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CHILD, FAMILY, AND STATE
Problems and Materials
on Children and the Law

*Fifth
Edition*

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Child, Family, and State

Problems and Materials on Children and the Law

Fifth Edition

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In memory of I. J. Mnookin, whose parental love illumined a
sovereignty the law must reflect.
—*R. H. M.*

To my husband, George, and my children, Aaron and Sarah.
—*D. K. W.*

PREFACE

A single overarching question lies at the core of this fifth edition, as in the previous editions: Who decides on behalf of the child? More precisely, how does law allocate power and responsibility for children in our society, and how should it do so? This question reflects the belief that the primary function of law in relation to children is to outline a framework for the distribution of decisional power among the child, the family, and various agencies of the state. Thus, the title of the book.

What makes the study of children and the law particularly intriguing is the fact that as children grow up they acquire an increasing capacity for making decisions for themselves. Babies and very young children are incapable of making decisions about many important questions affecting their lives. It is not simply unwise to emancipate a two-and-a-half-year-old; it is impossible. Therefore, for the very young, the question is not whether the child should decide, but rather which adult should decide on behalf of the child. As the child grows older, however, it becomes increasingly possible for the child to assume responsibility. Consequently, a critical issue that recurs in many contexts throughout the book concerns the degree to which law should recognize the autonomy of older children — that is, the extent to which the law gives power to children to decide for themselves.

Another core issue explored in various contexts throughout the book concerns the appropriate role of government vis-à-vis children and their families. The *parens patriae* tradition reflects a deep-rooted notion that government has a special responsibility to protect children even from their parents. Delineating the scope of the government's role necessarily poses profound questions of political and moral philosophy concerning the proper relationship of children to their family and of the family to the state.

Note on the Fifth Edition. This fifth edition of the casebook continues the basic design and emphasis of the former editions. At the same time, this edition takes into account many timely and fascinating changes in the law.

Chapter 1 provides a discussion of legal developments wrought by the Internet, including federal and state regulation of sexually explicit content (*Ashcroft v. ACLU* (*Ashcroft II*)), child pornography, and student library access to the Internet (*United States v. American Library Assn.*). The chapter also explores the legal ramifications of the school violence epidemic, including the movement to restrict minors' access to violent materials in movies, television, music, and video games; mandatory dress codes aimed at preventing school violence; and the extension of zero-tolerance policies to include a wider variety of behaviors and harsher sanctions.

In addition, Chapter 1 explores many contemporary educational issues that involve state and federal regulation of the family, such as home schooling, school vouchers, proposed "parental rights" legislation that permits increased authority over children, and parental disputes about the religious education of children

(i.e., *Elk Grove Unified School District v. Newdow*). Finally, the chapter includes the latest developments on abortion (i.e., parental notification requirements, partial-birth abortion bans, violence at abortion clinics), regulation of research on embryos, and legal protection of the fetus in a variety of novel contexts (e.g., fetal homicide legislation and the imposition of criminal liability on pregnant substance abusers).

Chapter 2 includes an update on federal welfare reform legislation, as well as legal developments regarding the parental obligation for necessities, state and federal enforcement of child support obligations, postmajority support, the legal status of nonmarital children, and stepparent support obligations. Cutting-edge topics include the legal status of children born of assisted reproduction, including disputes involving same-sex couples (*T.F. v. B.L.*), as well as the posthumous child's right to government survivorship benefits (*Gillett-Netting v. Barnhart*).

Chapter 3 covers updates on the parental privilege to discipline children, central registries, corporal punishment in the schools and at home (including international developments), the clergy sex abuse scandal, evidentiary concerns involving the child sexual abuse victim as a witness (including the implications of *Crawford v. Washington*), and termination of parental rights. The chapter also highlights developments regarding foster care, including foster parents' rights, the problems raised by exit from foster care for older children (*Ocean v. Kearney*), and foster care reform.

Chapter 4 incorporates a discussion of current developments regarding state-imposed health requirements applicable to all children, mandatory HIV testing of newborns, and the resolution of disputes about the medical treatment of infants with severe physical and mental impairments. This chapter features many new topics. In particular, it explores the issue of parents' refusal of treatment in the context of a severely premature newborn whose prognosis is uncertain (*Miller ex rel. Miller v. HCA*). The chapter also examines the issue of whether parents may consent to nontherapeutic medical procedures for their children (*Grimes v. Kennedy Krieger Institute, Inc.*). The chapter concludes with a new section highlighting some of the legal issues that are implicated in the context of adolescent health (e.g., suicide and obesity).

Chapter 5 addresses legal developments in the custody and visitation rights of stepparents, grandparents (*Troxel v. Granville*), lesbian mothers, and unwed fathers; the child's preference in custody decision making; legal representation for children (including discussion of the ABA Standards of Practice for Lawyers Representing Children in Custody Cases); relocation disputes, and child custody jurisdiction and enforcement (including discussion of the Uniform Child Custody Jurisdiction and Enforcement Act); and alternative dispute resolution (including a new discussion of collaborative law techniques). The chapter also covers updates on the topics of assisted reproduction, such as post-dissolution disputes over "ownership" of embryos, surrogate parenting (including international developments), and the use of reproductive technology by gays and lesbians. A new section addresses the relevance of sexual orientation in adoption (*Lofton v. Secretary of the Department of Children and Family Services*), and a new case focuses on the relevance of race in adoption (*Adoption of Vito*). Finally, the chapter includes a comprehensive discussion of the ALI Principles of Family Dissolution and the recently revised

Uniform Parentage Act, particularly the latter's significance for maternity/paternity establishment and gestational surrogacy agreements.

Revisions to Chapter 6 include updates on state regulation of juvenile drivers (regarding employment, substance abuse, and graduated licenses); sex education in the schools (i.e., abstinence-based sex education programs); teen contraception; a new case on juvenile curfews (*Hodgkins v. Peterson (Hodgkins II)*); status offenders (i.e., changes in the standard of proof, entitlement to counsel, and developments in the re-institutionalization movement to detain status offenders in secure facilities); and emancipation (i.e., juveniles "divorcing" their parents).

Finally, Chapter 7 explores several major legal developments in juvenile justice. Significantly expanded sections focus on the law of search and seizure (*Board of Education v. Earls*), the voluntariness of juvenile confessions (*Yarborough v. Alvarado*), the right to jury trial, anti-gang legislation, *Miranda* rights for juveniles, and the juvenile death penalty (*Roper v. Simmons*). The chapter also highlights developments and criticisms regarding the practice of judicial waiver to adult court. Finally, the chapter explores suggestions for reform of the juvenile justice system.

Like the previous editions, this fifth edition places considerable emphasis on empirical psychological and sociological research. This edition highlights data on minors' exercise of abortion rights; corporal punishment; the effects of divorce on children; the changing foster care population; gay and lesbian parenting; state compliance with deinstitutionalization requirements for status offenders and run-aways; juvenile drinking and driving; teenage sexual activity (rates of intercourse and pregnancy) and contraceptive practices; juvenile curfews; differential treatment of male and female status offenders; juvenile crime rates; transfer to adult criminal court; juvenile capacity and maturity in the contexts of confessions and the juvenile death penalty; and the legal representation of juveniles in the delinquency context.

Note on the First Edition. This book is designed for a law school course on children and the law. The first edition grew out of a conviction that critical questions relating to children could not be adequately addressed in the traditional family law or juvenile justice course and that there were intellectual and pedagogical advantages in a more systematic examination of the legal treatment of childhood. Juvenile law courses typically concentrate on the juvenile court—its jurisdiction and its procedures. Family law courses, on the other hand, are primarily concerned with questions relating to marriage and divorce. Existing casebooks for such courses seemed either too narrow or too broad to allow a systematic examination of what it means to be a child for purposes of the law.

In approaching the task of writing this book, it was obvious that an extraordinarily broad range of law might affect or be relevant to children. It was decided that the primary objective would be to write a book that would provide students with the opportunity of learning how to think about children and the law and how to develop a framework that might then prove useful in exploring a broad variety of issues, including many that are not touched on in the book.

Note to Instructors. Because the book is designed for law school teaching, a few paragraphs addressed primarily to law school instructors are in order. The Questions and Problems sections in each chapter are the heart of the book. More questions are included than could possibly be discussed with any thoroughness in

the available class time. It is hoped, however, that questions not discussed in class may nonetheless stimulate student thought, be useful to generate student research that can result in law review notes and comments, and encourage scholarship by lawyers and nonlawyers alike.

In addition to the Questions, there are a number of Problems. In fact, this fifth edition includes many more Problems than did the fourth edition. These Problems can serve either as vehicles for classroom discussion or as written exercises for students; in our teaching we use them for both. The Problems exhibit considerable variety not only in subject areas but also in terms of the lawyering skills required.

Some background in psychology, human development, and sociology is extremely helpful in the study of children and the law. Instructors may wish to assign background reading concerning children and families at the beginning of the course. In this respect we would like to recommend Arlene S. Skolnick's *The Intimate Environment: Exploring Marriage and the Family* (6th ed. 1996) and Arlene S. Skolnick and Jerome Skolnick's *The Family in Transition: Rethinking Marriage, Sexuality, Child Rearing and Family Organization* (12th ed. 2002). These books provide a lucid introduction to and summary of a great deal of theoretical and empirical research relating to the social context of childhood, the psychology of socialization, child development, and the child's social relationships within the family. Other excellent areas for background reading are the history of childhood and the history of the family. Recommended sources include the chapter on "Inducting Children into the Social Order" in Carl N. Degler's *At Odds: Women and the Family in America from the Revolution to the Present* (1980) and the introductory chapter on "The Evolution of Childhood" in *The History of Childhood* (Lloyd deMause ed., 1974). For more recent works, see Paula S. Fass and Mary Ann Mason eds., *Childhood in America* (2000) and Steven Mintz, *Huck's Raft: A History of American Childhood* (2004). Several collections of materials relating to the history of childhood merit special mention, including Robert H. Bremner ed., *Children and Youth in America: A Documentary History* (3 vols., 1970-1974) and Paula S. Fass ed., *Encyclopedia of Children and Childhood in History and Society* (3 vols., 2003).

Many students will undoubtedly wish to do outside reading on the questions, problems, and cases presented in the book. For this purpose, we have included references to helpful articles and books. Several additional collections of essays are particularly useful: Margaret K. Rosenheim et al. eds., *A Century of Juvenile Justice* (2001), S. Randall Humm et al. eds., *Child, Parent, and State: Law and Policy Reader* (1994), and the journals in the series "The Future of Children" (on such topics as adoption, child abuse, divorce, firearms, foster care, health care, and the juvenile court), published by the David and Lucile Packard Foundation, Center for the Future of Children, Los Altos, California. Finally, a number of recent law review symposia have focused on interesting issues relevant to children. See Symposium, Caring for Our Children: Delivery of Mental Health Services to Children and Adolescents, 25 J. Legal Med. 1 (2004); Symposium, Defending Childhood, 14 U. Fla. J.L. & Pub. Pol'y 125 (2003); Symposium: The Relationship Rights of Children, 11 Wm. & Mary Bill Rts. J. 843 (2003); Symposium, Therapeutic Jurisprudence and Research, 71 U. Cin. L. Rev. 13 (2002); Symposium, Research with Children: The New Legal and Policy Landscape, 6 J. Health Care L. & Pol'y 1 (2002).

This edition of the casebook continues to allow instructors considerable flexibility in designing courses or seminars of varying lengths and emphasis. The book as a whole is intended for a one-semester course that meets three hours a week. The book also could be used, however, for shorter courses such as in-depth seminars. For example, a seminar might focus on the juvenile justice system, emphasizing Chapters 3, 6, and 7. For law schools that offer a separate course in juvenile delinquency or in which delinquency issues are covered in criminal law courses, the instructor might use Chapters 1 through 6 and omit Chapter 7. Particular chapters will also provide a focus for specialized seminars. Chapters 3, 4, and 5 certainly could form the core materials for in-depth seminars: Chapter 3 on child abuse and neglect, Chapter 4 on medical treatment of children, and Chapter 5 on custody law. Apart from the first chapter—which introduces major themes that are explored in the remainder of the book—the chapters may be rearranged to suit the needs of the instructor.

Editorial Matters. This fifth edition incorporates significant editorial revisions. Judicial opinions often tend to be long and redundant. Instructors will note that many of the cases and excerpts in previous editions have been shortened markedly for the sake of brevity and clarity. Throughout the book, deletions are indicated by ellipses, with the following exceptions: citations have been modified or eliminated, footnotes have been eliminated, and paragraphs have been modified to make edited excerpts coherent without indication. When retained, footnotes in reprinted materials have the original footnote numbers. Our own footnotes are indicated by footnote numbers in brackets. These bracketed footnotes are numbered consecutively throughout each chapter. Additions to reprinted materials are indicated by brackets as well.

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