Strategies and Techniques for Teaching Family Law

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Acknowledgments and Dedication

Strategies and Techniques for Teaching Family Law is so much better for the insights contributed by my law fellow (and sometimes co-author), Cameron Flynn. Cameron's perspective as a student taking "practicum" courses in Washington and Lee's experiential curriculum lent perspective that I did not have from the other side of the desk. I also am deeply indebted to Howard Katz, the series creator and editor, for his thoughtful, thorough comments on multiple drafts. Finally, I am grateful to Carol McGeehan and Carmen Corral-Reid for the opportunity to think hard about law teaching and mentoring, and to Susan McClung for taking such care with the manuscript.

This is for Ken Wilkinson, who has taught me so much about living life with grace, courage, and patience.

Strategies and Techniques for Teaching Family Law

I. Introduction

If law teaching is the best job in the world (and it is), arguably the most thoroughly enjoyable class to teach is family law. In no other course (that I know of) is having a dysfunctional family an asset, making one a better teacher, capable not only of illustrating the difficulty of particular legal rules, but also of humanizing the material. In no other course (that I know of) can a professor do actual preparation for the next class while skimming news online or checking out in the grocery line—where, conveniently, gossip magazines like the *National Enquirer* and *People* provide fodder for the next class. And in no other course (that I know of) does the entire class willingly become an army of teaching assistants, flagging relevant news for the next class discussion.

At the same time, teaching family law poses challenges that are not present in other courses. Unlike the Icelandic pace at which civil procedure changes, something changes every day in family law. In the space of one week in 2013, for example, two states recognized same-sex marriage by judicial decision (Utah, in which a federal district court struck down the state's constitutional same-sex marriage ban in *Kitchen v. Herbert*,[1] and New Mexico, in which the New Mexico Supreme Court found it unconstitutional to deny marriage licenses to same-sex couples in *Griego v. Oliver*[2]). Likewise, state legislatures have enacted same-sex marriage laws at warp speed. But just as frenetic across the 50 states are proposals to reform alimony, property division, parentage, and child custody and visitation.

Family law does not just move fast: It's controversial and it's personal. Virtually no class goes by in which some student does not have a personal connection to the subject under discussion. Of course, when a student reveals such a connection, it often makes for the most compelling and teachable moments. This year, when my class turned to custody and visitation, and specifically to the relationship between child support payments and time spent with the supported child, a young man explained that fathers can signal directly to their children their commitment to stay involved in ways other than just money. When I asked how one does this, he said that he gave his son a ring when he and the child's mother broke up so his son would know "he

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1 Case No. 2:13-cv-217 (Dec. 20, 2013).

2 Docket No. 34,306 (Dec. 19, 2013).

would always be there." I know that many in the class were deeply moved by the reality of this man's attempts to stay involved in his son's life, even if things did not work out for the adults' relationship. As a teacher, I could not have hoped for a better discussion of the challenges facing noncustodial parents.

As this story illustrates, however, one cannot plan for the unpredictable. I had expected the kind of dry, clinical discussion typical of my 20-something students in past years, and really did not know what else to say, other than to thank him for sharing. This personal dimension puts a premium on showing empathy (and thinking quickly) because that personal connection is in fact personal to that student. Although delicate, this aspect of teaching family law should not dissuade you from taking on a terrific course. With some simple but effective strategies, teachers can easily meet these challenges.

This guide offers prospective family law teachers, both green and seasoned, some thoughts on how to get started and how to deal with recurring challenges. I am a big believer in mentoring and think we can do a lot to make things easier for new colleagues, as well as experienced colleagues teaching family law for the first time. Newer teachers should also consult the excellent companion book, *Strategies and Techniques of Law School Teaching* by Howard E. Katz and Kevin Francis O'Neill, which addresses almost all aspects of law teaching.

The beginning of this guide, Part II, poses some foundational questions that will guide a number of decisions about class objectives and course coverage. Part III suggests how you might winnow to a manageable list all the material that could be presented. It also outlines some considerations when selecting a casebook, and things you might want to read to get ready to teach family law for the first time. Part IV discusses day-to-day classroom issues, like fostering classroom discussion and handling sensitive topics. It describes how I present some specific material throughout the course. This part also sketches some pros and cons of including an experiential component in a survey or advanced family law class. Part V discusses the course finale, the review and final examination.

Although this guide focuses primarily on the introductory family law survey, the advice in Part IV would apply to teaching a number of other related courses, such as classes on children and violence, domestic violence, children and the state, assisted reproduction, and

bioethics. Like family law, these classes are equally fraught with controversial and deeply personal questions that can be landmines for inexperienced and seasoned teachers alike.

II. The Big Picture

A. FOUR QUESTIONS

Long before the semester starts, four questions are important to shaping your family law class:

1. How many credits do you have to teach your family law class?
2. Are upper-level courses available?
3. Will your course integrate experiential learning?
4. Does your scholarship focus on family law now, or is it likely to at some point?

The answers to these questions will largely guide the design of your course.

In my experience, a family law survey course tends to be a three-credit-hour, exam course, but it might not be at your school. It is not atypical that a family law survey serves as an introduction to more specialized upper-level courses on children and the law, adoption law, child abuse and neglect or the child welfare system, international family law, gender and the law, or law and sexuality.

The number of credits for the family law survey and whether the class acts as a gateway to other courses or represents the sole offering in family law might well be out of your control, but factors like this will definitely shape what you can cover. For example, when teaching at a law school that did not offer a separate course on adoption, I nonetheless chose not to cover adoption in my three-credit-hour course as a stand-alone topic because I simply did not have enough time. However, I frequently discussed issues surrounding adoption when covering parentage, incest restrictions (especially whether such restrictions should encompass adoptive children), and special challenges facing lesbian, gay, bisexual, and transgender (LGBT) families who are not permitted to marry in some states. Obviously, if

a later course will be substantially devoted to adoption, doing more than touching on adoption is even less necessary.

With the rise of experiential teaching, some law schools and teachers want to expose students to a more practice-based approach. This emphasis will control many other choices you need to make—not only coverage and selection of a course book, but actual presentation of material, and perhaps the framing of the entire course.

The family law survey often exposes students to substantive law that students will need later in required clinical courses during their third year—such as a child and family advocacy clinic, community legal practice clinic, domestic violence clinic, or even a mediation clinic. The presence of these clinics means that students could benefit from some exposure to "real work" before the clinic. On the other hand, if students will later do live client representation or simulated work in the clinic, this takes some pressure off the need to emphasize skill acquisition in the survey class. Nonetheless, I think a good survey course benefits from some combination of problems, concrete exercises, and in-class or out-of-class simulations or written work product. Asking students to do substantial work in addition to the exam carries its own challenges, however, as discussed later in this book.

Finally, it matters whether you are planning to be a family law scholar—or presently are one—or whether teaching family law is a kindness to your dean (by the way, it is never a bad idea to be nice to your dean). To some extent, if family law is a service course for you, it might be easier to just cover the "meat and potatoes" of family law, after you decide what students need to take away, either for the bar exam or for their general preparation as lawyers.

For those who both teach and write in family law, each class offers the possibility of essentially outlining and previewing one's thoughts for a new article. I have benefitted immensely from talking with my class about works in progress. Students have an uncanny knack for honing in on the difficulty with my ideas and pushing back against them.

Even more than future scholarship, though, past scholarship absolutely influences what I do from class to class. For example, my early writing looked at risks of child sexual abuse in nontraditional families. As a result, when we explore as a class why the law places such a significant emphasis on marriage when assigning parentage and custody rights, I have a lot more to say based on that empirical

lens into family functioning. On topics outside of my scholarship, like alimony and the theories behind it, I am much more likely to hew closely to the casebook.

What you bring to the class in terms of your scholarship will naturally shape what you emphasize. This inclination is not without some risk, however, especially as a young scholar and teacher. Obviously my family law survey could not be a course in child abuse alone, even if my early writing focused almost exclusively on child abuse. Our own scholarly agendas cannot overwhelm the class's expectations about coverage or the school's institutional needs.

All of these questions bleed into what you want to accomplish with your course, as the next part discusses.

B. CLASS OBJECTIVES

Strategies and Techniques of Law School Teaching by Howard E. Katz and Kevin Francis O'Neill sets forth 19 possible objectives for any law school class, while recognizing that individual teachers might also have others. The list is so good that I replicate it here:

1. Giving your students a strong grasp of the black-letter rules
2. Teaching students how to apply those rules to new fact patterns
3. Getting students to see—through problems and hypotheticals—how a seemingly minor change in the facts can produce a change in the outcome
4. Teaching students case analysis—how to dissect a case, breaking it down into discrete components (facts, issue, precedent, rule, application, holding) to discern what the court is actually doing
5. Honing students ability to distinguish between facts that are pivotal to the outcome of a case and facts that are irrelevant
6. Getting students to focus on procedural issues—and to recognize that the outcome of a judicial decision must be viewed in terms of its procedural posture
7. Exposing students to ethical and professional responsibility issues that lurk beneath the surface of the cases

8. Giving students practical tips on how cases are actually litigated in the real world
9. Giving students litigation-oriented skill training through courtroom simulations that involve questioning a witness or arguing a motion
10. Giving students transaction-oriented skills training through contract drafting exercises and mock negotiations
11. Giving students litigation-oriented drafting exercises (pleadings, motions, jury instructions, etc.)
12. Taking care to include, in your coverage of a given case, the lawyering problems that likely occurred *before* the lawsuit was filed
13. Teaching your students the methods of statutory construction and giving them statutory drafting exercises
14. Tracing the historical development of the doctrinal rules in your course
15. Giving your students an appreciation of the policies on which the rules are grounded
16. Covering the larger jurisprudential or philosophical framework of the subject
17. Developing a coherent theory to explain and justify the rules
18. Getting your students to examine the subject through a law-and-economics perspective
19. Helping students to see the race or gender implications in the rules and cases.

To some extent, the teacher of family law has an easier task of preparing students because a number of these objectives will surely be accomplished long before students reach family law in the second or third years. I assume that students in family law already grasp how to dissect a case and apply the black-letter law to new fact patterns, understand that a minor change can produce a change in outcome, can distinguish pivotal facts from irrelevant ones, and grasp how the procedural posture of a case (such as summary judgment) matters greatly to the principle established. Of course, if you teach at a school

that offers family law in the first year, you would be wise to prioritize Objectives 1 through 6.

Although I assume that students have a firm grasp of the basics of legal analysis, I do hammer difficult concepts, like procedural posture. For example, when we get to a foundational case like *Marvin v. Marvin* (which reversed the trial court's grant of judgment for Lee Marvin on the pleadings in the lawsuit brought against him by his former cohabitant, Michelle Marvin), I explicitly ask students whether the decision, which takes Michelle's allegations in the pleadings as true, will cash out much for ordinary people. Most of us romanticize our relationships, rather than reducing them (or their specifics) to writing. Indeed, Michelle ultimately wound up with nothing in *Marvin III*[3] because she could not marshal sufficient proof of an agreement. Contrasting the law on the books with the reality for most cohabitants is essential not only to a student's mastery of *Marvin* as black-letter law, but also to any thoughtful critique of whether the law should provide additional or other remedies to the weaker earning cohabitant.

Even assuming most students have mastered Objectives 2 through 6, no teacher can hope to accomplish all of the remaining objectives in a single three-credit-hour survey. Emphasizing certain objectives can produce a very different class. For example, a class that emphasizes the black-letter law could easily include an experiential or practical focus, periodically raise ethical and professional responsibility issues, provide practical tips on how cases are actually litigated, and convey some litigation-oriented skills through in-class simulations or out-of-class drafting exercises or mock negotiations. In other words, a class like this would emphasize Objectives 6 through 12. A number of family law casebooks make teaching such a course easier than it would have been in the past because the book is organized around problems or documents, or the work of the family law lawyer. Part IV canvasses some considerations when deciding to include graded and ungraded simulations or exercises in a survey course.

Emphasizing Objectives 13 through 19 would produce a very different class, focused much more consciously on law and policy. This class might seek to (1) help students understand how the law evolved as it did and the implications of antiquated and modern approaches to the regulation of families for individuals, such as

[3] Marvin v. Marvin (III), 122 Cal.App.3d 871, 176 Cal.Rptr. 555 (Ct of App., 2d, Div. 3, 1981).

traditionally vulnerable parties like women and children; (2) place family law in a jurisprudential or philosophical framework like feminist theory or law-and-economics (or both); or (3) develop one or more coherent theories to explain or justify various rules.

Of course, many law teachers do not strive for a strictly experiential or theoretical focus, but seek to combine elements of both in the same course. For example, in my survey course, I spend a lot of time on the inability of women before the Married Women's Property Acts (MWPA) to hold property in their own names. Although the notion that women could not contract in their own names or hold property after marrying is offensive on its face, state law reforms that permitted women to have separate legal identities erased important common law protections for married women against their (ne'er-do-well) husbands' creditors, without giving them meaningful rights in what we would call today marital property. A discussion of the MWPA can nicely benefit from a feminist prospective, a law-and-economics perspective focused on modern examples of wealth shielding by married couples (think the homestead exemption and $10 million mansions), or a close statutory reading to see that the MWPA confers no rights to wealth acquired during the marriage by labor.

At the same time that I take a blended approach (talking about theory and critique as well as the black-letter law), I integrate several in-class exercises to drive home both nuances in the law as well as an appreciation for what family law is like in practice. As Part IV of this book explains, students in my family law class do two child support exercises. The first is an easy child support calculation based on a fact pattern. The second is a fairly complicated in-class oral argument advocating for or against one of the parties to a petition to modify child support. Of course, you might want to accomplish some objectives in one part of the course and other objectives in another part of the course.

None of this advice depends on the quality of your students or even how elite your law school is. Regardless of the school's ranking or whether your class is chock-full of *Law Review* students, any of these approaches can be successful. Some teachers at more elite schools might resist a focus on black-letter law, thinking that any good law student can master this in the bar course. I absolutely believe this is true. In fact, I openly tell my own students on the first day that they do not need to take this class just to pass the bar, because they can master the material during the bar review (unlike

something complicated such as debtor–creditor relationships or secured transactions).

Notwithstanding this, I also believe that students value being able to count family law in the "passed" column for purposes of the bar, so I consciously flag what I think will be tested. At every institution at which I have taught (second-tier schools, top-tier schools, private schools, and public schools), this overt focus on what is needed to pass the bar exam has been warmly received.

C. META-QUESTIONS ACROSS THE COURSE

A few meta-questions might also help to organize material across the course:

1. What are the functions and purposes of family law, and why does the state try to achieve these purposes by focusing on regulation of the family as a unit, as opposed to regulating the individual?
2. Who should count legally as a family?
3. To what extent should marriage be the dominant locus for regulation of the family, and what are the costs of leaving others out of regulation focused on marriage?
4. How have families changed over time, how should the law respond to the families we actually form, and can the law have a meaningful impact on actual behavior?
5. How does family law fit together with other areas of the law?

III. Designing and Preparing the Course

A. WHAT SHOULD THE COURSE COVER?

No law school course should strive to be only a bar preparation course—that would bore not only the teacher, but every good student in the class. That said, neither does one's class need to be divorced from the fact that much of what is covered might, in fact, be tested on the bar exam.

Of course, what subjects appear on the state-specific portion of the bar exam varies from state to state.[4] Of the 50 states and the District of Columbia, all jurisdictions test family law or domestic relations on their bar exams (sometimes in conjunction with another topic like equity), except 5, which do not test domestic relations: Connecticut, Delaware, New Jersey, Ohio, and Oregon.

Because family law is tested on nearly every bar, I emphasize black-letter law far more in this course than I would elsewhere. Of course, the law varies greatly among the states on particular topics (e.g., how long temporary alimony can run, what counts as separate property for purposes of equitable distribution, etc.), so one question you must face is which black-letter law, if any, to emphasize. When I first started teaching, my answer to this was easy: I taught at a law school where the vast majority of students sat for the same bar, the bar in the jurisdiction in which the school was located. Having moved to a law school where students land in many different jurisdictions, however, I now emphasize the black-letter law in a few key jurisdictions. I begin every survey course by asking where students see themselves sitting for the bar, revealing a dozen or so jurisdictions (where I last taught, Virginia, California, Texas, New York, New Jersey, and the District of Columbia came up regularly). I still contrast majority and minority approaches among the states, but I would make a conscious attempt to illustrate points throughout the semester from those jurisdictions where it made sense to do so.

Still, when the law of any one jurisdiction would serve to make a point as well as any other, I also consciously defaulted to the law of the jurisdiction in which the school was located. One reason for this is that some students find jobs after bar application deadlines in the third year have passed, and others (a growing fraction in recent years) graduate without a job in hand. Many of these students "default" to taking the bar exam in the state in which the school is located. Because bar passage rates figure so heavily in the school's own ranking, and because students graduating without a job in hand are already under tremendous self-imposed pressure, I believe that some mastery of that state's law, on at least one subject, helps to put students at ease.

What is examined on the bar exam also guides, to a limited extent, what I cover in my survey course. Early on, in deciding what

[4] See generally http://barexam.info/ (listing topics tested on respective state bar examinations).

to include in a three-hour course, I asked my law librarian to gather all the questions tested on the bar over the last two decades. I then grouped the questions by topic and used this as a rough guide, as much for what not to emphasize as what to emphasize. For example, in Virginia, over the last two decades, the bar examiners tested the subjects shown in Figure 1.

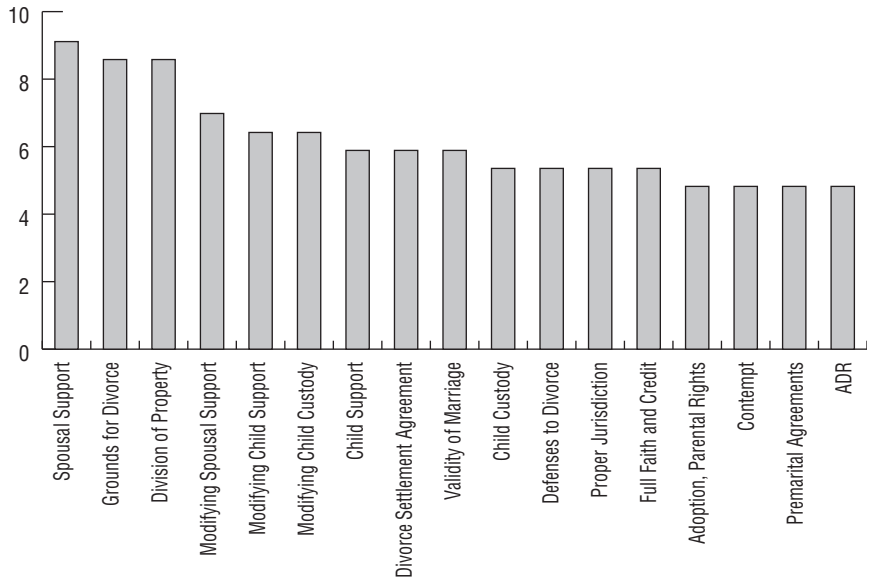

Figure 1. Topics tested across twenty years in one jurisdiction.

This analysis confirmed for me my independent choice not to emphasize adoption, other than at various points described earlier.

There are other ways to glean insight into the bar exams. In some states, the bar examiners will meet with faculty from schools in the state to go over the "model" answer before assigning the submissions for grading. This is a very interesting process, not only for the insight into what to emphasize in one's course, but for giving students guidance on how to construct their own answers. Elsewhere, faculty members are hired to draft the questions and answers.

With only three credit hours available, some hard choices have to be made. In my "meat-and-potatoes" family law class, I include marriage and its alternatives, entering marriage, informal families, grounds for divorce, property division, child support, and child custody. I do not cover child abuse and neglect because there is

an upper-level course devoted to the child and the state. Nor do I devote much time to mediation because students have whole courses devoted to mediation available to them. Of course, some of the topics I emphasize can be, and often are, left out so that other topics can be covered.

Even though I "reverse-engineered" from past bar questions in deciding on the guts of my family law survey, no thoughtful course could simply follow the topics most frequently tested on state bar exams. For example, I always address incest restrictions when discussing who can marry, but have never seen that tested anywhere. As I explain later in Part IV, a discussion of incest serves as a powerful, but nonthreatening, introduction to the state's claimed purposes in regulating entrance into marriage.

An emphasis on what the law is should not crowd out a full-throated critique of why a particular approach gets it wrong. However, the emphasis on legal critique should be surgically separated and clearly demarked from what the black-letter law actually is. In many instances, that means that you, as the teacher, will explain why one approach is clearly better than competing approaches.

With so much variation among the states, the temptation might be to spend more time talking about what the law should be rather than what it is in any particular jurisdiction or set of jurisdictions. For me, this is a missed opportunity to prepare students for the next step on their path to becoming practicing lawyers.

In short, my bottom line on course coverage is this: Select a handful of jurisdictions to illustrate what the law seeks to accomplish (e.g., promoting marriage, or not; protecting dependents from becoming wards of the state; channeling sexuality and procreation into relationships sanctioned by the state; etc.), how it gets to that result, and where and why it falls short. This might involve contrasting majority and minority approaches, all the while conscious of the fact that your students will be sitting for a bar exam where those approaches may well be taken—and tested.

In my class, I address these topics in the following order:

- Marriage and Its Alternatives
- Informal Families
- Entering Marriage
- Grounds for Divorce
- Alimony

- Property Division
- Child Support

This order makes sense to me because it permits us, as a class, to start off asking who counts as a family and why any collection of individuals should have obligations and duties to one another. This set of material surfaces the question of whether the state should continue to give significant support to married couples to the exclusion of other relationships, and asks whether the same rights and obligations should apply *inter se* (between the individuals) as opposed to against the state. As I discuss in Part IV, we synthesize from the key cases a number of characteristics that we might use to define the family (e.g., emotional relationship or financial interdependence), and then apply those characteristics to a group that most would not consider a family, especially the state: the characters from *Scooby-Doo*.

This is the part of the course that notes that marriage supplies off-the-rack rules for the duties and obligations between spouses, unless the couple departs from those duties with an enforceable premarital or marital agreement. This section explores why the law places so many procedural and substantive protections around premarital and marital agreements, and describes those protections.

From there, the course turns to informal families, and doctrines developed to provide some remedies to cohabitants. This section includes a discussion of contract remedies, equitable remedies, remedies that approximate the status-like treatment that marriage receives (e.g., implied contract), and then newer statuses like domestic partnerships or civil unions. In this part of the course, we explore why the state created a marriage alternative, with special attention to the requirement in many state domestic partnership laws that the partners be of the same sex. This is clearly a marriage substitute. We also note that laws establishing same-sex partnerships are often repealed when the state enacts same-sex marriage. Here, I find that state maps maintained by the Human Rights Campaign and the National Gay and Lesbian Task Force are especially useful (for more about this, see the section "What Should I Read to Get Ready?" later in this book).

At week four, the course then takes a sharp tack in the direction of marriage and divorce. We spend several classes talking about impediments to marriage, such as restrictions on age for marrying, marriages between closely related adults, same-sex marriage, and polygamy. As explained

later, I deliberately discuss cousin marriage before seguing to same-sex marriage, as the latter generates a lot of emotion. I am fond of using the Woody Allen–Mia Farrow–Soon-Yi Allen love triangle to note when marriage restrictions apply in nonmarital families, and when they do not. This segment of the course also contrasts statutory marriage and common law marriage and asks whether common law marriage can serve any useful purpose today as a remedy for cohabitants. We note how common law marriage is different from domestic partnership or other statuses.

For this early part of the course, I draw heavily on cases and law review excerpts, both of which appear in abundance in most casebooks. Even though I find excerpted law review readings thought-provoking, my students seem to have little patience for multiple excerpts. On some subjects, like marriage restrictions, I now supplement the casebook offerings with assigned readings from more "hip" sources like *Slate,* where many of the same points are made.

Before diving into divorce, we briefly talk about annulment, revisiting our discussion in the first two days of class (for more about this, see the section "First Day (or Two) of Class: Britney Spears" later in this book). We read a specific state annulment statute and work through the differences between void and voidable marriages.

At roughly week five, we then move to divorce, money, and children, which will consume the remainder of the course. We begin with the shift from fault-only divorce to no-fault grounds. Most casebooks have notes or excerpted readings on the transition, explaining that, before 1969, couples who could not divorce in the absence of fault sometimes colluded to deceive the court. Many of the notes and readings then contrast the scant showing couples need to make to exit a marriage today. We ask what repercussions this might have, especially for children or the custodial parent's standard of living. To push on the general sentiment that the reason for the divorce should not matter to the financial divisions, we discuss how the recent experience of Crystal Harris precipitated new legislation in California (for more about this, see the section "Possible Exercises" later in this book).

This can be a useful juncture to note, and critique, some modern attempts by states to encourage married couples to stay together "for the sake of the children," such as covenant marriage. It can also be a good place to talk about bargaining at divorce and how ease of exit can affect what bargains people are likely to strike. For this point,

I direct students to the *New York Times'* Room for Debate[5] about New York's ultimately successful repeal of the requirement for a no-fault divorce that both parties agree to financial and custody terms. The opinion pieces preceded New York's embrace of unilateral no-fault divorce. In the opinion pieces, the president of the National Organization for Women of New York State argued that requiring both parties to agree to a no-fault divorce gave women, often the weaker earning spouse, a stronger bargaining position in the divorce.[6]

When we get to alimony, I like to begin with the Uniform Marriage and Divorce Act (UMDA) model provision, which makes need a threshold to awarding alimony, along with inability to satisfy one's needs from one's own labor or from the property division itself.[7] We then read a pair of cases in which the weaker earning spouse receives very little support, and one in which she receives a fairly generous award. We use these cases to discuss the law's strong preference for a clean break, and the policy arguments in favor of, and against, dividing the stronger earning party's future earnings.

This is one of several places where I emphasize lessons from practice. One way to understand the disparate outcome of the paired cases is to look at how well the weaker earning party made the case for support when filing financial statements with the court. The conventional wisdom about financial statements is to be exhaustive, but there is a risk in being overly aggressive. I share one anecdote from a family law hearing in which a divorcing couple has three children who live with the mother during the pendency of the divorce. The father listed more in food and entertainment costs than the wife listed for her household of four. That did not sit well with the judge, and in effect underlined the father's ample resources, out of which he could pay support. This is a nice juncture for emphasizing other practice points as well: that alimony *pendent lite* often pays the attorney's bills, and could weakly influence the final award.

As a way to spark discussion, as well as fostering close reading of a statute, I like to examine recently enacted laws reforming alimony. For example, effective March 1, 2012, Massachusetts law permits a

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5 See http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce/ (June 15, 2010).

6 See Marcia Pappas, *Reject Divorce on Demand*, NYTimes.com, http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce/#marcia (June 15, 2010).

7 Uniform Marriage And Divorce Act § 308.

court to "order alimony for an indefinite length of time for marriages . . . [only for] longer than 20 years." Shorter marriages can receive only time-limited awards. For marriages that lasted less than 5 years, alimony cannot extend longer than half of the total time married. In 5- to 10-year marriages, alimony cannot be ordered for a duration longer than 60% of the months married; for 10- to 15-year marriages, no longer than 70% of the months married; and for 15- to 20-year marriages, no more than 80%. *Id.* The court can deviate from the defined time limits "upon written finding by the court."[8] The court can also award transitional alimony for up to 3 years from the date of the parties' divorce but may not "modify or extend transitional alimony or replace transitional alimony with another form of alimony."[9]

After discussing traditional and time-limited forms of alimony, we move to reimbursement and rehabilitative alimony, which can look like a final property award if paid in a lump sum. This discussion provides a nice segue to the topic of equitable distribution. One foundational point to make early on is that alimony awards may be modifiable, but property settlements are final and may not be modified or reopened (absent fraud). This is another juncture at which we discuss practical considerations, such as who benefits if a financial payout is in the form of alimony or a property settlement, and how to preclude modification of alimony if the parties intend that result.

Because so many of our intuitions about fairness between the parties come down to contributions each made to the marriage—or to each other's careers—I push on those intuitions with handouts that project each party's contributions based on the financial snapshot given by the court. See, for example, the discussion of *Mahoney* and *O'Brien* in Part IV.

When discussing equitable distribution of property, I also make explicit the financial constraints that largely bind the court's hands in reaching a different result. For a good example of this, see the discussion of the *Geldmeier* case in Part IV. In this section of the course, I use handouts more heavily than anywhere else because many students have little familiarity with complicated financial matters.

In discussing child support, I use the child support guidelines of a specific state and then rely heavily on problems and an oral argument exercise, which is described in great detail in Part IV.

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8 *See* Mass. Gen. Laws Ann. ch. 208, § 49 (West 2012).

9 Mass. Gen. Law Ann. ch. 208 § 52 (West 2012).

We spend the last week of the class on custody, discussing the classic best interest of the child case, *Painter v. Bannister*. After developing a critique of the open-ended best interest standard, we ask whether the grandparents should be accorded as much weight as they receive in this contest with Mark's natural father. We distinguish their custodial claim against Mark's father, who left Mark with the grandparents for several years, from claims by grandparents for visitation against a fit parent in *Troxel*.[10] We then contrast the best interest standard with later attempts to constrain judicial discretion, like the primary caretaker standard. Among other things, we ask in part whether this test will be just as gendered as a straight-up maternal preference.

This is where I talk about the fathers' rights movement, and ask whether standards that emphasize past caretaking lock parents into roles they intended, and that made sense, during the intact relationship, but that might not be what they intend in day-to-day caretaking after divorce. For a good summary of this argument, see Patrick Parkinson, *The ALI's Past Child-Caretaking Standard in Comparative Perspective*, in Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution.[11]

Many casebooks contain lengthy excerpts from the child psychologist in the *Painter* case, permitting a discussion of whether impermissible values come in through this backdoor, as opposed to directly in the form of the judge's values. This is an ideal juncture for discussing the rise of nonlegally trained experts in the divorce process, whether one sees them as a positive development or a negative one. These experts might not be legally trained, like the child psychologist or social worker, or they might be an attorney acting as the guardian ad litem or (more rarely) an attorney for the child. More recently, parent coordinators also might be assigned by the court in cases of domestic violence where decision makers would not reasonably expect the adults to coparent together. This can be an opportunity to talk with students about casting their job search net widely to consider positions in court systems that provide these services to families.

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10 Troxel v. Granville, 530 U.S. 57 (2000).

11 Robin Fretwell Wilson, ed., Cambridge University Press (2006), available at http://www.amazon.com/Reconceiving-Family-Institutes-Principles-Dissolution/dp/0521861195.

One could also use this opportunity to highlight how adversarial and draining divorce practice can be. This can present a natural opportunity to describe the experience of many family law practitioners, who say that the emotional component of family law is different than in other areas of practice. This stems not only from the 2 a.m. phone calls from frantic parents, but because the stakes are so great, as divorce often involves children and the individuals' most personal hopes and aspirations for their lives. For those students considering family law as a field, I emphasize how loving the subject matter should not be the sole guide; they also need to appreciate the nature and pace of the practice (adversarial, emotional, steady vs. spurts of energy, etc.).

One might prompt this discussion about practicing law by including readings on collaborative lawyering, which would permit the class to explore whether this development will reduce the emotional conflict between the parties, or the emotional and workload toll on the lawyer. One could also discuss professional ethics obligations here.

B. CASEBOOK, SUPPLEMENTS, AND STUDY AIDS

Once you have decided what material to cover, the next decision is finding a textbook. There are a number of quality textbooks available for the family law survey course. One consideration will be whether you want to include an experiential focus, or a more theoretical one, as discussed earlier. A quick review of texts will show real variability in terms of focus on problems, ethical considerations, skills acquisition, and the amount of text devoted to an understanding informed by history or the social sciences.

Another consideration might be whether you, or a colleague, will teach a more specialized class later. Ideally, if the same text can be used for both classes, it will save students money and might save you some work. This worked for my survey class and my "advanced family law" class, a practicum[12] course that had a deliberately experiential focus. I do not think using a single book would work well for, say, a family law survey and a later course on adoption, child abuse and neglect, or domestic violence. Most family law casebooks include at most a

[12] For more on practicum courses, see the Washington and Lee University School of Law Web page.

chapter on these more specialized subjects, but a crop of new books focused just on domestic violence, children and the state, and adoption now exists and probably makes more sense for those later courses. That might not be true of every topic, though, so thinking ahead is wise.

It is valuable to look at the teacher's manuals for books you are considering because the manuals offer insights to both new and seasoned teachers for how to teach the materials collected. The teacher's manual can be especially useful for helping students to place individual cases or approaches into a larger thread across the course.

Because so much of family law is governed by statute or regulation (child support calculations, factors for equitable distribution, etc.), another question might be how to integrate statutory or regulatory materials. Some books have more sample statutes than others. Most books include the uniform acts like the UMDA, which is excerpted in virtually every textbook, although the UMDA has been adopted in only a handful of jurisdictions.[13] Other uniform acts have been so widely adopted that teaching from them makes a tremendous amount of sense, such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[14]

A number of statutory supplements provide excerpts of national uniform laws and federal and international materials, such as the Hague Convention. Because family law generally remains the province of the states, I prefer to hand out selected state statutes to put flesh on what equitable distribution looks like in a particular jurisdiction, if the text does not already excerpt a state law.

I do think students naturally wonder what the law is in the state in which they grew up, or where they now live or expect to sit for the bar exam—specifically, whether that law follows a given approach or uniform act. Some books have more exhaustive notes than others, which can fill in these question marks. Other books give cites for or hyperlinks to 50 State Surveys on Westlaw so that students—or you as the teacher—can easily ascertain the law of a given jurisdiction. Additionally, some casebooks offer a table of Web sites, or other

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13 See Acts: Marriage and Divorce Act, Model, Uniform Law Commission (2014) available at http://www.uniformlaws.org/Act.aspx?title=Marriage%20and%20Divorce%20Act,%20Model (reporting that six jurisdictions have enacted the UMDA).

14 See Uniform Child Custody Jurisdiction and Enforcement Act, Uniform Law Commission (2014) available at http://uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (reporting all jurisdictions have enacted the UCCJEA except Puerto Rico).

collection of Web sites, they might guide you to places that can help you answer specific questions.

I have found that casebooks that are too dense in the notes—or that pose too many open-ended problems with permutations on the principle developed in the main reading—leave students wondering what, if anything, they should take away. In some sense, this is inherent in a body of material that can vary so much from place to place, but some casebooks seem to foster that feeling more than others.

Although I think it is rare for a family law survey to be a writing course rather than an exam course, I do understand that some schools offer family law as a standard three-hour course, with optional writing credit. If I were offering such a class, I might lean more heavily toward a casebook that emphasizes historical and social science materials explaining why the law developed as it did and critiquing that development. Such a broader casebook might give students more context for, and spark an interest in, a particular paper topic.

C. WHAT SHOULD I READ TO GET READY?

With family law being a quickly changing field, news and media deserves special attention. I personally work with my law librarian at the beginning of the semester to set up Westlaw WestClips that track topics that I teach. Even if you do not have access to a law librarian, you can set up your own WestClips. As an alternative to WestClips, I also find Google News alerts on given topics are useful. Whatever method you choose, you need to be diligent in keeping up with current family law trends. The following outlines what I do.

First, I consult BNA's *Family Law Reporter,* which encapsulates recent family law decisions, as well as some statutory developments. It also periodically provides more in-depth analysis of trends. A good way to stay abreast of changes is to read the *Review of the Year in Family Law* for the last year, published annually in the Family Law Quarterly, by Linda Elrod and Robert Spector.[15]

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[15] For example, *A Review of the Year in Family Law 2011-2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, available at http://washburnlaw.edu/profiles/faculty/activity/_fulltext/elrod-linda-2013-46familylawquarterly471.pdf.

Although annual reviews are essential for the big picture, family law changes almost as quickly and often as the weather on some issues, like same-sex marriage. To stay current on day-to-day changes, my WestClips track same-sex marriage, custody, alimony, divorce, child abuse, and a few other topics.

You should also develop a list of trusted Web sites that you consult before starting certain sections of the course. Many take an advocacy position on the subject, but update quickly and fairly present the state of the law. On same-sex marriage, for example, Web sites I trust include the state maps maintained by the Human Rights Campaign[16] and the National Gay and Lesbian Task Force.[17] Also, some "pro-marriage" (some would see these as socially conservative) Web sites on family law flag interesting developments before I certainly would have learned of them otherwise, and might be worth consulting from time to time.[18] Although I freely consult these to get up to speed, I am loathe to require students to check them because some might see this as an endorsement of a particular view point. For reasons I explain later, I assiduously avoid staking out any particular position on same-sex marriage, or other hot-button topics.

Other valuable reading includes good academic books on how families, and family law, have changed, like From Partners to Parents: The Second Revolution in Family Law[19] by June Carbone, or Red Families v. Blue Families: Legal Polarization and the Creation of Culture by Naomi Cahn and June Carbone.[20] Principles of the Law of Family Dissolution, by the American Law Institute (ALI), provides excellent research notes on various topics,[21] and can be a good source as well, even though its recommendations have not seen the uptake by courts and legislatures that the Reporters had hoped for.[22] You might also consult my

16 http://www.hrc.org/resources/entry/maps-of-state-laws-policies

17 http://www.thetaskforce.org/

18 See, e.g., Institute of American Values (2014), available at http://www.americanvalues.org/index.php; and Institute for Family Studies, available at http://family-studies.org.

19 Columbia University Press (2000), available at http://www.amazon.com/From-Partners-Parents-June-Carbone/dp/0231111177.

20 Oxford University Press (2011), available at http://www.amazon.com/Red-Families-v-Blue-Polarization/dp/0199836817.

21 American Law Institute (2002), available at https://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=97.

22 See, e.g., Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 Hofstra Law Review 1103

collection of reactions to the ALI Principles as a good primer across the field, Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution.[23]

Of course, no matter how much you read and use alerts to stay up to date with issues in the public spotlight, your students will sometimes learn information before you. As I discuss later, student involvement is a terrific asset for staying abreast of family law change.

IV. In the Classroom

A. FIRST DAY (OR TWO) OF CLASS: BRITNEY SPEARS

On the first day of class, I ask students to read a packet of information on Britney Spears. The packet[24] includes a number of legal documents and news stories, including the following:

- Britney Spears's Complaint for Annulment from her January 3, 2004 Las Vegas marriage to Jason Alexander
- Britney Spears's Petition for Divorce from her October 6, 2004 marriage to Kevin Federline
- Britney Spears's Temporary Custody Order
- "Split decision, Tom Cruise's divorce papers"
- Britney Spears's Agreement with Kevin Federline regarding their "faux wedding" (they later solemnized their marriage)
- "Does Britney Spears have a pre-nup?"
- "Britney Spears marriage annulled"
- "Britney being investigated for child abuse?"

Although she is no longer the most current celebrity (Miley Cyrus would be tempting, but she hasn't married), I talk about Britney Spears on the first few days of class to draw students in early and

(2010) (empirical analysis of custody agreements); *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote? 50th Anniversary Issue*, 42 Family Law Quarterly 573 (Fall 2008) (with Michael Clisham) (empirical analysis of all recommendations).

[23] Robin Fretwell Wilson, ed., Cambridge University Press (2006), available at http://www.amazon.com/Reconceiving-Family-Institutes-Principles-Dissolution/dp/0521861195.

[24] For details on the packet contents, see my Web page, available at http://www.law.illinois.edu/faculty/profile/robinfretwellwilson.

get them invested in the material. Many students in my class are contemporaries of Britney's and so have insights and knowledge of their own to add. This has been a tried and true method, largely because there is a little voyeur in all of us. Britney is so dysfunctional that one could almost teach the whole course based on her alone.

I use the Britney Spears packet to preview a medley of topics that the course will cover, as well as to introduce students to how certain legal doctrines (e.g., grounds for divorce) are operationalized in practice. For example, we discuss why Britney's divorce filing lists the no-fault grounds of "irreconcilable differences" (Box 5(a)(1)) rather than "incurable insanity," a vestige of a prior era in which divorce could be secured only on "fault" grounds. We then contrast Britney's divorce filing, which seeks to have the couple's property rights determined (see Box 7(h)), with Britney's Complaint for Annulment in the same year, in which paragraph 4 avers that there is no community property. We spend some time discussing why the state wants to encourage early exit from frivolous unions before any real damage is done (joint debts, joint property, but even more so, the possibility of children—see paragraph 3 of the Complaint for Annulment) when essentially the state has very little interest in preserving the marriage or regulating exit from it. This also tees up a discussion of the nature of marriage—whether it is a covenant or a contract. The representations in paragraph 8 of the Complaint for Annulment highlight the contractual understanding of marriage,[25] but the need to solemnize a marriage (mentioned in the Faux Wedding Agreement at paragraph 2) suggests that marriage is something more than just a contract.

The rocky ending of Britney's marriage to "K-Fed" allows us to talk about child custody and the awesome power of the state to dictate terms and conditions of one's contact with one's own children.

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[25] There, Britney attests: "That there are grounds for this Court to grant an annulment pursuant to NRS 125.359 because Plaintiff Spears lacked understanding of her actions to the extent that she was incapable of agreeing to the marriage because before entering into marriage the Plaintiff and Defendant did not know each other's likes and dislikes, each other's desires to have or not have children, and each other's desires as to State of residency. Upon learning of each other's desires, they are so incompatible that there was a want of understanding of each other's actions in entering into this marriage. Additionally pursuant to NRS 125.350 there was no meeting of the minds in entering into this marriage contract and in a court of equity there is cause for declaring the contract void" (emphasis added).

This is true not only for deciding who receives custody (Boxes 7(a) and (b) in the Petition for Divorce), but also in requiring supervised visitation with Sean and Jayden, as one of the news articles notes. The request for legal and physical custody sets the stage for the two aspects of custody and for inquiring whether shared decision making is easier to achieve for ordinary versus super-wealthy people (e.g., shared decision making has its costs but is more feasible than shared time with each parent, given school schedules and other practical constraints).

Britney's Faux Wedding Agreement permits us to discuss why she might have wanted a separate prenuptial agreement, especially given her considerable wealth and poor relationship track record (the annulment occurred only months before). This permits me to plant the notion in students' minds that the rules for marriage are supplied by the background law unless the parties depart from them with "private ordering." It also permits me to talk about the many ways in which the state polices prenuptial agreements for procedural and substantive fairness—including the fact that California, after the Barry Bonds case[26], now requires for enforcement a seven-day "cooling-off" period between presentation of the agreement and signing.[27] The Faux Wedding Agreement further permits me to flag more arcane doctrines we will cover later. We note how the state imposes certain statutory prerequisites to marriage (like solemnization), but also how the state protects people who wrongly, but in good faith, believe themselves to be married, the putative spouse doctrine discussed in paragraph 4. It also serves to highlight how nonmarried partners generally are left with few remedies after breaking up precisely because they fall outside the marriage box.

Contrasting the Petition for Divorce (Box 7(f) seeking spousal support is left blank) with the Complaint for Annulment (in which Britney says in paragraph 6 that neither party should be awarded spousal support) nicely frames a discussion of the nature of alimony. We ask what the rationale is for this kind of wealth transfer between the parties after the relationship ends and why might it be due after a divorce but not after an annulment.

Finally, the packet can be used to spotlight some practical advice. I use the Petition for Divorce (Box 4 on page 5) to flag the possibility of dual proceedings in different jurisdictions regarding custody and

[26] See In re Marriage of Bonds, 2001 WL 1191386 (Cal. Ct. App. Oct. 9, 2001).
[27] See Cal. Fam. Code § 1516.

how uniform acts and state laws resolve which jurisdiction's order will govern. We talk about the standard family law restraining orders to discuss the risks facing the parties as they unwind their financial affairs and how easy it is for one party to take the other down financially absent those restraining orders.

I contrast the Britney–K-Fed experience with the Nicole Kidman–Tom Cruise divorce, which was filed on the cusp of their tenth anniversary. We explore what might have created the urgency to file before the ten-year mark, noting that California law imposes different standards on dissolution of "long-term" marriages than it does on shorter ones.[28]

I like this discussion not only because it tours the waterfront of what we will cover over the semester, but because it helps students connect legal doctrines to what happens in actual filings. It also shows students real documents, something they don't often see in law school, and grounds the discussion in the kind of advice practitioners might give their clients in specific circumstances.

B. FOSTERING CLASSROOM DISCUSSION

I would hate to teach family law solely as a lecture. Every class is a conversation tackling thorny questions, made richer by insights and reactions that I do not always see coming. As other primers on teaching note, there are better and worse ways to spark such discussion. When I was a student, I liked being called on by class seating assignment or by row because I could predict when I would be the designated "volunteer." As a teacher, I find this method one of the surest ways to stifle active discussion with the rest of the class, who might be afraid to jump ahead of the "volunteer," lest they look like "gunners." True, the designated "volunteers" are in fact much more prepared, but the conversation tends to be one-on-one rather than a dialogue with the class as a whole.

I use a loose system of going to actual volunteers first, but will randomly cold-call if necessary. I encourage participation with both a carrot and a stick. As to the carrot, I indicate that more-than-usual class participation could help a student's grade. Specifically, in my

[28] See Cal. Fam. Code § 4336(a) (providing that in longer duration marriages, the court retains jurisdiction indefinitely, meaning that spousal support orders could be modified).

syllabus for both my large survey class and my smaller Advanced Family Law class, I include the following:

> *Grading*. . . . Please note that I reserve the right to adjust grades up or down ½ letter grade (e.g., from A– to A) to reflect class participation and expect to do this for extraordinary class participation (see below).
>
> *Class Participation*. I encourage class participation and will call on students randomly. I define class participation very broadly to include being prepared *when called upon* or asking questions, attending any conferences with me that you arrange, discussing family law during office hours, and contributing articles of interest (and cartoons) regarding family law in the U.S. or Virginia, including celebrity news, especially copies of divorce papers or stories about their divorce proceedings.

Some schools might not permit grade changes for participation. Accordingly, any time I start as a new teacher at a new school, I always have the academic dean look over my course policies to ensure everything fits with the law school's culture (e.g., grade adjustment for class participation or including a graded exercise in addition to the exam). This has the added benefit of creating "buy-in" if a problem arises.

For all kinds of good reasons, students sometimes just cannot be prepared for each class. I find this especially true if they are lucky enough to be doing "call-backs" at firms for prospective jobs. So I permit students to pass, so long as they give me a note in advance. My class policies say:

> If you are not prepared for a particular class, you may, *before class begins*, give me a note with your name on it asking not to be called on that day. You may exercise this option no more than twice a semester.

As to the stick, my class policies indicate that:

> I reserve the right to ask any unprepared student who has not exercised this option to leave the classroom.

I am not sure I have ever exercised this right, but making students conscious of it seems to have some utility.

Awarding credit for class participation is not without its costs. It invites students to be obsequious. Credit for participation also invites

students to send me things "just because," as opposed to material that really dovetails with the reading for that day or coming classes. It also invites them to spend time talking to me in my office—not to clarify material I managed to confuse, but solely to be racking up kudos for class participation. This is one reason I invite contributions by e-mail—it permits me to manage the interpersonal time in a way that does not encroach as much on my ongoing scholarship. Thus, I tell my class that I only make the ½ letter grade adjustment for a small handful of students with exceptional participation. Typically this means that I would only adjust the grade of one or two students out of a class of 40. Even with these caveats, I find the incentive typically sparks a richer class discussion.

C. ILLUSTRATIONS

I think it is a no-brainer to use problems to illustrate various legal rules during the class discussion. Some topics are so arcane that students need to work through a problem to see the import of a particular legal rule. I would place women's ability to hold and manage property before and after the MWPA in this category. For example, I ask students to work through a problem in which Wanda marries Harry, bringing into the marriage $50,000 of personal property (like stocks and furniture) and $100,000 of real property. Harry owns 100 acres of real property at the beginning of the marriage and earns $500,000 during the marriage by labor, which he uses to buy the house the couple lives in. (As an aside, I suggest for simplicity's sake, that you try to make the husband an H name [Harry] and the wife a W name [Wanda] in exercises so it's easy for students to abbreviate).

Ignoring trust devices to preclude Harry's control of Wanda's property, we then construct a table showing what rights H has in W's property pre-MWPA (he can sell, alienate, manage, take the rents and profits, etc., and H's creditors can reach H's interest in W's land, including the rents and profits, and all personal property of W's, like her stock) and what protections she receives (primarily her dower interest in all the lands of which H was seized during the marriage, which gives W a life estate in one third of all H's real property). W's dower precludes H from selling all his property out from underneath her or having creditors grab it all, which would have left her completely destitute.

To prevent creditors from reaching the wealth W brought into a marriage is one reason that some families, pre-MWPA, placed placed property of the wife (usually their daughter) in trust for her benefit. The trustee often was W's father or brother.

Post-MWPA, the property W brings into the marriage, both personal and real property, remains hers—she can manage it, control it, alienate it, and capture the gains from it. H's creditors now cannot reach W's property. However, W loses the important protections flowing from her dower rights in H's property, so a creditor now could reach all of H's real property, leaving W destitute. More important, W receives no rights in H's property acquired by labor during the marriage (what we would call today marital property). Absent family wealth given to W upon marriage or later by gift or inheritance, women who work in the home rather than the workforce miss out on the real source of wealth for many middle- and lower-income families—the other spouse's earnings.

Working through these results as a group is important so that students see what changes the law made in ownership and control, and also to realize that the MWPA did little to give stay-at-home spouses a "fair share" of the earnings during the marriage.

I am especially fond of illustrations that students can easily relate to. As noted earlier, the course starts with the classic who-is-a-family cases: *City of Ladue v. Horn*,[29] *Braschi v. Stahl Assocs. Co.*,[30] and *Moore v. City of Cleveland*.[31] We discuss how the family can act as a buffer between individuals and the state and how far this privacy rationale can take us.

At this early stage, I introduce the idea that there are *inter se* claims (those claims between two parties within a family) versus third-party claims (e.g., a family against a landlord). I suggest that society might more readily consider a group of individuals to be a family if the claims are against a third party. In many of the third-party cases, equity runs toward the individual, like the surviving party of the unmarried same-sex couple in *Braschi*.

We distill from these cases factors, like those highlighted in *Braschi*,[32] that might be important for qualifying as a family, such as

[29] 720 S.W.2d 745 (1986).

[30] 74 NY2d 201 (1989).

[31] 431 U.S. 494 (1977).

[32] The court identifies "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have con-

financial interdependence, emotional support, co-residence, a legal tie (adoption or marriage), or a blood relationship (as in *Moore*). We then talk about other collections of individuals at the margins, such as a group home for boys or a convent for nuns. We ask whether and why courts consider such groups to qualify as a family under functional definitions.

We then turn to the concrete example of *Scooby-Doo*. I flash a photo of the Mystery Machine van and ask someone to summarize the relationship between Scooby, Shaggy, Fred, Velma, and Daphne.[33] They share some features with groups that the courts have variously considered a family, but not necessarily all (e.g., were any of the relationships conjugal?). Most students conclude that the Scooby characters do not qualify as a family, but this illustration pushes them to explain why.

In some years, I also discuss the proposal by the Law Commission of Canada entitled *Beyond Conjugality*.[34] There, the Commission recommends that two sisters who live together should count as a family. The Commission emphasized that the state should not limit a family to those having sex (presumably) within a marriage.

A second illustration comes when discussing who can marry for purposes of the state's ban on marriages between closely related adults. As I explain later, I discuss marriage between cousins before getting to same-sex marriage. This allows the class to examine state purposes in restricting entry to marriage in a less controversial manner than with the more loaded topic of same-sex marriage. In discussing the marriage ban, we read *Israel v. Allen*.[35] This allows me to ask questions about whether marriage restrictions should bar marriages between a brother and sister if one or both is adopted. We note how most marriage restrictions expressly ban marriages between adults related by "whole blood" or "half-blood." *Israel* also tees up this question: Does it make a difference if the legal relationship between the siblings arises only after the two are adults?

To illustrate the limits of the marriage ban when it comes to nonmarital, informal families, I use Woody Allen's relationship with

ducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services."

33 "Scooby Doo, Where Are You!" Wikipedia.org, available at http://en.wikipedia.org/wiki/Scooby-Doo.

34 Published in 2001, this document is now available at http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf.

35 577 2d. 762 (1978).

Mia Farrow to flesh out what relationships the incest regulations encompass. Woody Allen's and Mia Farrow's dating and relationship history is nothing if not interesting.[36] In 1980, Woody Allen began a 12-year relationship with Mia Farrow. They never married and resided in separate homes across Central Park from one another. Although never coresidents, the couple adopted two children together, Dylan Farrow (who now lives under a different name to maintain her anonymity), and Moses Farrow. Woody and Mia also have a natural child together, Satchel, now known as Ronan (although Mia said in a 2013 *Vanity Fair* interview that Satchel's father may be Frank Sinatra). At the time they began their relationship, Farrow also had an adopted daughter from a previous marriage named Soon-Yi Farrow Previn. Thus, their family tree looked like Figure 2.

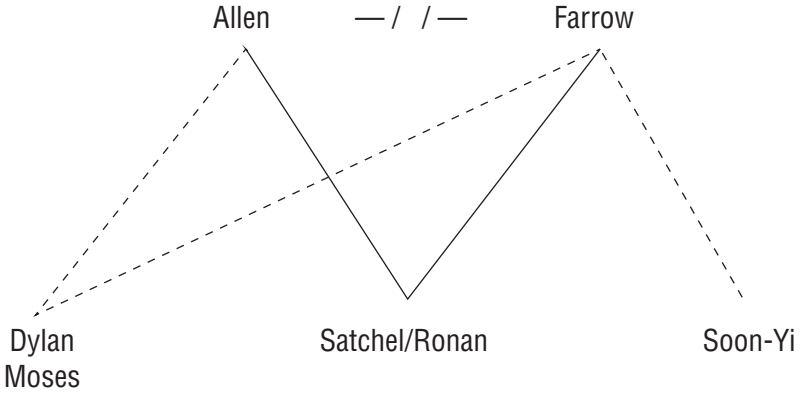

Figure 2. The Farrow and Allen family tree. *Note:* the dotted line denotes a legal relationship (marriage, adoption); the solid line denotes a blood relationship.

In 1992, Allen and Farrow split. Following the breakup, Farrow reportedly discovered pornographic pictures of Soon-Yi that had been taken by Allen when Soon-Yi was roughly 20 years old. In 1997, Allen and Soon-Yi married.

Now, some would consider Mia and Woody to be a family based on the length of their romantic involvement or the emotional commitment they presumably made to one another. In Britain, for

[36] See Wikipedia, "Woody Allen, Personal Life."

example, the term LATs was developed to describe adults who "live apart together."[37]

Others would consider Mia, Woody, and all their children, including Soon-Yi, to be a family, if not based on the adults' relationship, then because Mia and Woody have children in common. The fact that the term *baby daddy* now is solidly entrenched in the American vernacular shows that ordinary people sense that having children together—whether married or not—creates a significant, and perhaps enduring, bridge between the adults.

Notwithstanding this intuition, the law generally has imposed a nonnegotiable obligation of support between an adult and any child that results from that adult's intimate relationship with another adult. But absent a marriage, a domestic partnership, or some other express contract between the two adults who create a child together, the law has turned a blind eye to the human repercussions for the two *adults*. They are treated as legal strangers.

In a forthcoming book entitled Pink and Blue Cement: The Parent-Partner Status, Professor Merle Weiner argues that the law should catch up to how real people often organize their intimate lives and childbearing. She proposes an entirely new framework for thinking about the relationship between two adults who are connected by a natural or adoptive child, our "pink and blue cement." Professor Weiner believes that an alternative status—which is triggered automatically on a child's birth or adoption and from which the parties cannot opt out—can alleviate the disproportionate cost to the parent who does most of the work of taking care of children. As Professor Weiner amply demonstrates, when one party provides the majority of child care—whether inside marriage or outside it—that party can be disadvantaged in all sorts of ways, but most frequently in the workplace by prioritizing the child's care over his or her own work or career. Under current law, if the caretaking party never marries the other parent, he or she often is not compensated for the very real costs of providing care (even if married, one might receive nothing close to the felt "losses" from caretaking).

The beauty of celebrity and popular news illustrations is that, without fail, students add new salacious details to the story from their "research." A student recently pointed out that in 2012, Satchel/

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[37] See, e.g., Constance Rosenblum, "Living Apart Together", New York Times, http://www.nytimes.com/2013/09/15/realestate/living-apart-together.html?_r=0.

Ronan apparently tweeted to the world, "Happy father's day, or as they call it in my family, happy brother-in-law's day."[38]

The Woody Allen–Mia Farrow–Soon-Yi Farrow-Previn story allows us to explore the scope of statutory "incest" restrictions. I assign the New York incest statutes (both the criminal ban and the marriage restriction).[39] We contrast the incest restrictions with New York's domestic violence statute, which encompasses violence against any member of the family or household.[40] Unlike the incest

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[38] See "Woody Allen," Wikipedia.org, available at http://en.wikipedia.org/wiki/Woody_Allen.

[39] Compare N.Y. Penal Law § 255.25 (McKinney) ("A person is guilty of incest in the third degree when he or she marries or engages in sexual intercourse, oral sexual conduct or anal sexual conduct with a person whom he or she knows to be related to him or her, whether through marriage or not, as an ancestor, descendant, brother or sister of either the whole or the half blood, uncle, aunt, nephew or niece. Incest in the third degree is a class E felony.") with N.Y. Dom. Rel. Law § 5 (McKinney) ("A marriage is incestuous and void whether the relatives are legitimate or illegitimate between either: 1. An ancestor and a descendant; 2. A brother and sister of either the whole or the half blood; 3. An uncle and niece or an aunt and nephew. If a marriage prohibited by the foregoing provisions of this section be solemnized it shall be void, and the parties thereto shall each be fined not less than fifty nor more than one hundred dollars and may, in the discretion of the court in addition to said fine, be imprisoned for a term not exceeding six months. Any person who shall knowingly and wilfully solemnize such marriage, or procure or aid in the solemnization of the same, shall be deemed guilty of a misdemeanor and shall be fined or imprisoned in like manner.").

[40] See N.Y. Soc. Serv. Law § 459-a (McKinney) ("Family or household members" mean the following individuals:

(a) persons related by consanguinity or affinity;
(b) persons legally married to one another;
(c) persons formerly married to one another regardless of whether they still reside in the same household;
(d) persons who have a child in common regardless of whether such persons are married or have lived together at any time;
(e) unrelated persons who are continually or at regular intervals living in the same household or who have in the past continually or at regular intervals lived in the same household;
(f) persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors that may be considered in determining whether a relationship is an "intimate relationship" include, but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an 'intimate relationship'; or

prohibition, these statutes protect any child that an adult lives with from overreaching and violence, rather than protecting only those children who have a legal or blood relationship to an adult. It also protects adults from violence by individuals with whom they share a child, whether or not they ever lived together, if they have had an "intimate relationship." Of course, Allen would fall outside the ambit of family under the coresidence test of § 459(e), as he and Mia maintained separate residences. Mia and Woody would constitute a family, however, by virtue of the three children that they have in common under § 459(d).

We explore some possible purposes behind the restriction on marriage between closely related adults. We first asked whether the restriction is designed to preclude sex between family members and then we ask how well a marriage restriction can serve that purpose today given the delinking of marriage and sex in our culture. Here, I usually show U.S. Census data on the number of nonmarital births, such as Figure 3.[41]

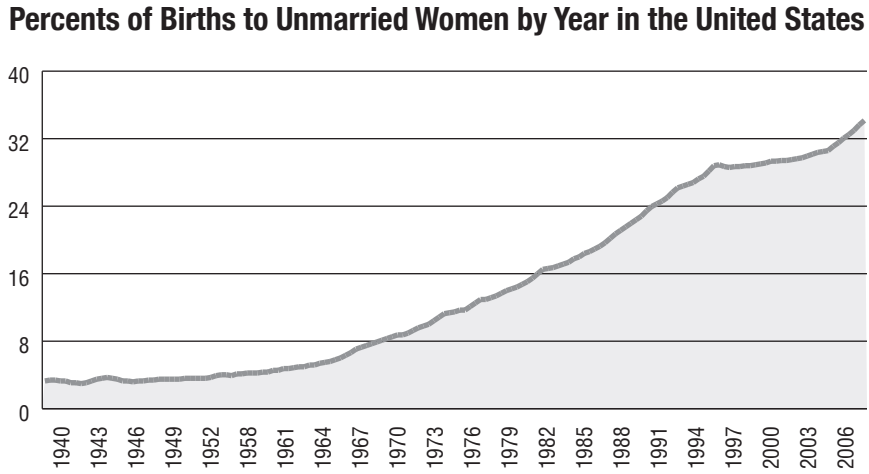

Figure 3. Percentage of nonmarital births in the United States.

I also assign social science readings from Margaret Mead or Lévi-Strauss about the incest taboo. We then explore whether the

(g) any other category of individuals deemed to be a victim of domestic violence as defined by the office of children and family services in regulation.").

[41] See Carmen Solomon-Fears, Nonmarital Childbearing: Trends, Reasons, and Public Policy *Interventions, CRS Report for Congress, Nov. 20, 2008, at CRS-21.*

marriage proscription is designed to take sexuality and sexual relationships off the table between adults and minor children, promoting greater closeness emotionally between child and adult. In essence, by bracketing sexuality, children can have a close relationship without questioning the meaning of a hug or other close physical contact. By contrast, others like Lévi-Strauss posit that the marriage restriction encourages families in agrarian societies to disperse their children widely, building alliances with other communities (think *Game of Thrones*).[42]

D. EXERCISES AND PROBLEMS

Unlike the simple illustrations we do together in class, exercises are more involved, complex problems that students must work through before class. Exercises are ideal for conveying ideas that are not intuitive. In one exercise that I have students do when we first discuss child support under an income shares model, I ask students to complete a child support calculation using a Web-based child support calculator. Virginia's child-support calculator[43] conveniently lists on the second page, next to each entry, those sections of the Code that make the question relevant—allowing students to connect the calculation to specific provisions of the Code.

For this exercise, we assume a couple, John and Marie, who have two children at the time of their break-up. John earns $75,000 annually, and Marie earns $25,000 (students have to do basic math to generate the monthly gross income); John pays the kids' health care, $100 per month, through his employer-sponsored plan; and the kids need after-school care for Marie to work, which costs $300 per month. This easy calculation works as shown in Figure 4.

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[42] If you are a fan of *Game of Thrones*, you could show a snippet of Episode 5 of the third season. There, Tywin Lannister tells Tyrion, his son, that he is to marry Sansa Stark of House Stark. Tywin then tells his daughter, Cersei, that she will marry Ser Loras Tyrell of the prominent House Tyrell. Both weddings are designed to create alliances between powerful families that otherwise would be hostile to one another. (Note that this segment does not have any inappropriate scenes.) See, e.g., http://www.youtube.com/watch?v=bVfClyxJOHA.

[43] http://www.courts.state.va.us/forms/district/dc637.pdf. An automated calculator is available at http://www.supportsolver.com/2004/dc637_04.htm.

CHILD SUPPORT GUIDELINES WORKSHEET Case No. .....
Commonwealth of Virginia Va. Code § 20-108.2

Marie v. John

DATE

		MOTHER	FATHER
1.	Monthly Gross Income (see instructions on reverse)	$ 2,083	$ 6,250
2.	Adjustments for spousal support payments (see instructions on reverse)	$	$
3.	Adjustments for support of child(ren) (see instructions on reverse)	$	$
4.	Deductions from Monthly Gross Income allowable by law (see instructions on reverse)	$	$
5.	a. Available monthly income b. Combined monthly available income (combine both available monthly income figures from line 5.a.)	$	$ $ 8,333
6.	Number of children in the present case for whom support is sought:		2
7.	a. Monthly basic child support obligation (from schedule — see instructions on reverse)	a. $ 1,450	
	b. Monthly amount allowable for health care coverage (see instructions on reverse)	b. $ 100	
	c. Monthly amount allowable for employment-related child care expenses (see instructions on reverse)	c. $ 300	
8.	Total monthly child support obligation (add lines 7.a., 7.b., and 7.c.)	$ 1,850	
		MOTHER	FATHER
9.	Percent obligation of each party (divide "available monthly income" on line 5.a. by line 5.b.)	25.00 %	75.00 %
10.	Monthly child support obligation of each party (multiply line 8 by line 9)	$ 463	$ 1,387
11.	Deduction by non-custodial parent for health care coverage when paid directly by non-custodial parent or non-custodial parent's spouse (from line 7.b.)	$	$ 100
		MOTHER	FATHER
12.	Adjustments (if any) to Child Support Guidelines Calculation (see instructions on reverse)		
	a. Credit for benefits received by or for the child derived from the parent's entitlement to disability insurance benefits to the extent that such derivative benefits are included in a parent's gross income	-$ 0	-$ 0
	b.	$	$
	c.	$	$
13.	Each party's adjusted share	$ 463	$ 1,287

Figure 4. Child support guidelines worksheet.

I use the calculation to emphasize that if Marie receives custody, she will not receive the full child support amount of $1,850 per month, but only the fraction owed by John (75%). In other words, Marie is chipping in her share of $463 to herself (or absorbing her payment of $463, if that is easier to grasp). We also use the calculation to see the following:

1. John gets a credit for monies deducted from his check for the kids' health care costs, in the amount of $100, which affects the amount of the check he writes to Marie, assuming Marie receives custody.

2. John and Marie share pro rata the costs of the kids' day care, which permits Marie to work, because it is "above the line," before the fractional split is made.

Even more complex exercises can be used to help students focus on the intricacies of a statute, where, in the absence of a hypothetical, I can imagine students' eyes just glaze over because of the detail. Think about the pages of rules governing how much child support to award in specific instances (not only the gross income chart, but how to treat self-employed individuals, reasonable business expenses, prior child support payments, disability payments from the federal government, imputed income, and other situations) or the dozens of factors that influence an alimony or property award in some jurisdictions.

To focus students' minds, I give students an exercise on difficult issues in child support with the following facts:

> Facts:
>
> Harvey and Wendy Anderson were married in Alleghany County, Virginia, on May 8, 2000. During their marriage they had two children: Alice and Andy. Harvey and Wendy divorced in August 2006 and Wendy received sole custody. By stipulated order dated September 7, 2006, Harvey was ordered to provide child support in accordance with the guidelines. Harvey earns $5,405 per month as a contractor and Wendy earns $1,505 as a secretary. Following Va. Code § 20-108.2, calculate Harvey's monthly child support payments. Assume Wendy's neighbor provides day care at the cost of $100/week. Also assume that Harvey covers the children's health care cost ($100/month for both children).
>
> Now assume Harvey moves in with his girlfriend, Sally, and they have twins: Betty and Brad. Sally does not work. Harvey now has four children, two with Wendy and two with Sally, but does not earn nearly enough to support them all. Monthly cost for the twins' diapers, formula, and wipes alone is $230. Harvey believes his child support payments for Alice and Andy should be lowered because he

now has two additional children to support on his sole salary. He argues this constitutes a hardship.

Meanwhile, Wendy quits her job. Wendy argues that Harvey knew about the high cost of parenting *before* having more kids. As such, she believes this does not constitute a hardship. She also feels like her job was unfulfilling and because she is seeking another now, the court should not impute income to her.

Use Va. Code § 20-108.1 and § 20-108.2 to argue on behalf of your client (see groups below). In each case, calculate what the child support payment would be if the court (a) finds or rejects a hardship for Harvey and (b) finds or rejects imputed income for Wendy. You might also consider how the two later-born children would have affected the child support payments for Alice and Andy if the twins had been born while the divorce was pending.

The purpose and goal of the exercise is as follows:

Purpose:

To practice applying a complex statutory regime, Virginia's child support statutes, to a set of facts in a family law dispute. This exercise will also assist you to articulate statutory and policy arguments for a client's position an on open issue. Half the class will advocate on behalf of the wife and half on behalf of the husband (see below). Please work with your group for the amount of time scheduled for class, [*INSERT TIME, e.g., 1 hour*], either during the normal class hour or outside at an agreed upon time.

Goal:

Figure out what's at stake and marshal the best arguments on behalf of your client. Each group will present arguments on [*DATE*], during the beginning of class. Plan on spending 5 minutes each. You may want to appoint a spokesperson for your group.

The exercise is to be completed in groups of five or six students, with some representing the ex-husband and others the ex-wife. The exercise requires students to do a number of things. Students have to examine a complex statute and distill out the important sections from the statute. Essentially, both parties worked at the time of the initial order. The obligor then forms a "second family" and seeks to reduce payments due his "first family"—whereas the obligee wants

no change to the child support amount, even though she is not now working outside the home. The exercise surfaces not only questions of fairness between first and second families,[44] but hones in on the benefit of having a presumptive guideline amount rather than having to satisfy the fairly exacting test for rebutting that presumption.[45] The beauty of the exercise is that it makes students ratchet through complex child support calculations and make sophisticated arguments, but because it is done orally, it involves no extra grading. As an oral experience, it also does not create an exorbitant amount of additional work for students. In fact, their outside class preparation takes the place of one class session.

1. Some Considerations Before Using Exercises

I find that exercises can be among the best learning tools for students, but they can be a lot of work both for the student and the teacher—a reality that must be taken into consideration. Factors to consider when preparing exercises are the ground rules, whether to

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[44] See Va. Code Ann. § 10-108.2(C) (2014) ("Where a party to the proceeding has a natural or adopted child or children in the party's household or primary physical custody, and the child or children are not the subject of the present proceeding, there is a presumption that there shall be deducted from the gross income of that party the amount as shown on the Schedule of Monthly Basic Child Support Obligations contained in subsection B that represents that party's support obligation based solely on that party's income as being the total income available for the natural or adopted child or children in the party's household or primary physical custody, who are not the subject of the present proceeding. Provided, however, that the existence of a party's financial responsibility for such a child or children shall not of itself constitute a material change in circumstances for modifying a previous order of child support in any modification proceeding. Any adjustment to gross income under this subsection shall not create or reduce a support obligation to an amount which seriously impairs the custodial parent's ability to maintain minimal adequate housing and provide other basic necessities for the child, as determined by the court.").

[45] See Va. Code Ann. § 10-108.1(B) ("3. Imputed income to a party who is voluntarily unemployed or voluntarily under-employed; provided that income may not be imputed to a custodial parent when a child is not in school, child care services are not available and the cost of such child care services are not included in the computation and provided further, that any consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party, including to attend and complete an educational or vocational program likely to maintain or increase the party's earning potential. . .").

grade an exercise, how to deliver feedback, and what the payoff is for you.

Purpose and Ground Rules Exercises require you to articulate a purpose for the exercise, what students should take away, and ground rules. Earlier, I included a sample purpose and goals for the exercise about difficult issues in child support.

The course policies, the exercise assignment itself, or both should also be extremely clear about ground rules. Ground rules need to specify what students can share with each other and what they can borrow from students in past classes. One might allow sharing within a team, for example, but require each student to prepare his or her own written work, as follows:

> The class will be divided into four firms, listed below. You may discuss your research and analysis only with other members of your firm. Each attorney is to draft a memorandum in support of [plaintiff's] position separately, however. You may not share your draft with other colleagues.

As a blanket policy, one might bar students from using written work done by another:

> Some, but not all, of the exercises we will do in this course include assignments that students completed in prior years. You may **not** consult their work or grading sheets when preparing your work. It will be considered an Honor system violation to have done so.

Policing this is not always easy, however. Washington and Lee University, where I recently taught, has a strong honor system, so the following was sufficient:

> If I have reason to believe that you have engaged in conduct prohibited by the Honor system, I am obliged to report this to the Executive Committee.

Of course, your own school's individual culture might warrant other measures. You might need to change the exercises from year to year, especially if there is not a strong honor system or norm against unauthorized sharing. If you anticipate needing to change exercises each year, this cost should be taken into account in deciding on the number or scope of exercises.

Whether to Grade an Exercise Another consideration is whether the exercise will be graded. Exercises can be graded, pass/

fail, or ungraded, and they can be written or oral. Each option poses different advantages and disadvantages.

I personally stay away from pass/fail written exercises in a survey course because students believe that if they turn anything in, they will receive a passing grade. Somehow, a pass/fail grading metric tends to make students "phone it in" and encourages them to take the submitted work less seriously. In my experience, this option often does not create the type of high-quality work that I want to spend my time giving feedback on.

As a consequence, I only use the pass/fail, written option for a first assignment in a class where a series of exercises will count for some fraction of the grade, as they do in my Advanced Family Law practicum (where typically the grade is based on five or six graded exercises through the semester).

I have found that the pass/fail option does work with oral exercises, however, especially when I invite distinguished guests to join us in class for students' arguments. This ratchets up the embarrassment factor for students and seems to pay off in the quality of their work.

At the same time, ungraded exercises are less taxing for the professor. They do not require a detailed grading sheet or "model answer," as graded exercises do. However, ungraded exercises allow the teacher to give as much feedback as one desires without attaching a single grade on which some students focus to the exclusion of what is really meaningful: the feedback on their individual effort.

With ungraded exercises, I find that I can be brutally honest without creating tons of anxiety in individual students—precisely because no grade is attached. In courses where later assignments will be graded, an initial pass/fail assignment can be a nice tool for setting expectations and seguing to better, more careful work on the assignments that "count."

Graded exercises require more thought on the teacher's part. They require not only feedback worth giving, but a coherent grading tool and the extra energy required to correlate the feedback with the grading tool. A coherent grading tool should contain not only the overarching answer, but the architecture for getting there, including all the small points. One example is shown in Figure 5.

GRADING SHEET

Attorney's Name: Subject Memo	POSSIBLE PTS	
Question	5	
Facts	10	
I. Transfer of stock is presumptively marital property	5	
Ia. Transfers between spouses are presumed to be gifts rather than property held in a resulting trust	10	
Ib. For conveyances not involving a purchase money trust, evidence of parties' agreement to reconvey is required	10	
II. Only a party with clean hands may claim a resulting trust	10	
III. Nonmarital property transmuted into marital property	5	
IV. Plaintiff engaged in a pattern of deceit	5	
Conclusion	5	
Table of cases	5	
Miscellaneous	25	
TOTAL	100	

Figure 5. A sample assignment grading sheet.

In my experience, adding even one graded, written exercise to a survey course can be the equivalent of administering two exams instead of one—in other words, it adds a significant amount of work. Of course, if you scale the final exam back from three hours to two, or four hours to three, you might save enough time grading the final exam to make up some of the extra work on the graded project. In all likelihood, though, you will have added to your overall workload.

With graded exercises, you also risk being the only faculty member who requires students to do graded midsemester projects. Students might resent a graded project in the middle of the semester when they are accustomed to only having a graded final. They might see the project as a drain on valuable semester time, which could aggravate some students and discourage them from taking your class (although that might not be such a great loss). You also might need to negotiate with the associate dean or appropriate administrators the ability to award part of the course grade for written work if graded exercises are not part of your law school culture.

Giving Feedback in a Supportive Way The key to either graded or ungraded projects is the feedback. Students are extremely grateful for the time and energy that good feedback takes. They routinely

say things like "I received more feedback on this assignment than I received in all of my legal writing classes in law school." That feedback can run from the simple—for example, explaining the need to define terms before using them—to the more esoteric—for example, that a petition to modify a child support order requires a different threshold showing (of changed circumstances that could not have been foreseen at the time of the entry of the first order), rather than just a quick run-through of the presumptive amount due, together with any arguments for departing from the presumptive amount. Whether graded or ungraded, I believe that if one asks students to spend time doing something, then one needs to spend class time talking about it.

For oral exercises, I might have teams of students argue for one party or the other on a certain matter (see earlier discussion of exercises, problems, and illustrations). To give more feedback on the quality and presentation of their arguments, I often have a clinical colleague, judge, or practicing attorney sit in (after having prepped my guest on the problem). Having a guest sit in makes the feedback more "real" for students somehow. It also takes pressure off me, which is welcome because I am also guiding the discussion. In such mock oral arguments, each of the evaluators fills out feedback sheets on each presenter, as do the other students (on an anonymous basis). The feedback form is quite simple, based on advice from clinical teaching colleagues:

1. Please list three aspects of the student's Oral Argument he/she should **maintain**.
2. Please list three aspects of the student's Oral Argument he/she should **improve**.

When an exercise is written, whether graded or pass/fail, there is a real premium on quickly turning around assignments for students. If the assignments are not returned soon, students will simply not remember what they were thinking when they were drafting the answer.

For written exercises, whether graded or pass/fail, I mark up each paper and keep a running list of common errors across the class. We use class time to discuss why some answers are exemplary and why others could have been better. A lot of this discussion is about execution, namely how to avoid the easy mistakes through more

careful drafting (e.g., not creating two defined terms for the same thing).

Whether illustrating an aspect of an answer that is good or bad, I redact student names to avoid any embarrassment. Redacting names and scanning in samples of points you want to make during the class will be time consuming for you or your administrative assistant (assuming you have one).

Without a thorough markup, I believe students do not benefit from doing actual work. However, one aspect of thorough markups makes exercises even more time-intensive for the faculty member: managing students' reactions to the feedback that they receive. Even if one covers common errors in class, when returning an extensive markup—especially if graded—the teacher really needs to sit down with each individual student or team and visit with them about the work product. A student's writing is very personal and egos are easily deflated. Moreover, in an economy where jobs are hard to get, we need to take extra care to be productive with our students, not destructive. I find that if I can walk through some big-ticket items with students individually, the feedback will be taken in the spirit in which it is given—to help them succeed off the mark.

Where Is the Payoff for Students? These sit-downs can be a nice opportunity to ask students about their interest in practicing family law, where they are focusing their job search, and all sorts of other one-on-one questions. It is also the time to tell them, if their work has been poor, that what sells a professional is one's reputation. In effect, each piece of work is a sales opportunity for the next. Even if a young attorney lands at a firm, every partner in that firm is that attorney's "client." I use these conversations to drive home the need for professionalism and taking care with every detail. One story I share concerns a law school colleague who was a year behind me and who summered at the firm I ultimately joined. He was the quintessential summer associate: charming, a social gadfly, well liked (this, of course, was during the heyday of summer associate programs when firms asked associates to do very little actual work). Within six months of landing at the firm, he could not find enough "client-partners" to make his billable hour requirements because he produced sloppy and careless work.

Somewhere along the way I emphasize that nearly every new attorney makes the same battery of mistakes, and that it is far better

for students to get the feedback in a setting where it does not harm them, rather than in a forum where it could tarnish their reputations.

Where Is the Payoff for the Faculty Member? Giving extensive, meaningful feedback might be far more than you bargain for. For me, giving this feedback has paid off on my teaching reviews. A consistent theme is that I care about how students will do in practice and try, in concrete ways, to help them get jobs.

2. Possible Exercises

Exercises can range from short and fairly straightforward (e.g., prepare a *pendente lite* affidavit seeking temporary support during the pendency of a divorce) to a complicated legal research memorandum (e.g., characterizing whether a particular piece of property should be treated as marital property, subject to division, or as separate property not subject to division). In a survey class, I would not recommend the more complicated exercise, but would stick to ones taking only a few hours outside class. As noted earlier, oral exercises can hit the balance between challenging and not too time consuming. In a more advanced family law course, such as a practicum in which students do "real work" (course work that mimics what a student might do in actual practice), the majority of exercises I require are graded.

With any exercise, I ask students to keep time and bill at $185 per hour for their work. This offers a wonderful opportunity to talk about "defensive billing"—that is, billing in a way that is likely to satisfy clients that the product merited the cost. Defensive billing also makes it difficult for senior partners to cut the billable time of junior attorneys.

Although "hard cases (may) make bad law," they do make for the best class discussions and exercises (as well as the best law review articles and books). One easy way to ramp up a new exercise is to build on a rich factual context as it unfolds publicly, like the case of Crystal Harris,[46] who was raped by her husband (he was subsequently convicted). This did not prevent Ms. Harris from being ordered to pay Mr. Harris's attorney's fees in the later divorce, nor did it prevent a California judge from awarding Mr. Harris alimony.

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[46] Juju Chang and Alyssa Litoff, Sexual Assault Victim Ordered to Pay Alimony to Attacker Fights to Change California Law, ABC News (Apr. 5, 2012), available at http://abcnews.go.com/US/sexual-assault-victim-ordered-pay-alimony-attacker-fights/story?id=16075409.

Many spouses care deeply when acts of great violence or breaches of great trust (e.g., cheating) precipitate the end of the marriage. In California, however, the court basically had to consider fault in divorce proceedings only if one spouse attempted to kill the other. The court also could take into account evidence of domestic violence for some purposes. Ms. Harris's experience precipitated California Assembly Bill 1522 (which ultimately became law) that requires courts to take fuller account of sexual violence between the spouses when dividing property, awarding alimony, and awarding attorney's fees.[47]

E. STUDENT PREPARATION

I expect students to be fully prepared for classes. However, I do permit students to alert me before class if they wish not to be called on. It is valuable to let students realize that you understand they are busy and might not be prepared for every class. As such, I add the following clause in my syllabus:

> If you are not prepared for a particular class, you may, *before class begins*, give me a note with your name on it asking not to be called on that day. You may exercise this option no more than twice a semester. I reserve the right to ask any unprepared student who has not exercised this option to leave the classroom.

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[47] See Cal. Fam. Code §§ 4320, 4324.5. The bill's text itself explains:

> This bill would expand the above-described provisions to apply when a spouse is convicted of a specified violent sexual felony against the other spouse, and would require the court to consider the convicted spouse's criminal conviction for a violent sexual felony in ordering spousal support, as specified. The bill would also require the court to order the attorney's fees and costs to be paid from the community assets if warranted by economic circumstances. Under the bill, the injured spouse, as defined, would not be required to pay any of the convicted spouse's attorney's fees out of his or her separate property. The bill would further, at the request of the injured spouse, define the date of the parties' legal separation as the date of the incident giving rise to the conviction, or earlier if the court finds that the circumstances justify an earlier date, for community property purposes.

See California Assembly Bill 1522 chaptered (2011-2012), *available at* http://legiscan.com/CA/text/AB1522/id/665698.

This typically prevents most problems. Even so, occasionally you will still see subpar student preparation. The section "Classroom Challenges," later in this book, should help with these challenges.

F. HANDOUTS

I use handouts in my class for two reasons:

1. To help students understand complicated facts or assumptions critical to a case—most often with financial or monetary issues.
2. To summarize splits among the states in black-letter law so that the class can focus on what the costs and benefits of each approach are during our discussion (as opposed to trying to take notes on those splits while trying to discuss them).

With all of my handouts, students are welcome to bring them into the exam. This is one place where I am not imposing rules that simulate the bar exam, largely because there are so many state law approaches to master. As I discuss later, I give students a typical fact pattern exam problem that requires them to apply these rules to the facts, as opposed to having to memorize large bodies of law. In my view, a handout does not harm the basic objective of applying the law to facts.

Handouts can unpack assumptions that are critical to the result reached in a case, or that strongly influence our sense of unfairness if the law does not provide a remedy. For example, when contrasting the professional degree cases excerpted in every casebook—*Mahoney*, which recognizes reimbursement alimony for contributing to a spouse's education, and *O'Brien*, which makes one spouse's degree divisible property—I provide a handout that details Mr. and Mrs. Mahoney's probable earnings during the marriage. I assume that reported earnings[48] of each spouse in the case increase by 5% from each preceding year. I also subtract estimated earnings for Mr. Mahoney for the 16 months he attended Wharton.[49] The handout looks like Figure 6.

[48] Mahoney v. Mahoney, 91 N.J. 488, 493 (1982).
[49] Id. at 492.

Evaluating Mahoney and O'Brien
Entitlement to a % of the Professional Degree for Providing Support

	Mr. Mahoney	Mrs. Mahoney	
1978	25,600	21,000	Time of divorce
			Assume 5% increase from each preceding year
1977	24,320	19,950	
1976	23,104	18,952	
1975	21,949	18,005	
1974	20,851	17,105	
1973	19,809	16,250	
1972	18,818	15,437	
1971	17,877	14,665	
Less time off from work	$172,328 $30,805	$141,364	
	$141,523	$141,364	

Figure 6. Sample informational handout.

These assumptions yield very similar contributions by each spouse during the marriage. The class discussion then asks whether Mrs. Mahoney would qualify for traditional alimony under the UMDA (she would not, because she does not meet the threshold test for need) and notes how "unfair" it would be for Mr. Mahoney to receive this benefit in the marriage without sharing the long-term gains from the couple's investment. We also discuss whether reimbursement alimony—or a slice of the degree's value as property—can be explained in terms of Mrs. Mahoney's sacrifice, lost opportunity, expectation, contract, or other notions of "fairness."

The handout provides a nice opportunity to illustrate Mr. Mahoney's investment in his own education while contrasting his investment with Mrs. Mahoney's. Although her investment might be difficult to calculate, many students believe that she should receive far more than the limited amount the court was willing to award (the amount of contribution received by Mr. Mahoney). On the other hand, students frequently see the modest out-of-pocket investment by Mrs. O'Brien in Dr. O'Brien's medical degree (putting aside child-rearing) as resulting in a massive windfall to her, given the actual outlay. I find students get into this pair of cases as much as any,

because they are making substantial investments in their own careers at the moment.

It is especially important to help students follow the money but also appreciate some finer points of finances. Even though I have taught at schools with nontraditional (older) students, the vast majority of my students have not been married and have never owned a house or taken out a significant loan (other than student loans). They might have a personal connection to divorce through their parents, but they were likely shielded from precisely what the divorce entailed (i.e., the terms of the settlement agreement or divorce decree).

An example of a handout that helps students to follow the money is replicated in Figure 7. It is drawn from *Geldmeier v. Geldmeier*, in which a couple has nearly as much debt as assets (like most American couples that are divorcing). The trial court's property division runs the risk of thoroughly confusing students. I create a spreadsheet showing how the various courts and opinions divided the couple's property. Although simple, it is effective in aiding student comprehension.

Financial Constraints		
Income to parties	Wife	Husband
Salary	0	2,400
Alimony	100	-100
Child support	640	-640
Net income	740	1660
Mortgage costs	10-year loan	30-year loan
1st mortgage	198.23	131
2nd mortgage	216.73	144
Total mortgage costs	414.96	275

Figure 7. Sample handout on following the money: Trial Court Approach spreadsheet.

Trial Court Approach				
Proposed split				
		Wife	Husband	
Home		$40,000		
Mortgage		($16,400)		
Mortgage			($15,000)	
Note in favor of husband		($7,500)	$7,500	
Cutlass car		$800		
Furniture, etc.		$500		
Chevelle car			$450	
Boat			$500	
Pension			$2,000	
Life insurance			$1,100	
Cash			$2,500	
Stock			$3,000	
Signature & student loans			($6,500)	
Money owed to different parents				
Other debts			-600	
Total assets rec'd		$41,300	$17,050	
Total debt		($23,900)	($22,100)	
Net		$17,400	($5,050)	total
% split		100%	0%	$12,350
Worse than this	%s	140.89069	(40.89)	

Figure 7. (continued) Sample handout on following the money: Trial Court Approach spreadsheet.

The small spreadsheet first projects income to the husband and wife. At the time of the decisions, H makes $2,400 a month, but after alimony and child support, he has $1,660 available.[50] The wife, who is not working outside the home, has only the $740 in support available to her. Their mortgages on the largest asset, the house, likely consume hundreds of dollars a month (I derived this range using a mortgage calculator and an interest rate of roughly 8%, which today would not be realistic, but might have been at the time

[50] Geldmeier v. Geldmeier, 669 S.W.2d 33 (1984). Mr. Geldmeier's gross income during 1981 was $36,465.00.

of the case). This disparity between expenses related to the house and the modest income to the wife sets up the need to assign all or part of the debt related to the house to the husband, even though the house is awarded to the wife (this is a nice opportunity to discuss the relationship between custody and the typical award of the marital home to the custodial parent). As the larger spreadsheet in Figure 7 shows, the trial court "splits the baby," saddling the wife with one mortgage and the husband with the other. The trial judge tries to soften the blow to the husband by awarding him a note from the wife in the amount of $7,500, which nonetheless leaves the split presented on the Trial Court Approach spreadsheet. The trial court's decision, predictably, leaves the husband miffed because he receives –40% to the wife's 140% of the couple's total wealth.

Concurrence		
	Wife	Husband
Home	$40,000	
Mortgage	($16,400)	
Mortgage		($15,000.00)
Note in favor of husband	($7,500)	$7,500.00
Cutlass car	$800	
Furniture, etc.	$500	
Chevelle car		$450.00
Boat		$500.00
Pension		$2,000.00
Life insurance		$1,100.00
Cash		$2,500.00
Stock		$3,000.00
Signature & student loans		$0.00
Money owed to different parents		
Other debts		0.00
Total assets rec'd	$41,300	$17,050.00
Total debt	($23,900)	(15,000.00)
Net	$17,400	($2,050)
	89%	11%

Figure 8. Sample handout on following the money: Concurrence spreadsheet.

The Concurrence, shown in Figure 8, improves on the split, but only by ignoring the $6,500 student loan that the husband has to pay, as well as the $600 loan (highlighted, with zeroes inserted to show the impact of the decision). This sleight of hand would seem to yield an 89% to 11% split, although the husband is likely to experience it exactly the same way as the Trial Court's approach since the debts are not forgiven.

One point of the spreadsheets is to show students how the majority and concurring opinions differ in the way that they view the distributed assets and the implications for the different parties. One point that I hammer home is that the "Note in Favor of Husband" is essentially "fake money" that the husband is awarded to make the distribution appear less harsh. Because the note has no absolute date due and pays no interest, it does very little to improve the husband's day-to-day experience of wealth.

I follow the spreadsheets showing different splits endorsed by the trial court, the majority, and the Concurrence with yet another proposed split, shown in Figure 9.

Last Try			
Proposed split			
	Wife	Husband	
Home	$40,000		
Mortgage	(16,400)		
Mortgage		(15,000)	
Fake money note	($14,400)	$14,400	
Cutlass car	$800		
Furniture		$500	
Chevelle car		$450	
Boat	$500		
Pension		$2,000	
Life insurance		$1,100	
Cash		$2,500	
Stock		$3,000	
Signature & student loans		($6,500)	
Other debts		(600.00)	
Sum	$10,500	1,850	$ 12,350
% split	85%	15%	

Figure 9. Sample handout on following the money: Last Try spreadsheet.

This proposed split does not ignore unsecured loans, as the Concurrence does, but nonetheless yields a larger fraction of the couple's wealth for the husband by giving him a bigger "fake money" note. He does not come out materially better in the short run, although he might in the longer run (assuming that the wife ever satisfies the note). This split gives the wife some assets, like a Cutlass car, that can be easily alienated as well. One advantage of the spreadsheets is that students can pull up the file (assuming that you share it) and move assets from one column to the other to see what effect this has on the split.

Sometimes I will pair a handout that illustrates a complicated idea, like these financial splits, with another handout that summarize the major "takeaways" from our discussion. For example, I use the spreadsheets to focus class attention on the actual split, and I follow up the next day with a recap of the major points, focusing on the practical considerations driving the court's decision to split property as it did. These points are outlined in Figure 10.

As you can see, the companion handout recaps some finer points made in the class discussion—for example, about what assets might be most attractive (e.g., because of liquidity or low cost of carrying), and why the spouses' lives remain financially intertwined notwithstanding the desire for a clean break (e.g., that the wife cannot refinance a joint loan in her name alone because she has little income, and the husband might not qualify for refinancing either, because he does not live in the house), among other points. I tell students at the beginning of the two classes devoted to the special problem of debt that I will recap the discussion for them—largely as a way to avoid having copious note-taking trounce a lively discussion.

A third kind of handout assists students to make sense of state approaches on how to treat different kinds of property (e.g., whether a gift between spouses will be marital or separate). I provide this to students because I am skeptical that students could take appropriate notes, capturing all the nuances, while contributing to the class discussion. For example, one handout summarizes the majority and minority approaches to the following topics:

- Gifts by third parties to a spouse.
- Gifts between spouses.

Family Law
Professor Wilson

Recapping Practical Considerations in Property Division

Geldmeier

- The debt on the house:
  - Mrs. G should want Mr. G to pay off the second mortgage so she doesn't risk non-payment by him and would have more equity to borrow against in tough times.
    - Mr. G. cannot refinance the second mortgage he is directed to pay since he doesn't have possession of the house.
      - He can take a signature loan, not secured by the house (like a student loan, mere promise to pay); likely will qualify since he has income.
  - Mr. G will want Mrs. G to pay off the first mortgage that she assumes so that he can more credit available to him and can then buy his own house.
    - Mrs. G cannot refinance the mortgage since she doesn't have income and the equity in the house is less than what is borrowed.
    - Mrs. G can deduct mortgage interest, not other types of interest.

- The notes on the house:
  - Mr. G is receiving fake money, with no interest, no monthly payments, and no date certain on which he gets his money from her.
    - Mr. G may never get the money if the child is not emancipated due to disability, etc.
  - Yet Mr. G has to make monthly payments on the debts that he takes, including the unsecured ones (despite the fact that the concurrence would ignore these).
  - One approach to division would be to have both notes follow the assets/house to which they are attached (this is approach 4 in n. X, p. XXX):
    - Differences in income explain why court rejects this.
    - Mrs. G has income of $740/month in alimony and child support.
    - Mr. G has income over $1,600/month (after alimony and child support).
    - The two notes would likely cost between $275/month and $415/month.
    - Because Mrs. G almost certainly cannot pay both notes, the court makes Mr. G take one of the two mortgages.
      - Being the wealthier party doesn't always pay.

- Other differences between assets that one should advise clients about:
  - Is it depreciable or will it appreciate? (think cars vs. retirement accounts)
  - Are there penalties for reaching into the assets? (as with a retirement account)
  - Does the asset cost money to maintain every month? (a house does; a retirement account doesn't)
  - What are the tax advantages of receiving money in one form or another?
    - Property division, even if made monthly, is not counted as a deduction by PS paying spouse or income to receiving spouse.
    - Alimony does get deducted by payor and included as income by recipient.
    - Alimony can change for change of circumstances; ppty division cannot.
    - Liquidity.

Figure 10. Companion handout for the spreadsheets.

- Commingling of separate property and marital assets and tests for deciding whether the property is "transmuted."
- Treatment of the increase in value of separate property.
- Treatment of income from separate property.

To make the handout especially valuable, I cross-reference the specific pages of the casebook where the relevant rule or holding appears. These handouts are far more technical than any BarBri outline, and function to take the pressure off me as a teacher, as well as the students. We go first very quickly through the black-letter law before proceeding to an informed discussion of whether a given approach tends to further sharing norms in the marriage or serve other purposes.

In short, I use handouts as an aide to foster class discussion by easing through the "nuts and bolts" of the law, getting to a more analytical level. I place the handouts on reserve after each class. You could also post them to a class Web page, if you maintain one.

G. TECHNOLOGY

I use a lot of technology in my classes. I will often use a news story or interview to introduce a topic. For example, during my discussion of polygamy, I show an interview of a young woman, Sara Hammon, who escaped from a large, polygamous family.[51] Before class, I always check to ensure the link is still active, as links often expire over time. In addition to simply checking the link ahead of time on my office computer, for my first class, I ask the technology services people to meet me in the class earlier in the day to check that the computer's software setup accommodates the video clip (e.g., Flash Player is loaded). After verifying the basic setup in the beginning, I still go to the class early anytime I use a video clip to make sure the computer is still compatible with the link (it is surprising how often it is not) and not somehow locked down by a previous user. I also skip the commercials and ads that inevitably precede the video. This also allows me to ensure the volume in the classroom is appropriate.

For the new (and experienced) law professor, technology can easily trip you up. Scheduling time with the technology services people in advance is important to minimizing disruption to them and

[51] http://abcnews.go.com/video/playerIndex?id=4677685.

to avoiding embarrassing failures. Even with all of this planning, it is invaluable to know how to contact technology services during the class if an issue does arise.

So that I do not reinvent the wheel from year to year, I save particularly good links in a word processing document, noting what each link accomplished. Another option would be to bookmark the Web site with a short explanation in your Web browser (e.g., with Google Chrome you can sign into your own account on any computer and have access to your links). If a link is especially good and there is reason to believe it will expire soon, only to be searched for like a needle in a haystack, I sometimes ask the technology services staff to capture it in a format that does not require the Internet. You might receive pushback on a number of grounds for this (e.g., copyright or they don't think it is necessary—even though link rot is a well-known phenomenon).

In some years, I have used a class Web site such as TWEN. The site nicely archives materials from the course such as the syllabus, handouts, updated assignments, and a discussion forum for the class, as well as links to cases and Web pages.

With flu and other health and safety concerns (e.g., poor weather), there is pressure on faculty to record their classes, at least sometimes. Some universities record every class; others leave it up to the individual faculty member. By contrast, some schools discourage recording, saying it puts too much of a burden on technology services. I personally allow students to request that a class be recorded, but they must let me know (ideally through a cc: on their e-mail requesting the recording). As a result, roughly a third or a fourth of my classes are recorded.

This is both good and bad. In the "bad" column, a faculty member must decide whether watching the recording counts as attending. It also creates a risk that students will not come to class because they can watch it from elsewhere, sapping the overall discussion. I very much try not to police attendance, but instead make students certify that they meet the attendance requirements before sitting for the exam.

Another risk is that if a new faculty member has an annual review in which other faculty review her teaching through the recording as opposed to actually attending her classes, the recording frequently captures students doing everything except paying attention in class (e.g., students purchasing Prada purses online). This has the effect of

making colleagues doubt that teacher's ability to manage the class. Another risk is that it preserves everything, including a less-than-well stated comment, whether by you or a student.

In the "good" column, students have the flexibility to take full advantage of the class while doing callbacks or other necessary activities (e.g., moot court, law review symposiums, endowed lectures, or any other school-related activity that faculty might want to encourage). Additionally, it prevents the need for a private tutoring lesson with students who miss class, because you can direct them to the recording. I routinely refuse to meet with students who miss class until they have gotten notes from a classmate or watched the video.

Finally, although I've never needed recordings of a class to prove that I actually met with my class (unlike the recent scandal with athletes at the University of North Carolina),[52] the one time I was very grateful to have a class recording was in an Honor system investigation over attendance. One student in my course alleged that another student violated the honor system by certifying that she had met the law school's attendance policy when she allegedly had not—and the recording helped resolve the matter.

Alternatively, one can pass around a class roster. Even if you do absolutely nothing with it, the roster seems to cajole students into attending because they think it will count for something. This self-actuating mechanism requires little effort and can be quite effective.

H. CLASSROOM CHALLENGES

1. Pace and Quality of Discussion

In my class, I assign a tentative reading list giving the pages to be read over the course of the semester without predicting actual dates on which we will take up particular material. I value an organic discussion, which means that some topics take longer than others. I let this proceed at a comfortable pace and assign reading at the end of each class. Because some students like to read ahead, this system is manageable if classes are separated by several days, but does not work well when they are on consecutive days.

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[52] Sarah Lyall, A's for Athletes, but Charges of Fraud at North Carolina, New York Times (Dec. 31, 2013), available at http://www.nytimes.com/2014/01/01/sports/as-for-athletes-but-charges-of-tar-heel-fraud.html?pagewanted=2&_r=0.

If there is one negative comment that appears regularly on my teaching evaluations, it is that I do not rigidly follow a syllabus. New teachers might not want to use my system for precisely this reason. Additionally, some students look at that list, see a lot remaining, and believe you are cramming in too much of the course at the very end.

Still, I firmly believe that a more organic discussion leads to better quality. The Internet sometimes can play a role in that organic discussion. Frequently, a student in class will announce literally breaking news because he or she receives a newsflash (e.g., a Google Alert) during class. I welcome this because it adds to the general feeling of a conversation, but allowing students access to the Internet in class comes with certain costs. Some students will be distracted because they are busy shopping, checking e-mail, or sending text messages. For this reason, some of my colleagues prohibit students from accessing the Internet during class. I am loathe to follow suit, however. That kind of micromanagement of adults rubs many students the wrong way. Moreover, I assume that given the cost of a law school education, students have sufficient motivation to learn as much as they can from class.

2. Unsuccessful Answers

In a class that employs the Socratic method, as do most survey classes, you will inevitably face a student who provides a completely wrong answer, an answer that does not make sense or link up to the discussion, or a student who says nothing at all (e.g., the deer in the headlights).

Unsuccessful answers can come from a number of factors. The student might not have been paying attention (i.e., was moments before shopping for Prada purses), or might have come to class unprepared, or simply did not understand the material. Just as likely, it is difficult to both listen and take active notes, which makes fielding cold-calls extremely difficult for anyone. The question posed, in the moment, might have simply been confusing. As often as not, how I framed the question seems to explain the less-than-perfect response I received.

These are characteristics of the best questions:

- They are short enough to allow students to follow them.
- They do not require mental gymnastics by the student, but instead clearly link ideas and concepts.

- They are sensitive to various approaches and opinions on topics that could be divisive.
- They alert students to the kind of answer you are seeking—for example, application of the black-letter law to new facts or critique of the law itself.

Often, rephrasing a question that receives an unsuccessful answer produces a far better answer. If that is not forthcoming, I usually go to another student or ask a volunteer to "help out a colleague."

3. Divisive or Sensitive Topics

Some family law topics are rife with potential for deep disagreement and even hostility among students. The most obvious candidate for such tension might be the discussion of same-sex marriage. Like the six degrees of separation notion, most Americans have an LGBT family member or know someone who is LGBT[53]—even as the country remains deeply divided over whether to recognize same-sex marriage.[54] As with Americans more generally, some students might be LGBT or very close to people who are. Others, however, whether as a result of religious or moral values or some other deeply held belief, might not be open to the idea of same-sex marriage (or might be uncomfortable with homosexuality itself, although this view is rarely expressed).

As with any divisive topic, there are a number of strategies for tempering the discussion. One device is to use a less-loaded topic to surface the underlying considerations. Before discussing same-sex marriage, I deliberately discuss how different states regulate entry into marriage by closely related adults. The assigned reading is a very clever article contrasting states that permit first or second cousins to marry with those that do not. The article appeared in *Slate*[55] and

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[53] See In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as "Inevitable," Pew Research: Center for the People & The Press (Jun. 6 2013), available at http://www.people-press.org/2013/06/06/section-2-views-of-gay-men-and-lesbians-roots-of-homosexuality-personal-contact-with-gays/ (describing how "more people today have gay or lesbian acquaintances" including family members).

[54] See Robin Fretwell Wilson, A Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections, 64 Case Western Law Review (2014) (summarizing polling data across the United States and projected attitudes in 2016 and 2020, by state).

[55] William Saletan, The Love That Dare Not Speak Its Surname: What's wrong

has the virtues of being sophisticated, easy to read, riotously funny, and, perhaps most important, short. With this primer, the class explores the nature and extent of the state's interest, if any, in who marries whom. The nice part about the *Slate* article is that it discusses the scientific basis for "incest" restrictions, exploring in particular whether procreation by closely related individuals does in fact carry biological or genetic risk for any resulting child. It also explores the "ick" factor—namely, that the hesitancy or reflexive distaste that some have for marriages between closely related adults comes from the foreignness of the idea.

Marriage between cousins also allows the class to explore in a less-loaded context what the social goods and purposes are of marriage—and by extension the state's interest in regulating entrance to marriage. This neutral subject permits students a huge amount of freedom to express their opinions without pulling any punches, largely because nobody in the room likely has any experience with cousin marriage, most (if not all) don't envision themselves ever marrying their cousin, and most (if not all) don't know anybody who has. Thus, cousin marriage offers a safe place to ask: Why is who may marry whom such a big deal? Why does the state even bother to regulate this?

Raising cousin marriage before same-sex marriage gets all the state purposes on the table without triggering deep emotions on both sides. It allows students to examine their own suppositions about state regulation in a context that carries less pressure to reach a particular result. If a student expresses opposition to cousin marriage, her opposition likely won't have any implications for friends in the class nor will it be held against her (e.g., in the law school dating market).

A less obvious landmine is cohabitation. Although most of my students have not been married, many do have a personal connection to cohabitation because they are currently cohabiting with someone or have in the past. Moreover, in recent years, nearly everyone who expresses an opinion under a certain age seems to think they will cohabit at some point—although this possibility does not seem to drive students' views on whether cohabitants should have remedies against one another because they shared a residence (or a life together). Still, emotions run high on the question.

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with marrying your cousin? Slate (Apr. 10, 2002), available at http://www.slate.com/articles/news_and_politics/frame_game/2002/04/the_love_that_dare_not_speak_its_surname.single.html.

People bring very powerful emotions to the table, not only about same-sex marriage and cohabitation, but about more plain vanilla issues surrounding divorce. Alimony, child support, child custody, and property division have proven just as fraught with emotion, in ways that never cease to surprise me. In one class, for example, a woman in her 20s was so shaken during the discussion of child support that she quietly got up and left the room. I surmised later that her father did not meet his child support obligations, causing considerable hardship for her family. The difficult moment for me occurred when she returned. I wanted to show empathy, but the risk was that I would bring more attention to the student and what occurred. I decided instead to reach out by e-mail and invite her to come by my office if she wanted to discuss the material or anything else. Making this invitation by e-mail allowed her to decide for herself whether she wanted to discuss the matter further. Granted, not every law teacher wants to be, or envisions themselves thrust into the position of, mentor or counselor. That is the job of the Dean of Students. But, family-law-related courses unfortunately require teachers to decide on many occasions how they are going to approach emotional issues, emotional students, and mentoring more generally.

4. Funny and Sensitive

In the classroom, I try to hit the "sweet spot" between engaging and funny and not dismissive of any particular viewpoint. That is not always easy. For example, one would think I could safely be lighthearted about polygamy while teaching in southwest Virginia. Most of us think of polygamy, if it is practiced anywhere, as isolated to Utah, Nevada, and parts of California[56] (of course the mainline Mormon church does not sanction polygamy and hasn't for decades). However, early in my first semester at Washington and Lee in Lexington, Virginia, a very kind student approached me to say that Southern Virginia University, located 10 minutes away, is the "BYU of the East." Little did I know that I would have more self-identified Mormons in my classes at Washington and Lee than in all my previous years of teaching. In other words, be wary of assuming anything is a phenomenon of others.

[56] *Sister Wives*, a TLC reality show, provides an interesting example of a polygamous family that lived in Utah before moving to Nevada.

5. Gaps in Your Knowledge

Almost inevitably, teachers of family law will encounter the question: "How does this work in Georgia?" (or any other jurisdiction). To answer these jurisdiction-specific questions requires the kind of encyclopedic knowledge that only giants in the field, like Professor Homer Clark, had. I try to resist the impulse to take my best guess because if wrong, students might labor under an incorrect assumption. "I don't know, but I will find out" is often the best answer I can give. Of course, even this answer poses challenges. First, I have to remember to find out and, second, I have to find the right answer quickly.

So where does one go for answers fast? Many casebooks contain the answer somewhere in the book itself. Some have fairly exhaustive notes that might contain the answer. Others consciously cite *50 State Surveys* in the casebook so that the teacher need look no further than the Westlaw link. But, what to do if the casebook does not provide a lead?

When I first started teaching, I naturally consulted Professor Clark's treatise *The Law of Domestic Relations in the United States,*[57] but as treatises fall out of favor, it is harder to find one-stop-shopping answers. However, there are some good supplements that canvas majority and minority approaches like these:

- Example and Explanations: Family Law[58]
- Family Law Essentials[59]
- Family Law in a Nutshell[60]
- Understanding Family Law[61]

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[57] See, e.g., Homer J. Clark, The Law of Domestic Relations in the United States (2d ed. 1988).

[58] Robert E. Oliphant and Nancy Ver Steegh, Aspen Publishers (4th ed. 2013), available at http://www.amazon.com/Examples-Explanations-Family-Fourth-Edition/dp/1454815523/ref=dp_ob_title_bk.

[59] William Statsky, Cengage Learning (3rd ed. 2014), available at http://www.amazon.com/Family-Law-Essentials-William-Statsky/dp/1285420594/ref=dp_ob_title_bk.

[60] Harry D. Krause and David. D. Meyer, West Publishing (5th ed. 2007), available at http://www.amazon.com/Family-Law-Nutshell-West-Publishing/dp/0314183671/ref=sr_1_1?s=books&ie=UTF8&qid=1389122198&sr=1-1&keywords=family+law+in+a+nutshell.

[61] John De Witt Gregory, Peter N. Swisher, and Robin Fretwell Wilson, Lexis Nexis (4th ed. 2013), available at http://www.amazon.com/Understanding-Family-John-Witt-Gregory/dp/0769847447.

No supplement, though, purports to cover the law of all 50 states. There are good treatises on subtopics, such as equitable distribution.[62] On complicated jurisdictional questions, I have found *Jurisdiction in Civil Actions* by William M. Richman and Robert C. Casad especially helpful.[63]

There are also useful Web sites on current interest topics, like same-sex relationship recognition. The better Web sites provide state maps and are updated frequently. For example, the Human Rights Campaign[64] updated their same-sex marriage map the day the New Mexico Supreme Court recognized same-sex marriage by judicial decision. Such a Web site can provide a starting point for finding good authority and reporting back to the class. The Family and Juvenile Law section of the Association of American Law Schools (AALS) also has a very active listserv for section members, who respond quickly to inquiries. Finally, if you are lucky enough to have a law librarian assigned to you or you have access to one, his or her help can prove invaluable in answering the query quickly.

V. Examinations

A. EXAM

As with any law school exam, there is a choice of having a closed call—that is, a question that asks for responses on identified issues—or a more open-ended, "issue spotting" exam. In my experience, bar examiners use the closed call format, guiding students to discuss specific issues. For this reason, I use the same format on my exams. However, you do not need to do the same. You can choose among a variety of approaches in framing your exam. Your exam could do any of the following:

1. Include a closed call.
2. Test issue spotting.

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62 See, e.g., Brett R. Turner, Equitable Distribution of Property 350 App. A. (3d ed. 2005).

63 Butterworth Legal Pub (3 supp. ed. 1999), available at http://www.amazon.com/Jurisdiction-Civil-Actions-Territorial-Limitations/dp/0327007141.

64 http://www.hrc.org/resources/entry/maps-of-state-laws-policies. See also http://www.thetaskforce.org/.

3. Ask students to apply black-letter law to novel facts.
4. Ask students to evaluate a policy question (e.g., whether cohabitants should in fact owe each other anything after the relationship dissolves or whether alimony should be time limited).
5. Ask students for more objective answers (i.e., multiple choice or short answers).
6. Be open or closed book, or allow some finite universe of materials.

Even with my strong emphasis on black-letter law, I generally ask one policy question. I also sometimes use multiple-choice questions to get coverage across the whole course. Some issues just do not lend themselves to the long fact pattern question typical of many law school exams.

Concededly, students hate the multiple-choice questions because they are hard, but students do seem to buy my intuition that multiple-choice questions introduce some fairness in terms of testing more material. One particular risk with using multiple-choice questions is that you draft a bad question, which has to be invalidated. I ask testing professionals at my school to provide a statistical analysis of answers, which then allows me to strike certain questions. I also offer students the opportunity to contest an answer, which assuages some of their fears (and mine).

The instructions that you provide students for the exam are important to perceptions of fairness. I provide my class sample instructions for the exam weeks before the actual exam and invite their comments. In the past, students have felt strongly about printing requirements, being able to type exams, and whether they may access articles or outside information if exam software is not being used. My approach generally is to accommodate what a majority of the class would like.

One aspect of my exam is different than most: I have a space or word limit, in addition to an overall time limit for the entire exam. The relevant instructions for these limits are as follows:

> Parts I and II of this exam should be answered in a blue book. Use a new blue book for each answer, write on 1 side of the page only (not front and back), and skip every other line. Page limits

apply to each Part. Any part of your answer that exceeds the page limit will not be graded.

Parts I and II may be typed. Word limits apply to **each question in Part I and II**, which are noted next to **each** on the exam. Any part of your answer that exceeds the word count will not be graded. Each answer should be separated by a page break, and should contain at the end of the answer a word count as follows:

"WORD COUNT:____"

This requirement prevents students from writing on and on. It tends to elicit more concise, better thought-out exam answers.

One issue that I struggle with is whether, and how much, to recycle past questions. For this to work at all, I would need to be sure that students have not kept a copy of the exam. To preserve this option for myself, I require that students attest that:

8. Attestation That No Copy Has Been Retained. After you have taken this exam, you must send an e-mail to [XX] attesting that you have not retained a copy of this exam or your answer. I will not report a grade for any student who has not sent an attestation.

The previous text sufficed for me at Washington and Lee with its tradition of a strong Honor system, but this might be different at your school.

Technology might also change my willingness to recycle questions going forward. Students can quickly take pictures of an exam with cell phones or use handheld scanners, even if a copy is not retained and even if I provide only as many copies as there are students in the class. Moreover, nothing prevents a student from writing down everything he remembers following the exam.

Another decision to be made is what material to permit students to use on the exam, if any. My exams are all open book, as I like to focus on the application of the law as opposed to memorization of the law. As noted earlier, students may bring the handouts I prepare for them into the exam. One point of those handouts is to summarize splits in the law, so students do not need to memorize them. The one idiosyncratic limitation I do place on allowable materials is that students can bring in notes drawn from group outlines or professional study aids so long as the student personally prepared notes created from those sources (but he or she may not bring the group outline or aid itself). This, in effect, does not preclude group outlining, but

neither does it encourage students to free ride on others. Specifically, the instructions provide:

> **1. Limitations on materials available during the exam.** This is an open book, open notes exam. You may consult the casebook, a hard-copy of notes personally *prepared by you*, and handouts and cases provided in class. You may not use any published materials other than the course materials or handouts provided in class. Students using computers may not access their outline electronically during the exam or cut and paste from the outline. ***By taking this exam, you are certifying that you complied with the preceding limitations on materials available to you during the exam.***

B. PRE-EXAM REVIEW SESSION

My view of exam review is that I will not try to summarize my entire course. Instead, I set a time when the class as a whole can meet with me and ask me any questions they have about any material. The advantage of a review is that you can get everyone's questions out on the table at once. Many students don't even realize they have a question until someone else asks it. The fact that I do an exam review does not mean that students cannot come to me with questions when they have them. Many do and I am happy to field them.

I don't know whether it's intentional or not, but every semester, one or two students who come to my office with questions that easily could have been addressed in the review session. This may happen either because this question did not occur to them, or be because the student wanted an exclusive take on the question, possibly as a way to outperform others. To combat any sense of advantage, I take notes on questions asked in office meetings and relay the information to the class as a whole. Likewise, if students ask questions by e-mail, I don't respond privately. Instead, I redact the student's name and respond to the entire class. This also levels the playing field for the class (note, however, that playing fields are generally not level because all the water would puddle).

C. SAMPLE QUESTIONS

I provide a sample exam, although I might not update it from year to year (see the earlier discussion of recycling). I believe that providing an example creates a sense of fundamental fairness, because students in certain law school organizations (e.g., law review) often have access to exam samples that other students do not. I want to ensure that all my students know ahead of time what my exam is likely to be like.

Just as sample questions are important to students, tried and true exam questions are important to new teachers. Tried and true exam questions avoid the pitfall of all first drafts, which is that students see something we never intended and were not trying to test. Even bar examiners recognize this by soliciting faculty comment before finalizing the model answer. One hallmark of the family law academy is the willingness to share with new colleagues. Most teacher's manuals will include some sample questions. At one time, the family law section of the AALS maintained a test bank.[65] When drafting an exam question, it might be just as easy to consult previous bar exam questions, which you can then mark up.[66]

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[65] Jennifer Rosato, now Dean at Northern Illinois University College of Law, maintained it at one time.

[66] For example, the following question appeared on the July 2013 California Bar Exam:

> In 2007, while married to Hank and residing in California, Wendy inherited $150,000. Wendy used the money to purchase $50,000 worth of Chex Oil stock and a restaurant that cost $100,000. Hank managed the restaurant and, solely through his own efforts, it prospered and is now worth $300,000.
>
> In 2008, Hank inherited an unimproved lot in California worth $75,000. Hank and Wendy obtained a construction loan from a bank for the purpose of building a rental house on the lot. In making the loan, the bank relied upon the salaries earned by both Hank and Wendy and, in addition, required that Wendy pledge the Chex Oil stock. A rental house was constructed on the lot. The present market value of the property, as improved, is $500,000.
>
> In 2011, Cathy, a customer at the restaurant, tripped and fell over a box carelessly placed in the entryway by Hank. She obtained a judgment against Hank for injuries suffered in the fall.
>
> Hank and Wendy have now decided to dissolve their marriage.
>
> 1. What are Wendy's and Hank's respective rights in:
>
> a. The Chex Oil stock? Discuss.
>
> b. The restaurant? Discuss.
>
> c. The rental property? Discuss.

Even more important than sample questions, however, are sample answers. Here, getting not only questions from family law colleagues, but their grading tool, will save you a lot of time and grief.

On grading, I use a very detailed grading metric that leaves me little discretion when awarding points. In effect, I try to give as many points as I reasonably can to each and every blindly graded exam. I understand from other colleagues that they use a much more gestalt approach (which I don't really understand and have never tried).

VI. Conclusion

This guide was written as if you were sitting in my office as a new colleague. I've tried to give all the advice that I wish I had received, but no one can possibly anticipate every question. If you ever want to discuss questions that I did not address, please e-mail me or give me a call.

Warmly,

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2. To satisfy her judgment, may Cathy reach the community property, Hank's separate property, and/or Wendy's separate property? Discuss.