives and hold themselves out
			4. Reliance upon one another for daily family services
			5. Holistic approach - balancing all factors (consider totality of the relationship)
		3. Advantages of approach: Right result (they couldn’t marry=unfair), accounts for variety of fam structures
		4. Disadvantages of approach: Hard for landlords to implement/enforce; potential for abuse.
2. **Marriage**
	1. **Family Privacy**
		1. Doctrine
			1. Cts won’t get involved in family issues as long as family is intact, absent abuse/neglect. (*McGuire*)
			2. There is a private realm in which the govt should not intrude on intimate ass’ns (*Lawrence*)
		2. **Traditional example**
			1. *McGuire v. McGuire* (Neb. 1953) (146)
				1. Facts: W sued H to make H give her $ - W claims H not allowing her basic of necessities even though he can afford it. (Note - no divorce here, including “divorce from bed and board” (ie separation). At the time, H had a duty to support W. W was viewed as part of H).
				2. HOLDING: For stingy H. As long as family is intact, absent abuse or neglect, Ct will not exercise Jx b/c of doctrine of **family privacy**. Also, W has options – could move out and then sue for support $.
				3. Dissent: Why make W move out (break up family) in order to receive help from Ct?
		3. **Applying/Extending the doctrine**
			1. *Griswold* (SCOTUS 1965) (238)
				1. Facts: CT law prohibited use of contraceptives or assisting one in using contraceptives.
				2. HOLDING: Law is un-C’n’l; violates privacy right of marriage.
				3. Note: Rt to privacy not explicitly in C’n, but Justices find rt in dif ways: implicit in BoR (Douglas), essential for gov, 9A (Goldberg).
			2. *Eisenstadt* (SCOTUS 1972) (241)
				1. Facts: Man convicted for exhibiting contraceptives & providing them to an unmarried person.
				2. HOLDING: UnC’n’l b/c of EP clause. Also, the **rt of privacy = indiv rt**, not dependent on marriage. (“If the rt of privacy means anything, it is the rt of the *individual*, married or single, to be free from unwarranted govt’l intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” [242])
				3. Note: *Eisenstadt* does not say you have to treat married & unmarried people alike always.
			3. *Bowers v. Hardwick* (SCOTUS 1986) (244)
				1. HOLDING: Rt of privacy limited to marriage, procreation & childrearing. (GA allowed to criminalize same-sex sexual activity like sodomy)
			4. *Lawrence v. Texas* (SCOTUS 2003) (243)
				1. HOLDING: Overturns *Bowers*.

Rt of privacy extends beyond spatial bounds - this is abt control of personal relationships (intimate assn’s & gov intrusion)

* + - * 1. Dissent (Scalia): If we aren’t allowed to distinguish b/w hetero & homo activity then there is no C’n’l argument to distinguish b/w the 2 types of marriage. Case is really abt marriage recognition.
				2. Rule: **there is a private realm in which the gov. should not intrude on intimate ass’ns**.
				3. Note: O’Connor- EP argument; TX treats same conduct differently based on participants
	1. **The Fundamental Right to Marry**
		1. **The miscegenation context:**
			1. There are 2 kinds of anti-miscegenation laws:
				1. VA model: whites can only marry whites and who cares about everyone else.

One drop (of blood) rule – makes you non-white.

* + - * 1. CA model: any kind of mixing is not allowed.
			1. *Pace v. Alabama* (SCOTUS 1882) (BB)
				1. Facts: there were two statutes on adultery/fornication. If a couple was interracial the punishment was more severe. Man here was black, woman was white.
				2. HOLDING: Since both races were punished equally here, no violation of 14A EP
			2. *Naim v. Naim* (VA 1955) (BB)
				1. Facts: White woman sued her Chinese husband for an annulmt. VA criminalizes being married inter-racially. She wanted the marriage declared void.

Annulment: legal way to undo marriage (as if marriage never happened).

A void marriage is one that is not possible and is void from the outset.

EX: same-sex, siblings, fictional characters, non-humans, illegal.

Why seek annulment for void marriage? To clear the record.

A voidable marriage is one that is in some sense possible, but it requires Ct action to annul.

EX: fraud, duress, insane, age. (Lack relevant factors of consent)

* + - * 1. HOLDING: Marriage void. VA law preventing interracial marriage = C’n’l (no EP/DP violation).

14A is abt civil/political rights, but marriage is abt social rights. It is a legit state interest to regulate marriage for health reasons, morality, and public welfare, and the state doesn’t know what happens in terms of these if interracial marriages allowed.

Ct distinguished *Brown v. Bd of Ed* saying that providing good education is a foundation of good citizenship, but interracial marriage is not.

* + - 1. *Loving v. Virginia* (SCOTUS 1967) (58)
				1. Issue: Does a VA statute preventing interracial marriage violate EP and DP Clauses of 14A?
				2. HOLDING: Yes.

EP: Equal application not enough. Statute is abt white supremacy (since blacks & Indians could marry). Invidious race classification = only purpose of this statute. EP violation alone = sufficient to strike down the state’s ability to regulate marriage.

DP: Marriage is a fundamental rt & state needs a reasonable justification to disallow it.

If there’s a fundamental rt, apply strict scrutiny.

**Uncle/niece relationship in *May* not as fundamental/robust as race in *Loving***

* + - * 1. Simple reading: race = unjustified restriction, but other restrictions could be allowed (i.e. no gay marriage).
				2. Nuanced reading: states required to support gay marriage (marriage = fundamental rt).
		1. **The DP arg from *Loving*/the fundamental right to marry – how strong is this rt?**
			1. ***Zablocki***(SCOTUS 1978) (62)
				1. Facts: Wisconsin law prevented dead-beat parents from remarrying AT ALL, requiring parents to be able to support their kids

State’s Arguments:

The law helps existing children of dead-beat parents.

The law helps future children of dead-beat parents.

BUT a dead-beat parent can have kids w/o getting married (and can marry w/out having kids) so this is both under- and over-inclusive.

Counseling function.

* + - * 1. HOLDING: Statute is unC’n’l. Marriage is a fundamental rt & the means to achieve a compelling state interest is not narrowly tailored here. Reasonable regulations that do not significantly interfere w/ the ability to marry are allowed (include certain pre-reqs).

Need to disting b/w (1) entrance and (2) requirement to marry. If someone restricted from marrying altogether, that’s un’C’n’l.

* + - * 1. Concurrence (Stevens): the problem here is one of EP (economic status).
				2. Dissent (Rehnquist): Statute C’n’l. People can still get married and engage in intercourse. This is a reasonable regulation - state has interest in regulating marriage.
			1. ***Turner v. Safely*** (SCOTUS 1987) (71)
				1. Facts: Law required permission of prison superintendent before *inmate* could get married. Superintendent only allowed pregnancy or birth of an illegit child to be a factor.
				2. HOLDING: The statute is unC’n’l; marriage=fundamental rt that cannot be denied. Marriage has important characteristics that do not include procreation.
				3. This case is a clear articulation of the fundamental rt to marry based on DP, not EP.
		1. **Limits on the Fundamental Right to Marry**
			1. *Keeney v. Heath* (7th Cir. 1995) (BB)
				1. Facts: By statute, prison guard could not marry inmate (had to quit her job if she wanted to).
				2. HOLDING: The statute is C’n’l

The restriction could have been cured by her quitting or him getting released so it is only temporary (does not restrict one from marrying altogether).

* 1. **Traditional Model of Marriage and Challenges/Revisions to It**
		1. **Gender**
			1. **Past gender asymmetries in marriage:**
				1. *Graham v. Graham* (USDC Mich. 1940) (151)

Facts: H is suing for $300/month W promised him for quitting his job and traveling w/ her.

HOLDING: Ct finds for W and does not enforce K for several reasons:

No consideration

Married women could not enter into Ks

Ct recognizes this restriction is in process of being abolished (offers other reasons).

K violates public policy b/c it violates H’s *duty of support*. (gender asymmetry)

K subverts the idea that a W has to live where H chooses.

We don’t want Ks like this b/c State = 3rd party involved – can’t change essentials of marriage w/out State’s permission.

The K gets Ct involved in issues that it doesn’t want to get involved in (ie privacy concerns).

* + - 1. *Orr v. Orr* (SCOTUS 1979) (174)
				1. Facts: H wants alimony from W. But law protects Ws from paying alimony.
				2. HOLDING: This is different treatment on the basis of sex. Law isn’t protecting needy women, only protecting financially secure ones. Gender is not a proxy for need (wealthy women exist).

To w/stand scrutiny under EP, classifications by gender must serve important gov interest

Here, it doesn’t.

* + - 1. *US v. VA* (SCOTUS 1996) (176)
				1. Facts: VMI refused to admit women.
				2. HOLDING: Against VMI. “Parties who seek to defend gender-based gov action must demonstrate an exceedingly persuasive justification for that action.” (intermediate scrutiny for gender classification)
				3. This case = pinnacle of EP jurisprudence re: gender.
				4. Inherent differences remain b/w sexes, but those differences do not justify use of stereotypes
			2. *Nguyen v. INS* (SCOTUS 2001) (BB)
				1. Facts: Statute imposes dif. reqs for obtaining citizenship dependent on whether citizen-parent is M or F (if parents unmarried at time of birth). More difficult if F = citizen-parent.

Gov. argumts:

We know at birth who is M(not so w/ F).

B/c baby comes out of M, she has a unique opportunity to form a relationship w/ baby.

* + - * 1. HOLDING: Gov’s reasons satisfy scrutiny level demanded by *US v. VA*.

This case is example where differences b/w men and women re: reproduction can justify discriminatory laws. [ie no overbroad generalizations about women here]

* + - * 1. Dissent: No “exceedingly persuasive justification here.”

Re: argumt 1, the INS isn’t there at birth so that shouldn’t matter. (INS could look at who raised child)

Re: argumt 2, there is a real relationship here. A real relationship should trump a potential relationship. (We also have surrogate mothers today, i.e. legal versus birth mothers)

* + 1. **Contracts**
			1. Marriage Ks have a 3rd party, i.e. the state (See, e.g., *Graham*).
				1. State gives permission to enter/exit a marriage.
				2. State determines what the rights and duties of the K are.
				3. Changing certain feature of the K may, therefore, be seen as problematic & against public policy.
			2. Types of Ks include premarital/prenuptial/antenuptial agreemts & postmarital/postnuptial agreemts.
			3. For many years, Cts only allowed parties to enter into these Ks if they dealt w/ what happened at death. Ks that anticipated divorce were problematic - state would void these b/c of duress, power imbalances, and b/c they were not made at arm’s length.
				1. Old view: “the law will not permit parties contemplating marriage to enter into a K providing for, and looking to, future separation after marriage.” Thought prenuptial agreemts made divorce more likely.

However, opposite is true. Prenuptial agreemts encourage transparency, create more stability.

*Edwardson v. Edwardson* (1990) (201): Allowed for prenuptial agreemts that anticipate divorce.

* + - 1. Courts today:
				1. Pre-nups allowed as long as there is full and fair disclosure (ie no duress).
				2. BUT there are limits to what Cts will enforce

Enforce business Ks b/w spouses.

Don’t enforce Ks on household activities (lifestyle provisions)

Enforce Ks about assets.

Ks about child-support and visitation…are not necessarily honored.

Nevertheless, Ct sometimes looks at these provisions (parties’ intentions/tie-breaker)

* + - 1. Cases:
				1. *Simeone v. Simeone* (1990) (204)

Facts: W wants Ct not to enforce a prenuptial agreement.

W’s arguments:

She was under duress b/c the prenup was signed right b4 wedding (sign or no wedding).

She didn’t understand the K or specific terms like “alimony pendente lite” (temporary alimony during a divorce proceeding) which she agreed to waive.

She didn’t have an attorney.

HOLDING: As there was evid that she knew a prenup was coming, she could have retained counsel. She failed to do so and Ct will not step in now.

Ct discusses using a reasonableness standard when judging prenup agreemts. This is unlike other areas in K law where the Ct only uses unconscionability. Reasonableness, however, would be a sexist standard as it assumes that women are not capable of understanding.

* + - * 1. *Marvin v. Marvin* (1976) (769)

Facts: There was cohabitation agreemt that BF would take care of GF for rest of his life. After 7 yrs of unmarried cohabitation, parties separated. GF attempting to enforce K; wants palimony.

Cohabitation agreemts are more flexible than prenup agreemts and don’t req disclosure.

HOLDING: Such agreemts are to be enforced unless they are unlawful.

Ct will even look to implied Ks to protect a party’s expectations.

Some cts hesitant to enforce oral/implied Ks b/c they are nebulous and uncorroborated.

* + - 1. Note: **Putative marriage** **doctrine** – an apparently valid marriage entered into by both, but there’s something voidable about the marriage (ex: 1 of them is already married, the pastor was an actor, etc.) – Ct will still treat them as if they were married for purposes of asset distribution, etc.
		1. **Torts and Testimony**
			1. Alienation of affections: Cause of action to sue someone who enticed your spouse to commit adultery
				1. Note: \*Many Jx’s have eliminated this\*
				2. Premises of the COA:

Spousal affection is subject to theft.

Marriage is a K of property.

* + - * 1. Elements:

P and spouse were happily married and in love.

Love and affection were undermined/alienated by D

D’s active wrongful and malicious acts produced alienation.

* + - * 1. Cases:

*Hutelmyer* (NC 1999) (BB)

Facts: P claimed that D (secretary) maliciously destroyed P’s fairytale marriage.

HOLDING: As D’s actions satisfied all the elements of the COA, P wins ($1M).

Public Policy: Perhaps we are looking at the wrong party. Perhaps H is the guilty party and this COA should come out in divorce and not as a separate COA.

*Hoye* (1992) (BB)

HOLDING: As COA is premised on outdated notions, Ct abolishes it.

Ct acknowledges that this COA is meant to preserve marriage; however, Ct is worried that it will be abused. We don’t want blackmail during divorce suits. In addition, we don’t want double recovery.

* + - 1. Loss of consortium (limited to spouses)
				1. Consortium means “conjugal fellowship of H&W, and the rt of each to the company, society, co-operation, affection, and aid of the other in every conjugal relation.” (*Romero v. Byers* [BB])
				2. Loss of consortium is the loss of affection that goes w/ a conjugal relationship due to another’s tortious action (injury must be physical, not emotional).
				3. Most states req that this claim be added to a regular tort claim against the person who injured the spouse.

It is deemed foreseeable that if you harm a victim you also harm a spouse.

In most Jx’s, parents can claim loss of consortium for their children, but not vice versa.

* + - * 1. What about couples who don’t have so much affect? We want a bright line rule. At the same time it seems fair to allow this as a defense or for a reduction in damages.
				2. Ct in *Romero* adopted this COA in New Mexico against stare decisis which denied it. (1994, BB)
			1. Bystander liability
				1. Elements:

Death/serious injury of another caused by D’s negligence.

Marital/intimate familial relationship b/w P and victim.

*Dunphy* (BB): Ct uses functional approach in defining fam to allow fiancée to recover.

Observation of death/injury at the scene by P.

P’s resulting emotional distress.

* + - 1. Spousal tort immunity
				1. Even as women received their own legal identity this doctrine remained as a means of preventing fraud and disruptions in marital relationships.

Today most Jx’s allow spouses to sue each other. One can file for divorce and add a separate tort claim to the divorce claim.

* + - * 1. In *Boone v. Boone* (SC 2001, BB), Ct held that if the spouse himself/herself is not on the hook then these lawsuits don’t disturb marital harmony and are allowed.
			1. Spousal evidentiary privileges
				1. Spousal confidential communication privilege:

Prevents testimony regarding confidential communications b/w spouses unless both spouses consent. Neither spouse can testify about the communication (only applies to communications).

Privilege continues after death (ie forever).

Does not apply when spouses are suing each other.

* + - * 1. Spousal Testimony Disqualification:

Prevents a spouse from being forced to testify against his or her spouse.

Spouses must be married when testimony is sought.

After *Trammel v. US* (SCOTUS 1980, BB), under the Fed Rules of Evid the witness spouse holds the privilege and not the D spouse (D spouse cannot prevent witness spouse from testifying).

Ct rationale was that the value being preserved was marital harmony, but if the spouse is willing to testify clearly there is no marital harmony anyway.

At same time, she only was willing to testify b/c of a plea deal. The state turned the spouses against each other.

At same time, there is still a public policy in favor of getting evidence to prevent crime.

NY does not allow for this privilege.

* + - * 1. There are a few Jx’s that apply these privileges to functional spouses.
		1. **Crime in the Family**
			1. *Hasday, Legal History of Marital Rape* (281)
				1. CL regime exempted Hs from crim prosecutions if they raped their spouses. “Majority of states still retain some form of CL regime: they criminalize a narrower range of offenses if committed w/in the marriage, subj the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions.”
				2. MPC views rape of a W by a H and other rapes differently.

213.6: Extends this exception to functional fams.

Current justifications for the difference:

“Vindictive W” argumt (The rape card in a divorce proceeding is just too strong)

Facilitates marital reconciliation

The state’s intrusion into the marriage will undermine the abilities of the parties to preserve the marriage (channeling).

But we allow spouses to sue each other in tort.

If we want to facilitate reconciliation then recognizing the severity of the action may help parties to achieve better reconciliation.

There is generalized consent to sex in marital relationship

Privacy

* + - * 1. Other arguments

Some argue that we ought to treat intimate rape even more harshly than stranger rape b/c of the psychological trauma. W is losing her safe haven. Also, lower probability of detection.

The gender neutrality of fam law can create a problem in this case. It masks the highly gendered nature of vast majority of incidents of Hs raping Ws.

Perhaps it should be constitutionally permissible to treat the genders differently.

Should the crime be 1 that only men can commit, or should it be a crime that can only be committed against women?

* + - 1. **Battered Spouse Syndrome**
				1. *People v. Humphrey* (1996) (289)

Issue: What standard should be applied to a woman suffering from BWS?

HOLDING: Ct should look at the objective reasonableness of the fear of imminent harm from one who has experienced what a battered spouse has experienced.

* + - * 1. *R. v. Malott* (Canada 1998) (295)

HOLDING: We should not assume that all battered women have all the symptoms of BWS, i.e. we should not penalize those that don’t.

* + - 1. A Note About Orders of Protection
				1. Every Jx has some sort of emergency order of protection
				2. From POV of accused, being denied access to home, family, etc. w/out hearing, notice, etc.

Response – so concerned about danger to fam, have to take this quick, extreme action.

* + - 1. A Note About VA’s new mandatory arrest law in cases of domestic violence
				1. Lots of children being arrested when parents call the police
				2. Ex. of “rough justice” but can be expunged.
	1. **Who can get married (and what marriages are void or voidable)?**
		1. NYDRL Article 2 §§ 5-7 map out different categories of void and voidable marriages, which include incest, polygamy, physical/mental barriers, and consent issues arising from age, mental capacity, duress.
			1. **Incest**
				1. NY does not distinguish b/w whole & half blood.
				2. No mention of: step-parents, cousins.

So why the restriction still?

Still concern abt some genetic defects (but this is scientifically disputed for cousins)

NYT *Shaking Off Shame* says prohibitions of marriage b/w 1st cousins should be repealed

Note: N.C. doesn’t allow double cousins to marry.

High potential for abuse and psychological damage

Concern about power dynamics, consent, coercion, etc.

Concern about establishing family/home as a safe haven, free of sexual tensions

It’s gross!

But this rationale is subjective and is also used to limit gay sex, etc.

Note: CO allowed two step-siblings to marry (no blood relationship at all)

* + - * 1. *Singh v. Singh* (1990) (83)

Facts: (1) Ps married. (2) Ps found out they were uncle/niece. (3) Ps got marriage annulled. (4) Ps found out that they were only ½-uncle/niece. (5) Ps got remarried again in CA. (6) Ps want to undo their annulment.

HOLDING: Ct denies P’s request – ½-uncle/niece marriages not allowed.

Not in conflict w/ NY law from *People v. Baker* (pg 88) as the statute there said ½-siblings could not marry, but did not say ½-uncle/niece. Therefore, ½-uncle/niece was allowed in NY.

May have been a green card or sham marriage so Ct wasn’t going to reopen it.

* + - * 1. *Back v. Back* (1910) (89)

Facts: H married stepdaughter after divorcing W. Issue raised after H’s death re assets.

HOLDING: Marriage valid – prohibition against marrying child does not apply to stepchild. Whatever parental relationship existed ceased upon divorce (ie relationship of affinity ended).

**Consanguinity** (blood relation) vs **affinity** (relation by marriage).

* + - 1. **Age**
				1. Note: Possible exam question – can you prohibit adults from marrying someone 20-30 years their senior/junior?

Constitutional Arg: fundamental DP right to marry (restricting available spouses), no legit/compelling/reasonable gov. interest

* + - * 1. *Moe v. Dinkins* (S.D.N.Y. 1981) (95)

Issue: Are age restrictions to marriage for minors unconstitutional?

HOLDING: Age restrictions for minors do not violate the fundamental rt to marry.

This is not really a fundamental rt – that’s why Ct employs rational review

It is not an absolute prohibition. One can wait a little while and then get married.

Sort of like prison guard case – you can just quit your job & then marry. Here, just get older.

* + - 1. **Other restrictions on getting married**
				1. **State of mind restrictions**

*Lester v. Lester* (NY 1949) (135)

Facts: H&W married. Had K saying that marriage was sham. W is petitioning for support.

H’s arguments

This is a sham marriage.

Married under duress (W threatened suicide), so marriage voidable (NYDRL § 7(4)).

HOLDING:

(a) In practice, parties were married. In addition, one cannot contract around the essential features of marriage (ie “this is only a marriage in name” – can’t do that b/c state = party to K). In addition, W did not knowingly consent to K.

(b) No evidence to support the duress argument. Married for 10 yrs. If under duress, would you have stayed for 10 yrs?

* + - * 1. **Proxy Marriages**

Only TX, CA, Colorado, and Montana allow for these

Arguments against:

Concern abt fraud (fraud on one of the individuals) and sham (fraud on the state) marriages.

There is some purpose to a public declaration of marriage.

We want to channel people into better marriages by providing a selection criteria that provides for a better relationship.

Military (and some states) have consummation req for proxy marriage.

* + - 1. **Polygamy**

Concurrent vs Sequential Polygamy (married to multiple at the same time, vs. sequentially)

Several themes w/r/t polygamous marriages:

Criminalization of “plural” marriages.

States do not recognize plural marriages or polyamorous relationships. (*Bronson*)

Policy concern – polygamy makes it hard to sort out divorces, inheritances, etc.

Anti-adultery laws/norms.

Parental unfitness for polygamous parents. (*Sanderson v. Tryon*)

Gender imbalances.

Author of *My Husband’s 9 Wives* (NYT) suggests her relationship w/ her sister-wives is stronger than the relationship w/ her H.

Group marriages (3 people married to each other) vs plural marriage (one party w/ multiple partners).

***Bronson***(Utah 2005) (99) **(theme 2)**

Facts: H wants to marry another woman w/ W’s consent. County unwilling to issue marriage license. Ps make several args:

Freedom of religion

Rt to Privacy

Freedom of association

HOLDING: Ct upholds the decision of the state.

*Reynolds* (SCOTUS 1878) already considered the freedom of religion argument and upheld anti-polygamy statutes.

Compelling state interests for rejecting fundamental rt to marry in plural marriage cases.

**(1)** 1 dad-1 mom relationships are better for the children and the married couple.

* If law is really abt children it’s both over-and-under inclusive. Some polygamous parties make great parents while dead-beats can get married.

**(2)** Polygamy is bad for women b/c of abuse and childhood/ nonconsensual nature.

* Could argue that the reason that there’s abuse in these communities is b/c they’re forced to live secretly. Have to rat out the whole community to get out of the cycle.
* W in *Memories of a Plural Wife* (BB) describes abuse from polygamy.

**(3)** These relationships are unstable (jealousy).

Distinguished from *Lawrence* – that statute was regulating private sexual conduct. This is about public recognition.

***Sanderson v. Tryon*** (Utah 1987) (105) **(theme 4)**

Facts: Child custody case where ex-W is still involved in polygamy. TC says that practicing polygamy is prima facie grounds for neglect. Polygamist = morally failed parent.

HOLDING: Polygamy is just 1 of many factors in determining what is BIC. Alone it is insufficient to overcome the hurdle to modifying custody arrangements.

* + - 1. **Marriages Induced by Fraud**
				1. NYDRL Title 2 § 7: marriage is voidable if consent to marriage was by force, duress, or fraud.
				2. Standard test for fraud = **essentials of marriage test**. This test looks into whether the fraud involved an “essential element” of marriage (examples: had STD, abortion, children, married before).

*Johnston v. Johnston* (1993) (138) [ESSENTIAL OF MARRIAGE TEST]

Facts: W claims she married a good guy (clean-shaven, employable), but H turned out to be a drunk, dirty, and unemployable. W claims she married H under false pretenses and wants annulment b/c W has assets at stake (divorce would split the assets).

HOLDING: W’s complaints aren’t serious enough to constitute grounds for annulment as they don’t go to the very essence of the marital relationship. Mere disappointment w/ one’s partner is not enough.

ESSENTIALS OF MARRIAGE TEST. Essentials include: Ability to procreate or sex.

*Kober v. Kober* (NY 1965) (BB) [MATERIALITY TEST]

Facts: W finds out H is a Nazi lunatic.

HOLDING: Ct points out “that fraud need no longer necessarily concern what is commonly called the ‘essentials of the marriage’ relation; the rights and duties connected w/ cohabitation and consortium attached by law to the marital status.”

Instead, Ct adopts MATERIALITY TEST stating “it might be found to be ‘material to that degree that, had [fraud] not been practiced, the party deceived would not have consented to the marriage’ and is of such nature as to deceive an ‘ordinarily prudent person.’”

PRONG 1: Subjective Materiality (he lied, wouldn’t have married otherwise)

PRONG 2: Objective Materiality – “ordinary prudent person” standard

Cts struggle with reconciling these two tests – most adopt a middle ground: essentials + some subjectivity + some objectivity.

* + - 1. **Marriages voidable due to physical causes**
				1. NYDRL Title 2 § 7 states that marriage is voidable if 1 of the parties “is incapable of entering into the married state from physical cause.”

Implied in marriage is the capability of consummation - impotence is grounds for annulment

Not about fraud.

* + - * 1. *T. v. M.* (NJ 1968) (BB)

Facts: W impotent b/c incapable of having vagina penetrated w/o extreme pain.

HOLDING: Ct grants annulment. She knew she could not procreate and she knew that it was important to him.

Note: If she knew beforehand and didn’t tell, that would be fraud.

* + - * 1. Note: Physical defect may be ratified by the non-physically impaired spouse.
			1. **Sex/Gender**
				1. NYDRL does not specifically state that marriage must be b/w members of opposite sex. Nevertheless, §5 seems to suggest that marriage must be b/w heterosexuals (like in *Baker v Nelson*, Cts assume marriage means b/w man & woman)
				2. **Arguments for and against same-sex marriage: [need to tidy up this section/make it more streamlined]**

*Tuner v. Safely*: marriage is about more than procreation.

*Lawrence v*. Texas: the right to intimate associations.

It is important to note that the majority is of the opinion that the case has nothing to do w/ marriage. (Contrast Scalia)

Procreation/childrearing:

*Doe v. Doe* (115): “parent’s sexual orientation insufficient ground to deny custody of child in divorce action.”

2nd-parent adoption statutes undercut childrearing arguments against same-sex marriage.

Under RB review it would be rational for the legislature to wait for conclusive evidence regarding childrearing in gay/lesbian homes before permitting such marriages. (*Hernandez*)

Heterosexuals can accidently procreate. If the parties aren’t married this could be bad for the kids. Therefore, there is a reason to incentivize heterosexuals to get married. (*Hernandez*)

Dissent in *Hernandez* rejects this argument saying that affording same-sex couples the right to marry will not stop heterosexual couples from getting married out of wedlock.

Sex/gender discrimination: laws prohibiting same-sex couples from marrying violate equal protection b/c they prevent a man/woman from doing what a woman/man can do.

This argument is important b/c sex classifications get a higher level of scrutiny.

*Loving* is sometimes quoted here to support this argument; however, it is often rejected b/c *Loving* dealt w/ race which gets a higher level of scrutiny. Moreover, *Loving* was specifically concerned w/ the white supremacist/invidious intent background of the statute.

This argument can be refuted by *INS v. Nguyen* which allowed for disparate treatment b/w the sexes in some cases.

Most courts have rejected this argument.

Sexual orientation discrimination

Sexual orientation cases only get rational basis scrutiny.

Though CT, IO, CA, ON give a more heightened level of scrutiny to sexual orientation cases.

* + - * 1. **Determining gender**

Why do we care? Might have to do w/ sex as an “essential of marriage,” marriage defined as b/w man and woman in most states still.

Intersex – those who have ambiguous sex, making it unclear whether person should be described as male or female.

At times, there’s misidentification by Drs, either b/c plain mistake OR b/c baby is intersex.

There is an amendment process for birth certificates for this reason.

*MT v. JT* (NJ 1976) (126) [PRESENTATION SEX]

Facts: MT is post-op transsexual. Upon divorce MT filed for support & maintenance. JT claims marriage was void from get-go b/c chromosomally it was b/w 2 men. MT says that although there was no procreation, there was penis/vagina sex.

HOLDING: MT presents as a woman, w/ a normal vagina, ostensibly is woman. Ct looks to **presentation sex** (aka “medical sex” with letter from doc); rules for MT.

Concerns: Why are we looking to external genitalia if we’re not concerned w/ procreation? Why not just look to how they gender-identify?

*Littleton v. Prange* (TX 1999) (BB) [CHROMOSOMAL SEX]

Facts: A post-op transsexual brought wrongful death suit against physician. Dr claimed that parties were never really married b/c both were chromosomally men, and therefore, the post-op transsexual is not surviving spouse.

HOLDING: Ct looks to birth sex, i.e. **chromosomal sex**.

Dissent: Although the majority’s system may be easier to administer, there are mistakes at birth. That is the reason for the amendment process regarding birth certificates.

This case opened door for a M-to-F transsexual to marry a F in TX. (*Robin v. Jessica Wicks*)

Restricting transsexuals to only other transsexuals would be un’C’n’l b/c too restrictive

* + - * 1. **Cases re: the rights of same sex couples to marry:**

*Baker v. Nelson* (Minn 1971)

Issue: Is denying same-sex marriage C’n’l or statutorily permitted? Same-sex couple’s args include:

Statutory: marriage statute does not specifically say same-sex couples can’t marry.

Constitutional:

Fundamental rt to marry [though case is pre-*Zablocki*/*Turner*]; DP from *Loving*

Rt to privacy from *Griswold*

EP (14A)

HOLDING:

Statutory: Founders of the statute and dictionaries clearly understood marriage to be b/w members of opposite sex, so no prohibition against same-sex marriage necessary.

Constitutional:

Historically marriage has been b/w M + W. Fundamental rts are backward-looking. Also, factually (by def) marriage is b/w M + W and no C’n’al arg can change that.

*Loving* was specific to racial discrimination [pre-*Zablocki*/*Taylor*]

Privacy is ltd to marriage - privacy cannot be used to open the door to marriage.

Valid reason to discriminate: Marriage is linked to procreation & childrearing. Although some heterosexual couples choose not to procreate, very easy to tell if couple can or cannot procreate. Full inquiry = intrusive. In addition, C’n does not req that the restriction be perfectly exclusive/inclusive.

If this case were brought today, equality argument might win– you are saying a M can marry W, but a W cannot marry a W – sex discrimination = EP violation. (after *Orr*, *Goodrich*)

Response 1: W can bear children, M cannot – physical dif. justifies sex discrimination.

Response 2: No dif. treatment – each sex can only marry opposite sex.

But this arg rejected by *Loving*.

*Goodridge* (Mass. 2003) (109)

HOLDING: Denying gay marriage is un’C’n’l (state C’n). Rt to marry is meaningless if 1 does not have rt to marry the person of his/her choice, subj to health, safety, and welfare concerns.

EP & DP argumt / privacy

Like *Lawrence*, right to association b/w homosexuals, not right to gay sex/gay marriage

*Hernandez v. Robles* (NY 2006) (BB)

HOLDING: State has rational basis to deny same-sex marriage; therefore, it’s C’n’l to do so. (See childrearing and procreation argumts above)

Better for children to grow up w/ both M + F

Better for children + more stable to allow those who accidentally procreate to marry

No risk of accidental procreation for same-sex couples

Note: under RB, could be some over/under-inclusiveness (allowing 80-y/o’s to marry)

* 1. **Common Law Marriage, Alternatives to Marriage, and Abolishing Marriage**
		1. **Ways to have marriage recognized? Different types of marriage in order of strength:**
			1. Marriage
			2. Covenant Marriage – Extra strong marriage. (marriage plus!) that only 3 states have: AK, AZ, and LA. Marriage is harder to get into (req pre-marital counseling, typically w/ person of cloth or secular marriage counselor) & harder to get out of (like pre-no fault divorce. Have to prove abuse, abandonment, etc, or living apart for 2 yrs).
			3. Common Law Marriage – this is non-ceremonial pathway to marriage. Way to get married but w/o getting license or having public ceremony.
				1. Factors: Ability to get married, intent/agreemt to get married, co-hab, consummated, and publicly declared you’re H&W. (see *Estate of Love* below)
				2. ~10 states allow this as pathway to marriage. Nevertheless, states that do not allow for CL marriages give comity to those states that do and follow the rule of celebration.
				3. ***In re Estate of Love* (Georgia 2005) (141)**

Facts: Child is battling mother’s cohabitant for the estate. There is evid on both sides of the claim that H&W were CL married. Evid went to the elements of CL marriage.

HOLDING: Deferred to TC’s evaluation that evid lay more in favor that parties CL married.

**Evid:** Ability to marry (not married to others/not related), intent & agreemt to marry (ring!), Lived together, Shared bed, Public declaration/holding out (introduced each other as H&W)

**Counter**: W said she didn’t want to marry, listed him as “friend” on medical records + taxes.

Pt of case is: it’s sometimes hard to determine if a CL marriage exists, and therefore, sometimes even parties may not know whether they are or aren’t CL married.

* + - 1. Putative Marriage – This is not marriage. A putative spouse is someone who believes in good faith that the parties are married. The relationship is considered like a marriage so as to protect the party(ies) that was tricked. Way of getting some rts/benefits associated w/ marriage as an equitable remedy.
				1. eg, putative H tricks W into thinking they’re married. W can get remedy, eg equitable distrib of property, alimony etc.
			2. Civil Unions / “Robust” Domestic Partnerships – an equivalent to a marriage in state law except that parties aren’t married. (Cal, Nevada, Oregon & Washington)
				1. Where basically if you’re in one, you get all same rts/benefits of marriage for purposes of state law.
				2. Only for same-sex couples. EXCEPT – Illinois, will allow for same sex & different sex couples.
				3. Note: some Jx’s won’t accept civil unions (eg TX). Only available in NJ b/c other states allow it.

Concept of civil union invented in 1999 by VT legislature. Statute was short and explained how to enter/exit a civil union and then conferred any benefits that come from marriage onto a civil union. VT has since legislatively done away w/ civil unions and allows for same-sex marriages.

CT used to have civil unions; however, it has done away w/ them judicially allowing for same-sex marriages. (Arg was: *Loving* would not have agreed to civil unions only for inter-racial couples)

* + - 1. Cohabitation – eg *Marvin* case.
			2. Reciprocal/Designated beneficiaries OR “weak” domestic partnerships (as in NY) – Miniscule amt of benefits. Can do the same things as a robust domestic partnership; however, the parties don’t get alimony, equitable distribution, spousal testimonial privilege, etc
			3. **NOTE:** currently, immigration law talks about marriages – only accepts: marriages, cov marriages, CL marriages b/w dif. sex couples.
		1. **Abolishing Marriage**
			1. Dershowitz, *To Fix Gay Dilemma, Gov’t Should Quit the Marriage Biz*, LA Times (2003)
				1. Argues there should be civil unions and separate religious marriages. One would get a civil union (state type marriage) and then if the parties choose, they can go to a religious institution and get married.

Pro: This type of system allows for equal benefits irrespective of sexual orientation.

Con: Everyone is losing (like closing schools to prevent desegregation)

Con: People want marriage from the state not a civil union.

* + - 1. Zelinsky, *Gov’t Should Get Out of the Marriage Game*, Connecticut Law Tribune (2004)
				1. Argues that we should deregulate marriage and allow K to take place of marriage. The state would be completely removed from business of granting marriages or civil unions.

Pros:

Allows for equal access to marriage.

There will be mkt for different forms of marriage and competition is good.

Cons:

Will be so many types of marriage. Will be no default rules to handle breakups. A big mess!

Keeping track of all the different types of marriage would be impossible. What counts as marriage for tax/benefit purposes?

Total chaos may emerge. Institutions may grant crazy marriages that may include incest…Many K issues will arise that will be impossible to deal w/.

1. **Divorce**
	1. **Issues in divorce**
		1. Should divorce be granted? (More prevalent under fault-based divorce)
		2. Dissolution of marriage
		3. Distribution of property / joint assets
			1. (1) Classification=what of the property is subject to distribution?
				1. Question 1: Separate versus martial property?
				2. Question 2: Is there any separate property that the Ct will distribute?
			2. (2) Valuation=how do you value property that is not cash?
			3. (3) Distribution=What is an equitable distribution given certain factors?
				1. Principles for determining distribution (for property and support below) include: need, status, rehabilitation, contribution, partnership.
		4. Payment of Spousal Support (alimony)
		5. Child Support/custody/visitation
	2. **Divorce in NY includes seven statutory pathways:**
		1. Cruelty
		2. Abandonment for 1+ yrs (constructive abandonment counts)
		3. Imprisonment for 3+ yrs
		4. Adultery
		5. Living pursuant to a decree/judgment for separation for 1+ yrs.
		6. Living pursuant to a written separation agreement for 1 yr w/ proof that the terms have been followed.
			1. This is the close to no-fault divorce, but either party can say that the agreement has not been followed, and then the parties are back at fault.
		7. Incompatibility (no-fault)
	3. **Trad’l View of Divorce**
		1. At one pt, Cts didn’t grant divorce. Instead, legislatures would grant private bills of divorce, which made divorce exclusively avail for the wealthy.
		2. Until the 1960’s divorce was about a moral wrongdoing. “Innocent” spouse had to prove wrongdoing of “guilty” spouse. “Innocent” spouse had to have clean hands. Very difficult to get divorce.
		3. **Fault-Based Divorce**
			1. Had to be based on statutory grounds
			2. In NY in past, if you were the cruel or adulterous spouse, you weren’t allowed to remarry.
			3. Given that there’s no fault-based divorce anymore, why is it important to know?
				1. In some Jx’s, fault plays a role in distribution of property/children.
			4. **Statutory grounds include:**
				1. **Cruelty**

*Benscoter v. Benscoter* (PA 1963) (359)

Facts: H sued for divorce claiming indignities to person (cruelty). H claimed that W called him bad names and blamed him for not having a daughter. (W wanted to divorce b/c of adultery, but didn’t have enough evid). W is also in poor health.

HOLDING: No divorce. Cruelty has to be serious. In addition, H may not have been an “innocent” spouse.

Possible gender asymmetry at work here – normally H’s are abusive.

*Hughes v. Hughes* (LA 1976) (360)

Facts: Cruelty/indignity to person, habitual intemperance, etc. College-aged daughter testified that F was **physically abusive**

HOLDING: W received permanent separation under a cruelty theory.

Differences b/w *Benscoter* and *Hughes*:

There was clear testimony abt fault in *Hughes*.

Gender issues – protective of women (*Hughes* about W).

*Hughes* was not asking for divorce, rather for permanent separation.

In *Hughes,* W was innocent unlike H in *Benscoter*.

Cruelty in *Hughes* was about bodily harm, threatening violence (not just words)

In *Hughes* there was a reconciliation attempt showing that the marriage really couldn’t work.

* + - * 1. **Adultery**

*Arnoult v. Arnoult* (Louisiana 1997) (361): The parties separated and agreed to no-fault divorce. H then claimed adultery upon which the Ct granted divorce. Witnesses saw W kissing man.

* + - * 1. Neglect
				2. Impotence
				3. Desertion/abandonment/constructive abandonment
				4. Unnatural sex acts
				5. Imprisonment/commission of a felony
				6. Habitual drunkenness/addiction
				7. Wife’s pregnancy at marriage w/o husband’s knowledge.
			1. **Statutory defenses against divorce:**
				1. Lack of innocence of P.
				2. Connivance: one spouses plotted to cause divorce and then carried it out.

***Sargent v. Sargent*** (NJ 1920) (367): H set W and the butler up, so not entitled to divorce.

* + - * 1. Collusion: both spouses made a plan
				2. Condonation: spouse consented/forgave

***Willan v. Willan* (England 1960) (368):**

Facts: H sued W for divorce on the grounds of cruelty. She pestered him till he had sex w/ her… W claimed condonation and H counters that he just wanted her to stop pestering him.

HOLDING: No divorce b/c a wife can’t rape a husband. When a man has sex w/ a woman there is consent from the man.

* + - * 1. Recrimination: both spouses are equally at fault, so neither is victim and neither is solely at fault

***Rankin v. Rankin*** (PA 1956) (364): No divorce b/c neither party innocent. Both had been cruel.

Policy: Why keep two people in a marriage if they both want out and can’t get along?

We want people to take the marriage seriously.

We want to encourage people to behave in a marriage. If you don’t behave then you can’t get out.

* + - * 1. Insanity
				2. Accident
		1. **Adding tort actions to fault-based divorce (Joinder vs. no joinder)**
			1. ***Twyman v. Twyman* (TX 1993) (393)** [PRO-JOINDER]
				1. Facts: W sued for divorce on the grounds of adultery. She also wants to attach a claim for intentional infliction of emotional distress (IIED)
				2. Issue: Should W be able to join to fault-based divorce a tort claim for IIED?
				3. HOLDING: Spousal tort immunity has been abolished and the Ct is pro-joinder. Let’s settle everything at once.

Joinder: Joining multiple legal concerns in one hearing. In divorce, would be fault, property, alimony, children, etc.

* + - * 1. Dissent: Tort claims like this undermine the collaborative nature of divorce. Divorce should be protected as a separate proceeding. We want it to be less adversarial.
				2. Policy Arguments:

Pro:

Divorce is meant to settle all claims and allow parties for a clean slate.

Judicial/personal efficiency.

Con:

Ct may factor this element into the divorce decision as well, resulting in double recovery.

We want less contentious divorce.

May unfairly bias judges against tortfeasor spouse.

Pro/Con: Only familial torts should be joined b/c of their connectedness to divorce.

* + - * 1. Many Jx’s are pro-joinder in both fault and no-fault regimes; however, they are concerned about double recovery in fault regimes and introducing fault in no-fault regimes.
	1. **No-Fault Divorce**
		1. Starting in the 1960s/1970s every Jx (except for NY, which doesn’t have pure no-fault divorce) allowed for one of two types of no-fault divorce:
			1. Some Jx’s replaced the structure of divorce to basically only use no-fault (CA).
			2. Some Jx’s added no-fault to the established fault grounds for divorce (NY).
				1. In some Jx’s (not many), if one party says that the marriage is not irretrievably broken you go back to fault-based divorce.
		2. **What fueled the change?**
			1. Many people sought divorce which led to the recognition that marriage wasn’t forever.
			2. There were many collusive divorces w/ the paralegal of the lawyer being named as the other woman.
			3. Shifting social attitudes.
		3. **Policy Arguments:**
			1. Pro no-fault divorce:
				1. Fault-based divorce is impractical.
				2. No-fault fits w/ social reality.
				3. Channels people into good relationships, as we let people out of bad relationships.
				4. Better for kids + women
				5. Freedom of K.
				6. It makes for better divorces (less adversarial).
				7. Easier to administer and saves money.
				8. Privacy
			2. Against no-fault divorce
				1. “Wronged” spouses can’t get vindicated (hurts weaker party).
				2. Facilitates bad marriages – think twice before you get married!
				3. Too easy to get divorced (people have less incentives to reconcile).
				4. It is bad for the less powerful spouse and bad for children.
				5. It is bad in terms of economies of scale b/c it is more expensive to live separately.
				6. Arkansas, Oklahoma, and Arizona have returned to the fault regime.
			3. Note: Theoretically a divorce based on irreconcilable differences requires a fact-based determination by the judge, but in practice this doesn’t happen.
		4. **K attempts to avoid a provision(s) of no-fault divorce law**
			1. *Massar v. Massar* (NJ 1995) (388): Ct upheld a private separation agreement that neither party can claim divorce on grounds other than no-fault. (W had claimed cruelty after signing the agreement)
				1. Ct was hesitant and didn’t develop a per se rule prohibiting separation agreements – said it would consider on a case-by-case basis.
			2. *Diosdado v. Diosdado* (CA 2002) (391)
				1. Facts: H had an affair. The parties got back together, but made an agreement guaranteeing $50,000 in liquidated damages separate from a divorce settlement if any party cheats. H cheated again.
				2. HOLDING: Ct strikes down the agreement; will not allow parties to bring fault into no-fault regime.
	2. **Access To Divorce**
		1. ***Boddie v. Connecticut*** (SCOTUS 1971) (415)
			1. Facts: Indigence. Costly divorce.
			2. Issue: Is there a fundamental rt to divorce?
				1. Some argue that there must be b/c otherwise people wouldn’t be able to remarry.
			3. HOLDING: If we’re going to allow ppl to divorce, we should also make it available to indigent people (EP)
				1. Ct does not go so far as to say that there is a fundamental rt to divorce.
		2. ***Sosna v. Iowa*** (SCOTUS 1975) (418)
			1. Facts: W moved to Iowa and sued there for divorce. She hadn’t been living in Iowa long enough, as Iowa req’d a 1-yr residency waiting period for divorce.
			2. Issue: Are waiting periods for divorce constitutional?
			3. HOLDING: Yes, b/c she will eventually be able to divorce and remarry. Just temporarily delaying.
				1. Policy:

We don’t want Jx shopping.

States have a right not to be divorce mills. States are not as open about people coming in for divorce, as they are to allow them to marry there.

Note: NV actually created a cottage divorce mill industry.

Not a total deprivation.

* 1. **Division of Property**
		1. The traditional approach was that title governed, and as all property was in H’s name, W would only get alimony/spousal support.
		2. **3 steps:**
			1. Classification (what’s in the pot?)
			2. Valuation (how much is stuff in the pot worth?)
			3. Distribution (how will pot be distributed?)
		3. **3 approaches today:**
			1. Community Property Approach: During marriage, each spouse owns a 50% interest in all property acquired during marriage except by gift, devise or descent or if designated separate property (7-10 Jx’s, include CA, LA)
				1. Spouses retain separate property and community property is split.
			2. Common Law (Majority Approach) (**NY**): accepts the title approach during marriage, but upon divorce the marital estate comes into existence. The marital estate includes the same things that are in the community property approach (ie anything acquired during marriage, minus gift, devise, etc.).
			3. Common Law (Minority – **Hotch-pot** approach): Title ownership governs during marriage. Upon divorce the marital estate comes into existence. The marital estate includes both things from the community property approach and some separate property. The Ct is to attempt equitable distribution.
				1. ***Ferguson v. Ferguson*** (Miss. 1994) (709)

Facts: Bubba case.

HOLDING: W is granted custody of Bubba b/c H deemed morally unfit (he just let Bubba drive tractor, do tobacco and watch porn). W is also granted certain property include house.

Point of case is that Ct is trying to effectuate equitable distribution. Since W gets Bubba, Ct awards her the house to maintain continuity.

This is a hotch-pot (CL minority) Jx – Ct looks at separate property and includes it in analysis.

* + 1. **Factors to be considered for equitable distribution of marital property (*Ferguson* [Miss. 1994])**
			1. Need
			2. Status
			3. Rehabilitation
			4. Contribution
				1. Restitution (if you contributed x, you need to be compensated)
				2. Compensated for lost opportunities
				3. Return on investment
			5. Partnership (regardless of contribution, a marriage is a partnership –economic and emotional – so distribute assets as such)

***[THOSE are the TOP 5]***

* + - 1. [fault?]

7-16. *FERGUSON* CT MENTIONS A BUNCH OF OTHER FACTORS [See attack outline]

* + 1. **Determining whether property is marital or separate:**
			1. ***Innerbichler v. Innerbichler*** (Maryland 2000) (700)
				1. Facts: (1) married over 10 yrs; (2) have a daughter; (3) H is 8 yrs older; (4) H had an affair; (5) H is a gambler/spender; (6) H has been married before. H filed for a limited divorce, which is a more modern version of a separation from bed & board. Used when the parties can’t estab the grounds for divorce. The parties can’t be intimate w/ others or w/ each other. W initially counterclaimed w/ adultery and later claimed a 2-yr separation. Divorce granted on the latter claim & Ct is now discussing distribution.
				2. ISSUE: Abt H’s business which he started before the marriage, but didn’t grow until during the marriage – Is it separate or private property?
				3. HOLDING: Ct awards to W the value of the business that it considers marital property.

Ct considers W’s contribution to the marriage in allowing H the opportunity to grow business.

* + - * 1. Rule: Enhancement of separate property by marital labor is marital property.
			1. **Source of funds rule vs. transmutation of property**
				1. Source of funds rule/inception of title: the party who paid for the property should get it.
				2. Transmutation of property: the property has gone from separate property to marital property.

Once funds are comingled, stock is bought w/ comingled assets, etc. in marriage, the property becomes marital (unless there is some agreement/effort to keep the portions separate)

* + - * 1. ***Thomas v. Thomas*** (Georgia 1989) (706)

Facts: Prior to marriage, W lent H money he used to buy stock options. W bought house prior to marriage. W paid most of the mortgage payments, but some marital funds were used.

HOLDING: the options were considered separate property. W is only awarded restitution and not ‘return on investment’, as it was just a loan before the marriage. The Ct applies the source of funds rule regarding the house and denies H a full share (gives him a small share, based on the portion of the house that was paid for w/ marital funds) in the appreciation of the house value.

Note: short marriage; H might have more claim to the house if married longer.

* + - 1. **Financial Misconduct**
				1. This normally comes up in claims of improper dissipation of marital resources
				2. ***Siegel v. Siegel*** (NJ 1990) (722)

Facts: H incurred significant gambling losses after the marriage was irreparably fractured. In addition, part of the debt was basically to himself and he forged her signature on taxes.

Issue: Should both spouses bear the losses of one spouse?

HOLDING: Ct places the entire burden of the loss on H.

* + - 1. **Pensions and other deferred income**
				1. Two questions:

How should a vested/non-vested pension be valued?

When should the receiving spouse receive his/her share?

* + - * 1. ***Laing v. Laing*** (Alaska 1987) (724)

Facts: an unvested pension (worth nothing if job terminates)

HOLDING: Ct uses **Reserved Jx** approach (will determine split when pension vests)

Problem w/ approach: it creates incentives to forgo the pension, as the working spouse will only get part of the pension if s/he continues to work.

Alternative: **Present Value** approach – problems: someone gets bad deal, hard to determine, etc.

* + - 1. **Human Capital**
				1. Non-transferrable, hard to value, helps individual earn more (ex: law degree).

HC is marital property and should be valued and distributed [MINORITY APPROACH]

HC is not property or is not marital property. [MAJORITY APPROACH] (Ex: *Clapp*)

Still provide support thru other form (eg alimony), but not through distribution of HC.

* + - * 1. 3 questions:

Is it property?

Most Jx’s say no, but may still be considered to determine equitable distribution.

If yes, is it marital?

If yes, how should it be divided upon divorce?

Restitution OR

Return on Investment (% of value/future value)

* + - * 1. ***Postema v. Postema*** (Michigan 1991) (713) [MINORITY APPROACH]

Facts: W supported H during law school after which got divorced. H&W had plan that H would go to law school, then W would get nursing education.

Is the degree property? Personal, but it’s also like an investment.

Is it marital? We can look at the source of funds for the investment. W worked and supported H thru law school. On other hand, it may not be a joint enterprise b/c at end of the day only H went to law school.

How should degree be divided? W wants to use ROI, while H wants to use restitution.

HOLDING: Ct treats law degree as marital property; however, Ct only awards restitution. Logic being that H may never use the degree, and thus, W shouldn’t get a ROI if H never gets a return

How would one value a law degree in general?

PV of the difference in future earnings b/w having the degree and not having the degree

Who do we look at? Lawyers in general? Lawyers in Michigan? ...

Do we look at other skills one could get during the 3 yrs in law school?

Argue for alimony not for property distribution.

* + - * 1. ***Elkus v. Elkus*** (NY 1991) (719) [MINORITY APPROACH]

Facts: Opera singer case.

HOLDING: Ct awards H a share of W’s opera singing ability in the form of a ROI (partnership approach).

H was actively involved in W’s career and not just the preparation.

Unlike the case in *Postema*, the parties here were married much longer which would push towards transmutation of property. He was involved in her career as a coach etc.

* + - * 1. Takeaway from *Postema* and *Elkus*: In Jx’s where HC is property (MINORITY APPROACH), it is only marital if its attainment is the result of concerted family effort.
	1. **Alimony**
		1. Spousal Support/alimony/maintenance: a regular cash payment to support the less-$ spouse beyond the marriage that is usually conditioned on not remarrying.
		2. Only awarded in 20% of the cases (used to be more common)
		3. Note: modification causes rise in litigation
		4. Main theories of alimony (basically the same as marital property, generally, above):
			1. Need
			2. Continued Lifestyle
			3. Rehabilitation
				1. Restitution
				2. Compensation for lost opportunities
				3. Return on investment
			4. Partnership Theory (spouses were partners, should get 1 yr alimony for every 2 yrs together)
		5. Uniform Marriage and Divorce Act (731)
			1. Alimony will only be paid if spouse seeking maintenance:
				1. § 308(a)(1): lacks sufficient property to provide for his reasonable needs; and
				2. § 308(a)(1): is unable to support himself through appropriate employment.
			2. Factors to consider in determining amt of spousal support [§ 308(b)(1-6)]
				1. The financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living w/ the party includes a sum for that party as custodian;
				2. The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
				3. The standard of living established during the marriage;
				4. The duration of the marriage;
				5. The age and the physical and emotional condition of the spouse seeking maintenance; and
				6. The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.
		6. *In re Marriage of Wilson* (CA 1988) (732)
			1. Facts: Married 6 yrs. 5 yrs after divorce, H stops paying alimony. W became disabled during marriage.
				1. W argues that H can afford it, she needs it, and she hasn’t been rehabilitated. She’s disabled and can’t find employmt.
				2. H argues that forcing lifetime support deters marriage, ppl shouldn’t be insurance policies, marriage was short, and they weren’t econ partners (she wasn’t facilitating his work by staying home).
			2. HOLDING: For H. At this point, it is society’s, or the state’s, obligation to support her.
				1. Applies factors from UMDA, noting that they are all relevant factors and no one is dispositive.
		7. *Clapp v. Clapp* (Vermont 1994) (734)
			1. Facts: The parties were married for 20 yrs w/ 2 kids. H (attorney) makes more $. Ct awards alimony.
				1. H’s argument is that W has $ and doesn’t need alimony.
				2. W’s argument is a status argument (relative need). She is entitled to maintain her status as she contributed to helping him build his career and raised his kids while he worked.
			2. HOLDING: W deserves alimony to maintain her status. She gets a share of his future income stream b/c of her contributions during the marriage.
				1. Although not a specific factor from UMDA, courts have held that delaying education, etc. to raise kids during marriage entitles one to more alimony.
		8. **Modifying Spousal Support**
			1. After an award of spousal support, the Ct continues to maintain Jx over the award and the parties as modification under changed circumstances may be appropriate.
				1. Uniform Marriage and Divorce Act

§ 316: modification only appropriate “upon a showing of changed circumstances so substantial and continuing as to make the terms of the existing arrangement unconscionable.”

* + - 1. *Graham v. Graham* (DC 1991) (753)
				1. Issue: Whether an increase in the noncustodial parent’s ability to pay is a “change in circumstance” that justifies an increase in support (both child and spousal)? Kids + spouse have no changed needs.

W argues that she contributed to H’s growing career - if H’s salary went down he would definitely seek a modification. She should not bear all downside risk w/out any upside.

H argues that divorce is about disentanglement. W got her spousal support based on many considerations including partnership, status, and need at the time. The partnership is now over.

* + - * 1. HOLDING: Yes in some cases – H’s increased income was grounds for increase in alimony.

Alimony dif. from child support. Child support = absolute. Alimony fluctuates based on income.

Crucial Finding: H likely delayed raise until after the divorce.

* 1. **Child Support**
		1. Parents have legal obligation to provide child support for minor children (under 18).
		2. Modification of child support requires showing of **substantial change in circumstances**
		3. **Terms:**
			1. Visitation: visiting the child w/o having custody.
			2. Legal Custody: who makes the decisions about the child (i.e. which school…).
			3. Physical Custody: who the child lives w/.
			4. Child Support: payments from noncustodial parent to custodial parent to help cover child’s expenses.
		4. **Under Family Support Act (federal law), each state must develop specific child support guidelines.** These guidelines must create a rebuttable presumption of what child support should be.
			1. **3 main approaches:**
				1. % of noncustodial parent’s income

Depending on # of kids, may have to pay higher % (ex: 20% for 1 child, 25% for 2, 30% for 3)

* + - * 1. % of income of both parents

Looks at total parental income, noncustodial parent pays his pro-rata share %.

% of total child support to be paid by NCP = [NCP Income/(W+H Income)]

NCP Support Payment = (Total support due) x (NCP Pro-Rate Share %)

NOTE: Algebra shows that this is the same as the % of NCP’s income approach

* + - * 1. Melson DE Formula

Looks to income levels of noncustodial parent and custodial parent. If one is not self-supporting then s/he pays no child support. If both are not self-supporting then they both pay a little.

We want to make sure that each parent can sustain him/herself first.

* + - 1. TC can divert from guidelines if the decision states a reason for not following them (ie why it would be unfair, etc).
				1. Provides judges w/ leeway – does this undo the reason for creating guidelines (ie conformity)?
				2. ***Schmidt v. Schmidt*** (SD 1989) (784)

Facts: Modification case. Schmidts have 3 kids. M gets custody and F pays $375/month child support. F is then awarded custody of oldest and other 2 kids in the summer. F’s salary is less than M’s. TC amended the child support amt., but wasn’t in tune w/ guidelines.

Both spouses made arguments that fit w/in the guidelines.

HOLDING: TC not permitted to deviate from guidelines absent specific findings that support deviation. (Case remanded to TC to adjust child support amt. to be in line w/ the guidelines, or to make specific findings warranting deviation)

* + - * 1. ***In re Marriage of Bush*** (Illinois 1989) (788)

Facts: F makes a lot of money, but so does custodial M. TC follows the guidelines and requires 20% of income, making F do things like put some of the $ in a trust and in life insurance.

HOLDING: Excessive award is a valid reason for not following child support guidelines. Remanded for consideration of a more reasonable award (less than 20%).

* + 1. **Separation Agreements and Child Support**
			1. \*See “Separation Agreement” section below for incorporation vs. merger distinction\*
			2. ***Solomon v. Findley*** (Arizona 1991) (791)
				1. Facts: Agreement stipulated that H would provide post-secondary education for kids. Problem is that Jx of family Ct limited to child support until the age of majority (18 years).
				2. HOLDING: The part of the separation agreement that the Ct did not have Jx over (re post-secondary education) was not merged into the judgment. Can only be enforced by a separate K action.
			3. BUT SEE ***Johnson v. Louis*** (Iowa 2002) (815)
				1. Facts: Case involved an illegitimate child. Under Iowa statute, kids of divorced parents could get post-secondary educational support, but children of unmarried parents could not. EP violation?
				2. HOLDING: No EP violation.

Rational Basis: Children of divorced parents have lost stability, but children of unmarried parents have not lost stability b/c their parents were never married.

* + 1. **Imputing Income**
			1. If parent paying child support leaves his/her job for a lowering paying job, Ct may impute income (i.e. make him pay support according to earning capacity).
				1. **Rule** (from *Little*): Ct must consider the overall reasonableness of parent’s voluntary decision to take a reduction in income. [See factors in *Little*]
			2. ***Little v. Little*** (AZ 1999) (804)
				1. Facts: F left his Air Force job to become a law student and sought reduction in child support.
				2. HOLDING: Ct adopts intermediate approach (b/w “strict” and “good faith” tests) and decides to impute the foregone income to H (he must keep paying high amt.).

**Rule:** Cts must consider the overall reasonableness of a parent’s voluntary decision to terminate employment and return to school.

There are several factors to consider:

Does the parent’s current educational and physical capacity enable him to find work?

Is the additional training likely to increase the parent’s earning potential?

Will kids benefit from parent’s increased future income? (How long is program?)

Can the parent finance his or her child support obligation while in school through other resources such as student loans or part-time employment?

Is the decision made in **good faith**? (i.e. not just doing it to avoid child support)

How to justify this level of state involvement?

Once marriage breaks up and Ct becomes involved (divorce), parents become subject to greater scrutiny and special protection afforded family is lost.

Having kids curtails your dreams, deal w/ it.

* + - 1. ***Bender v. Bender*** (PA 1982) (807)
				1. Facts: M paying child support of $25/wk. M gets pregnant, decides to leave her job to care for baby. TC suspended her child support responsibility. F wants to impute income.
				2. HOLDING: Income may be imputed to parent who decides to stay home to care for another child.

Ct remands to apply a **balancing test** in deciding whether to impute income.

“Among the factors are: the age and maturity of the child; the availability and adequacy of others who might assist the custodian parent; the adequacy of available financial resources if the custodian-parent does remain in the home. We underscore that, *while not dispositive*, the custodian-parent’s perception that the welfare of the child is served by having a parent at home is to be accorded significant weight in the court’s calculation of its support order.”

* + 1. **Second Families**
			1. ***Ainsworth v. Ainsworth*** (Vermont 1990) (798)
				1. Facts: F is paying $35/wk for each of his 2 kids. M claims guidelines have changed and wants more. F says that he has since remarried and now has a stepchild. F wants the calculation to be based on him having 3 children. **Does a new kid on the block reduce other kids’ support?**

F’s argument: realistically if you have more kids you spend less on each kid even if you are married. Economies of scale.

M’s argument: when family is intact you have economies of scale. In addition, decision to have another child was not an intact family decision, but one made totally by F. If new wife was rich, F wouldn’t be forced to give the first 2 kids the upside so they shouldn’t suffer downside.

* + - * 1. Issues:

If a party has some other child is that grounds to deviate from the guidelines?

Do stepchildren count?

* + - * 1. HOLDING: Stepchild is a “change in circumstance” that should be counted. [MAJORITY APPROACH]

Existing kids must also “tighten belts” when new kid arrives.

* + - * 1. Dissent: Even if he has support obligations to his stepchild, these should not be deducted from his income when calculating his child support to his first two kids.
				2. Possible Exam Q: What counts as voluntary? If parent must support ill family member, is that a change in circumstance? What if it’s an unmarried partner that is sick?
		1. **Step-Parents**
			1. ***Miller v. Miller*** (NJ 1984) (809)
				1. Issue: Can a stepparent be ordered to pay child support?

Note: there is a biological F out there who could (in theory) pay.

* + - * 1. HOLDING: In this case, yes. SF had stated that he would support the child and even ripped up M’s check. Therefore, M relied on promise and SF is req’d to support the kid.

Prof: This rule would apply to a de facto psychological parent like a cohabitating BF or GF.

* 1. **Child Custody and Visitation**
		1. **Presumptions and default rules**
			1. In favor of the mother
				1. Tender Years Presumption: young children should, all else being equal, be given to M.

Some Cts discuss nursing/breast-feeding preference; EP problems w/ approach in the 1960s

* + - * 1. Maternal preference: all else being equal, Ms are better than Fs at taking care of kids.
				2. Note: Most Jx’s now reject this approach (Ex: *Pusey v. Pusey* (UT)), but Ct’s still look at them.
			1. Gender/race matching: Boys w/ dads, girls w/ moms, black kids w/ black parents, etc.
			2. Primary Caregiver: Preference for parent who did more parenting during marriage.
			3. Child’s Preference: Once kid is old enough to decide, should go w/ kid’s choice
			4. Physically/Morally Fit Parents: See *Carney, Hollon* – physical/moral fitness not dispositive.
			5. Joint Custody: Newer idea; prefer to give both parents custody (*Squires*, even if there is hostility)
			6. **Policy:** Default rule of custody vs. nuanced Best Interests of the Child (BIC) analysis?
				1. Default Rules: Very efficient. Hard to do a good BIC analysis and judges may be incompetent. They are also non-adversarial. May encourage parties negotiating a deal, which feels more legitimate to the parties. May also prevent using custody as bargaining chip/pawn (outcome more certain).
				2. BIC analysis: This is an important decision and cannot be left to default rules. There are also some good judges out there. Concern about imbalances in bargaining power – don’t want parties to negotiate.
				3. Compromise: Default rules could be heuristics to guide more nuanced decision-making.
		1. **Physical Fitness:** *In re Marriage of Carney* (CA 1979) (525) [BIC]
			1. Facts: F & M had 2 kids. They separated shortly after #2 born. She left them for 5 years and barely contacted kids. F married woman who watched the kids. F had accident & became quadriplegic, but still functional. F applied for custody. M claimed she should get custody.
				1. TC granted M custody and ordered F to pay child support, etc. based on presumption that F’s disability makes him an unfit parent.
			2. HOLDING: For F - The main factor to be considered is BIC. Physical impairment is not in itself sufficient grounds to grant M custody.
		2. **Weighing multiple factors for BIC:**
			1. *Hollon v. Hollon* (Mississippi 2001) (532)
				1. Facts: TC focused on M’s homosexuality, deeming her morally unfit to be a mother.

M’s argument: Even if M is morally unfit (which she doesn’t concede) F is also morally unfit. She has stability/continuity on her side and is a better parent.

* + - * 1. HOLDING: For M. BIC determined by weighing many factors:

age, health and sex of the child

who was primary caretaker before separation

who has better parenting skills

the employment of the parent and responsibilities of that employment

physical and mental health and age of the parents

emotional ties of parent and child

moral fitness of parents

home, school and community record of the child

preference of the child (at age where child understands)

stability of home environment and employment of each parent; and

other factors relevant to the parent-child relationship.

* + 1. **The child’s preference**
			1. *McMillen v. McMillen* (PA 1992) (554)
				1. Facts: Child wants F to be granted a change in custody. After 6 years, the Ct listens.
				2. HOLDING: The child’s preferences should be accepted here. The child has good reasons for preferring F (unlike Bubba), the child was old enough to articulate good and mature reasons.
				3. Child’s reasons included his fear of his stepfather and his dislike of M.
		2. **Primary caretaker presumption**
			1. *Garska v. McCoy* (WV 1981) (569)
				1. Facts: M & F never married. TC granted F custody as it determined that F would be better parent b/c he was more educated & intelligent. F was better off financially, better looking and spoke Eng.
				2. HOLDING: For M - “Where one parent can demonstrate w/ regard to a child of tender yrs that he or she is clearly the primary caretaker parent…the Ct must further determine only whether the primary caretaker parent is a fit parent [to]…award the child to the primary caretaker parent.”
		3. **Alternative to BIC: Past Division of Parental Responsibility**
			1. Rule: custody should depend on who cared more for the children before divorce (BIC=subjective)
				1. BUT concerns –

Harms/disincentivizes working parent (might discourage parents from dividing labor)

Emphasizes Quantity over Quality - what if existing pattern of caregiving is bad?

Assumes one parent is primary, another isn’t (ie not joint custody)

* + - 1. *Young v. Hector* (Florida 1999) (579)
				1. Facts: Both parents are fit.

F’s argument: he is a stay at home parent and has been doing more parenting. M works late hours and he will be able to spend more time w/ the kids in the future.

M’s argument: F is a loser who can’t find a job and that is why he is at home. In addition, the nanny is the one watching the kids, even when F is home. Furthermore, F abandoned the family for a period of time to hunt for buried treasure. As the children are girls, sex-matching is appropriate as a woman is more capable of teaching the girls about sexism and menstruation. M is more economically stable and does not have a temper problem like F.

* + - * 1. HOLDING: TC didn’t impermissibly use gender bias in its determination. M’s arguments (as true primary caregiver) were grounds enough to award her custody.
				2. Dissent (Goderich): “I find it extremely hard to believe that if the roles were reversed any trial judge would question a mother’s lack of employment or the employment of a nanny when the father earns over $300,000 per yr.” He believes gender bias played a role here.
		1. **Joint Custody**
			1. Concurrent parenting is when divorced parents who have joint custody co-parent w/o any kind of plan. It is separate parenting at the same time.
				1. Problems:

Confusing for kids – need stability

Concerned about hostility b/w parents (they will have way more contact)

* + - 1. *Squires v. Squires* (Kentucky 1993) (574)
				1. Facts: M appeals an award of joint custody saying joint custody should not be awarded when one party opposes it. The legislature stated that TC must consider joint custody.
				2. Issue: Should hostility b/w the parties prevent joint custody?
				3. HOLDING: No - in favor of joint custody.
		1. **Modification of Custody/Visitation**
			1. NOTE: Cts maintain continuous Jx over custody and visitation rights until kids reach age of maturity (18)
				1. Can seek modification of initial custody determination if a **“material change in circumstances”**
			2. *Hassenstab v. Hassenstab* (Nebraska 1997) (596)
				1. Facts: F appeals a denial of modification of custody complaining that M is suicidal and homosexual.
				2. HOLDING: For M. Modification only granted if there’s a material change in circumstances showing that the custodial parent is unfit or that it is in BIC.

M’s past suicide attempt is not relevant b/c the Ct is concerned w/ the present and future.

There is no evidence that M’s drinking/partying has affected the child.

M’s sexual activity is insufficient to establish a material change in circumstances absent a showing that it adversely affected the child.

* + - * 1. Dissent: The parties are Catholics. Therefore, it would be appropriate for Ct to apply the moral principles of the parent’s own religion. Catholicism is against homosexuality, so M is unfit.
			1. **Relocation in modification cases**
				1. Need to ask Ct if you can move if it’s going to affect custody.
				2. *Wetch v. Wetch* (ND 1995) (599)

Facts: M wants to relocate b/c of domestic violence. F claims that domestic violence was prior to divorce, so it is not a change in circumstances to deny F visitation. Moreover, M’s moving is a change in circumstances. TC wouldn’t consider any evidence prior to the divorce.

HOLDING: Ct reverses and remands to determine custody as the TC erred in refusing to consider custody-related evidence predating the divorce. This hampered Ct’s ability to determine what is in the BIC (relocating may actually be good for the children)

* + - * 1. *Baures v. Lewis* (NJ 2001) (605)

Facts: M wanted to move to Wisconsin to be closer to her parents who could help w/ special needs of her child (autistic). F opposed the request. TC req’d M to show that this was BIC and that there was a problem living in NJ that could only be solved by moving to Wisconsin. (High standard)

HOLDING: Standard for relocation is that the judge must be satisfied that the custodial parent has **a good faith reason for the move and that the child won’t suffer from it.** (case remanded b/c wrong standard used by TC)

* + - 1. **Race and ethnicity in modification cases**
				1. **Race:** *Palmore v. Sidoti* (SCOTUS 1984) (538)

Facts: F sued for a modification of custody b/c M moved in w/ a black man (not married). TC viewed this as a substantial change in circumstance to award custody to F b/c it would be in the BIC, as society will treat the child badly.

HOLDING: For M – Ct is either saying that you can’t consider race at all or that external biases and the possible effects that they may inflict cannot be considered to modify child custody.

There is no specific statement by Ct regarding initial custody proceedings.

Note: In the end M lost custody anyway b/c the child was in the custody of F and his new wife for too long. F and his new wife moved to Texas and initiated custody proceedings while appeal was pending. On remand from the SCOTUS, Florida deferred to Texas. In Texas, the Ct decided that stability/continuity now weigh in favor of F. (shows negative effect of losing at trial)

* + - * 1. **Ethnicity:** *Jones v. Jones* (SD 1996) (540)

Facts: 3 children. M is white while F is Native American. F gets physical custody. Ct awards joint legal custody.

M’s arguments:

F has a history of alcoholism which manifested as abuse.

M was a home-maker so may have had a greater connection.

One of the kids is not F’s biological child.

Psychological experts recommended custody w/ M.

HOLDING: Ct rules for F for several reasons:

F suffered prejudice as a Native American and can help his children overcome said prejudice.

Doesn’t this conflict w/ *Palmore* as the Ct is looking at ethnicity?

The decision was not based on F’s physical race, but F’s ability to expose his children to his Native American culture heritage.

But custody is not required for this. In addition, a white person may actually know more about it.

Native Americans are a very special, protected group (need to protect heritage)

In *Palmore*, F was probably a racist and Ct knew it

F has money.

F has a close-knit family, which aided in the stability of the family.

* + 1. **Religion**
			1. *Kendall v. Kendall* (Mass. 1997) (549)
				1. Facts: F believed that if you didn’t believe in Jesus then you went to hell (wanted to take kids to church and teach them). M and the children were orthodox Jews. Divorce order said that neither parent may indoctrinate the children in a way that turns them away from the other parent.
				2. HOLDING: F cannot share his religious views if it imposes severe stress and trauma on the children.
			2. *Zummo v. Zummo* (PA 1990) (618)
				1. Issue: Whether an order prohibiting F from taking his children to religious services “contrary to the Jewish faith” during periods of lawful custody and visitation violated F’s constitutional rights or constituted an abuse of discretion. (There was a religious agreement b/w the parties)
				2. HOLDING: As there is no harm to the child, Ct should take an attitude of benign neutrality to religious practices.
				3. This case is different from *Kendall -* children are OK in this case (only M is distressed).
			3. Open Q: Should religious Ks be enforced?
				1. No – Cts shouldn’t delve into religious practices; concern about using religion to affect outcome of custody finding (ie agree to raise kids Jewish, but only one parent is– that parent has custody leg-up)
				2. Yes – Cts can and should do this to preserve BIC; freedom of K.
				3. ES is not persuaded by *Zummo* Ct’s claim that religious Ks are unenforceable. Most Jx’s enforce religious Ks absent a change in circumstances.
		2. **Visitation**
			1. *Eldridge v. Eldridge* (Tennessee 2001) (613)
				1. Facts: F has sole custody and M has visitation. F objects to M having her homosexual partner around when his daughter visits M. TC found for M and AC reversed.
				2. HOLDING: For M. “In the absence of any evidence of harm beyond the mere unsubstantiated predictions of a vying parent, the trial court’s ruling in this case cannot be said to unreasonable. The evidence adduced in this case supports a reasonable conclusion that unrestricted overnight visitation was in Taylor’s best interests.” Therefore, TC did not abuse its discretion.

So basically you can only consider the sexuality of spouse if it affects BIC (not like race).

* + - 1. *Troxel v. Granville* (SCOTUS 2000) (621)
				1. Facts: Troxels are GPs. Their son & M never married. Son died & GPs wanted right to visit their Gkids more often than permitted by M.  Very broad Washington statute granted 3rd party visitation petitions to any person, even over custodial parent’s objection, if found to be in BIC. TC granted visitation to GPs.
				2. HOLDING (plurality): Statute violated the rt of parents, under 14A DP, to make decisions concerning the care, custody, and control of their children.

"The liberty interest at issue in this case -- the interest of parents in the care, custody, & control of their kids -- is perhaps the oldest of the fundamental liberty interests recognized by this Ct."

So long as they’re fit/not neglecting their children.

* + - * 1. Dissent (Stevens): Children are parties w/ interests & rights too. These rights should be decided in the BIC, which may be to allow and consider 3rd party visitation.
				2. Policy Q: How to apply this fractured standard to other statutes?
			1. See *Quinn* below.
		1. **Stepparents**
			1. Theories
				1. Biological parent – who is the biological M or F of the child?
				2. VS.

De facto parent – who is acting the role of parent?

Nurturing parent – who is doing the nurturing?

Psychological parent – who does child identify as parent(s)?

* + - 1. Cases
				1. *Kinnard v. Kinnard* (Alaska 2002) (630) [DE FACTO PARENT]

Facts: Bio F vs Step-M. Bio F raising kids w/ Step-M, then divorce.

HOLDING: joint custody to maintain stability and continuity.

* + - * 1. *Simons v. Gisvold* (ND 1994) (633) [BIOLOGICAL PARENT]

Facts: Step-M versus Bio-M. Bio-F & Step-M raising kid; Bio-F dies. Step-M has been a nurturing mother for yrs. M hasn’t been as much in the picture.

HOLDING: Genes matter. Bio-M gets custody and Step-M gets visitation.

* + - * 1. *Quinn v. Mouw-Quinn* (SD 1996) (635) [BIOLOGICAL PARENT]

Facts: Bio-M vs Step-F about visitation of non-bio child of Step-F. Kid thought of Step-F like parent (2 older siblings were bio kids of Step-F). Step-F requesting visitation, not custody.

HOLDING: Step-F gets visitation.

* + - 1. Notes
				1. Cts seem to suggest that **all else being equal, bio parent should be granted custody of the child.** (*Kinnard* = unique b/c child viewed SM as her full-fledged mother. Being removed fully from the custody of Step-M would not have been in the BIC).

Interests of bio parent vs. interests of child in maintaining relationship w/ psychological parent.

NOTE: This is just a default rule (can be overcome by showing serious harm)

* + - * 1. Granting psychological parents some rights gives them incentives to build relationships w/ the child.
				2. New reproductive technology makes the term Bio-M ambiguous as there are now genetic mother and separate birth mothers (surrogates).
	1. **Separation Agreements**
		1. “The parties are bargaining in the shadow of the law.” = they bargain knowing what the alternative option to bargaining is, i.e. the legal option
			1. NOTE: Most cases get settled w/ a separation agreement.
		2. There are two ways for these agreements to become part of the divorce decree:
			1. The agreement could be **merged** into the judgment of divorce.
				1. As the agreement becomes part of the court’s order, Ct maintains Jx to modify the agreement as it does w/ any other order.
			2. The agreement could be **incorporated by reference**.
				1. Ct can only modify the agreement if there is an unforeseen change in circumstances and if it is in BIC to do so.
				2. The agreement is then not a matter of public record.
		3. Advantages of separation agreemts:
			1. Speed / efficiency / cheap
			2. Less nasty
			3. Better for kids
			4. Reduces Ct docket
			5. Get on w/ your life, less draining
			6. If you’re an agent in the terms of your own divorce, you’re more likely to follow it
		4. Why don’t people just use separation agreemts then?
			1. Spite / Disappointment / Bad history
			2. Might not be mutual decision
			3. Imbalance of power (think domestic violence, educated vs uneducated etc)
			4. Those that are litigated are contentious b/c of spite, disappointment, a party doesn’t want finality (complicated emotional issues), there is no middle ground (especially w/ children), there is uncertainty (of law and judges), or b/c parties overestimate the strength of their own cases.
		5. **Cases:**
			1. ***Duffy v. Duffy*** (DC 2005) (848)
				1. Facts: Agreed on many things include child support. After 2 yrs F began paying significantly less.

F arguments:

Changed circumstances.

Then it depends on whether the agreement was merged or incorporated by reference.

F only signed a letter, but he resisted signing the actual agreement.

The judge can still merge or incorporate the letter.

* + - * 1. Public Policy

Freedom to K

Looking at protecting people from hurrying into ill-advised sep. agreemts.

* + - * 1. HOLDING: Ct enforces the separation agreemt. There’s strong public policy to enforce sep. agreemts

Ct avoided the determination of whether the agreemt was merged or incorporated by reference stating that F didn’t give any reasons to reduce the child support amt.

* + - 1. ***Toni v. Toni*** (ND 2001) (852)
				1. Facts: W asks Ct to adjust the spousal support amount even though the agreement was incorporated by reference and waived Jx for Cts.
				2. HOLDING: Ct agrees w/ Jx’s that allow for couples to make spousal support nonmodifiable. (Majority approach)

Child support agreements are always modifiable subject to BIC.

* + - * 1. Policy arguments:

In favor of allowing for nonmodifiable agreements:

These are two mature adults signing a K.

Finality will encourage the parties to avoid uncertainty and plan accordingly.

Against allowing for nonmodifiable agreements:

The parties may not have equal bargaining power.

Jx belongs to the court.

Ct may be saying we are retaining Jx and you can ask, but we will always say no.

Society will have to pay if there is change in circumstances making 1 spouse a public charge.

* + - 1. *Kelley v. Kelley* (Virginia 1994) (859)
				1. Issue: Whether child support provisions could be voided after they became final if the agreement was incorporated by reference.
				2. HOLDING: Ct can always modify or void child support agreements. Parents can’t abridge rights of their children.
1. **Jx Issues in Family Law**
	1. Full Faith & Credit Clause (Article IV, Section 1)
		1. Text: *“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”*
			1. 2 views of the FFCC as it relates to comity
				1. The FFCC constitutionalizes the standard principle of comity. Implicit in comity, however, are exceptions for marriages against natural law and/or the public policy or positive law of the 2nd state.
				2. FFCC has nothing to do w/ marriage b/c marriage is neither a public act nor a judicial proceeding. As marriage is part of the record of a state, all one needs to do is recognize that the parties are married in the other Jx.
			2. NOTE: FFCC definitely applies to divorce (judicial proceeding)
				1. Open Q: should it apply to final judgments only (ie not ongoing issues w/ continuing Ct Jx)?
	2. Defense of Marriage Act (DOMA) (1994)
		1. (§2) Text: *"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship b/w persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."*
			1. **Summary:** **States can define marriage how they want and it doesn’t violate FFCC not to recognize same-sex marriage from other states.**
				1. Under 2nd reading of FFCC, Congress may be saying that the effect to be given to state laws on same-sex marriage is no effect.
				2. Under the 1st reading above DOMA is trivial as the state could just say that same-sex marriage is against its public policy/natural law.
		2. (§3) Text: *"In determining the meaning of any Act of Cong, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the US, the word 'marriage' means only a legal union b/w 1 man and 1 woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."*
			1. **Summary:** **Same-sex marriage is not recognized for purposes of Federal law.**
				1. This can cause many problems (ie income tax filing, bankruptcy, etc).
		3. **Challenges to DOMA and mini-DOMAs**
			1. *In re Balas* (CA Fed Bankruptcy Ct 2011)
				1. Facts: Bankruptcy case. Gay married couple declare joint bankruptcy. Lower Ct says DOMA §3 = no gay marriage recognized.
				2. HOLDING: DOMA §3 is unconstitutional.
			2. *Wilson v. Ake* (District Ct in FLA 2005) (121)
				1. Facts: Florida has a mini-DOMA
				2. HOLDING: Neither DOMA nor Florida’s mini-DOMA are unconstitutional. DOMAs foster a legitimate state interest of parenting, procreation, and relationships b/w states.

SCOTUS’s dismissal of *Baker v. Nelson* for want of a federal question gets cited to show that there is no constitutional issue regarding DOMA.

* + - 1. Holder Memo (Obama administration)
				1. Says Obama administration believes DOMA §3 to be unconstitutional, will no longer defend it in Ct

But Congress will defend.

* 1. Many states either have a law (ie mini-DOMA) or constitutional amendment or both saying that they won’t grant same-sex marriage and/or they won’t recognize same-sex marriages from other states.
		1. VA C’N’al Amendment
			1. Text: *“That only a union b/w one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”*
				1. **Summary:** **No same-sex marriages performed by VA, nor recognized in VA from other states**
			2. *“This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”*
				1. **Summary:** **VA won’t recognize anything that seeks to approximate marriage (civil union, etc).**
				2. Concerns about this provision:

Too broad – might encompass situations (like a gay couple jointly buying a house or UVA letting same-sex partner of prof/student use gym) not intended to be affected.

Concern that gay spouses won’t be able to seek orders of protection (ie *Marvin* – cohabitation = functional approach to fam).

* 1. **Jx Cases**
		1. **Splitting Divorce Decrees**
			1. ***Vanderbilt v. Vanderbilt*** (SCOTUS 1957) (817)
				1. Facts: After separation W moved to NY; H filed for divorce in NV (a “divorce mill” at the time). W neither served nor did she appear in NV. NV granted divorce and no alimony for W. After a yr, W asked for alimony & separation in NY. NY Ct sequesters some of H’s prop as collateral for the alimony W is asking for. H says NY can’t order separation/alimony b/c already divorced. NY says that the NV divorce is valid except that it cannot cut off W’s claim for support b/c the NV Ct did not have personal Jx over W (no notice, opp to be heard, etc.)
				2. HOLDING: Ct upholds NY decision, thereby, splitting the NV decree in 2: the divorce part will be enforced, but the alimony part will not.

Bc W wasn’t there in NV (and NV lacked personal Jx), alimony decision is void, not subj to FFCC

* + - 1. **THIS IS WHY there is Uniform Interstate Family Support Act (UIFSA)**
				1. Support used to not be subj to FF&C.
				2. URESA/UIFSA are statutes that deal w/ deadbeat parents. They create mechanisms for transmitting support orders to other Jx’s.
				3. Also w/r/t custody & visitation [UCCJA/UCCJEA] [see below!]
				4. This eliminates Jx shopping on behalf of sneaky ex-spouses.
		1. **Questioning Domicile**
			1. *Fink v. Fink* (Illinois) (in class)
				1. Facts: H had a GF and a W. H told his employer that he is leaving his job. He told his landlord that he is leaving his apartment. H moved to NV. After 6 weeks he became a NV domicile and got a divorce. After a little while H moved back to Illinois where H got his job and apartment back and married his GF. W contested the NV divorce, saying NV did not have Jx over the marriage b/c H was not a true domicile and W didn’t have the opportunity to question that domicile.
				2. HOLDING: You can challenge domicile in another state that legitimately has Jx over the marriage, but only if the original state didn’t already question the domicile of the suing party.
		2. **Limits to Long-Arm Jx**
			1. ***Kulko v. California*** (SCOTUS 1978) (818)
				1. Facts: NY & CA wouldn’t divorce W. W went to Haiti, which allowed for quick divorce. (H wouldn’t challenge this b/c they already agreed on all the terms) The divorce incorporates the agreement. Daughter wants to live w/ M in CA, so F sends her. Son also wants to live there & M sends a ticket. M wants to modify custody & child support b/c she has the kids. M asks CA to make the Haiti decree a CA judgment and then modify it. F gets notice & he appears specially to say CA doesn’t have Jx over him.
				2. Issue: In an action for child custody/support, can a state Ct exercise Jx over a non-resident/non-domicile parent of a child who physically is present in the state?
				3. HOLDING: F’s connections w/ CA are too minimal. Violates DP to make him come to CA to dispute custody and more specifically child support.
		3. **Interstate Custody Disputes**
			1. Concern about forum-shopping. Concern that ppl would move to another Jx or kidnap their child and go to a Jx that is more favorable.
			2. Parental Kidnapping Prevention Act (PKPA) - federal statute addressing problem of forum-shopping by requiring that states give FF&C to the custody decrees of other states. If a Ct learns that a custody proceeding has been initiated in another state w/ Jx under Act, it must stay its own proceeding and confer w/ the other state to determine which forum has Jx. Unless new forum makes more sense, preference for initial forum.
			3. UCCJA – state law controlling every proceeding involving child custody and visitation whether it is an initial proceeding or modification. The UCCJA provides two essential bases for the exercise of state Ct Jx:
				1. **Home State Jx**: Applies when either (1) a child has lived w/ a parental figure for at least 6 mos prior to custody proceeding; or (2) a child has moved from his or her home state w/in the last 6 mos and one parent still lives in that state.
				2. **Significant connection Jx**: basis for Jx is when a child and a parent have a “significant connection” w/ a state and there is “substantial evidence” in that state w/r/t appropriate care for the child.
				3. NOTE: When the two bases of Jx conflict, home state wins.
			4. Cases
				1. *Chaddick v. Monopoli* (Florida 1998) (665)

Facts: M got custody awarded by a Mass. Ct w/ visitation to F. F lives in VA and M lives in FLA. F filed a temp emergency custody petition in VA which was granted. M argued that VA didn’t have Jx to determine custody under the PKPA and failed – VA was better forum than Mass. Several yrs later, M files a petition in FLA asking for enforcement of the original Mass. decree. The FLA judge followed the PKPA and called the judge in VA. FLA judge then dismissed the case after the call.

HOLDING: For F. M doesn’t get a second bite at the apple.

* + - * 1. ***Miller-Jenkins v. Miller-Jenkins* (VT 2006) (BB)**

Facts: VA residents go to VT to get civil union, then go back to VA. They then move to VT b/c they believe it’s better to have child there. Lisa (BM) & the child move to VA. BM then files a petition in VT for dissolution of the civil union and custody of child. BM gets custody and Janet (NBM) gets visitation. BM doesn’t permit visitation. NBM sues in VT requesting that Ct hold BM in contempt. BM in VA gets a VA Ct to give her sole custody and not treat NBM as a parent at all.

Issue: We have conflicted decision in different states:

VA: BM is the sole parent and NBM has no rights.

VT: BM gets custody and NBM gets visitation. BM in contempt.

HOLDING: VA Ct should have called VT. VA should have given FF&C to VT custody determination. The VA Ct erred by not recognizing the first custody determination.

VA Ct says this is not a case about DOMA or marriage. It is just about custody and visitation. VT Ct had power to determine custody. VA can modify the custody determination if it has Jx, but it must be in contact w/ the VT court.

“home state” under PKPA was Vermont.

Dvorak, “In Custody Battle Btwn Two Mom’s, Little Girl Is Lost,” WashPost (BB): BM and child disappeared. VT Ct has order contempt of Ct. VT Ct modified custody. The order was transferred to VA. BM is now a fugitive.

**OVERVIEW:**

What is family?

Rel btwn fam/state?

What are rts/duties assoc w/ being in the same fam?

Focus on adult familial relationships & how they intersect w/ issues of parenting

Why they have this status as a matter of policy?

What forms of recognition do states have?

Trad’lly 2 ways to be in a fam w/ someone:

1. by marriage
2. by blood

but even this was oversimplication then (b/c of adoption & b/c of CL marriage)

Now blended families, marriage & parents and alterns/modifications are expanding and proliferating

Then, our attn to divorce

How state deals w/ break-up of marriages

**Divorce should be seen as a benefit of marriage** as well – if a complex relationship (not a marriage) dissolves, you don’t have benefit of the expedited proceeding of divorce/mediation/other structures. SO, divorce & dissolution system we have is a benefit (it’s not why we get married – no one’s thinking that) but on other hand it is part of system that state sets up AND there are policy reasons for divorce – we want people to be able to move on, marry again. So we ease that. – create marriage w/ a relatively easy escape-hatch (now that we have no-fault div’s)

So we understand the purpose & value of marriage by looking backwards & seeing what happens when marriage comes to an end.

Finally, theme of comity, FF&C and inter-Jx questions about marriage. Fam law in a distinctive federalist setting.

One hand – a lot of fam law is state law. In state ct. B/c fam law is in many ways in state laws

Problem is – lots of people moving around from state to state, inter-Jx disputes arising often. Fam law & its policies in context of our peculiar federalist system.