ON GOLDEN POND: INTEGRATING LEGAL ISSUES OF THE ELDERLY INTO FAMILY LAW

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Who well lives, long lives; for this age of ours
Should not be numbered by years, days, and hours.[1]

I. INTRODUCTION

The most significant demographic trends in the United States reflect the "greying" of our population. In 1900 3.1 million Ameri-

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1. John Bartlett, *Familiar Quotations* 148 (Justin Kaplan ed., 16th ed., Little, Brown & Co. 1992) (quoting Guillaume de Salluste, Seigneur Du Bartas, *Divine Weeks and Works*, Fourth Day, bk. 2 (1578)).

cans (4 percent of the population) were over the age of 65.[2] In 1998 the figure increased to 34.4 million.[3] By 2010 the number of Americans over the age of 65 is expected to increase to 40.1 million, almost 13.3 percent of the nation's total population, and in 2030 that percentage is projected to rise to 20.1 percent.[4] Moreover, the proportion of those over eighty-five years old is increasing even faster.[5] The entrance of the "baby boom" generation into the ranks of the retired will produce what President William Jefferson Clinton has called "one of the central challenges of the coming century."[6] The need for legal services for the elderly is, of course, great. Although very large numbers of older Americans are impoverished,[7] many others have net worths above the national average.[8] In 1998 approximately 43 percent of family households with a head of household over the age of 65 had incomes in excess of $35,000 annually.[9] These middle- and upper-class individuals require the assistance of lawyers in many issues of traditional family law — premarital agreements, support, custody, visitation — as well as sophisticated and detailed financial planning.

Given these statistics, we might expect elder law to be a major focus of law schools preparing the next generation of lawyers for practice. That would be incorrect. The traditional curricular response to legal issues of the elderly has been a focus on "death" courses, such as estate planning, wills, or gift and estate tax.[10] But

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2. U.S. Dept. Health & Human Servs., *Administration on Aging, Profile of Older Americans: 2000* <http://www.aoa.dhhs.gov/aoa/stats/profile/default.htm> (accessed Apr. 1, 2001).

3. *Id.*

4. Susan Levine, *Aging Baby Boomers Pose Challenge; Preparations Needed for Coming Strain on Services, Census Report Says,* 119 Wash. Post A09 (May 21, 1996).

5. *See* U.S. Dept. Health & Human Servs., *Administration on Aging, AOA Annual Profile of Older Americans Shows Drop in Poverty Rate* <http://www.aoa.dhhs.gov/pr/PR2000/OAprofile.html> (accessed Apr. 1, 2001) (population 65 years and older projected to grow from 34.4 million to 70.1 million, while population 85 years and older projected to grow from 4 million to 8.9 million).

6. William Jefferson Clinton, *Remarks Announcing a Long-Term Health Care Initiative,* 1999 Pub. Papers 2, 4.

7. AARP & U.S. Dept. Health & Human Servs., *Administration on Aging, Profile of Older Americans: 1998* <http://www.aoa.dhhs.gov/aoa/stats/profile 98.html> (accessed Apr. 1, 2001) (finding that seventeen percent of Americans over the age of sixty-five were defined as "poor or near poor" in 1997 as defined by the United States Government).

8. *Id.*

9. *Id.*

10. *E.g.* Stetson U. College of L., *Course Descriptions, Estate and Gift Taxation of Estate Planning* <http://www.law.stetson.edu/registrar/coursedes.htm> (accessed Apr. 1, 2001); U. Fla. College of L., *Course Descriptions, Estate Planning, Estates & Trusts* <http://www.

the elderly are living, and elder law needs to confront the issues surrounding long life.

Legal issues of older citizens traditionally have received short shrift in the law school curriculum, particularly in family law courses. Elder law courses are a recent addition to the curriculum; many law schools still have no specialized courses. This situation will not change quickly. A search of the four major legal publishers — West Group, Foundation Press, LEXIS Law School Division, and Aspen Law & Business — revealed eleven family law casebooks currently in print.[11] In contrast, these four publishers publish one elder law casebook.[12] Consequently, the issues of aged citizens can be better addressed by their inclusion in the standard law school curriculum.

Moreover, an analysis of the content of the family law casebooks, and we may assume the traditional classroom courses that use them, reveals a focus on families as units of parents with minor children.[13] Although older persons interact with family law and legal practitioners in numerous ways, these interactions are rarely reflected in the traditional family law course. Happily, however, these issues of older persons fit well into family law and can be included in existing courses easily. Family law would be enriched by adding the legal, social, and economic questions that result from the varied and multicultural families of contemporary America.

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law.ufl.edu/academics/jd/description.html> (accessed Apr. 1, 2001).

11. Judith Areen, *Family Law* (4th ed., Found. Press 1999); Homer H. Clark, Jr. & Ann Laquer Estin, *Cases and Problems on Domestic Relations* (6th ed., West 2000); Ira Mark Ellman et al., *Family Law: Cases, Texts, Problems* (3d ed., LEXIS L. Publg. 1998); Leslie J. Harris & Lee E. Teitelbaum, *Family Law* (2d ed., Aspen L. & Bus. 2000); Harry D. Krause et al., *Family Law: Cases, Comments and Questions* (4th ed., West 1998); Robert H. Mnookin & D. Kelly Weisberg, *Child, Family and State: Problems and Materials on Children and the Law* (4th ed., Aspen L. & Bus. 2000); Carl E. Schneider & Margaret F. Brinig, *An Invitation to Family Law: Principles, Process and Perspectives* (West 1996); Peter N. Swisher et al., *Family Law: Cases, Materials and Problems* (2d ed., Matthew Bender 1998); Walter Wadlington & Raymond C. O'Brien, *Domestic Relations* (4th ed., Found. Press 1998); D. Kelly Weisberg & Susan Frelich Appleton, *Modern Family Law: Cases and Materials* (Aspen L. & Bus. 1998); Walter O. Weyrauch et al., *Cases and Materials on Family Law: Legal Concepts and Changing Human Relationships* (West 1994).

12. Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Cases & Materials* (2d ed., LEXIS L. Publg. 1999).

13. *Supra* n. 11.

Families have always been multigenerational and multifaceted. Our courses should reflect that reality. As the Supreme Court has noted,

> It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.
>
> Ours is by no means a tradition limited to respect for . . . the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. . . . Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together. . . . Especially in times of adversity . . . the broader family has tended to come together for mutual sustenance . . . .[14]

This Article will examine eight topics customarily covered in family law courses and explain how each of these would be enhanced by adding cases, statutes, hypotheticals, and other materials addressing the legal and human concerns of individuals over the age of sixty-five. We serve our students and the profession better by presenting the family as an interconnected web of two, three, or even four generations, rather than just as a single-dimensional unit.

II. MARRIAGE

Marriage and its legal ramifications are central to family law courses. The treatment of this institution in law school, however, tends to focus on statutes and interpretive cases involving youth getting married.[15] Yet, older persons also marry or remarry, and these unions present a range of legal issues that should be included in family law courses.

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14. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–505 (1977) (footnotes omitted).

15. *E.g.* Areen, *supra* n. 11, at 64–68 (discussing *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981), which held constitutional a statute requiring parental consent for the marriage of minors); Harris & Teitelbaum, *supra* n. 11, at 302–304 (discussing *In re Barbara Haven*, 86 Pa. D. & C. 141 (Erie County Ct. Orphans Div. 1953), which found that special circumstances did not exist to allow the court to issue a marriage license to minors); Krause et al., *supra* n. 11, at 83–85 (discussing *Moe*, 533 F. Supp. 623); Swisher et al., *supra* n. 11, at 70–73 (discussing *Moe*, 533 F. Supp. 623); Wadlington & O'Brien, *supra* n. 11, at 170–176 (discussing *Moe*, 533 F. Supp. 623); Weisberg & Appleton, *supra* n. 11, at 204–208 (discussing *Moe*, 533 F. Supp. 623).

Practitioners often are asked to draft premarital agreements for elderly clients that vary from customary rights under state law. The enforceability of these contracts varies from state to state.[16] The Uniform Premarital Agreement Act (UPAA)[17] has been adopted in almost half of the states and the District of Columbia.[18] This Act creates a high degree of certainty in the enforcement of premarital agreements, but only at the expense of other considerations. Under the Act, if there has been a "reasonable disclosure of the property or financial obligations" and adequate representation,[19] then a written voluntary waiver of rights makes the agreement enforceable,[20] notwithstanding its unconscionability.[21] Both procedural and substantive deficiencies must exist for the premarital agreement to be found unenforceable later.[22] As Professor Gail Frommer Brod has noted, this standard is quite different from that in other contracts where unconscionability alone is sufficient to invalidate the contract.[23] In a host of situations, this will produce injustice for one

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16. *See generally* Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229, 233 (1994) (discussing the development of the law relating to premarital agreements and its socioeconomic effect on women).

17. Unif. Premarital Agreement Act, § 6, 9B U.L.A. 369 (1987 & Supp. 2000).

18. Ariz. Rev. Stat. Ann. §§ 25-201 to 25-205 (West 2000); Ark. Code Ann. §§ 9-11-401 to 9-11-413 (LEXIS L. Publg. 1998); Cal. Fam. Code §§ 1600–1601, 1610–1617 (West 1994); Conn. Gen. Stat. Ann. §§ 46b-36a to 46b-36j (West Supp. 2001); Del. Code Ann. tit. 13, §§ 321–328 (1999); D.C. Code Ann. §§ 30-141 to 30-150 (1998); Haw. Rev. Stat. Ann. §§ 572D-1 to 572D-11 (LEXIS L. Publg. 1999); Idaho Code §§ 32-921 to 32-929 (1996); 750 Ill. Comp. Stat. Ann. 10/1–10/11 (West 1999); Ind. Code Ann. §§ 31-7-2.5-1 to 31-7-2.5-10 (West 1999); Iowa Code Ann. §§ 596.1–596.12 (West 1996); Kan. Stat. Ann. §§ 23-801 to 23-811 (1995); Mont. Code Ann. §§ 40-2-601 to 40-2-610 (1999); Neb. Rev. Stat. §§ 42-1001 to 42-1011 (1998); Nev. Rev. Stat. Ann. §§ 123A.010–123A.100 (LEXIS L. Publg. 1998); N.J. Stat. Ann. §§ 37-2-31 to 37-2-41 (Supp. 2001); N.M. Stat. Ann. §§ 40-3A-1 to 40-3A-10 (2000); N.C. Gen. Stat. §§ 52B-1 to 52B-11 (1999); N.D. Cent. Code §§ 14-03.1-01 to 14-03.1-09 (1997); Or. Rev. Stat. §§ 108.700–108.740 (1990); R.I. Gen. Laws §§ 15-17-1 to 15-17-11 (2000); S.D. Codified Laws §§ 25-2-16 to 25-2-25 (1999); Tex. Fam. Code Ann. §§ 5.41–5.56 (1998); Utah Code Ann. §§ 30-8-1 to 30-8-9 (1998); Va. Code Ann. §§ 20-147 to 20-155 (2000).

19. Unif. Premarital Agreement Act, § 6(a)(2)(i), (iii), 9B U.L.A. at 376.

20. *Id.* at § 6(a)(2)(ii), 9B U.L.A. at 376.

21. *Id.* at § 6(a)(2), 9B U.L.A. at 376. The UPAA makes no mention of unconscionability at the time of the enforcement of the agreement, only at the time of execution. *Id.* Moreover, in states adopting a version of the UPAA, a provision waiving the right to financial disclosure beyond what has been provided will make the agreement enforceable. Brod, *supra* n. 16, at 277.

22. Unif. Premarital Agreement Act, § 6(a)(1)–(2), 9B U.L.A. at 376.

23. Brod, *supra* n. 16, at 276 n. 259. "'If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.'" *Id.* (quoting *Restatement (Second) of Contracts* § 208 (1979)).

party, typically the wife.[24] Therefore, some states have adopted a modified version of the UPAA, allowing unconscionability, standing alone, to justify refusing to enforce the agreement.[25]

The lawyer's task in representing clients and drafting prenuptial agreements differs dramatically depending on whether the parties are young, contemplating children and caretaking responsibilities, or elderly, considering a late marriage without these same concerns.[26] Hostility and suspicion may be present between the elderly soon-to-be stepparent and the adult stepchild due to fears concerning the statutorily mandated division of the estate after the death of the parent.[27] A prenuptial agreement is an excellent vehicle for confronting these legal and emotional issues.

A prenuptial agreement "is the most conventional premarital agreement, and the least controversial. It anticipates a marriage that ends in the death of one spouse, not divorce, and so some, though not all, of the trust in the marriage is preserved."[28] But family law casebooks and courses rarely incorporate specific materials discussing this application of prenuptial contracts. In the eleven family law casebooks mentioned previously, only three did so.[29]

Other concerns of elderly clients who plan to marry need to be addressed by family lawyers. Domicile, joint or separate property, obligations to children of prior marriages, tax considerations, and the marital residence are just a few of those issues.[30] Another concern is whether one spouse is forfeiting rights as a result of the

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24. *Id.* at 240–241.

25. *E.g.* Iowa Code Ann. § 596.8 (West 1999); Nev. Rev. Stat. Ann. § 123A.080; N.J. Stat. Ann. § 37-2-38 (Supp. 2000).

26. *See e.g.* Randall J. Gingiss, *Second Marriage Considerations for the Elderly*, 45 S.D. L. Rev. 469, 469–470 (2000) (listing factors that should be considered when developing a plan for an elderly client entering a marriage).

27. *Id.* at 482.

28. Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 72 (1998) (footnote omitted).

29. *See* Ellman et al., *supra* n. 11, at 837–839 (discussing *Penhallow v. Penhallow*, 649 A.2d 1016, 1017 (R.I. 1994), involving a seventy-eight-year-old man and a fifty-year-old woman who entered into a prenuptial agreement prior to their marriage); Wadlington & O'Brien, *supra* n. 11, at 501–508 (discussing *In re Estate of Benker*, 331 N.W.2d 193, 194 (Mich. 1982), involving a seventy-one-year-old man and a sixty-year-old woman who entered into a prenuptial agreement prior to their marriage); Weisberg & Appleton, *supra* n. 11, at 143–147 (discussing *In re Marriage of Greenwald*, 454 N.W.2d 34, 37 (Wis. App. 1990), involving an eighty-one-year-old man who agreed to marry his sixty-seven-year-old live-in housekeeper under the condition that they both sign a prenuptial agreement).

30. *See* Gingiss, *supra* n. 26, at 469–490 (dealing with these issues in depth).

marriage. The question then becomes whether the forfeiture is recognized and whether there is a need to compensate for the loss. Marriage of a senior citizen might result in a number of negative financial consequences, such as loss of alimony from a former spouse or a prior prenuptial agreement,[31] termination of benefits from a trust or will,[32] or loss of social security benefits drawn on the record of a prior spouse.[33] Such forfeitures, when recognized, can be addressed in a well-drafted premarital agreement.

III. THE MULTIGENERATIONAL FAMILY

A. Custody of Children

Custody of children is a familiar and essential issue in both survey and advanced family law courses. Both the high rate of divorce[34] and the difficulty in litigating custody cases[35] make this subject a necessary component of preparation for practice. Aside from introducing students to the substantive law, custody issues also present an opportunity to discuss the tension between rules and judicial discretion, a theme that runs throughout family law.[36] The most common fact pattern presented in family law casebooks is the parent-versus-parent custody contest.[37]

But custody disputes also occur between parents and non-parents — either blood relatives or third parties. The biological

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31. *Id.* at 490.

32. *Id.* at 477–478.

33. *Id.* at 469.

34. Inst. for First Amend. Stud., Inc., *National Divorce Statistics* <http://www.ifas.org/fw/9607/statistics.html> (accessed Apr. 1, 2001) (The number of divorces per 1000 of population was 3.5 in 1970, 5.2 in 1980, and 4.7 in 1990.).

35. Richard Neely, *The Divorce Decision: The Legal and Human Consequences of Ending a Marriage* 58 (McGraw-Hill Bk. Co. 1984); Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 Fam. L.Q. 495, 555 (1990).

36. *See* Schneider & Brinig, *supra* n. 11, at 146–147, 648–742 (discussing this tension). An example of the tension between rules and judicial decisions is the judiciary's continued use of the "best interest of the child" standard as a basis for custody decisions. Freed & Walker, *supra* n. 35, at 555.

37. *E.g.* Krause et al., *supra* n. 11, at 653–657 (citing *Owan v. Owan*, 541 N.W.2d 719, 720 (N.D. 1996)); *id.* at 671–675 (citing *Beck v. Beck*, 432 A.2d 63, 64 (N.J. 1981)); Swisher et al., *supra* n. 11, at 1093–1097 (citing *Maxfield v. Maxfield*, 452 N.W.2d 219, 219 (Minn. 1990)); *id.* at 1108–1111 (citing *Yates v. Yates*, 702 P.2d 1252, 1253 (Wyo. 1985)); Wadlington & O'Brien, *supra* n. 11, at 954–961 (citing *Garska v. McCoy*, 278 S.E.2d 357, 358 (W. Va. 1981)); *id.* at 964–969 (citing *Johnson v. Johnson*, 564 P.2d 71, 72 (Alaska 1977)); Weisberg & Appleton, *supra* n. 11, at 801–805 (citing *Devine v. Devine*, 398 S.2d 686, 686 (Ala. 1981)); *id.* at 826–829 (citing *Tucker v. Tucker*, 910 P.2d 1209, 1210 (Utah 1996)).

parent may seek return of a child from a non-parent who has been living with and caring for the child, or the non-parent may seek custody, alleging failure of the biological parent to provide adequate care. These situations highlight the legal rules governing the relationship between biological parent and child and the circumstances under which parents may lose part or all of their prerogatives.

In 1996 twenty-eight percent of all children under the age of eighteen in the United States lived with only one parent.[38] In these single-parent households, as well as in the increasingly two-job traditional two-parent household, third persons often are asked to assist in daily tasks of child rearing and to assume a share of the financial, psychological, and emotional role of parents.[39] Grandparents always have been, and are even more so today, family figures who meet these needs.[40] In 1998 approximately 4 million children, or 5.6 percent of all children under the age of 18 in the United States, lived in a grandparent's household.[41] The incidence of grandparent-maintained homes in which no parent is present increased markedly between 1992 and 1997.[42]

Painter v. Bannister,[43] a case involving sixty-year-old grandparents, often is appropriately included in family law casebooks to illustrate parent-versus-non-parent custody contests.[44] The case reflects the varied circumstances involving the living/caretaking situations of many families. In *Painter*, the biological father left his son with the maternal grandparents after the mother was killed in an accident.[45] At that time, the child, Mark, was five years old.[46]

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38. U.S. Dept. Com., *Bureau of the Census, Current Population Reports Series P23-194, Population Profile of the United States: 1997* <http://www.census.gov./prod/3/98pubs/p23-194.pdf> (accessed Apr. 1, 2001).

39. *Supra* n. 14 and accompanying text.

40. *Id.*

41. Terry A. Lugilla, *Marital Status and Living Arrangements: March 1998 (Update)*, in U.S. Dept. Com., *Bureau of the Census, Current Population Reports: Population Characteristics* <http://www.census.gov/prod/99pubs/p20-514.pdf> (accessed Apr. 1, 2001).

42. Ken Bryson & Lynne M. Casper, *Coresident Grandparents and Grandchildren*, in U.S. Dept. of Com., Bureau of the Census, *Current Population Reports: Special Studies (May 1999)* <http://www.census.gov/prod/99pubs/p23-198.pdf> (accessed Apr. 1, 2001).

43. 140 N.W.2d 152 (Iowa 1966).

44. *E.g.* Areen, *supra* n. 11, at 1252–1259; Harris & Teitelbaum, *supra* n. 11, at 713–718; Krause et al., *supra* n. 11, at 694–700; Schneider & Brinig, *supra* n. 11, at 620–627; Wadlington & O'Brien, *supra* n. 11, at 993–999; Weisberg & Appleton, *supra* n. 11, at 867–871.

45. 140 N.W.2d at 153.

46. *Id.* at 156.

Mark spent three years with his grandparents before his father returned to reestablish custody of the child.[47] The grandparents refused to relinquish custody of the child and litigation resulted.[48] The lower court granted custody to the father, but the Iowa Supreme Court reversed on the basis of the "best interest of the child."[49]

The decision in *Painter* presents many of the practical and conceptual issues involved in custody disputes between parents and third parties, particularly when a case is to be decided on the basis of a standard as flexible or unpredictable as the "best interests of the child." Although the Iowa court nominally used a presumption of parental preference, the court found that returning the child to the father would be disruptive and disturbing.[50] The court relied on expert testimony revealing that the grandfather had become the child's father figure in the intervening absence of the natural father.[51] The court also emphasized the importance of stability in the life of the child.[52] The court did not require the grandparents to demonstrate that the child would be harmed if he returned to his father.[53]

But, in a more high profile case, a California trial court imposed this burden on the grandparents. Law students often are fascinated by examples drawn from contemporary history that are familiar to them. Family law teachers may utilize this interest with the highly publicized parent-versus-grandparent situation in the O.J. Simpson case.[54] Lou and Juditha Brown, the parents of Nicole Brown Simpson, had temporary custody and guardianship of the children for the two and one-half years between O.J. Simpson's arrest and his ultimate release.[55] The Browns opposed return of the children to O.J. Simpson after his acquittal.[56] However, a California trial court

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47. *Id.* at 153.

48. *Id.*

49. *Id.* at 156.

50. *Id.* at 157–158.

51. *Id.* Many casebooks discuss the concept of "psychological" as opposed to "biological" parents as a factor in determining custody, and this seems to be the case with the grandparents in *Painter*. *See* Joseph Goldstein, Anna Freud & Albert J. Solnit, *Beyond the Best Interests of the Child* 16–20, 97–101 (Free Press 1973) (outlining a model child placement statute that includes definitions of "biological parents" as well as "psychological parents").

52. *Painter*, 140 N.W.2d at 158.

53. *Id.* at 154.

54. Greg Hernandez & Jeff Kass, *Simpson Wins Custody of His Son, Daughter*, 116 L.A. Times A1 (Dec. 21, 1996).

55. *Id.*

56. *Id.*

placed the children with their father, concluding that the grandparents had failed to prove that being in Simpson's custody would be "harmful to the children."[57] The court, though, awarded visitation to the grandparents.[58]

An interesting follow-up to class discussion of extended family ties and application of the "best interest" standard may be presented with a hypothetical based on the Argentine children whose parents "disappeared" during the military rule in Argentina between 1976 and 1983.[59] Between 9,000 and 30,000 young adults are believed to have been taken illegally and forcibly from their homes at night by the Argentine security forces and brought to detention centers.[60] Most of these "leftists" were tortured and killed.[61] Their bodies were hidden to avoid creating martyrs or evidence.[62] Many of their children were kidnapped and raised by other families, including many military and police officers.[63] Pregnant women were kept alive until they gave birth;[64] their babies were "adopted" by high-ranking government officials, members of the military, or police officers.[65] These abducted children were raised in the "adoptive" homes for many years.[66]

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57. *Id.*

58. *Id.* The Browns appealed and won a reversal and remand based on procedural and evidentiary errors by the trial court. *Guardianship of Sydney Simpson*, 79 Cal. Rptr. 2d 389, 405 (App. 4th Dist., 3d Div. 1998). Before a second custody trial, the parties negotiated a settlement, essentially reiterating the initial trial court decision. Hector Becerra, *Simpson's Former In-Laws Agree to Let Children Stay with Him*, 119 L.A. Times B3 (Aug. 6, 2000). Juditha Brown, the mother of Simpson's slain ex-wife, retained legal guardianship. *Id.* Under the agreement, the children will continue to visit the Brown family in Dana Point, California during the summer and on some holidays. *Id.* Juditha Brown was prompted to drop the custody fight at the urging of the children, who asked her to let them stay with their father. *Id.*

59. *See generally* Rita Arditti, *Searching for Life: The Grandmothers of the Plaza de Mayo and the Disappeared Children of Argentina* (U. Cal. Press 1999) (detailing the plight of the "grandmothers").

60. *Id.* at 16–17, 21, 43–44.

61. *Id.* at 10.

62. *Id.* at 14.

63. *Id.* at 51.

64. *Id.* at 24.

65. *Id.* at 51.

66. *Id.* at 139. It is highly doubtful whether the term "adoption" should be applied to the factual circumstances in Argentina. An adoption is the result of a voluntary relinquishment by birth parents, but the birth parents in this horrifying situation did not relinquish their children voluntarily. *Id.*; *see e.g.* Cal. Fam. Code § 8700(a) (West 1994) (Agency adoption requires a written relinquishment by a birth parent that is signed by two witnesses and a public notary.); *Matter of Baby M*, 537 A.2d 1227, 1242 (N.J. 1988) (stating that New Jersey recognizes adoptions "where there has been a voluntary surrender of a child").

The "Abuelos" (Grandmothers) de la Plaza de Mayo were the grandmothers of abducted babies born in captivity.[67] They formed an organization and marched weekly in the Plaza de Mayo in Buenos Aires, because public gatherings were prohibited.[68] After the military junta was overthrown, the grandmothers attempted to have these children returned to them or to the extended family of the disappeared Argentine "subversives."[69]

Although hundreds of children are believed to have been stolen, only a small number have been identified.[70] From the overthrow of the junta in Argentina in 1983 through 1997, "thirty-one [children] were reunited with their biological families, thirteen stayed with their adoptive parents, eight children were found murdered, and six cases were in the courts."[71] The Abuelos also were successful in passing a new adoption law that allows all adopted people in Argentina to learn their original identities when they reach the age of eighteen.[72]

This is a gripping and moving story with which students can engage readily and thoughtfully. What the "best interest" of these children is remains ambiguous, both in terms of our human sympathies and the legal principles to be applied. Some of the Argentine adoptive parents were innocent of crimes against the children's birth parents and adopted the children in good faith.[73] In these rare situations, the grandmothers agreed to "open" adoption arrangements allowing the children to have contact with both families.[74] More often, the adoptive parents knew about the birth parents' deaths and even may have participated in them.[75] The Abuelos sought, and continue to seek, return of these children, who are now teenagers or young adults and do not yet know the truth of their origins.[76]

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67. Arditti, *supra* n. 59, at 56.

68. *Id.* at 35 (Thus, standing still would have been illegal.).

69. *Id.* at 1, 37.

70. *Id.* at 73–74. The Abuelos obtained the help of scientists to create a genetic test for grandparenthood, developed in the mid-1980s by University of California at Berkeley Professor Mary-Claire King. *Id.* at 70. There is now a genetic databank that will be kept until 2050 to enable individuals seeking their original identities to be matched with blood samples left by grandparents and their family members. *Id.* at 72–73.

71. *Id.* at 103.

72. *Id.* at 154.

73. *Id.* at 65.

74. *Id.* at 66.

75. *Supra* nn. 63–65 and accompanying text.

76. Arditti, *supra* n. 59, at 1–2.

The "best interest" of the child is not the only legal standard used in custody determinations. Some courts utilize the "primary caretaker" or "psychological parent" as alternative standards for the decision.[77] *Garska v. McCoy*[78] is used in many casebooks[79] as an example of a presumption of custody in favor of the primary caretaker unless he or she is unfit.[80] In *Garska*, the custody conflict pitted grandparents, who sought to adopt their daughter's child, against the natural father.[81] The case highlights the discretion-versus-rule issue once more. The court acknowledged the effect that formal legal rules have on cases negotiated between the parties, rather than being finalized in adversary proceedings before the court.[82]

Another major issue addressed in the materials on custody of children, particularly young children, is the legal significance of who has become the "psychological parent" of the child. Casebooks often present *Bennett v. Jeffreys*[83] or *Guardianship of Phillip B.*[84] to illustrate this factual situation.[85] But this also could be considered from an elder law perspective. Grandparents often become the psychological parents of a grandchild who lives with them for an extended period of time. For example, *In re D.R.S.*[86] involved grandparents who had custody from birth to age four of a child born to a single mother.[87] The court found the grandparents to be the

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77. *E.g. Guardianship of Phillip B.*, 188 Cal. Rptr. 781, 789 (App. 1st Dist., 1st Div. 1983); *Garska*, 278 S.E.2d at 360.

78. 278 S.E.2d 357 (W. Va. 1981).

79. *E.g.* Ellman et al., *supra* n. 11, at 658–661; Wadlington & O'Brien, *supra* n. 11, at 954–961.

80. *See Pikula v. Pikula*, 374 N.W.2d 705, 713 (Minn. 1985) (holding that the best interests of the child standard, as delineated by statutory factors, requires that where both parents seek custody of the child, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing of unfitness to be the custodian); Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 Fam. L.Q. 1, 17 (1984) (Many states use the identity of the primary caretaker as one factor in custody determination.); *but see Harris v. Harris*, 546 A.2d 208, 214 (Vt. 1988) (arguing that a primary caretaker presumption may violate statutes requiring consideration of a variety of factors).

81. 278 S.E.2d at 358–359.

82. *Id.* at 360–364; *see generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979) (discussing the effects of divorce cases).

83. 356 N.E.2d 277 (N.Y. 1976).

84. 188 Cal. Rptr. 781 (App. 1st Dist., 1st Div. 1983).

85. *E.g.* Wadlington & O'Brien, *supra* n. 11, at 1000–1008, 1011–1120.

86. 717 S.2d 1259 (La. App. 1998).

87. *Id.* at 1261.

"psychological parents" of the child and determined that adoption by the grandparents would be in the "best interests of the child."[88]

B. Visitation

Visitation can be seen as a limited form of custody. While parental rights are not absolute and are subject to the state's traditional *parens patriae* power to protect the child from various forms of abuse and neglect, the common law regarded the parents' decision about visitation to be absolute and final.[89] Courts regarded this decision to control access to the child as part of "the natural liberty of parents to direct the upbringing of their children."[90] Visitation by third parties (including grandparents) without parental consent was viewed with deep suspicion.[91]

Recently, all fifty states enacted statutes giving grandparents, among others, standing to petition a court for visitation over the objection of custodial parents.[92] These statutes conflict with the rule

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88. *Id.* at 1262; *but see Harrison v. Ballington*, 498 S.E.2d 680, 684 (S.C. App. 1998) (holding that although the father temporarily relinquished his child to the custody of the grandmother after the death of the child's mother, the father is still entitled to a rebuttable presumption that favors placing custody with the biological parent).

89. *E.g. Odell v. Lutz*, 177 P.2d 628 (Cal. App. 2d Dist. 1947) (discussing a maternal grandmother who was denied visitation with her eight-year-old granddaughter, the child of her deceased daughter, because of the objection of the child's father who had remarried).

90. *Id.* at 629.

91. *Id.*

92. *Troxel v. Granville*, 530 U.S. 57, 73–74 n.* (2000) (plurality). (In addition to the challenged Washington statute, the Supreme Court cited the following state statutes: "Ala. Code § 30-3-4.1 (1989); Alaska Stat. Ann. § 25.20.065 (1998); Ariz. Rev. Stat. Ann. § 25-409 (1994); Ark. Code Ann. § 9-13-103 (1998); Cal. Fam. Code Ann. § 3104 (West 1994); Colo. Rev. Stat. § 19-1-117 (1999); Conn. Gen. Stat. § 46b-59 (1995); Del. Code Ann., Tit. 10, § 1031(7) (1999); Fla. Stat. § 752.01 (1997); Ga. Code Ann. § 19-7-3 (1991); Haw. Rev. Stat. § 571-46.3 (1999); Idaho Code § 32-719 (1999); Ill. Comp. Stat., ch. 750, § 5/607 (1998); Ind. Code § 31-17-5-1 (1999); Iowa Code § 598.35 (1999); Kan. Stat. Ann. § 38-129 (1993); Ky. Rev. Stat. Ann. § 405.021 (Baldwin 1990); La. Rev. Stat. Ann. § 9:344 (West Supp. 2000); La. Civ. Code Ann., Art. 136 (West Supp. 2000); Me. Rev. Stat. Ann., Tit. 19A, § 1803 (1998); Md. Fam. Law Code Ann. § 9-102 (1999); Mass. Gen. Laws § 119:39D (1996); Mich. Comp. Laws Ann. § 722.27b (West Supp. 1999); Minn. Stat. § 257.022 (1998); Miss. Code Ann. § 93-16-3 (1994); Mo. Rev. Stat. § 452.402 (Supp. 1999); Mont. Code Ann. § 40-9-102 (1997); Neb. Rev. Stat. § 43-1802 (1998); Nev. Rev. Stat. § 125C.050 (Supp. 1999); N. H. Rev. Stat. Ann. § 458:17-d (1992); N. J. Stat. Ann. § 9:2-7.1 (West Supp. 1999–2000); N. M. Stat. Ann. § 40-9-2 (1999); N. Y. Dom. Rel. Law § 72 (McKinney 1999); N. C. Gen. Stat. §§ 50-13.2, 50-13.2A (1999); N. D. Cent. Code § 14-09-05.1 (1997); Ohio Rev. Code Ann. §§ 3109.051, 3109.11 (Supp. 1999); Okla. Stat., Tit. 10, § 5 (Supp. 1999); Ore. Rev. Stat. § 109.121 (1997); 23 Pa. Cons. Stat. §§ 5311-5313 (1991); R. I. Gen. Laws §§ 15-5-24 to 15-5-24.3 (Supp. 1999); S. C. Code Ann. § 20-7-420(33) (Supp. 1999); S. D. Codified Laws § 25-4-52 (1999); Tenn. Code Ann. §§ 36-6-306, 36-6-307 (Supp. 1999); Tex. Fam. Code Ann. § 153.433 (Supp. 2000); Utah Code Ann. § 30-5-2 (1998); Vt. Stat.

that the custodial parent has the right to decide who (including relatives) can associate with the child.[93] If the grandparent's child died, divorced, or had her parental rights terminated, access to grandchildren ended unless the custodial spouse voluntarily permitted continuation of the relationship.[94]

These statutes, and decisions interpreting them, vary in defining what a grandparent must show to be awarded visitation rights. Some set out explicit requirements,[95] while other statutes are more open-ended and authorize grandparent visitation simply when it is in the child's best interest.[96] In most instances, courts have tended to impose two principal threshold requirements before adjudicating a grandparent or other third-party visitation claim. First, a relationship between the child and another person that is of an unusual depth and quality must be proved.[97] Such exceptional interpersonal connections, usually with consistent caretakers or de facto parents, provide a justification for the state's interest in overturning a parental decision. Second, it must be demonstrated that the legal parent consented to and fostered the significant relationship. In the illustrative examples used in the family law casebooks, like *Painter*, the legal parent consented to and fostered the relationship between the child and the third party.[98] At one time, the parent had considered the relationship to be in the child's best interests and allowed it to occur.[99]

Ann., Tit. 15, §§ 1011-1013 (1989); Va. Code Ann. § 20-124.2 (1995); W. Va. Code §§ 48-2B-1 to 48-2B-7 (1999); Wis. Stat. §§ 767.245, 880.155 (1993-1994); Wyo. Stat. Ann. § 20-7-101 (1999)").

93. *E.g. Thomas v. Pickard*, 195 S.E.2d 339, 342 (N.C. App. 1973) (arguing that a natural parent is entitled to the custody of a child as against all other persons, including relatives and grandparents).

94. *Id.*

95. *See e.g.* Minn. Stat. Ann. § 257.022 (residence with child of more than twelve months); N.C. Gen. Stat. § 50-13.2(A) ("substantial relationship"); Or. Rev. Stat. § 109.121.(1)(a)(A) (1990) ("ongoing personal contact with the child"); Tex. Fam. Code Ann. § 153.433(2)(F) (1996) (six months).

96. *See e.g.* N.H. Rev. Stat. Ann. § 458:17-d(II)(a) (Supp. 2000) (The court shall consider whether grandparent visitation "would be in the best interest of the child."); Tenn. Code Ann. § 36-6-302 (1996) (Grandparent visitation may be awarded "upon a finding that such visitation rights would be in the best interests of the minor child.").

97. *See e.g. King v. King*, 828 S.W.2d 630, 630–632 (Ky. 1992) (holding that the best interest of the child would be served by allowing grandparent visitation where the grandfather had daily contact with the child for sixteen months, the child's father had no concerns about the grandfather's ability to love and care for the child, and there was no question that the child would receive proper care during visitation).

98. *See supra* nn. 45–53 and accompanying text (discussing *Painter*).

99. *Id.*

Some state appellate courts upheld the constitutionality of these grandparent visitation statutes, finding that the child's interest in maintaining relationships with grandparents outweighed any marginal infringement of parental autonomy authorized by the statute.[100] In these situations, grandparents typically had a significant amount of involvement with the child.[101] However, other courts found grandparent visitation statutes to be an unconstitutional intrusion into parental authority over children.[102]

The issue was finally presented to the United States Supreme Court in June 2000 in *Troxel v. Granville*.[103] Jennifer and Gary Troxel[104] were the grandparents of Natalie and Isabelle, ages ten and eight, respectively.[105] Their son, Brad Troxel, Natalie and Isabelle's father, committed suicide in May 1993.[106] After Brad's death, the Troxels continued to see their grandchildren on a regular basis until the mother, Tommie Granville, informed them that she would "limit their visitation with her daughters to one short visit per month."[107]

The grandparents filed a petition to obtain visitation rights under two Washington statutes, Washington Revised Code Sections 26.09.240 and 26.10.160(3).[108] The latter provides,

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation

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100. *E.g. Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993).

101. *Id.* at 205, 211 (Grandparents who had a constant presence in their grandson's life were granted visitation rights.). Some examples of involvement include attending all of a grandson's sporting events, a grandfather coaching his grandson's basketball team, a grandmother teaching her grandson's Sunday school class, and a grandson spending his afternoons after school at his grandparents' house. *Id.*

102. *See e.g. Beagle v. Beagle*, 678 S.2d 1271, 1277 (Fla. 1996) (holding that a statute allowing grandparent visitation over the parents' objections in an intact family violates fundamental rights of parents); *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995) (arguing that a grandparent visitation statute violated the constitutionally protected interest of parents to raise their children without undue state interference).

103. 530 U.S. 57 (2000) (plurality).

104. More mature readers may be interested to learn that Gary Troxel was the lead singer of the Fleetwoods', a wildly popular rock and roll band in the late 1950s and 1960s. Mr. Troxel was the lead singer for *Come Softly to Me, Mr. Blue*, and many other hits. *Letter from Dan Greenfield*, Former Host of *The 50s Hall of Fame Radio Show*, to Editor, ABA J., *Grandpa's Wild Youth*, in 86 ABA J. 11 (Sept. 2000).

105. *In re Troxel*, 940 P.2d 698, 699 (Wash. 1997) ("At the [first] trial in December 1994, Natalie and Isabelle were five and almost three years old, respectively").

106. *Troxel*, 530 U.S. at 60 (plurality).

107. *Id.* at 61.

108. *Id.*

> may serve the best interest of the child whether or not there has been any change of circumstances.[109]

"[T]he Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer."[110] The Washington trial court entered a "decree ordering visitation one weekend per month, one week during the summer, and four hours on . . . [each] grandparent's birthday."[111] The case proceeded through various trial and appellate proceedings, during which time the mother remarried, and her new husband formally adopted the two children.[112]

Although the Washington Supreme Court "found that the plain language of § 26.10.160(3) gave the [grandparents] standing to seek visitation," the court denied them any access to their grandchildren.[113] "The court rested its decision on the Federal Constitution"[114] and held that the statute "unconstitutionally infringe[d] on the fundamental right of parents to rear their children," because it did not require a threshold showing of harm to the child to enable a court to order grandparent visitation.[115]

The Washington Supreme Court also found the statute too broad.[116] The court stated that "[p]arents have a right to limit visitation of their children with third persons," and "between [parents and judges], the parents should be the ones to choose whether to expose their children to certain people or ideas."[117]

The United States Supreme Court affirmed the Washington Supreme Court's ruling, but on much narrower grounds.[118] The Court's decision in *Troxel* provides an extraordinary teaching opportunity for instructors to present the complexities of constitutional doctrine, the interrelationship of substance and procedure, and the contentious intergenerational dynamics that are often a part of family law cases. Nine Supreme Court Justices wrote six opinions, appearing as divided as the family in this case.[119] Justice

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109. Wash. Rev. Code § 26.10.160(3) (1994).
110. *Troxel*, 530 U.S. at 61 (plurality).
111. *Id.*; *In re Smith*, 969 P.2d 21, 23 (Wash. 1998).
112. *Troxel*, 530 U.S. at 61–62 (plurality).
113. *Id.* at 62–63.
114. *Id.* at 63.
115. *Id.*
116. *Id.*
117. *In re Smith*, 969 P.2d at 31.
118. *Troxel*, 530 U.S. at 63 (plurality).
119. *Id.* at 59.

Sandra Day O'Connor's opinion garnered four votes, gaining a plurality.[120] Two Justices concurred in the outcome, but articulated different reasoning from the plurality.[121] Three Justices dissented.[122] When the Supreme Court decides a case by a plurality, defining the "holding" of the case presents a legal jigsaw puzzle.

The plurality opinion concluded that the Washington statute "as applied" to these facts violated the mother's constitutional right to decide how to rear her children.[123] Justice O'Connor's opinion used old precedent to reiterate that the parents' liberty interest in this case, the interests "in the care, custody, and control of their children," might be "the oldest of the fundamental [Fourteenth Amendment] liberty interests recognized."[124] Justice O'Connor also relied on a group of cases decided from the 1970s to the present.[125] The plurality opinion found the Washington statute "breathtakingly

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 67.

124. *Id.* at 65. Justice O'Connor stated "that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'" *Id.* (quoting *Meyer v. Neb.*, 262 U.S. 390, 399, 401 (1923)). Justice O'Connor continued, "[t]he 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'" *Id.* (quoting *Pierce v. Socy. of Sisters*, 268 U.S. 510, 534–535 (1925)). Justice O'Connor further stated that "'[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Id.* at 65–66 (quoting *Prince v. Mass.*, 321 U.S. 158, 166 (1944)).

125. *Id.* at 66. Justice O'Connor stated, "It is plain that the interest of a parent in the companionship, care, custody and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Id.* (quoting *Stanley v. Ill.*, 405 U.S. 645, 651 (1972)). Justice O'Connor continued, "'The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.'" *Id.* (quoting *Wis. v. Yoder*, 406 U.S. 205, 232 (1972)). Justice O'Connor found, "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.'" *Id.* (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)). Justice O'Connor mentioned that "'our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.'" *Id.* (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)). Justice O'Connor further mentioned that "'[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child'" has been recognized. *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). Justice O'Connor lastly found, "'In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children.'" *Id.* (quoting *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997)) (alterations in original).

broad" and failing to accord deference to the parent's decision on visitation.[126] In Justice O'Connor's view, the statute allowed a judicial determination of third-party (grandparent) access based simply on *"the best interest of the child,"*[127] but there had been neither allegation nor showing that Granville was an unfit parent.[128] The trial court should have utilized the "presumption that . . . parents act in the best interests of their children."[129]

> "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."[130]

Absent that finding of unfitness, there was "no reason for the State to inject itself into the private realm of the family."[131]

As a result, Justice O'Connor found that the Washington trial court "failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters."[132] As examples of constitutional grandparent visitation laws, Justice O'Connor cited favorably a California statute that creates a "rebuttable presumption that grandparent visitation is not in a child's best interest if parents agree that visitation rights should not be granted."[133] Also finding Justice O'Connor's approval are other state laws that increase the burden of proof to "clear and convincing evidence" that grandparent visitation will "not [significantly] interfere with any parent-child relationship."[134]

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126. *Id.* at 67.
127. *Id.* (emphasis in original) (quoting the Washington statute).
128. *Id.* at 68.
129. *Id.*
130. *Id.* (quoting *Parham*, 442 U.S. at 602).
131. *Id.*
132. *Id.* at 69–70.
133. *Id.* at 70 (citing Cal. Fam. Code Ann. § 3104(e)).
134. *Id.* Justice O'Connor pointed out that, under Nebraska law, the "court must find 'by clear and convincing evidence' that grandparent visitation 'will not adversely interfere with the parent-child relationship.'" *Id.* (quoting Neb. Rev. Stat. § 43-1802(2)). Justice O'Connor found that, under Rhode Island and Utah law, a "grandparent must rebut, by clear and convincing evidence, the presumption that a parent's decision to refuse grandparent visitation was reasonable." *Id.* (citing R.I. Gen. Laws § 15-5-24.3(a)(2)(v) and Utah Code Ann. § 30-5-22(e) (1998)). Justice O'Connor drew attention to an interpretation of North Dakota law as unconstitutional "because [the] State has no 'compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests.'" *Id.* (quoting

The factual circumstances constitutionally required to allow interference with the parent's rights were left undecided. The four-Justice plurality opinion recognized a "presumption" in favor of "fit parents act[ing] "'in the best interests of their children.'"[135] Students (and faculty) are thus forced to hypothesize what proof of harm to the child or parental unfitness is required to order visitation over parental objection.[136]

The plurality opinion carefully distinguished the *Troxel* case from those instances in which the parent "sought to cut off visitation entirely."[137] In *Troxel*, the mother was willing to grant some visitation, but less than the Troxels requested.[138] The plurality opinion noted that "many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party."[139]

Troxel leaves the precise scope of the parental due process right in the visitation context to be decided by subsequent state court adjudications interpreting state statutes in the light of individual cases. Thus, the various opinions provide an opportunity for instructors to present the class with a real or hypothetical state grandparent visitation statute and invite analysis of its viability in the aftermath of *Troxel*.[140]

Hoff v. Berg, 595 N.W.2d 285, 291–292 (N.D. 1999)).

135. *Id.* at 68.

136. Justice David Souter's concurrence disagreed with this part of the opinion, specifically noting that the Court did not have to say what must be shown to overcome the presumption of validity of parental decision-making. *Id.* at 77 (Souter, J., concurring). It would appear that Justice Souter believes a mere "best-interests-of-the-child" finding would be insufficient, especially as applied to a statute like Washington's, which allowed "any party" at "any time" to seek judicial redress. *Id.* at 77–78.

137. *Id.* at 71 (plurality).

138. *Id.*

139. *Id.* Justice O'Connor found that Mississippi law required a court to "find that 'the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child.'" *Id.* (quoting Miss. Code Ann. § 93-16-3(2)(a)). Justice O'Connor found support in Oregon law, which allows courts to "award visitation if the 'custodian of the child has denied the grandparent reasonable opportunity to visit the child.'" *Id.* (quoting Or. Rev. Stat. § 109.121(1)(a)(B)). Justice O'Connor further found support in Rhode Island law, wherein a "court must find that parents prevented grandparent from visiting grandchild and that 'there is no other way the petitioner is able to visit his or her grandchild without court intervention.'" *Id.* at 71–72 (quoting R.I. Gen. Laws § 15-5-24.3(a)(2)(iii)–(iv)).

140. *See e.g.* N.Y. Dom. Rel. Laws § 72 (providing "[w]here either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court . . . and . . . the court, by order, after due notice . . . may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child"); *Lulay v. Lulay*, 739

Troxel may be used for other purposes as well. In addition to the substantive family law doctrine and questions to be gleaned from the *Troxel* opinions, the case allows instructors the opportunity to teach students how to "read" and "apply" a decision. The two concurring opinions do not necessarily debate the plurality opinion on its own terms.[141] Students can and should be asked what is "dicta" and what is the "holding" in *Troxel*. The case also is an excellent vehicle to illustrate the interrelationship of procedural rules with substantive doctrine. One major battleground between the opinions is to what extent the Supreme Court will allow a facial attack on the constitutionality of state statutes, which might have some constitutional application.[142] Moreover, *Troxel* provides a wonderful teaching opportunity for discussing the appropriate role of federal law in traditionally state-governed family law issues, a theme that surfaces in numerous decisions of the Supreme Court in family law.[143]

Adding fact patterns involving elderly persons to family law courses also will provoke thought on numerous other issues. Although grandparents' interests in their grandchildren have never been accorded federal constitutional protection, state constitutions may provide greater rights.[144] *Troxel* also can be used to probe the implications of the decision for other third-party-parent conflicts about children. Gay men and lesbians, for example, who have been "psychological parents" or fulfilled the "primary caretaker" role, often have found their ties with children precarious or terminated

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N.E.2d 521, 529 (Ill. 2000) (holding the Illinois grandparent visitation statute, 750 Ill. Comp. Stat. Ann. 5/607, unconstitutional in the aftermath of *Troxel*).

141. Justice Clarence Thomas's opinion, for example, does not specify a precise test for visitation although he does say he "would apply strict scrutiny to infringements of fundamental rights," which covers the mother's decision in this case. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

142. *See id.* at 85 (Stevens, J., dissenting) (indicating this facial challenge should fail).

143. *See e.g. id.* at 93 (Scalia, J., dissenting) ("I think it obvious — whether we affirm or reverse the judgment here, or remand as JUSTICE STEVENS or JUSTICE KENNEDY would do — that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures."); *Zablocki v. Redhail*, 434 U.S. 374, 398 (1978) (Powell, J., concurring) ("In my view, analysis must start from the recognition of domestic relations as 'an area that has long been regarded as a virtually exclusive province of the States.'" (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))).

144. *See e.g. Michael v. Hertzler*, 900 P.2d 1144, 1151 (Wyo. 1995) (arguing that state constitutional familial associational rights include the connection between grandparents and grandchildren); *but see Von Eiff v. Azicri*, 720 S.2d 510, 516–517 (Fla. 1998) (holding that privacy protected by the Florida Constitution invalidated a grandparent visitation statute).

when their relationship with the "biological" parent ends because of separation or death.[145] *Troxel* may well turn out to be a short-lived "parents' rights" victory. The liberty interest inherent in parental autonomy may be surmountable; what "special weight" the majority demands to overcome the parent's decision to limit grandparent visitation is far from the virtual veto the Washington Supreme Court granted to the biological parents. Indeed, the plurality opinion was careful to note the "changing realities of the American family,"[146] and that presages a long legal struggle in state courts over rights to children between biological parents, grandparents, and others.

IV. MANDATORY MEDIATION OF CUSTODY AND VISITATION DISPUTES

Family law instructors also may wish to inject some interpersonal and intergenerational dynamics and feelings into the discussion of *Troxel*. The bitter dispute between the mother and the grandparents regarding visitation with the daughters of the deceased husband proceeded through the trial court twice, through three levels of appellate review, lasted seven years, and may yet be ongoing.[147]

What can we deduce from this record? *Troxel* resembles child custody contests between divorcing parents, generally agreed by family lawyers and judges to be damaging to all concerned.[148] The characters in these human dramas find their lives probed by partisan experts; old incidents and wounds are revisited by opposing counsel in the courtroom. These lawsuits exact an enormous toll upon all participants — the litigants, the children, and the court system. *Troxel* is an appropriate case for a discussion of other forms

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145. *In re Alison D.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that a lesbian partner had no standing to seek the visitation of her ex-partner's daughter).

146. *Troxel*, 530 U.S. at 64 (plurality).

147. "[T]he children's mother now will make a visitation decision on her own, 'as she should — but in private' . . .

[Granville] won't be making her decision in the newspapers or on TV." Gordy Holt, *Grandparents Ready to Settle for Offer Made Early in Dispute*, 137 Seattle Post-Intelligencer A5 (June 6, 2000) (available in 2000 WL 5296537).

148. *See* Krause et al., *supra* n. 11, at 629 ("[W]hen a custody dispute does go to court, it often is bitterly fought. In the midst of battling over their own rights, it is easy for parents to lose track of their children's needs and interests."); Swisher et al., *supra* n. 11, at 1093 ("Amidst all this potential conflict there is a child. There can be no doubt that children survive divorce, and sometimes they do remarkably well. Yet, at the very least the parents' divorce is a trying time for the child, and at worst it can cause life-long trauma.").

of dispute resolution, such as mediation, arbitration, negotiation, and other processes. These methods might provide a substitute for, or at least a supplement to, the processes of trial and appeal. In a grandparent-parent visitation case, a New York court observed that the case presented "a tragedy in human interpersonal relationships which is basically beyond purview of the law."[149] Another court examining extended litigation over grandparent visitation commented,

> We can only wonder how courts are to determine when visitation has been unreasonably denied where, as here, a parent and adult child have become so estranged that they cannot communicate and act only to hurt one another. We can also only wonder what business courts have getting into such intra-family disputes.[150]

And in the O.J. Simpson case, the lengthy and bitter contest over custody of the children took more than five years of trial and appellate litigation, and ended only after a negotiated settlement.[151]

Recognizing that litigation often is painful and traumatic to all parties involved, including the children, many jurisdictions have enacted statutes or local court rules that either allow or mandate courts to order mediation before they hear custody or visitation disputes.[152] Family law casebooks and courses provide coverage of alternate dispute resolution (ADR) as a potentially useful means of resolving custody and visitation disputes.[153]

"Mediation is a process of conflict resolution and management that returns to the parents the responsibility for making decisions

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149. *Doe v. Smith*, 595 N.Y.S.2d 624, 627 (Fam. Ct., Queens County 1993).

150. *Komosa v. Komosa*, 939 S.W.2d 479, 482 n.2 (Mo. App. E. Dist., 2d Div. 1997).

151. *Supra* nn. 54–58 and accompanying text.

152. In 1991 California was the first state to adopt mandatory mediation in custody disputes. *See* Cal. Fam. Code §§ 3170–3173, 3175–3177 (West 1994). Similar requirements exist in other states. *See e.g.* Ariz. R. Prac. Super. Ct. Pinal County 4.2(a) (2001) (available in the AZ-Rules database in Westlaw); Del. Fam. Ct. R. 16(b)(1) (2001); Fla. Stat. § 44.102(2)(b) (1994); Ky. R. Prac. Jefferson Fam. Ct. 509(B) (available at <http://www.adc.state.ky.us/jefferson/fcrules.htm> (accessed Apr. 1, 2001)); Nev. Rev. Stat. § 3.500 (1998); N.C. Gen. Stat. §§ 7A-494, 50-13.1 (1999); Or. Rev. Stat. § 107.765(1) (1990); Wis. Stat. Ann. § 767.11(5)(a) (West 1993).

153. Areen, *supra* n. 11, at 842–925; Harris & Teitelbaum, *supra* n. 11, at 419–426, 778–779, 799; Krause et al., *supra* n. 11, at 926, 933–946; Schneider & Brinig, *supra* n. 11, at 104–117; Swisher et al., *supra* n. 11, at 821, 856–859, 864, 1093; Wadlington & O'Brien, *supra* n. 11, at 1061–1062; Weisberg & Appleton, *supra* n. 11, at 602, 934–949.

about their children."[154] A trained mediator encourages the parties to listen to one another, communicate their needs, and "explore alternatives and consider accommodations to reach a consensual decision on issues relating to their children."[155] Cooperation and compromise may resolve some or all of the issues that separate the parties, or at least narrow the gap, so that attorneys may negotiate a settlement of the remaining issues prior to trial.[156] Results include higher settlement rates, fewer cases litigated, and reduced court congestion, all of which enable courts to spend more time on the remaining cases. Jurisdictions that require mediation, such as San Francisco, report settlement rates as high as ninety percent.[157]

In theory, mediation minimizes the divisiveness engendered and perpetuated by family law litigation, but some feminists have expressed concern that the mediation process actually is harmful to women.[158] These commentators worry that it is not possible for women to succeed in mediation, because social and sexual characteristics favor men.[159] The plight of the battered woman, finally freeing herself from the violent situation and then being forced by the state into mediation with the batterer to work out a "fair agreement," particularly has aroused concern.[160] Morever, the confidentiality and

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154. Jay Folberg, *Mediation of Child Custody Disputes*, 19 Colum. J.L. & Soc. Probs. 413, 414 (1985).

155. *Id.*

156. Linda Silberman & Andrew Schepard, *Consultants Comments on the New York State Law Revision Commission Recommendation on the Child Custody Dispute Resolution Process*, 19 Colum. J.L. & Soc. Probs. 399, 407 (1985).

157. Folberg, *supra* n. 154, at 423; *see Anderson v. Anderson*, 494 S.2d 237, 238 (Fla. Dist. App. 4th 1986) (finding eighty-six percent settlement rate in Dade County, Florida); Folberg, *supra* n. 154, at 423 (finding more than fifty-four percent in Los Angeles County). Thirty-three states have statutes or court rules that mandate mediation in contested custody and visitation cases. Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 Fam. Advoc. 34, 34 (Winter 1995).

158. *See e.g.* Andree G. Gagnon, Student Author, *Ending Mandatory Divorce Mediation for Battered Women*, 15 Harv. Women's L.J. 272 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545 (1991).

159. Grillo, *supra* n. 158, at 1604–1607.

160. *Id.* Professor Trina Grillo, for example, criticizes mediation for undercutting the bargaining position of women, because incidents from the past routinely are discouraged from being a factor in the present resolution of the problem. *Id.* at 1550. Denying women the ability to express anger in the mediation context disempowers them and preys on women's traditional sense of self as being relational in order to achieve settlements that may not be in the women's best interest. *Id.* at 1577–1581, 1603.

secrecy of mandatory mediation places these women in a potentially coercive situation.[161]

Whatever the merits of this critique of mandatory mediation, family law scholars and practitioners should consider the merits of mediation and other ADR mechanisms in cases involving grandparents or other aging contenders for custody or visitation. These disputes often are "nasty and brutish."[162] For example, consider the seven-year saga of the *Troxel* litigation.[163] There is no guarantee that out-of-court procedures would have produced a better, quicker result for the adults and children involved in that case, but such a possibility is certainly worth exploring with students who are soon-to-be family law practitioners. The critique of ADR in situations involving power imbalances unfavorable to battered women will seldom be applicable in these grandparent custody or visitation cases.

V. INTRA-FAMILY SUPPORT OBLIGATIONS

Intra-family support is another major focus of the family law course. The casebooks provide extensive coverage of spousal and child support issues. Financial responsibilities of and for elderly parents and grandparents, however, are omitted totally in most casebooks,[164] which is another example of elder law issues being ignored. Inclusion of these topics concerning the elderly adds important substantive law and helps students see the family as an intertwined web of relationships between the generations.

A. Spousal Support

The common law obligated husbands to support their wives financially in return for "services."[165] Modern statutes have

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161. *Id.* at 1585, 1587, 1598. Professor Grillo goes so far as to identify mandatory mediation as institutionalized rape. *Id.* at 1605. Others have echoed this theme. *E.g.* Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 Buff. L. Rev. 441, 450–451, 457–476 (1992) (arguing that because of economic and educational differences, a husband is typically in a much better negotiating position than a wife).

162. *See* Thomas Hobbes, *Leviathan* pt. I, 106–108 (Liberal Arts Press 1958) (originally published 1651) (describing the nature of mankind in a state of war).

163. *Supra* nn. 103–147 and accompanying text.

164. Almost all family law casebooks ignore this topic. Only two family law casebooks include this subject, but both do so briefly. See Harris & Teitelbaum, *supra* note 11, at 606–615 (i.e., ten pages), and Krause et al., *supra* note 11, at 852–855 (i.e., four pages).

165. *See Manby v. Scott*, 86 Eng. Rpts. 781, 784 (1659) (Husbands are bound by the common law to provide for and maintain their wives.).

rewritten this obligation in gender-neutral terms.[166] Almost all family law casebooks provide coverage of the extent of the intra-spousal support obligation.[167] *McGuire v. McGuire*[168] is often used in these casebooks to illustrate reluctance by the courts to police the details of the level of support required in an intact marriage.[169] Dean Lee E. Teitelbaum has argued forcefully that cases like *McGuire* establish a common law doctrine of family autonomy into which the state can rarely intrude.[170] In his view, the intact family "stands apart from and is ordinarily closed to state authority."[171]

The educational potential of teaching spousal support duties could be enhanced by discussing elderly married couples. A major issue among older clients is payment for medical care. More and more elderly persons are living long enough to experience chronic illnesses or conditions, such as arthritis, heart disease, and senile dementia.[172] Large amounts of family resources are consumed by health care costs and long-term care in the last years of life.[173]

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166. *See e.g.* N.Y. Jud. Laws § 412 (McKinney 1999) ("A married person is chargeable with the support of his or her spouse."); Va. Code Ann. § 55-37 (1999) ("The doctrine of necessaries as it existed in common law shall apply equally to both spouses.").

167. *See* Areen, *supra* n. 11, at 761–800, 822–925 (i.e., 144 pages); Ellman et al., *supra* n. 11, at 249–470 (i.e., 222 pages); Harris & Teitelbaum, *supra* n. 11, at 3–72, 429–560 (i.e., 202 pages); Krause et al., *supra* n. 11, at 110–146, 790–832 (i.e., seventy-eight pages); Schneider & Brinig, *supra* n. 11, at 234–256 (i.e., twenty-three pages); Swisher et al., *supra* n. 11, at 105–188, 869–998 (i.e., 214 pages); Wadlington & O'Brien, *supra* n. 11, at 249–259, 372–413, 451–602 (i.e., 205 pages); Weisberg & Appleton, *supra* n. 11, at 248–261, 649–729, 785–797 (i.e., 108 pages).

168. 59 N.W.2d 336 (Neb. 1953).

169. *E.g.* Krause et al., *supra* n. 11, at 132–136; Wadlington & O'Brien, *supra* n. 11, at 249–253; *see generally* Krause et al., *supra* n. 11, at 137 (citing *Sharpe Furniture, Inc. v. Buckstaff*, 299 N.W.2d 219 (Wis. 1980) (holding that a husband incurs the primary obligation, implied as a matter of law, to assume liability for the necessaries that have been procured for the sustenance of his family)); Wadlington & O'Brien, *supra* n. 11, at 255–259 (citing *State v. Clark*, 563 P.2d 1253 (Wash. 1977) (holding that a wife's legal expenses are a family expense for which a husband is liable)).

170. Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 Utah L. Rev. 537, 542.

171. *Id.*

172. "Older people accounted for 40% of all hospital stays and 49% of all days of care in hospitals in 1995." Thomas P. Gallanis et al., *Elder Law: Readings, Cases and Materials* 12 (Anderson Publg. Co. 2000). In that year, elder "persons averaged more contacts with doctors . . . than did persons under 65 (11.1 contacts vs. 5 contacts)." *Id.*

173. *Id.* at 7 ("While . . . 1.4 million . . . [or 4 percent] of the 65+ population lived in nursing homes in 1995, the percentage increased dramatically with age, ranging from 1% for persons 65–74 years to 5% for persons 75–84 years and 15% for persons 85+" (using information from Dept. Health & Human Servs., *Administration on Aging, A Profile of Older Americans: 1998 (November 1998)* <http://www.ada.dhhs.gov/aoa/stats/profile/profile 98.html> (accessed Apr. 1, 2001))).

Although public programs absorb some of these costs, many expenses (for example, prescription drugs) are not covered at all or are covered only partially. Despite the popular view that seniors' medical needs are provided by Medicare, it is estimated that when expenses are totaled, Medicare pays less than fifty percent.[174] Many jurisdictions impose liability on a spouse if the patient is unable to pay health care costs.[175] Hospitals and other health care providers have sought to recover these large sums from spouses under family law doctrines such as "necessaries."[176]

B. Parent-Child-Parent Support Duties

Child support receives extended treatment in all family law casebooks.[177] The importance of financial support to children fully justifies the space and time that family law casebooks and courses provide. On the other hand, filial responsibility laws, which impose a duty of financial support on adult children for their indigent elderly parents, are rarely mentioned.[178] This topic is another link between elder law and family law.

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174. Lynn Etheredge, *Three Streams, One River: A Coordinated Approach to Financing Retirement*, 18 Health Affairs 80, 82 (Jan.-Feb. 1999).

175. *See e.g. Porter Meml. Hosp. v. Wozniak*, 680 N.E.2d 13, 16 (Ind. App. 1997) (holding that a husband is potentially secondarily liable for the medical expenses of his wife under the doctrine of necessaries); *St. Francis Regl. Med. Ctr., Inc. v. Bowles*, 836 P.2d 1123, 1125 (Kan. 1992) (holding that both spouses are liable for the necessary expenses incurred by either spouse and that medical services are considered necessaries); *Cheshire Med. Ctr. v. Holbrook*, 663 A.2d 1344, 1347 (N.H. 1995) (holding that a husband is secondarily liable for the necessary medical services provided to his wife under the doctrine of necessaries, but only to the extent that the resources of his wife are insufficient to satisfy the debt); *N.C. Baptist Hosps. v. Harris*, 354 S.E.2d 471, 473 (N.C. 1987) (holding that the doctrine of necessaries is applicable to medical services provided to either spouse); *Landmark Med. Ctr. v. Gauthier*, 635 A.2d 1145, 1150 (R.I. 1994) (finding that medical expenses are characterized as "necessaries" within the spirit of the doctrine of necessaries); *Marshfield Clinic v. Discher*, 314 N.W.2d 326, 327 (Wis. 1982) (discussing that a wife shares with her husband a limited legal duty of support of the family; this includes liability for necessary medical expenses incurred by either spouse.).

176. *Supra* n. 175.

177. *See* Areen, *supra* n. 11, at 801–925 (i.e., 125 pages); Ellman et al., *supra* n. 11, at 497–596 (i.e., 100 pages); Harris & Teitelbaum, *supra* n. 11, at 561–613 (i.e., fifty-three pages); Krause et al., *supra* n. 9, at 836–893 (i.e., fifty-eight pages); Schneider & Brinig, *supra* n. 11, at 970–1045 (i.e., seventy-six pages); Swisher et al., *supra* n. 11, at 1003–1085 (i.e., eighty-three pages); Wadlington & O'Brien, *supra* n. 11, at 413–450 (i.e., thirty-eight pages); Weisberg & Appleton, *supra* n. 11, at 729–784 (i.e., fifty-six pages).

178. Almost all family law casebooks ignore this topic; only two include it, but both do so briefly. *See* Harris & Teitelbaum, *supra* n. 11, at 606–615 (i.e., ten pages); Krause et al., *supra* n. 11, at 852–855 (i.e., four pages).

Thirty states currently have filial responsibility laws with twenty-two as civil statutes.[179] The financial obligation of the adult child is described in various ways from a duty to provide "necessary food, clothing, shelter, or medical attention,"[180] to a duty to provide "necessaries,"[181] "medical expenses,"[182] or even burial expenses.[183] In some states, the obligation to support indigent elderly relatives even is extended to adult grandchildren.[184] Often statutes and case law

179. Alaska Stat. §§ 25.20.030 & 47.25.230 (LEXIS L. Publg. 2000); Ark. Code Ann. § 20-47-106 (LEXIS L. Publg. 1991); Cal. Fam. Code §§ 4400, 4401, 4403, 4410–4414 (West 1994), Cal. Penal Code § 270c (West 1999), Cal. Welf. & Inst. Code § 12350 (Supp. 2001); Conn. Gen. Stat. Ann. §§ 46b-215, 53-304 (West Supp. 2001); Del. Code Ann. tit. 13, § 503 (1999); Ga. Code Ann. § 36-12-3 (2000); Idaho Code § 32-1002 (1996); Ind. Code Ann. §§ 31-16-17-1 to 31-16-17-7 (West 1999); Ind. Code Ann. § 35-46-1-7 (West 1998); Iowa Code Ann. §§ 252.1, 252.2, 252.5, 252.6, 252.13 (West 2000); Ky. Rev. Stat. Ann. § 530.050 (LEXIS L. Publg. 1999); La. Stat. Ann. § 4731 (West 1998); Md. Fam. L. Code §§ 13-101, 13-102, 13-103, 13-109 (1999); Mass. Gen. Laws Ann. ch. 273, § 20 (West 1990); Miss. Code Ann. § 43-31-25 (2000); Mont. Code Ann. §§ 40-6-214, 40-6-301 (2000); Nev. Rev. Stat. Ann. § 428.070 (LEXIS L. Publg. 2000), Nev. Rev. Stat. Ann. § 439B.310 (LEXIS L. Publg. 1996 & Supp. 1999); N.H. Rev. Stat. Ann. § 167:2 (1994); N.J. Stat. Ann. §§ 44:4-100 to 44:4-102, 44:1-139 to 44:1-141 (1993); N.C. Gen. Stat. § 14-326.1 (1999); N.D. Cent. Code § 14-09-10 (1997); Ohio Rev. Code Ann. § 2919.21 (Anderson 1999); Or. Rev. Stat. Ann. § 109.010 (1990); 62 Pa. Consol. Stat. § 1973 (West 1996); R.I. Gen. Laws §§ 15-10-1 to 15-10-7 (2000); R.I. Gen. Laws §§ 40-5-13 to 40-5-18 (1997), S.D. Codified Laws §§ 25-7-28, 25-7-29 (1999); Tenn. Code Ann. § 71-5-115 (1995), Tenn. Code Ann. § 71-5-103 (Supp. 2000); Utah Code Ann. § 17-14-2 (1999); Vt. Stat. Ann. tit. 15, §§ 202, 203 (1989); Va. Code Ann. § 20-88 (2000); W. Va. Code § 9-5-9 (1998).

180. *See e.g.* Ind. Code Ann. § 31-16-17-1 (West 1999) ("Any individual . . . shall contribute to the support of the individual's parents if either parent is financially unable to furnish the parent's own necessary food, clothing, shelter, and medical attention."); Mont. Code Ann. § 40-60-301(1) (An adult child has a duty to "provide necessary food, clothing, shelter, [and] medical attendance, ..."); S.D. Codified Laws § 25-7-27 (1999 & Supp. 2001) ("An adult child [has a duty to] provide necessary food, clothing, shelter, or medical attendance.").

181. *See e.g.* Cal. Fam. Code § 4401 ("The promise of an adult child to pay for necessaries . . . is binding."); Miss. Code Ann. § 43-31-25 ("[T]he decendants of any pauper . . . shall be liable to any governmental entity who supplies such poor relative . . . with necessaries . . . .").

182. *See e.g.* Nev. Rev. Stat. Ann. § 428.070 ("[C]hildren . . . shall pay to the county which has extended county hospitalization to any person under the provisions of NRS 428.030, the amount granted to such person."); Tenn. Code Ann. § 71-5-115 (allowing the state department of health to be reimbursed by adult children for rendering "medical assistance" to the parent).

183. *See e.g.* Alaska Stat. § 47.25.230 ("[C]hildren . . . of the needy person . . . shall reimburse the state or a municipality for the funds expended . . . for the relief or burial of the needy person . . . ."); Ind. Code Ann. § 31-16-17-1(2) (West Supp. 2000) ("[T]he individual shall also provide financial support for the parent's burial . . . ."); W.Va. Code § 9-5-9 ("[T]he relatives of an indigent person . . . shall be liable . . . to pay the expenses of burial . . . .").

184. Alaska Stat. § 47.25.230; Ark. Code Ann. § 20-47-106 (LEXIS L. Publg. 1998); Iowa Code Ann. § 252.5; La. Stat. Ann. § 4731; Utah Code Ann. § 17-14-2.

provide a right of contribution from other relatives when one child has been required to support the parent.[185]

Twelve states make failure to provide financial support to an indigent parent a criminal offense. As in the civil liability statutes, a defense is explicitly provided by many states for children who were not supported by their parents during their minority[186] or who are unable to provide the support.[187]

Family law professors in states with such laws may use their own or another state's statute to raise questions of statutory interpretation and public policy appropriate for class discussions. Who has standing to enforce these statutes? If aid is provided by one child, does he or she have a right of contribution from other relatives? Forcing or enabling financial support for indigent elderly parents from adult children saves public dollars that may be redeployed to education, libraries, recreation, or similar services. But is legal coercion necessary to require families to support their older relatives, and what are the long-term (including psychological and emotional) costs of legal intervention? Moreover, can a court decree create ongoing social and financial relationships within

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185. S.D. Codified Laws § 25-7-28 (stating that when a child provides for a parent, that child "shall have the right of contribution from his adult brothers and sisters, who refuse or do not assist"); *Gluckman v. Gaines*, 71 Cal. Rptr. 795, 797 (App. 3d Dist. 1968) (construing a California statute to require "children to support [their] parent in proportion to their abilities"); *Wyman v. Passmore*, 125 N.W. 213, 214 (Iowa 1910) (holding that "where one of several children undertakes to keep the parent at the request of others, those at whose request the service is performed are under obligation to make reasonable compensation").

186. *See e.g.* Ind. Code Ann. § 35-46-1-7(b) (West 1998) ("It is a defense that the accused person had not been supported by the parent during the time he was a dependent child under eighteen . . . ."); Mass. Gen. Laws Ann. ch. 273, § 20 (West 1992) (Refusal to support a parent is not deemed unreasonable when the parent did not support the child.); Ohio Rev. Code Ann. § 2919.21(E) (It was an affirmative defense when a parent abandoned a child or failed to support that child when the child was under eighteen); R.I. Gen. Laws § 15-10-1 (2000) (Refusal to support a parent is not deemed unreasonable when a parent did not support the child.); Va. Code Ann. § 20-88 (The law does not apply when "substantial evidence of desertion, neglect, abuse or willful failure to support [the] child" is shown.).

187. *See e.g.* Cal. Penal Code § 270c ("[E]very adult child who, having the ability so to do . . . ."); Conn. Gen. Stat. Ann. § 53-304 (unless the child "is unable to furnish such support"); Ind. Code Ann. § 35-46-1-7(c) ("defense that the accused person was unable to provide support"); Ky. Rev. Stat. Ann. § 530.050(1)(a) (Support is required when it can be reasonably provided.); Md. Fam. L. Code § 13-109(3) (child released from duty when not having sufficient means to provide support); Mont. Code Ann. § 40-6-301(1) (1999) (duty only imposed on those "having the financial ability"); N.C. Gen. Stat. § 14-326.1 (duty only imposed on those "having sufficient income"); Ohio Rev. Code Ann. § 2919.21(D) (affirmative defense if unable to support); Vt. Stat. Ann. tit. 15, § 202 (duty only imposed if one has "sufficient pecuniary or physical ability" to provide support); Va. Code Ann. § 20-88 (duty only imposed if one has "sufficient earning capacity or income").

families? Litigation as a means of solving personal family problems is a particularly blunt instrument when continuing relationships or processes are involved. Discrete transactions between strangers are appropriate for winner-takes-all litigation, as Professor Joel Handler perceptively has pointed out, but long-term relations require cooperation and compromise.[188]

Moreover, while not apparent on the surface, parent and grandparent responsibility laws implicate important gender issues that deserve extended attention in a family law course. It is typically women who find themselves saddled with the multiple responsibilities of rearing children, working for income outside the home, and providing care for aging family members. Caregiving as women's work is ingrained deeply in our culture,[189] and the toll upon the caregiver is often considerable.

> The most severe impact of caring for a dependent adult appears to be that it is totally monopolizing and without respite, twenty-four hours a day, seven days a week, 365 days a year.... There is gradually isolation... [of] the main caregiver. They no longer go out, no longer invite people over, no longer accept invitations, because they cannot leave the dependent person alone and are too nervous about their unpredictable behavior to receive people or to have confidence in substitute care.[190]

To impose a legal financial responsibility in addition to the traditional caregiving role will, in many circumstances, place an unfair burden on women. Moreover, the increasing numbers and longevity of the aged[191] means having to care for very old and frail relatives for extended periods of time.

Filial responsibility laws also may be used to describe and analyze very broad-based shifts in American public policy toward

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188. Joel F. Handler, *Community Care for the Frail Elderly: A Theory of Empowerment*, 50 Ohio St. L.J. 541, 543, 545 (1989).

189. *See e.g.* Elaine M. Brody, *Women in the Middle: Their Parent-Care Years* 1, 33–35 (Springer Publg. Co. 1990) (presenting a study finding that adult daughters more likely than adult sons are the primary caregivers for their elderly parents); Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (Viking 1989) (explaining a study finding that women do more household chores and child care than men in the modern two-working-spouses family).

190. Hilde Lindemann Nelson & James Lindemann Nelson, *Frail Parents, Robust Duties*, 1992 Utah L. Rev. 747, 748–749 (quoting Nancy Guberman, *The Family, Women, and Caring: Who Cares for the Carers?* 17 Resources for Res. 37, 39 (1988)) (first alteration in original).

191. *Supra* nn. 1–5 and accompanying text

indigent families. Major legislative enactments of the 1990s, Temporary Assistance to Needy Families (TANF)[192] and the child welfare provisions of the Adoption and Safe Families Act (ASFA),[193] illustrate the current ascendancy of national policies reinstituting primary responsibility for needy individuals to private individuals or charities. Four hundred years ago, the Elizabethan Poor Laws decreed that families should "rel[ie]ve and maintain[ ]" any poor or disabled relative.[194] Only after exhausting the private resources of blood relatives were public funds to be expended.[195]

The Elizabethan Poor Laws required grandparents to support grandchildren, and these laws generally were transported to the colonies.[196] American common law, however, developed the opposite principle.[197] Generally grandparents were not financially responsible for grandchildren. Child support proceedings were to be undertaken against parents, not grandparents.[198] An exception was typically made when the grandparent acted *in loco parentis* to the grandchild.[199]

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192. *Temporary Assistance to Needy Families*, H.R. 3734, 104th Cong. (1996).

193. AFASE, H.R. 867, 105th Cong. (1997), amended the Adoption Assistance and Child Welfare Act, codified at 42 U.S.C. § 671 (Supp. 2000). It shifts the focus for the care of the abused and neglected children from state welfare authorities seeking to reunite families to freeing up the child for adoption so that support may be provided by private persons. Senator John Rockefeller IV of West Virginia summarized the major objective of the act as "mov[ing] abused and neglected kids into adoptive or other permanent homes and to do so more quickly and more safely than ever before." 143 Cong. Rec. 12199 (1997).

194. 43 Eliz. 1, ch. 2, § VI (1601).

195. Art Lee, *Singapore's Maintenance of Parents Act: A Lesson to Be Learned from the United States*, 17 Loy. L.A. Intl. & Comp. L.J. 671, 675 (1995).

196. Laura W. Morgan, *Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 Fam. L.Q. 705, 706–707 (1999).

197. *See e.g. In re Gollahon*, 707 N.E.2d 735, 738 (Ill. App. 4th Dist. 1999) ("Parents, not grandparents, are responsible for the children's custody, care, education, nurture, and support."); *Blalock v. Blalock*, 559 S.W.2d 442, 443 (Tex. App. 14th Dist. 1977) (holding that "[t]here is no common law requirement that grandparents provide support for their grandchildren.")

198. *See e.g. State v. Miranda*, 715 A.2d 680, 687 (Conn. 1998) (finding that "'general obligations of parenthood entail . . . the duty to supply necessary food, clothing and medical care.'" (quoting *In re Adoption of Webb*, 544 P.2d 130 (Wash. App. 1st Div. 1975))); *Dubroc v. Dubroc*, 388 S.2d 377, 380 (La. 1980) (explaining that a child support duty is imposed by "fact of maternity or paternity"); *Wilsey v. Wilsey*, 831 P.2d 590, 592 (Mont. 1992) (stating that "child support is a social and moral obligation" of parents).

199. *E.g. Ex parte Lipscomb*, 660 S.2d 986, 988 (Ala. 1994) (stating that "a nonparent who stands *in loco parentis* to a child may be held responsible for the child's support") (emphasis in original); *Bennett v. Bennett*, 390 S.E.2d 276, 278 (Ga. App. 1990) (holding that grandparents stood *in loco parentis* to grandchild when the mother "relinquished in writing and before a notary 'all claim, right of custody and parental control [over her] child,'" and expressly consented to the appointment of child's grandmother as guardian (quoting

In 1996 the Federal Aid to Families with Dependent Children (AFDC) program was abolished and replaced by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[200] The PRWORA amended Section 666(a) by adding paragraph 18, which reads,

> Enforcement of orders against paternal or maternal grandparents
>
> Procedures under which, at the State's option, any child support order enforced under this part with respect to a child of minor parents, if the custodial parent of such child is receiving assistance under the State program under part A of this subchapter, shall be enforceable, jointly and severally, against the parents of the noncustodial parent of such child.[201]

Congress thus encouraged states receiving federal funds for child support enforcement efforts to enact statutes making grandparents fiscally responsible for their grandchildren. Minors who have children have a duty to support the child financially. Because minors often are in school or otherwise unable to meet that financial obligation, the state may enforce the court order, jointly and severally, against the grandparents.[202] At least "thirteen states have enacted statutes [providing for] grandparent liability" for child support.[203] Legislation holding grandparents financially responsible for the support of their grandchildren, when the grandchildren's parents are minors should, in theory, motivate grandparents to teach their teens about birth control, abstinence, and the dangers of

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Clabough v. Rachwal, 335 S.E.2d 648 (Ga. App. 1985))).

200. H.R. 3734, 104th Cong. (1996).

201. *Id.* at § 373.

202. N.C. Gen. Stat. § 50-13.4(b) (1999); *see Whitman v. Kiger*, 533 S.E.2d 807, 809 (N.C. App. 2000), *aff'd*, 543 S.E.2d 476 (2001) (discussing that the primary responsibility for an infant born to unemancipated minors is placed on the minors' parents, even if the minors' parents do not assume such responsibility in writing).

203. Laura W. Morgan, *Doing It Again: Grandparents Paying Child Support*, 35 Tr. 37, 38 (Dec. 1999).

pregnancy.[204] Grandparents also may sue their grandchild's parents for support.[205]

VI. ELDER ABUSE AND NEGLECT[206]

All family law casebooks now deal with family and domestic abuse,[207] generally perceived as violence by intimate partners, almost invariably non-elderly men. This subject is vast and includes issues of cause and effect,[208] the response of the criminal justice system,[209] confidentiality,[210] effect on young children,[211] and evidentiary issues,[212] as well as others. Child abuse and neglect likewise occupy positions of prominence in these casebooks and courses.[213]

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204. H.R. 3734, 104th Cong., at § 101(3) ("[P]romotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children."); *id.* at § 101(10) ("[I]t is the sense of Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests . . . .").

205. *See e.g. Stiefelmeyer v. Stiefelmeyer*, 485 S.2d 729, 730 (Ala. Civ. App. 1986) (affirming a decision for a grandmother who sought child support modification against the father of the child by showing "changed circumstances affecting the welfare of the child").

206. For a more in-depth treatment of elder abuse and neglect, see Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect — The Legal Framework*, 31 Conn. L. Rev. 77, 88 (1998).

207. *See* Areen, *supra* n. 11, at 291–325 (i.e., thirty-five pages); Ellman et al., *supra* n. 11, at 161–179 (i.e., nineteen pages); Harris & Teitelbaum, *supra* n. 11, at 116–147, 781–782 (i.e., thirty-four pages); Krause et al., *supra* n. 11, at 459–493 (i.e., thirty-five pages); Schneider & Brinig, *supra* n. 11, at 175–206 (i.e., thirty-two pages); Swisher et al., *supra* n. 11, at 419–457 (i.e., thirty-nine pages); Wadlington & O'Brien, *supra* n. 11, at 276–290 (i.e., fifteen pages); Weisberg & Appleton, *supra* n. 11, at 357–388 (i.e., thirty-two pages).

208. *See e.g.* Lenore Walker, *The Battered Woman* xvi–xvii (Harper & Row Publishers, Inc. 1979) (discussing how domestic violence occurs and its effects).

209. Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. Crim. L. & Criminology 1, 1–45 (1992); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA Women's L.J. 173, 173–182 (1997) (discussing generally the crime of battery and the criminal justice system).

210. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273, 281–299 (1995).

211. Stephen E. Doyne, Janet M. Bowermaster, J. Reid Meloy, Donald Dutton, Peter Jaffe, Stephen Temko & Paul Mones, *Custody Disputes Involving Domestic Violence: Making Children's Needs a Priority*, 50 Juv. & Fam. Ct. J. 1, 1–12 (Spring 1999).

212. *See generally* Heather Fleniken Cochran, *Improving Prosecution of Battering Partners: Some Innovations in the Law of Evidence*, 7 Tex. J. Women & L. 89 (1997) (discussing batteries and evidentiary issues).

213. *E.g.* Areen, *supra* n. 11, at 1025–1029, 1329–1421 (i.e., ninety-eight pages) (covering this topic, including mandatory reporting of suspected child abuse or neglect, evidentiary issues concerning children's testimony, etc.); Ellman et al., *supra* n. 11, at 1275–1384 (i.e., 110 pages); Harris & Teitelbaum, *supra* n. 11, at 116–147, 774–779, 781–782 (i.e., forty pages);

What is missing from this picture? In all these casebooks, and presumably also in the courses that use them, elder abuse and neglect is entirely ignored or given passing mention. This lack of attention to the elderly is, by now, quite familiar. I have noted this phenomenon already in connection with the lack of coverage of the legal needs of the elderly in relation to prenuptial contracts, custody, support obligations within the family, etc.[214] The scope of elder abuse and neglect and its significance for those affected strongly indicate the necessity of including the topic in conjunction with other aspects of family violence.

"Mistreatment of the elderly often is equated with physical abuse, but more often it takes the form of less dramatic but equally damaging behaviors--psychological or emotional abuse, financial exploitation, and neglect of care-taking obligations."[215] There are plenty of horrifying individual cases with which to capture student

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Krause et al., *supra* n. 11, at 459–493 (i.e., thirty-four pages); Schneider & Brinig, *supra* n. 11, at 802–969 (i.e., 168 pages); Swisher et al., *supra* n. 11, at 539–582 (i.e., forty-four pages); Wadlington & O'Brien, *supra* n. 11, at 828–876 (i.e., forty-nine pages); Weisberg & Appleton, *supra* n. 11, at 975–1103 (i.e., 129 pages).

214. *Supra* nn. 28–33, 37, 164 and accompanying text.

215. Moskowitz, *supra* n. 206, at 79.

attention.[216] This mistreatment occurs in both domestic and institutional settings.

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216. Examples of shocking mistreatment can be recounted without end. A few of the situations described by the *1990 Elder Abuse House Report* are reproduced here verbatim to illustrate the danger faced by some elderly persons. H.R. Subcomm. on Health & Long-Term Care of the Select Comm. on Aging, *Elder Abuse: A Decade of Shame and Inaction*, H.R. Print 101-752 (Apr. 1990) [hereinafter 1990 Elder Abuse House Report].

> An 82-year-old woman suffered a brutal beating at the hands of her 40-year-old daughter and had to be hospitalized for 8 weeks. She had been kicked and had her hair pulled out and puncture wounds had been inflicted by sharp objects all over her body. The daughter, who was reportedly unable to work because of back problems, was totally dependent upon her mother for financial support. The mother was found to be passive, withdrawn, pale and weak and so intimidated by the daughter that she was unable to consider taking any action to move or seek retribution.

Id. at 1–2.

> An elderly woman was brought to the hospital by paramedics, confused and minimally responsive. She was severely dehydrated and her hair was completely matted. She had maggots all over her left leg, which had been wrapped in cloth, and bloody drainage coming out of her knees. She weighed about 60 pounds. All uncovered parts of the woman's body revealed deep purple bruises. She also had a left black[ ] eye and a deep gash over her right eyebrow. The woman, upon questioning by police, said she lived with her daughter and children. She wouldn't confirm that her daughter had beaten her or denied her care because, "I don't want to get anyone in trouble."

Id. at 2. "From Texas came the report of a client, age 69, who was found by a neighbor one night, lying on the ground naked with ants crawling on her. The woman was paralyzed on one side from a stroke and had heart problems." *Id.* at 3.

> An 88-year-old Washington State woman had her prescribed medications withheld by her guardian. Cared for by a home health aide, the woman has reportedly had teeth extracted without any anesthetic and is continually having her tracheotomy and g-tube replaced by unqualified help. She was recently dropped during a move from room to room and now has a broken nose. No X-rays or pain medication were administered. She has been routinely left in her chair for 12 hours at a time and has very fragile skin which is vulnerable to decubiti.

Id. at 5.

> A home health aide in New Hampshire was startled to find her client, an elderly woman, in urine and feces-soiled clothing. The woman had suffered severe weight loss, too. The woman's husband, her caregiver, had failed to contact his wife's physician as he had promised the aide he would, although his wife was weak and malnourished and had to be hospitalized.
>
> Upon questioning, the husband became angry. He denied that his wife was neglected—he said he sometimes might seem to be ignoring her but that was only to encourage her to do things by herself. When officials asked him about his wife's difficulty breathing, which was another symptom, he said he treated that by applying Vicks ointment to her chest. In fact, she had serious respiratory problems.

Id. The Report sets out more than thirty-five such stories, noting these are "meant to be illustrative, not exhaustive." *Id.* at 1.

In a widely cited 1979 community survey, four percent of older adults reported experiencing incidents of elder abuse.[217] "International surveys have confirmed these general prevalence statistics."[218] There is room for debate about these estimates; definitions used in studies and statutes vary, and the research methodologies utilized often are inconsistent.[219] It generally is acknowledged, however, that very large numbers of the non-institutionalized elderly are seriously mistreated, that even larger numbers of elders are at risk in the United States today, and that our response to this problem has been ineffective.

After extensive congressional hearings, a 1981 report issued by the House Select Committee on Aging estimated that four percent of the American elderly population, approximately one million

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217. Karl Pillemer & David Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey* 28 Gerontologist 51, 51 (1988) (discussing a survey conducted by Block and Sinnett). Using a methodology previously validated in two United States family violence surveys, Karl Pillemer and David Finkelhor headed a research team that surveyed more than 2,000 non-institutionalized elders living in metropolitan Boston. *Id.* at 52. They found 2.0 percent had experienced physical abuse, 1.1 percent verbal aggression, 0.4 percent neglect. *Id.* at 54. The overall prevalence rate was 3.2 percent, and no inquiries were made about financial exploitation. *Id.* at 53. Extrapolated, this finding would mean 700,000 to 1.1 million cases of mistreatment across the nation. *Id.* at 54. The proportion of victims was almost equally divided between males and females, and economic status and age were not related to risk of abuse. *Id.* at 54–55. Other American studies have produced similar estimates. Suzanne K. Steinmetz, *Elder Abuse*, 315–316 Aging 6, 7 (Jan.-Feb. 1981).

218. Moskowitz, *supra* n. 206, at 88.

> [A] Canadian study, using a nationally representative sample of elders able to respond on the telephone found 4% had recently experienced one or more forms of mistreatment. The rates for men and women were about equal, but financial abuse was more common than physical or other maltreatment. A British study found 6% of individuals aged 65 to 74 reported recent verbal abuse by a close family member or relative; 2% reported physical mistreatment, and 1% financial exploitation. A survey, using written questionnaires and clinical evaluations to determine the rate of abuse and neglect in a small, semi-industrialized town in Finland, produced a 3% elder mistreatment prevalence rate for men and 9% for women, or 5.4% for both sexes. Since all these surveys are based on self-reporting, the percentages most likely are an underestimation of the problem rather than an exaggeration.

Id. (footnotes omitted).

219. A recent study making use of the "sentinel" methodology previously employed in child abuse surveys estimated that 450,000 persons aged 60 and over living in domestic settings were newly abused, neglected, or exploited in the United States in 1996 alone. Of this total, 71,000 cases were reported and substantiated by Adult Protective Services Agencies; the remaining approximately 379,000 cases were not reported, but were identified by "sentinels" (drawn from agencies that ordinarily serve older people, such as hospitals and clinics, law enforcement agencies, senior citizen programs, and banking institutions). Natl. Ctr. on Elder Abuse, *National Elder Abuse Incidence Study: Final Report September 1998* <http://www.aoa.gov/abuse/report/default.htm> (accessed Apr. 1, 2001).

persons, may be victims of moderate to severe mistreatment.[220] The study also concluded that elder abuse, although as prevalent as child abuse, is far less likely to be reported.[221] The Committee found that physical abuse, including neglect, is the most common type of mistreatment followed by financial and psychological abuse.[222] Ten years later, a follow-up congressional report, *Elder Abuse: A Decade of Shame and Inaction*, determined that the situation had worsened; elder maltreatment was reported to be increasing and 5 percent of the elderly, or more than 1.5 million elderly persons, were estimated to be abused annually.[223] Ninety percent of states reported to the Committee that the incidence of elder mistreatment was increasing.[224]

Likewise, abuse in institutional settings has never been measured precisely, but its occurrence has been well documented in reports of government inquiries, personal histories, and ombudsman projects. A survey of nursing home personnel in one state disclosed that thirty-six percent of nursing and aid staff reported having seen at least one incident of physical abuse by other staff members in the preceding year; ten percent admitted committing at least one act of physical abuse themselves.[225] At least one incident of psychological abuse against a resident had been observed by eighty-one percent of the sample in the preceding year, and forty percent admitted to having committed such an act.[226] These findings from community and institutional settings suggest that the mistreatment of older residents may be even more extensive than generally is believed.

The effects of mistreatment on an older victim's physical condition particularly is disturbing. Data from an annual health survey of 2,812 elders in one city were compared against reports of elder abuse and neglect made to the local adult abuse agency over a nine-year period.[227] The mortality rates of the non-abused and abused were tracked; by the thirteenth year following the initiation

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220. H.R. Select Comm. on Aging, *Elder Abuse: An Examination of a Hidden Problem*, H.R. Print 97-277, xiv-xv (Apr. 3, 1981).

221. *Id.* at xiv.

222. *Id.* at xv.

223. *1990 Elder Abuse House Report*, *supra* n. 216, at xi (estimating "more than 1.5 million persons may be victims of such abuse each year," and the number is rising).

224. *Id.* at xiv.

225. Karl Pillemer & David W. Moore, *Highlights from a Study of Abuse of Patients in Nursing Homes*, 2 J. Elder Abuse and Neglect 5, 18, 19 (1990).

226. *Id.* at 19.

227. Mark S. Lachs, Christianna S. Williams, Shelley O'Brien, Karl A. Pillemer & Mary E. Charlson, *The Mortality of Elder Mistreatment*, 280 JAMA 428, 428 (1998).

of the study, forty percent of the non-abused, non-neglected group were still alive.[228] Only nine percent of the physically abused or neglected elders were still living.[229] Thus, mistreatment may cause such extreme interpersonal stress that it confers an additional risk of death.[230]

One might hypothesize that the absence of materials regarding elder abuse and neglect in family law casebooks and courses stems from the equivalence of this phenomenon with the domestic violence issues covered. But such an equivalence is facile if not false. While the domestic violence model explains some percentage of elder abuse and neglect cases, significant differences also are present. Elder abuse and neglect are perpetrated not just by partners, but by adult children or third parties.[231] Domestic violence theory is grounded in the belief that society is sexist and tacitly accepts and approves of male dominance over women.[232] This analysis often is wholly inapplicable to many cases of elder abuse and neglect. Maltreated elder citizens find the shelters and services offered younger abuse victims to be inappropriate or closed to them. Elder abuse and neglect cases often present issues of competency, incapacity, and client self-determination.[233] The prototypical public response to domestic violence is based on the criminal justice system, while elder mistreatment cases generally are routed to a wholly different public system, Adult Protective Services.[234] Moreover, the dynamics of elder mistreatment in institutions significantly is different from that which characterizes domestic violence among younger partners in the community.[235]

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228. *Id.* at 430.

229. *Id.*

230. *Id.* at 431–432.

231. *See* Mary Jo Quinn & Susan K. Tomita, *Elder Abuse and Neglect: Causes, Diagnosis, and Intervention Strategies* xii–xiii (2d ed., Springer Publg. Co. 1997) (Initial studies indicated that abuse was more often perpetrated by adult children, but recent studies indicate abuse is more likely perpetrated by spouses.).

232. *See Walker, supra* n. 208, at ix–xvii (discussing historical notions of male supremacy and partriarchal society).

233. *See generally* John J. Regan, *Intervention through Adult Protective Services Program*, 18 Gerontologist 250 (1978) (providing that many states have set up Adult Protective Services to deal with these issues).

234. Adult Protective Services is a series "of preventative, supportive, and surrogate services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation." *Id.* at 251.

235. *See* Karl Pillemer & David W. Moore, *Abuse of Patients in Nursing Homes: Findings from A Survey of Staff* 29 Gerontologist 314, 314–320 (1989) (dealing with, from a study of nursing homes, characteristics of elder abuse in institutions).

VII. LEGAL ETHICS

All accredited American law schools have a specialized course on the ethical rules that govern the practice of law.[236] There is substantial controversy, however, about whether this is the best way to teach legal ethics and if it is sufficient to meet educational needs. As Professor Deborah L. Rhode, a leading expert on legal ethics and its place in legal academia, noted,

> Legal ethics deserves discussion in all substantive areas because it arises in all substantive areas. Faculty who decline, explicitly or implicitly, to address ethical issues encourage future practitioners to do the same. To confine professional responsibility discussions to a single required course marginalizes their importance and undermines their most important message: that moral responsibility is a crucial constituent of all legal practice.[237]

Family law is an ideal placement for discussion of ethical issues, particularly those involving the aged.[238] Pedagogical opportunities abound, and the professor may wish to distribute copies of relevant professional rules in connection with this discussion. I have sketched out below a few of the potential ethical issues involving elderly clients that are raised appropriately in a family law course.[239]

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236. ABA, *Standards for the Approval of Law Schools* Stand. 302(b) <http://www.abanet.org/legaled/chapter3.html> (accessed Apr. 1, 2001). The Standards mandate that accredited law schools "require of all students . . . instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association." *Id.*

237. Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 J.L. & Contemporary Problems 139, 140 (1995); *see generally* Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method* pt. 1 (Little, Brown & Co. 1994) (attempting to integrate a legal ethics discussion into substantive core courses); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31 (1992) (arguing for the teaching of professional responsibility as a topic in other courses as well as a course on its own).

238. *See e.g. supra* nn. 196–202 and accompanying text (explaining various ethical paths taken to ensure parent-child-parent support).

239. For a more detailed discussion, see Frolik & Barnes, *supra* note 12, at 60–88.

A. Identifying the Client

Often the lawyer is contacted, not by the older person, but by his or her son, daughter, or other relative. These family members are involved frequently in advising, assisting, and even directing financial and practical arrangements for care of the aged relative. At the interview, the elderly person typically is accompanied by one or more younger family members who provide the documentation or information the attorney needs about the senior citizen or his property.[240] Students should be asked what ethical issues immediately appear in this common scenario and what practical solutions are possible. There may, of course, be a conflict of interest between the child and parent, and, if it is evident initially, the attorney must decide quickly who the client is and explain completely and openly to other family members the limitations this will impose. A written retainer agreement may very well be a practical way of clarifying the client's identity, as would a letter to other family members clearly stating that the lawyer is not representing them.

An attorney has a duty to maintain complete confidentiality regarding all client disclosures.[241] The client should be informed, for example, that he may be waiving that confidentiality if he allows his child or another family member to sit in on the interview, to read mail from or to the attorney, or in some other way to reveal communications between the attorney and the client to a third party.[242] Again, students may be asked to suggest appropriate responses for the attorney in this situation, for example, asking the accompanying family member to wait in another room while he or she meets privately with the senior client. Students can appreciate the awkwardness created by such a request to those who have never considered these matters before.

B. Joint Representation

As an alternate solution, the lawyer may be asked to represent multiple clients, including an aged person, who have sought the services of one lawyer to help them resolve differences or execute a transaction between or among themselves. "A key factor in defining the relationship is whether the parties share responsibility for the

240. *Id.* at 60.
241. ABA Model R. Prof. Conduct 1.6 (2001).
242. *Id.*

lawyer's fee, but the common representation may be inferred from other circumstances."[243] When the lawyer acts as an intermediary, he or she must obtain informed consent from each client after explaining the advantages and disadvantages of common representation. That may be difficult with an aged, dependent family member.

Independent of that consent, the lawyer must reasonably believe that the matter can be resolved on terms compatible with the clients' best interests, that each client is competent to make informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients.[244] While acting as an intermediary, the lawyer must be impartial as to the competing interests of the individual clients. If there is any conflict in this intergenerational representation, the attorney must make a choice and inform all. This often will be difficult for an attorney contemplating either future legal work as executor or attorney for the estate or future representation of the younger family members. All rights to confidentiality and attorney-client privilege must be waived as between the clients involved in the intermediation, although commentary to Model Rule 2.2 suggests that it may be possible to preserve some limited rights.[245]

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243. ABA Model R. Prof. Conduct 2.2 cmt. 1 (2001). The comment states that "[a] lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests."

244. *See* ABA Model Code Prof. Resp. canon 5 (1981) (A lawyer should avoid conflicts of interest and fulfill his or her obligation to each individual, including loyalty.); ABA Model Code Prof. Resp. canon 6 (1981) (concerning competency and diligence); ABA Model Code Prof. Resp. canon 7 (1981) (concerning zealous advocacy); ABA Model Code Prof. Resp. EC 7.8 (1981) (providing for lawyer to enable a client to make informed decisions); ABA Model R. Prof. Conduct 1.1 (2001) (providing a new standard of diligence different from the older standard of neglect); ABA Model R. Prof. Conduct 1.3 (2001) (concerning zealous advocacy); ABA Model R. Prof. Conduct 1.4 (2001) (providing that a lawyer can enable a client to make informed decisions); ABA Model R. Prof. Conduct 1.7 (2001) (A lawyer should avoid conflicts of interest.).

245. Comment 6 to ABA Model Rule of Professional Conduct 2.2 (2001) provides:
A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. For a general discussion of attorney-client privilege and common representation, see Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:36 (West 1999).

C. Payment of Fees

If the family member, typically an adult child, is paying his parent's attorney's fees, that arrangement must be disclosed and appropriate consent obtained.[246] The assets of many aged persons often are not available quickly or without substantial changes in personal and living arrangements, i.e., personal retirement accounts or equity in a mortgaged home. The duty of loyalty is impaired, however, if the attorney gives priority to another's interests, such as those of the fee payer, over the client's interest, thus rendering him unable to advocate effectively for his client. Students readily can understand the professional and interpersonal strains created by such financial arrangements, and can be prompted to think about methods of coping with these.

D. Capacity

A particularly sensitive matter in dealing with elderly clients is assessment of the capacity of the elderly relative to make decisions. Often, a decision about whether to seek guardianship may be the triggering event that brings the family member, and perhaps the elderly parent, to the lawyer's office. What degree of mental impairment must be present to predict an individual's need for assistance is a difficult process for most lawyers,[247] because legal capacity varies according to the decision to be made.[248]

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246. "A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client." ABA Model R. Prof. Conduct 1.7 cmt. 10; *see id.* at R. 1.8(f) (2001) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation . . . .").

247. A standard was proposed by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Healthcare Decisions* 57–62 (1982) ("Decision making capacity requires, to a greater or lesser degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices." (footnote omitted)). An emotional state consistent with the task also is required.

248. Generally, the level of understanding required varies according to the weight of the consequences of the decision. A low degree of understanding is required to make a contract in which the subject matter and value are trivial. A higher degree is needed for the testamentary disposition of a person's assets. *See generally* Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices — What's an Attorney to Do?: Within and beyond the Competency Construct*, 62 Fordham L. Rev. 1101, 1165 (1994) (criticizing the legal system's reliance on "competency" to determine when and how to interfere with an individual's choice).

VIII. CONCLUSION

Practicing lawyers will confront legal issues of the elderly in a variety of ways. Almost all of the issues discussed in this Article may be incorporated into material already being covered in most family law courses. Other issues deserve to be considered as alternatives to subjects presently included. Incorporating the elderly and their legal concerns into law school curricula gives students the information and skills they need to represent their clients in a professional and competent manner — the core purpose of a legal education.