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BOOK REVIEW ESSAYS


Reviewed by Raymond C. O'Brien*

I. CASES AND OTHER MATERIALS

A casebook is like a musical score, bland and boring upon first observation, but in the hands of each maestro, possessing the "stuff", the "clay", the "fabric" from which the teacher may create the excitement—sometimes even rapture—of learning. This is the test of any assemblage of cases and other materials used in the profession of teaching students to learn. It warrants mention that the true test of the teacher's creation of this excitement is demonstrated by the student's commitment to continue the learning long after the cases and materials have found their way to the used book sale. A casebook is not like a novel; its worth cannot be measured by present tales. A casebook is not like history; its worth cannot be confined to past events. A casebook is a score, and its true virtue is its ability to be molded by the teacher into a vehicle by which learning may begin and continue.

Professor Wadlington is not a stranger to assembling cases and other materials on family law. Nor is he alone in his ability to create a compe-

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tent, analytical, and farsighted product. Among his contemporaries are Professors Homer Clark and Carol Glowinsky,2 Professor and Dean Judith Areen,3 Professor Harry Krause,4 and Professors Ira Mark Ellman, Paul

Wadlington, Laws on Sex, Marriage and Divorce: What the Physician Should Know, in MARI


3. Judith Areen, Cases and Materials on Family Law (2d ed. 1985). A unique feature of Professor Areen's casebook is its convenience through which a subscribing teacher may divide a course into issues related primarily to adults—marriage, divorce and property distribution—for example; and issues related to children—procreation, neglect, and adoption. Also, Professor Areen is comfortable embracing sociological data. See id. at xxi-xxii (citing statistics regarding the current definition of family); id. at 603 (citing Census Bureau statistics on alimony payments). She further discusses and difficult ethical and philosophical questions. See id. at 123 (asking, in regard to marital contracts, which provisions are currently enforceable in court and which should be enforceable); id. at 894-99 (offering a Report of the Committee of Inquiry into Human Fertilization and Embryology 31-41 (1984)); id. at 1004-08 (including a reprint from an article concerning education vouchers). All three of these issues are currently receiving intense scrutiny and debate as ethical and philosophical issues—and of course legal ones as well.

4. Harry D. Krause, Family Law: Cases, Comments and Questions (3d ed. 1990). While Professor Krause writes that "deeper forays into related, but non-legal subject matter should be left to courses in other departments," this casebook addresses constitutional, statutory, and public policy law. Id. at xxv. One paragraph, in which he asks a series of questions, indicates this characteristic:
Kurtz, and Ann Stanton. This is not an exhaustive list, but indicative of the interest that surrounds a field that was once the purview of surreptitious attorneys caballing with a cohort of private investigators, midnight photographers and ribald accusations. Not true today. During the 1960s, constitutional law and the expansive individual rights pursuit of the United States Supreme Court elevated the scrutiny directed towards family law, surely causing some constitutional scholars to wonder if the lofty realms had been invaded by the unwashed masses. During the 1970s, Social Security, bankruptcy, and various state statutes to accomplish such purposes as child sup-

Does the United States Constitution provide for the balancing of rights of the individual against the social interest in family relationships? Or against that of other parties involved, such as spouses and children? Has the Supreme Court done a fair interpretative job? Could it be argued that the individual-rights-centered U.S. Constitution (as well as state constitutions) now threatens the existence of the family as a social institution?

Id. at 24. Such questions pose the unique flavor of this book.

5. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS (1986). Over thirteen-hundred pages long, this book invites the teacher to select chapters to correspond with the particular subject matter of the course. The book recognizes what every other casebook does as well; the traditional family law course, with its concentration on marriage, divorce, and alimony, just does not represent what has developed in the last twenty years. That is, there are many courses today—some offered in other departments but still earning law school credit—that are all centered on the family, whatever that has come to mean.

6. Professor Wadlington incorporates constitutional law into his casebook at the very beginning with seminal cases such as Reynolds v. United States, 98 U.S. 145 (1878) (holding that a state may criminalize bigamy even though this would restrict the defendant’s free exercise of religion); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that specific guarantees in the Bill of Rights have penumbras which, in turn, create zones of privacy to which people are entitled as of right); Loving v. Virginia, 388 U.S. 1 (1967) (holding that state regulation of marriage is subject to due process and equal protection). Subsequent decades and cases expanded these decisions. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding that the Equal Protection Clause prohibits the state from differentiating between married and unmarried persons in the sale or use of contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy includes the abortion decision in a qualified sense); Palmore v. Sidoti, 466 U.S. 429 (1984) (holding that the Equal Protection Clause forbids child custody decisions to be based on race alone without strict scrutiny). Recent decisions by the Supreme Court have tempered the earlier cases. See, e.g., Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (expanding the state’s right to protect the health of the mother and fetal life over the privacy interest of the mother); Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that a person’s right to privacy does not confer on homosexuals a right to engage in sodomy, nor is the state’s criminalization of such conduct violative of the Due Process Clause); DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989) (holding that the Due Process Clause confers no affirmative right to governmental aid); Cruzan v. Director, Mo. Dep’t of Health, 110 S. Ct. 2841 (1990) (holding that the Due Process Clause does not prevent the state from requiring clear and convincing evidence of a person’s intent to withdraw life support).


8. See, e.g., In re Calhoun, 715 F.2d 1103 (6th Cir. 1983) (concerning what can be discharged in bankruptcy and what remains in the nature of support and alimony). See also
port and proof of paternity\textsuperscript{9} became the subject of family law. The 1980s and early 1990s witnessed the ascendency of a restrained judiciary,\textsuperscript{10} health care and the disabled,\textsuperscript{11} and conflicting procreation rights.\textsuperscript{12} These are all elements in the burgeoning area of family law.

All of these subjects must be included within the cases and other materials of family law. These and more. More difficult to categorize within specific

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10. An example of the Supreme Court's new attitude towards state statutes is evidenced in the facts of Cruzan v. Director, State of Missouri Department of Health. The State of Missouri required artificial nutrition and hydration over the objection of a patient's family after the patient was rendered incompetent as a result of severe injuries suffered in an automobile crash. Cruzan, 110 S. Ct. 2841, 2846. To discontinue this artificial feeding, the state required clear and convincing evidence of the patient's wishes. Cruzan v. Harmon, 760 S.W.2d 408, 425 (Mo. 1988) (en banc), aff'd sub nom, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990). The patient's family argued that this violated the Fourteenth Amendment's liberty interest of the patient to refuse unwanted medical treatment. Cruzan, 110 S. Ct. at 2852. The Court rejected the constitutional claim, upholding the state requirement. Id. at 2854. The important point is that the State of Missouri was able to establish procedures it thought to be adequate; no longer would the Court be the arbiter of family law. Rejecting the Cruzan family's arguments based on the Court's past decisions past decisions, Chief Justice Rehnquist wrote for the majority: "Here again petitioners would seek to turn a decision which allowed a State to allow family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way." Id. at 2855 (emphasis added).


decades is the heightened awareness of individual liberty—the ability to make personal choices unfettered by Judeo-Christian restraint, philosophical virtue, or statutory prohibition. This is a hallmark of the last thirty years: individual liberty, choice, and opportunity. And while it remained an unobtainable goal for many, it was bedrock belief for most. Of greatest significance, this individual liberty is so American. Writing in his 1982 book, Richard Reeves recreates the journey through America of Alexis de Tocqueville 150 years earlier, and recognizes this spirit of American individuality in the writings of another columnist, Ellen Goodman. He writes:

“It seemed like a good idea to raise our children to be independent,” said Ellen Goodman, a newspaper columnist in Boston. “But there were enormous implications to that independence .... We are a nation of leavers. We left to go West. Now we can’t go West anymore so we leave each other. I wonder how much things have really changed. Our ancestors left the old country or they moved West from New England—they left relationships for opportunity. Now people do the same thing personally, psychologically. They leave each other for real or imagined opportunity. Americans are living alone—its the centrifugal force at the end of individualism.”

By the end of the 1980s, another author, professor, and dean at an East Coast law school would write: “The autonomous and free individual is at the heart of how we see ourselves personally, how we see ourselves as economic men and women, and how we see ourselves as citizens.” Of greater impact to laws related to the family, individual liberty has changed the consensus of what it means to be family: “the dream of a satisfied, though stereotype-drenched, family life has more and more given way to dreams of a freer, more casual life, less bound by rules, by monogamy or sexual loyalty, less bound, in sum, by other people, more bound up in the concept of self.” Such descriptions sound so hedonistic, so foreign to what is learned in grade school or old movies. But it is the message of television, a medium described

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14. Id. at 71. Census Bureau statistics will confirm that an increasing number of Americans are living alone. See, e.g., George E. Jordan, So Single Minded, Newsday, Dec. 29, 1991, at 18 (offering statistics from a 1990 census, which states that one-third of all adult New Yorkers live alone); Jon Nordheimer, The Old Increasingly Being Bilked by the People They Must Rely On, N.Y. Times, Dec. 16, 1991, at A1 (reporting that by 1995, 60% of women 75 and older will live alone).
16. Id. at 28. For a summary of how AIDS has affected the American family, see Raymond C. O’Brien, AIDS, Perspective on the American Family, 34 Vill. L. Rev. 209 (1989).
"as a visual realization of the society the mainstream desires, blatantly instructionalist." The notion of individual liberty is integral to the American mainstream and this notion has spread through the American family and American laws during the last thirty years. It cannot be categorized by a decade or even by moral or ethical characterizations, but it blossomed and continues today.

While it is naive to look back and fantasize that another age or land was free of libido, guile, individual liberty or self, it is sustainable to state that statutory and common law have changed substantially during the last thirty years to reflect legislative and judicial recognition of individual concepts of self. Many of these changes were prompted by Supreme Court decisions during the 1960s and 1970s, but the acceptance of the changes—and even legislative enactment of many—exemplify American mainstream willingness to ratify the preeminence of individuality. Those familiar wooden signs demanding "Impeach Earl Warren!" dotting endless country roads have surrendered to the termites just like the objections to Warren's individualist philosophy. Today, no matter what the composition of the Supreme Court, individual liberty is part of the American mainstream and shall continue to manifest itself in further statutory and judicial changes.

Another subject difficult to place within a specific decade is the epidemic


18. An illustrative quote from the august Victorian age serves to dramatize the point that every age possessed its share of license: "Gentlemen in Victorian England could amuse themselves as much as they liked with 'actresses,' the term society applied to women of the streets and special houses . . . . The essential rule underlying the entire structure was discretion; everything might be known, nothing must be said." ROBERT K. MASSIE, DREADNOUGHT: BRITAIN, GERMANY, AND THE COMING OF THE GREAT WAR 19 (1991).

19. Examples include the following, taken from the Table of Contents of Professor Wadlington's casebook: Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that individuals have a fundamental right to marry which cannot be infringed by the state unless supported by sufficiently important state interests and which is closely tailored to effectuate only those interests); Braschi v. Stahl Associates, 543 N.E.2d 49 (N.Y. 1989) (holding that the reality of family life demands that family should not be restricted to those who have formalized their relationship through a marriage certificate or an adoption decree in order to provide protection for individuals); Gleason v. Gleason, 256 N.E.2d 513 (N.Y. 1970) (lessening importance of the status of marriage and recognizing that if two individuals wished to divorce, it is socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bonds); In re Mary P., 444 N.Y.S.2d 545 (N.Y. Fam. Ct. 1981) (granting a fifteen year-old girl an order of protection from her mother because she wished to carry her unborn child to term over the objection of her mother); Watts v. Watts, 405 N.W.2d 303 (Wisc. 1987) (holding that an unmarried cohabitant could enforce an express or implied in fact contract stipulating that the parties agreed to share property accumulated during a relationship that was neither common law nor statutory marriage; and further noting that each party had the individual right to contract and enforce that contract through a claim of unjust enrichment).

20. See supra note 6.
of AIDS. Perhaps the calamity of millions of men, women, and children dying will repress the American penchant towards individual liberty. Perhaps the government will mandate repression. Then again, perhaps a pluralism of individuality will suffice. Such speculation is expressed in the closing lines of Dean Monroe Price's book on AIDS:

If we are fortunate, our private actions, in this moment of community hazard, will fulfill public needs. Failing that, the time may come when the state will, to the extent it thinks possible and consistent with the constitutional interpretations of the moment, seek far more actively to discourage or prevent individuals from conducting themselves in ways that are inimical to the general weal.

Law schools are devoting entire courses to the legal ramifications of AIDS, yet that only dramatizes the point that it is impossible to predict what effect the disease and the manner in which it affects the sexual relationships of America will have upon families, individuals, or established law. To date, it is known that:

[T]he disease has shifted from a generally affluent population of young Caucasian homosexual males, living in four or five urban areas, to an increasingly inner-city population of poorer black and Hispanic heterosexual men, women, and children sharing contaminated needles and engaging in random sexual intercourse.

We further know that the disease dramatizes the inequity and collapse of the health care system. “As in most other biomedical problems, the earlier the

21. Professionals refer to the disease characterized as AIDS as Human Immunodeficiency Virus (HIV), yet legislative bodies and the public continue to use the AIDS designation. Nonetheless:

The term “AIDS” is obsolete. “HIV infection” more correctly defines the problem. The medical, public health, political, and community leadership must focus on the full course of HIV infection rather than concentrating on later stages of the disease (ARC and AIDS). Continual focus on AIDS rather than on the entire spectrum of HIV disease has left our nation unable to deal adequately with the epidemic.


22. PRICE, supra note 15, at 136.

23. See, e.g., AIDS Law and Policy Seminar. This seminar explores many of the legal and policy issues arising out of the HIV (Human Immunodeficiency Virus, which causes AIDS) epidemic. The topics covered include an assessment of the epidemic and its direction; AIDS discrimination, including discrimination in schools and the workplace; policy issues dealing with confidentiality, testing, and a duty to serve infected people under statute and case law; the impact of HIV infection on insurance and the health care system; blood and blood product cases; drug and vaccine development issues; and the issues relating to the more effective resolution of HIV-related conflicts. GEORGETOWN UNIVERSITY LAW CENTER, GEORGETOWN UNIVERSITY LAW SCHOOL BULLETIN 1991-1992 at 58 (1991).

intervention, the more favorable the outcome.” Yet few people currently infected with HIV are actually receiving any treatment due to the high costs associated with drugs such as AZT, DDI, pentamidine, and foscarnet. One commentator noted,

> When poor, uninsured or underinsured persons become sick, they typically turn to public hospitals where they live. The nation's public hospitals, however, are on the brink of collapse. AIDS has made manifest weaknesses in this system that society has long ignored. The problems are particularly acute in the 13 metropolitan areas that have fifty-five percent of all AIDS cases and in the five percent of the nation's hospitals that care for one-half of all AIDS patients.

This is not a problem that can be confined to one segment of the population; it will affect every American family, it will have an impact upon the manner in which laws are made and enforced. AIDS will have an impact upon the nation's penchant for individual expression.

From all of these cases and other materials, the author of any casebook must choose so as to create the “score” from which the teacher may create a learning atmosphere. It is like packing a suitcase for someone else: the author can assemble cases, statutes, statistics, sociology, constitutional law, essays, theology, ethics, and public policy, but will it be used or be useless baggage? This is the difficult part of compiling a casebook, choosing from all of the cases and other materials available and placing them at the disposal of the teacher so the teacher may become a maestro. Professor Wadlington recognizes this when he writes in his Foreword:

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25. D.P. Bolognesi, Prospects for Prevention of and Early Intervention Against HIV, 261 JAMA 3007, 3012 (1989). For many persons of color, lack of health insurance prevents early treatment: “In 1984, an estimated 22 percent of blacks and 14 percent of whites under age 65 were not covered by either public or private health insurance . . . . and those figures have been rising since then.” D. Jaynes & R. Williams, A Common Destiny: Blacks and American Society 430 (1989); see also Spencer Rich, As Medicaid Outlays Soar, Millions Lack Coverage, Wash. Post, Nov. 15, 1991, at A21 (reporting that Medicaid is America’s largest welfare program and it will spend $115 billion in 1991 on the health care of 26 million people and this still only covers one-half of the poor); Davis et al., Health Care for Black Americans: The Public Sector Role, Currents of Health Policy: Impacts on Black Americans 213 (1987).

The number of cases decided by the Court... involving constitutional challenges... offers testimony to the ongoing 'constitutionalization' of the field... Other legislative activity has continued at an increased level... [and]... while the states have widely changed their laws to recognize that divorce can be a valid social tool... our increased understanding of biology and genetics and the array of new reproductive techniques seem to be forcing us finally to rethink some long held views about the legal dominance of biological parenting in crafting legal rules. The stage is now set for much broader conceptualization of the legal role of the family as a new round of reform begins.27

Implied within this Foreword are all of the cases and other materials necessary for today's teacher of family law: statutes and cases, federal and state constitutions, sociology, issues of health and biological change, and the ethical and theological dimensions of family as they are being discussed within the individualistic American mainstream. AIDS will be the pestle for them all. In the hands of the teacher seeking to incite a spark of learning within the student, Professor Wadlington's casebook offers all of the cases and other materials necessary.

II. THE PROOF IS IN THE DOING

Many law school courses concentrate on children. Many more focus on juvenile law or parent and child.28 Indeed, some courses on children demand as much credit as the traditional courses in family law,29 testifying to

27. WALTER J. WADLINGTON, CASES AND MATERIALS ON DOMESTIC RELATIONS xxi (2d ed. 1990).
28. At Georgetown University Law Center, for example, the following family law courses are offered:
   Family Law I: Marriage and Divorce.
   Family Law II: Parent Child and State.
   Family Law and Policy Seminar.
   Gender and the Law Seminar.
   Gender and the Law in American History Seminar.
   History of the Family in a Legal and Economic Perspective Seminar.
   Juveniles and the Courts Seminar.
   Law and the Aging Seminar.
29. See, e.g., THE WASHINGTON COLLEGE OF LAW OF THE AMERICAN UNIVERSITY, Washington, D.C., Catalog 1991-1992, at 49. The Washington College of Law offers a three hour course entitled: Juvenile Law: Children's Legal Rights, which examines legal problems faced by children within the family, in foster care, in school, and in the criminal justice system. The class considers legal issues such as formation of the family relationship, disintegration of the family through separation or divorce, propriety of state intervention in medical decision making affecting the child, authority of the state to remove a child from the
the expansion of materials within this once torpid field. Specialized courses in biotechnology tangentially concern children in that they discuss such issues as reproduction. The increased importance of children within America results from their horrific plight. One study showed that “[o]ne in four children is raised by just one parent. One of every five is poor. Half a million are born annually to teenage girls [fathered often by teenage boys] who are ill prepared to assume responsibilities of parenthood.”

Even though the number of children under age eighteen was approximately the same in 1990 as it was in 1960 (about sixty-four million), the proportion of children in the United States has declined sharply. At the end of 1960, children comprised thirty-six percent of all Americans; in 1990 they were twenty-six percent, and by 2010 they are expected to be twenty-three percent. Families are smaller, and birthrates have fallen; only the percentage of minority children has expanded. The National Commission on Children notes, “Because minority children are disproportionally disadvantaged in terms of family income, access to high-quality education and health care, and employment opportunities, the nation now faces a substantially

home in cases of abuse and neglect, the states’ response to a child’s poverty or homelessness, the schools’ control over a student’s freedom of expression, the schools’ obligation to offer the child an adequate education, and whether the death penalty should be applied to juveniles.

30. See, e.g., id. at 50. The school also offers a three hour course entitled: Biotechnical Innovation, Human Life, and the Law, which focuses upon the impact of biological and scientific innovation, including artificial insemination, in vitro fertilization, surrogate motherhood, abortion, genetic enhancement, gene therapy, transplantation, artificial organs, organ donation, anencephalism, brain death, right to refuse treatment, euthanasia, supportive medical technology (e.g. respirators), and genetic engineering of non-human life forms.

31. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES xviii (1991). The National Commission on Children was established by the United States Congress to provide a bipartisan investigation into the problems that children face in America.

32. Id. at 16.

33. Between the mid-1950s and the mid-1970s, the number of births per 1,000 women age 15 to 44 decreased by almost half, from 122.7 to 67.8; since then, it has remained steady. Id. The National Commission on Children notes:

Despite long-term declines in the birthrate, the U.S. population is projected to grow over the next 20 years because of immigration and because the baby boom cohort born during the decade following World War II will continue to have babies. However, in the twenty-first century, the United States, like several Western European nations, could face a declining population as well as an aging one.

Id.

34. The Commission states that “[i]n 1960, more than 86 percent of children were white, 13 percent were black, and 1 percent were other races. But in 1989, about 80 percent of the children born in the United States were white, 16 percent black, and 4 percent were of other races.” Id. Demographers project that the proportion of minority children will increase over the next 20 years. Id. at 17.
needier population of young people." This is not true for all minority children; these statistics are only proportionally accurate.

To describe children as substantially needier is not enough because children are the poorest Americans. While it is true that the majority of poor children are white, the percentage of minority children living in poverty is far greater. A recent study found that about forty-four percent of all black children and more than thirty-six percent of Hispanic children are poor, compared to fewer than fifteen percent of white children. This fact is not a product of race, but rather of disadvantage: over fifty percent of all black children and over thirty percent of all Hispanic children live in a single parent home. Based on this it is known that:

Nearly seventy-five percent of all American children growing up in single-parent families experience poverty for some period during their first ten years, compared to twenty percent of children in two-parent families. Among children living with their mothers, sustained poverty for seven or more years is common; among children living with both parents it is rare.

Children are thus victimized by a family in poverty that denies support, perpetrates abuse, divorces more often, and occasions disease and mini-

35. Id. For an excellent source of statistics concerning minorities and health status, see U.S. DEP'T HEALTH AND HUM. SERVS., HEALTH STATUS OF MINORITIES AND LOW INCOME GROUPS (3d ed. 1991). It is important to point out that health status is not a factor of race, but rather education and socioeconomic status. In almost all instances, the quality of a person's health is dependent on education and the ability to sustain a proper diet, health insurance and level of stress. See generally ROBERT M. WACHTER, M.D., THE FRAGILE COALITION (1991) (describing the relationship between socioeconomic status and the ability to obtain funding for health care); LAWRENCE O. GOSTIN, AIDS AND THE HEALTH CARE SYSTEM (1990) (analyzing the response of the health care network to the AIDS crisis); D. JAYNES & R. WILLIAMS, A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (1989) (reporting on a survey about blacks in American society).

36. NATIONAL COMMISSION ON CHILDREN, supra note 31, at 24.

37. The poverty rate for young families doubled between the early 1970s and 1989, with the greatest relative increases among young white families, young married couples with children, and young families headed by high school graduates. Id. at 83.

38. Id.

39. Id.

40. See, e.g., Spencer Rich, Children Shortchanged on Support, WASH. POST, Sept. 6, 1991, at A19 ("Although 11 million children have been awarded or promised support from absent parents, about $5 billion of the $15 billion due these children each year is not paid.").

41. See, e.g., OFFICE OF HUM. DEV. SERVS., U.S. DEP'T HEALTH AND HUM. SERVICES, U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 17 (1990) ("A national incidence survey showed that child maltreatment was seven times more likely in families with incomes under $15,000 (in 1986) than in families with higher incomes.").

42. Many more children have to cope with divorce than did previous cohorts of children. The number of children whose parents divorced more than tripled between 1950 and 1984.
It is quite understandable that entire law school courses are devoted to children and the delicate balance among parent, child, and state. Does Professor Wadlington offer sufficient cases and other materials to support a course directed exclusively towards this delicate balance? The answer is yes, and it is a credit to the versatility of this casebook that both traditional and innovative courses may be fashioned from the same material. A course centered upon parent, child, and state is unique enough to demand particular materials, but, at the same time, popular enough that current developments could demand expansion of the original syllabus. Using a


43. An example of parental neglect is the measles epidemic. In 1990, 27,672 measles cases were reported—the largest number reported since 1977. Centers for Disease Control, Measles—United States, 1990, 40 Morbidity and Mortality Wkly. Rep. 371 (1991). During 1987, 47.5% of the patients had been vaccinated on or after the first birthday; 47.9% were unvaccinated. Centers for Disease Control, Measles—United States, 1987, 37 Morbidity and Mortality Wkly. Rep. 528 (1988). The difficulty is getting the parents to immunize the children.

44. American public schools have recently come under increased attack recently. One researcher, writing about the Chicago public schools stated:

The degree of equanimity in failure . . . has led most affluent parents in Chicago to avoid the public system altogether. The school board president in 1989, although a teacher and administrator in the system for three decades, did not send his children to the public schools. Nor does Mayor Richard Daley, Jr., nor did any of the previous four mayors who had school-age children. J. Kozol, Savage Inequalities: Children in America's Schools 53 (1991). Parents, especially single-parent homes utilizing the public schools, contribute to the deficiency in education. See National Commission on Children, supra note 31, at 32-33.

45. A very general syllabus might include the following:


II. The Real Best Interest of the Child: Establishment of legal and biological parenthood creates a presumption of care, custody, visitation, and perhaps even eventual support from a child. Issues would derive from surrogacy and fertilization, legitimacy, common law, and statutory duties enforcing public policy considerations, psychological and biological balancing, adoption, and the definition of presumption in such cases as Santosky v. Kramer, 455 U.S. 745 (1982) (mandating clear and convincing evidence for termination of parental rights).

casebook that contains more than the minimum cases and other material offers teachers an instantaneous resource from which they can draw perspec-
tive and precedent. This is an essential ingredient that makes this an ex-
traordinary casebook.

Beyond innovative courses such as the one mentioned, the casebook is
amenable to the traditional three credit course in family law. Indeed, it is
particularly suited for this course because there are no neat divisions be-
tween, for instance, adults and children, or constitutional law and state stat-
utes. There is a symbiosis of material that precludes facile divisions, thereby
demanding that the teacher explore the book beforehand and chart a proper
course. The student will appreciate this. And because there is more mate-
rial than can be discussed in the traditional three credit course, it is possible
to draw upon additional cases and other materials if interest and time per-
mit. The point is that it is always better to have too much than too little.
And an additional point: it is always better to involve the teacher in an
exercise of choice before the class, rather than during the class.

Simply because it is possible to fashion both innovative and traditional

46. Of course, both the teacher's manual and the textbook supplement assist in developing
a syllabus.

47. A suggested syllabus for a three credit, six hundred and twenty-seven page course in
family law derived from Professor Wadlington's casebook would be:

<table>
<thead>
<tr>
<th>Pages</th>
<th>Sections</th>
</tr>
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<tbody>
<tr>
<td>1-82</td>
<td>Discussion of the role of personhood, family, state and federal guidelines, and shifting social patterns.</td>
</tr>
<tr>
<td>82-121</td>
<td>Alternatives to the status of marriage.</td>
</tr>
<tr>
<td>141-150</td>
<td>Annulment and theories of marriage</td>
</tr>
<tr>
<td>155-163</td>
<td>Entering the status of marriage: The Rules.</td>
</tr>
<tr>
<td>1023-1051</td>
<td>Divorce: Grounds, history, and defenses.</td>
</tr>
<tr>
<td>1052-1060</td>
<td>Divorce: No fault.</td>
</tr>
<tr>
<td>1061-1107</td>
<td>Jurisdiction for divorce: custody and support differences.</td>
</tr>
<tr>
<td>1108-1157</td>
<td>Support for adults: temporary and rarely permanent.</td>
</tr>
<tr>
<td>1157-1196</td>
<td>Support for children.</td>
</tr>
<tr>
<td>1196-1235</td>
<td>Equitable distribution of property: What is equity?</td>
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courses from Professor Wadlington's casebook does not make it unique. Returning to the simile used at the beginning of this essay, that a casebook is like a musical score, is this a good score? Are the cases and other materials chosen by author the best? Do they provide the “stuff” to enable learning to take place? And furthermore, show me why.

To demonstrate why this casebook is an open and exciting assemblage of materials, it is necessary to focus upon children, not as an innovative course, but as a part of the traditional course in family law. Generally, drawing upon the facts and statistics concerning children previously discussed, and specifically in the context of termination of parental rights, does the casebook offer an opportunity for learning? To do so, the book must provide cases and other materials to stimulate learning, and then invite whatever the teacher and student may contribute so as to bring about that spark of learning. Previously mentioned ingredients are necessary: constitutional law; individual liberties; statutory and judicial contribution; and the myriad of sociological, ethical, and theological perspectives that shift and share the bubbly public mainstream. Does the material on termination of parental rights evidence the quality of this book? Yes, unequivocally!

The chapter on termination begins with the seminal decision of *Santosky v. Kramer*. This is the decision by which the Supreme Court elevated the standard of proof necessary to terminate the right of a parent to custody and

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48. For an example of the placement of issues concerning children in a family law course, see the offered syllabus and particularly, the material associated with termination of parental rights, *supra* note 47. Within Professor Wadlington's casebook, the material on termination of parental rights appears on pages 891 through 931.

49. *See supra* notes 31-44 and accompanying text.

50. The effect of termination of parental rights may be found in the Pennsylvania statute offered in the casebook:

Effect of decree of termination:

(a) Adoption proceeding rights extinguished.—A decree terminating all rights of a parent or a decree terminating all rights and duties of a parent entered by a court of competent jurisdiction shall extinguish the power or the right of the parent to object to or receive notice of adoption proceedings.

(b) Award of custody.—The decree shall award custody of the child to the agency or the person consenting to accept custody under section 2501 (relating to relinquishment to agency) or section 2502 (relating to relinquishment to adult intending to adopt child) or the petitioner in the case of a proceeding under section 2512 (relating to petition for involuntary termination).

(c) Authority of agency or person receiving custody.—An agency or person receiving custody of a child shall stand in loco parentis to the child and in such capacity shall have the authority, inter alia, to consent to marriage, to enlistment in the armed forces and to major medical, psychiatric and surgical treatment and to exercise such other authority concerning the child as a natural parent could exercise.


visitation with his or her child from preponderance of the evidence to "clear and convincing" evidence. The majority decision of Justice Blackmun suffuses itself with the rich tapestry of constitutional decisions, many of which would be familiar to students who would also recognize the familiar theme of individual liberty: "Freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Because the majority opinion is consumed with constitutional law, state statutes, and evidentiary levels of proof—to the absence of the facts of the case—students are provided with an opportunity to discuss Due Process in an abstract manner that eventually will have to confront the reality of present day statistics and underlying attitudes. But this is law school; the majority opinion in *Santosky* is absolutely essential to establish that fact. By confronting the student with the *Santosky* decision at the beginning of the material on termination of parental rights, the casebook establishes the focus of the law school course: the law. This is correct pedagogy. But note, as shall be demonstrated, that the casebook invites other disciplines as well.

It is with the dissenting opinion of Chief Justice Rehnquist that the student's legal analysis is tempted to stray to statistics, sociology, and yes, emo-

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52. The Court stated, "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegation by at least clear and convincing evidence." *Id.* at 748. At the time of the decision, fifteen states, the District of Columbia, and the Virgin Islands required clear and convincing evidence; New Hampshire and Louisiana required evidence beyond a reasonable doubt. The remaining states, like New York, required preponderance of the evidence. *Id.* at 749-50.

53. *See, e.g.*, Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (holding that the Due Process Clause of the Fourteenth Amendment does not require appointment of counsel for indigent parents in each and every termination proceeding); Mathews v. Eldridge, 424 U.S. 319 (1976) (providing three distinct factors to consider when determining if due process has been accorded: the private interest affected, the risk of error created by the State's chosen procedure, and the countervailing interest supporting use of the challenged procedure); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an unwed father was entitled to a hearing to determine his fitness as a father before his children could be taken from him); Addington v. Texas, 441 U.S. 418 (1979) (acknowledging that public opinion should be taken into consideration in determining the standard of proof necessary to distribute the risk of error).

54. *Santosky*, 455 U.S. at 753.

55. The facts in the majority opinion are confined to a description of the names of the children and the parents, and brief findings of the Family Court Judge. *Id.* at 751-52, 760-61. The dissenting opinion of Justice Rehnquist provides the recitation of the facts. *See id.* at 773, 781.

tion. In the dissenting opinion the facts draw the students to the raw human carnage of abuse. How do the facts affect analysis?

Tina . . . when she was two years old . . . had suffered injuries . . . including a fractured left femur, treated with a homemade splint; bruises on the upper arms, forehead, flank, and spine. John, who was less than one year old . . . was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back.

The emotional impact of the facts may find analytical similarity in the opinions of another of the dissenters in Santosky, Justice O'Connor. Trauma and its effect upon a child was a factor in Justice O'Connor's majority opinion in Maryland v. Craig to allow the use of one-way closed circuit television during court examination of a child witness. Rejecting a strong dissent which argued any minimization of the face-to-face confrontations guaranteed by the Sixth Amendment was "utterly unheard-of," Justice O'Connor concluded that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." Child abuse victims in Craig were treated with the same practical attention as the children in Santosky without regard to "myopic scrutiny" of standards of proof or even of the United States Constitution.

Is the concern evidenced by Justice O'Connor's majority opinion in Craig or by Chief Justice Rehnquist's dissenter's opinion in Santosky, occasioned by the presence of children, weak and unable to care for themselves? Is the Court, like many members of Congress, concerned over the future of soci-


58. The Santosky children must be placed within the context of child abuse in America today. The National Commission on Children found: "Reports of child abuse and neglect rose 259 percent between 1976 and 1989, and more than 50 percent of all out-of-home placements today are for children who need protection from adults in their own homes." National Commission on Children, supra note 31, at 284.

59. Santosky, 455 U.S. at 781.
61. Id. at 3173 (Scalia, Brennan, Marshall, & Stevens, JJ., dissenting).
62. Id. at 3167. As the majority in Santosky observed, public policy was an important factor: "That a significant majority of States has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a policy." Id.
63. Santosky, 455 U.S. at 771.
64. See generally Children's Defense Fund, CDF's Legislative Agenda for the 100th Congress (1988); Children's Defense Fund, A Children's Defense Budget
ety: "Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance?" If so, what limits are students willing to place upon the Constitution? Are students willing to reverse the federalist trend of the recent decade and argue for greater court activism, especially on the part of the federal judiciary? And will this call to activism only protest the termination of rights of children, or also of prisoners, homosexuals, persons with AIDS, or single-parent poor?


65. Santosky, 455 U.S. at 790. In some contexts, students should be challenged to address specific religious tenets held by denominations sponsoring law schools. For instance, in Roman Catholic institutions, a particular Pastoral Letter of the United States Catholic Bishops concerns the role of families in the development of children:

The economic and cultural strength of the nation is directly linked to the stability and health of families. When families thrive, spouses contribute to the common good through their work at home, in the community, and in their jobs; and children develop a sense of their own worth and of their responsibility to serve others. When families are weak or break down entirely, the dignity of parents and children is threatened. High cultural and economic costs are inflicted on society at large. Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy, in 5 Pastoral Letters of the United States Catholic Bishops 383 (1988).

66. Writing for the dissent in Santosky, then Justice Rehnquist clearly advocated limiting the role of the judiciary and strengthening the legislative power of the states; "By Parsing the New York scheme and holding one narrow provision unconstitutional, the majority [in the Santosky decision] invites further federal-court intrusion into every facet of state family law."

Santosky, 455 U.S. at 770. And again:

Such a conclusion [choosing preponderance of the evidence rather than clear and convincing] is well within the province of state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the Members of this Court disagree with the New York Legislature's weighing of the interests of the parents and the child in an error-free factfinding hearing.

Id. at 788.

67. Once again, the marvel of Professor Wadlington's book is that he invites this question with his inclusion of In re Gregory B., 542 N.E.2d 1052 (N.Y. 1989). Seven years after Santosky, a state court terminated the parental rights of a father in his two children because the father was serving two concurrent sentences of 25 years to life for murder. Id. at 1059. Relying on the state statute, the court decided that "an incarcerated parent may not satisfy the planning requirement . . . where the only plan offered is long-term foster care lasting potentially for the child's entire minority." Id. at 1058.

68. See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (holding that Army regulation denying acknowledged homosexual the right to re-enlist does not violate a soldier's First Amendment right to freedom of speech or their Fifth Amendment right to equal protection), cert. denied, 110 S. Ct. 1296 (1990). See also Steffan v. Cheney, 920 F.2d 74 (U.S. App. D.C. 1990). A compelling state interest is not available because homosexuals do not constitute a suspect class: "If homosexual conduct may be constitutionally criminalized (Bowers v. Hardwick, 478 U.S. 186 (1986)) then homosexuals do not constitute a suspect class entitled to
Simply by initiating the material on termination of parental rights with the *Santosky* decision, Professor Wadlington creates the excitement of this discussion regarding children.

Rather than analyzing the law—the Constitution, state standard of proof, and the statutes—or the methodology of reform—federalism, judicial activism, or fascism—students may choose to count noses on the Court. Can the *Santosky* decision survive today’s Court with the arrival of Justice Kennedy, Souter, Thomas and Scalia? These latter Justices share many of the views espoused in *Santosky*'s dissent. Is it not easier to predict the restoration of New York’s, and every other state’s, ability to fashion its own laws based on counting votes, rather than the Constitutional or methodology? This is a time to remember Chief Justice Warren, Justice Marshall, Justice Brennan. Professor Wadlington’s casebook invites us to consider jurisprudence, the “stuff” of confirmation hearings.

Counting noses on the Court to answer the enigma of the facts of *Santosky* invites another comparison in the area of termination of parental rights. The brutality occasioned by the parents of Tina and John Santosky resulted in Justice Blackmun’s majority opinion that, based entirely on legal standards of proof and constitutional due process, restored the children to their parents where additional abuse could occur. Justice Blackmun was quite adamant in his support of parents: “The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . .” He further states that “[a]t the factfinding, the State cannot presume that a child and his parents are adversaries.” Relying on the premise that a child is better off with his or her parents, Justice Blackmun wrote: “For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo . . . .” This assumes leaving the child in foster care at best, or returning the child to abuse and neglect at worst. Justice Blackmun, arguably unsupported by the facts in *Santosky* and the facts contained in many greater than rational basis scrutiny for equal protection purposes.” *Ben-Shalom*, 881 F.2d at 464.


70. See supra note 58 and accompanying text.

71. Based on private conversations and correspondence with the Family Court Judge assigned to hear the case in Ulster County Family Court, the author of this book review and essay has learned that three of the children, Tina, John and Jed, were eventually adopted by another family after a subsequent termination of parental rights.

72. *Santosky*, 455 U.S. at 753.

73. *Id.* at 760.

74. *Id.* at 765-66.
mainstream scenarios, fashioned a legal argument that supported the age-old premise that a child's best interest is with his or her parents.\textsuperscript{75} This can be called the parental presumption.

Times have changed. \textit{Santosky v. Kramer} was argued before the Court on November 10, 1981 and decided in the spring of 1982. By 1989, however, Justice Blackmun would write another opinion, this time a dissent, parts of which would be quoted in newspaper editorials throughout the country. The dissent would castigate the majority decision for refusing to allow a civil rights action to be brought against a social worker and local officials on behalf of a poor boy brutalized by his father after repeatedly being returned to the father's custody. The decision was \textit{DeShaney v. Winnebago County DSS}.\textsuperscript{76} In that case, Chief Justice Rehnquist, writing for the majority, stated that the state had no constitutional duty to protect a child from his father after receiving reports of possible abuse.\textsuperscript{77} Legally this was correct, but the factual context of America's children has changed since \textit{Santosky}.

The facts were tragic. Joshua DeShaney was one year-old when custody of him was awarded to his father. Shortly thereafter, authorities were told of allegations of child abuse, but the boy was left in the father's care. When he was three years-old, Joshua was admitted to the hospital with bruises and abrasions, but after promises made to a Child Protection Team, the boy was returned to the father. One month later, the boy was treated in a hospital emergency room, but the boy remained with the father. Yet again the boy was taken to the emergency room, but the caseworker took no action to remove Joshua. The next year, when he was four years-old, the father beat Joshua so severely that he fell into a life-threatening coma.\textsuperscript{78} The Court's recitation of the facts indicates that "[e]mergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over


\textsuperscript{76} 489 U.S. 189 (1989). This case appears on page 634 of the casebook being reviewed.

\textsuperscript{77} \textit{DeShaney}, 489 U.S. at 197. The Court stated: "Our cases have recognized that the Due Process Clauses generally confer no affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." \textit{Id.} at 194. Justice Rehnquist cited the parent-child relationship so hallowed by Justice Blackmun's majority in \textit{Santosky} as one reason for the state's action in continually returning the child to the father. The Chief Justice wrote:

\begin{quote}
In defense of [state officials] it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relation, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.
\end{quote}

\textit{Id.} at 203. \textit{Santosky} was decided on the basis of the Due Process Clause of the Fourteenth Amendment. \textit{Santosky}, 455 U.S. at 747-48.

\textsuperscript{78} \textit{DeShaney}, 489 U.S. at 193.
a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded." 79

These facts affected Justice Blackmun. It is not enough to conclude that his dissent was based on his clear conviction that the Due Process Clause should have been the basis for at least permitting a suit on behalf of the boy. In DeShaney, Justice Blackmun went beyond the legal analysis that so dominated Santosky seven years earlier. He possessed the practical reality of Santosky’s dissent which so emphasized the facts. Justice Blackmun wrote: “Today, the Court purports to be the dispassionate oracle of the law . . . but, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or of the legal norms that should apply to those facts.” 80 Students would do well to ask about the Due Process Clause of the Fourteenth Amendment: Why did it extend so much protection to abusive parents in Santosky and DeShaney, but arguably, at least for the dissenters in DeShaney not provide a vehicle for relief against abusive parents? Have the factual contexts surrounding the reality of America’s children affected the parental presumption?

“Poor Joshua” is the phrase that Justice Blackmun used and that gained so much media attention. It signals a shift from the solitary legal analysis of seven years earlier in Santosky, a shift that emphasizes that, “compassion need not be exiled from the province of judging.” 81 It signals a shift towards the acceptance of the reality of facts and statistics. But how is law fashioned from this? Professor Wadlington’s casebook invites us to consider state statutes. Cases and materials presented in the chapter on termination provide ample discussion. But these must be seen within the context of changing statistics on child abuse, foster care, and perhaps most of all, a changing mainstream perception of parent and child. The casebook offers a cornucopia of opportunities to choose from with which to stimulate and fashion the student’s ability to learn. Counting noses in the case of Justice Blackmun is an example of both the Court’s shift and judicial and statutory recognition of changing times and circumstances. But, through the cases and other materials offered in Professor Wadlington’s casebook, the shift in time in reference

79. Id. at 195. Randy DeShaney was subsequently tried and convicted of child abuse. Id. Joshua and his mother brought suit alleging that social workers and local officials had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known. Id.

80. Id. at 212 (Blackmun, J., dissenting).

81. Id. at 213.
Domestic Relations

III. WILL IT BE ON THE EXAM?

Students are often told that if they prepare for class each day, the examination will be easy. This phrase is just as often met with skepticism. But there is a kernel of truth here. If the class invites the student to analyze and utilize the material presented, then the student need only accept the invitation to prepare well enough to make the examination easy. If this is to happen, the classroom teacher needs a good "score," the "stuff" by which he or she may create the excitement of learning. And if that excitement is genuine, it will continue long after the course ends.

Few would dispute the fact that family law is replete with possibilities of excitement. But learning should not be confused with scintillation. The man who supports a man who becomes a woman in order to marry a man, who after a marriage and a few years, says he is not married because he cannot marry a man who becomes a woman, is the subject of scintillation unless it can be placed within a proper context. The true test of the strength of Professor Wadlington's book is that it provides the proper context. The book is replete with the stuff of law: cases, model codes, and numerous up-to-date examples from the California family law code, among others. There is a choice that must be made among the cases and other materials, and it is a credit to this book and this author that the book offers such a concise and varied assemblage of legal references. This is not to say that the choices made are conclusive; rather, they are soupçon—they offer a taste of what can be added, instilled, or appended. To Santosky can be added DeShaney, Craig, and the statutes of In re Doe, Pennsylvania, and In Re Jeffrey E. To this can be added the material already cited in reference to AIDS, the plight of poor children in America, and the changing definition of parents. Jurisprudence, sociology, ethics, politics, and theology all provide another context.

The proper context demands the inclusion of cases that offer instruction and comparison; this is provided in Wadlington's casebook. But to be proper, the book must also include other materials; what they are has been

83. 666 P.2d 771 (N.M. 1983) (found at pages 911-17 of the casebook being reviewed).
85. 57 A.2d 954 (Me. 1989) (found at pages 927-31 of the casebook being reviewed).
86. See supra note 64.
87. See, e.g., the interaction among Santosky, DeShaney, and In re Gregory B.
quoted in this review. Novels, research books by sociologists, and pastoral letters from religious leaders are all present and a necessary part of teaching family law. The text and footnotes testify to how these materials support the cases, how they have been introduced at the behest of the cases, and how they allow teachers the "stuff" through they may create the excitement of learning. The law is on the exam; the law must be the initiator and then the other follows. The proof is in the doing, and an example has been provided in the use of the chapter on termination of parental rights.88

When all is said and done, a confession must be made. This is a good book because it is a part of me: my sweat has discolored the blue binding. I have notes and cartoons and at least one piece of chalk stuck between the pages. Seating charts and xeroxed cases dart like stubble from its bowels. This is the book I have used—or its predecessors—when teaching Texans, Californians, and a little bit of everyone in Washington D.C. The best review of all is to say that it works for me, and it works outstandingly well!

88. See supra notes 50-81 and accompanying text.