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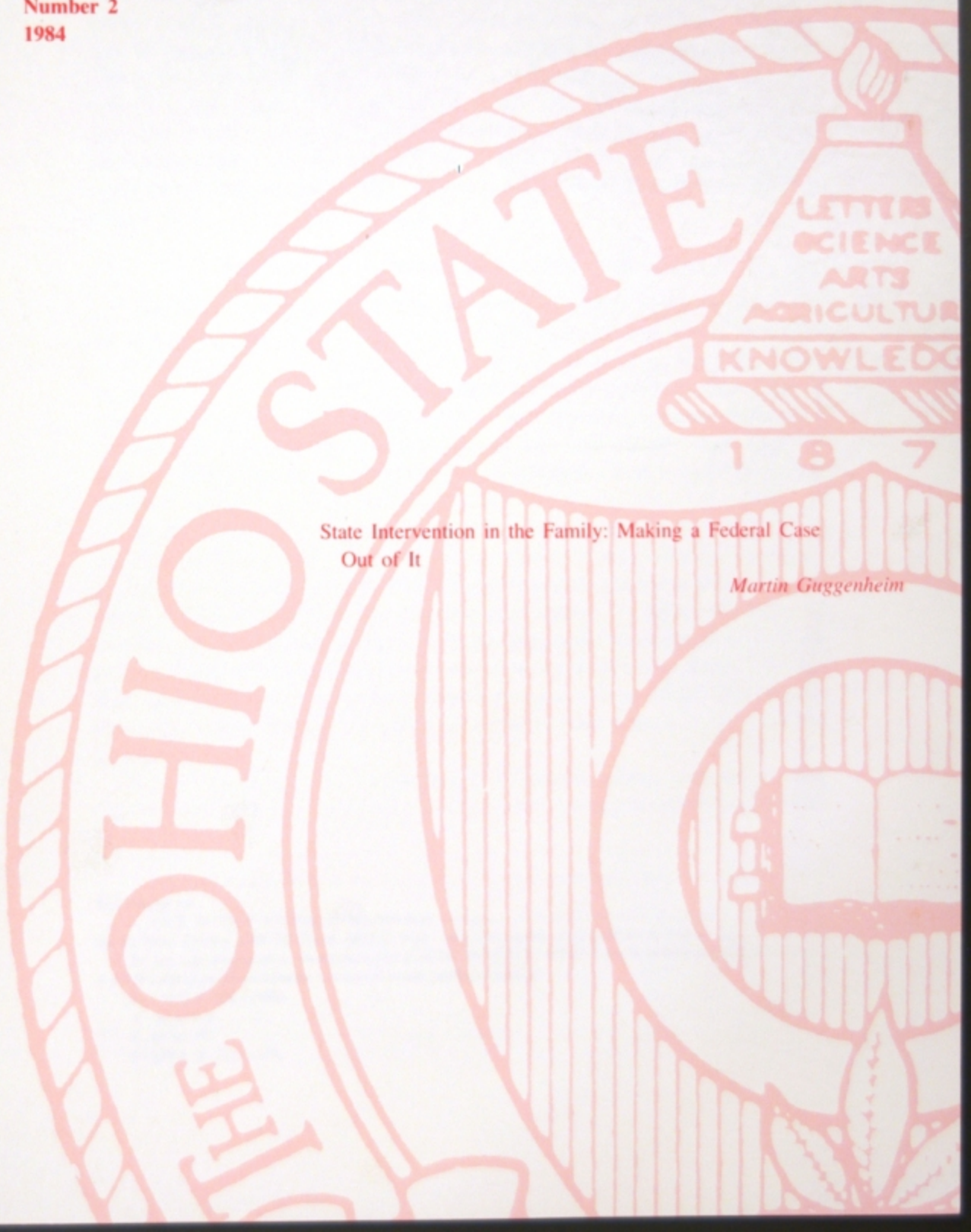

State Intervention in the Family: Making a Federal Case Out of It

Martin Guggenheim

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bws

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Making a Federal Case Out of I

MARTIN GUGGENHEIM*

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MARTIN GUGGENHEIM*

recent years, the United States Supreme Court has erected major obstacles for seeking federal review of child protection laws. This Article is based on the belief, which is not necessarily shared by the current Court, that litigants more successful in challenging child protection laws in federal rather than rt. This Article is not concerned primarily with substantive law but with al law. Rather than addressing the merits of a challenge to child protection s Article is concerned with how to get into federal court. A journey through 's obstacle course may prove instructive to lawyers struggling over how to e court litigation entirely or how to preserve certain issues for lower federal ew.

I. SUBSTANTIVE BARRIERS TO FEDERAL JURISDICTION

any years, access to federal courts was difficult or impossible whenever ing issue involved the parent-child relationship. The history of federal vement in the area broadly known as domestic relations is worth examin-[1] In two early cases, the Supreme Court fashioned the so-called domestic ception to federal court jurisdiction, which posited that generally cases in the law are not to be heard in federal court. The exception has frequently derstood and given broader meaning than the facts from which it was arrant.[2]

Burrus[3] the Supreme Court dismissed a petition for a writ of habeas ht by a father seeking to recover custody of his child from the child's The Court concluded that federal jurisdiction did not lie because "there ce that the child was restrained of its liberty, . . . under or by virtue of of the United States, or that [the grandparent's] possession of the child n of the Constitution or any law or treaty of the United States."[4] *Burrus* the proposition that federal courts have power to decide child custody nen, by reason of some other matter or thing in the case, the court has

ond case, *Matters v. Ryan*,[6] a Canadian mother petitioned for the hild from the custody of an American woman. *Matters* reaffirmed the

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tate University of New York at J.D., 1971, New York University. Clinical Professor of Law, New ...niversity.

1. *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1189–92 (2d ed. 1973 & Supp. 1981) [hereinafter cited as HART & WECHSLER].

2. *See, e.g.*, Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972) ("it has been the policy of federal courts to avoid assumption of jurisdiction in [state domestic relations cases]").

3. 136 U.S. 586 (1890).

4. *Id.* at 593.

5. *Id.* at 597.

6. 249 U.S. 375 (1919).