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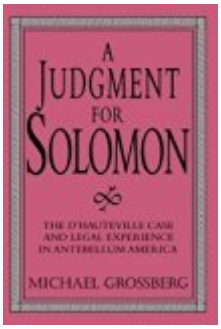

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Who Gets Custody of the Family?

One of the truly awful aspects of legal education is the tendency to extract law from life and treat it as an inviolate sphere of consciousness, elevated from pedestrian undergraduate concerns such as anthropology and history. First-year students begin regarding children crossing a busy street as inchoate tort cases. Fairly soon, in too many instances, budding lawyers ignore Holmes and brood incessantly about the omniscience of appellate case law. They then practice law with the mindset of a shoehorn. They should all read Michael Grossberg.

They should do so not because historical perspective provides an added, or even a critical, dimension to a case summary, but because Grossberg provides a richer, more accurate portrait of the power and paradox of law itself. *A Judgment for Solomon* recounts a child custody fight litigated in antebellum Philadelphia. In a sense, Ellen and Gonzalve d'Hauteville's struggle for custody of their son Frederick mattered only to them. The case set no binding precedent; in fact, the trial court's decision was never appealed. A report of their struggle appears in no domestic relations text. But in Grossberg's supple hands, the d'Hauteville case is transformed into a vehicle for examining the multi-tiered legal culture and the way in which popular and legal norms cross-pollinate. He makes his aim clear: "to present ... a model for contextualizing popular cases, and a brief for narratives as a way to probe the legal dynamics of social change" (p. xv).[1] He achieves his synthesis by a carefully braided narrative that pulls in strands of popular culture and formal legal argument to display an anthropological understanding of the intersection of gender and law at a moment of transition to the norms of the modern family.

In 1837, Ellen Sears, daughter of Boston money, married Gonzalve d'Hauteville, son of Swiss nobility. Each family had much to gain. The d'Hautevilles would establish a link to a Boston family of tremendous wealth; the Sears would enlist a titled aristocrat in their quest for social acceptance. Unfortunately for these great familial expectations, Ellen and Gonzalve wed in an era when the claims of patriarchal authority were adjusting to a subtle challenge from the romantic temper of the times and the nascent springs of feminine autonomy. Their marital relationship quickly dissolved. Pregnant and unhappy, Ellen left Gonzalve's home in Switzerland for Boston, giving birth to Frederick soon after. Gonzalve followed, demanding that his wife and son return home. The parties alternated efforts at negotiation with a cat-and-mouse game of forum shopping. Ultimately, the couple turned to the American version of King Solomon, the judiciary, and a highly-popularized custody trial commenced in Philadelphia in 1840.

That the matter was even contested should be surprising. Common law doctrine granted full sway to a father's decisions regarding child custody and family residence.[2] Indeed, as Grossberg observes, Ellen's claims to autonomy "voiced a standard of marital expectations at odds with the law" (p. 43). Gonzalve's self-image as paterfamilias conflicted with Ellen's growing sense of herself as mother tormented by an unfeeling spouse. But hi-

erarchical claims had always trumped those of mutuality. Ellen thus faced a seemingly insurmountable obstacle. Since Gonzalve had not physically abused her or violated any other obligation of his marriage oath, she had no right to seek a divorce.[3] Yet the law refused to intervene on behalf of married women. All were subject to their husbands' power and protection. Grossberg describes in fascinating detail how Ellen and her Philadelphia lawyers devised a strategy that would challenge the accepted legal formulation along its emerging cultural fault line. Essentially, their scheme was to emphasize Ellen's maternal role, and to characterize Gonzalve's actions as mental cruelty, which, though insufficient to warrant a dissolution of the conjugal union, rendered him unfit to usurp the mother in the care of an infant. Gonzalve's legal team, on the other hand, focused on Ellen's marital fault in deserting the husband's home, and relied on Gonzalve's paternal rights to custody of his child.

In Grossberg's earlier book, *Governing the Hearth: Law and the Family in Nineteenth-Century America*,[4] he outlined the fall of the hierarchical family in the face of burgeoning attention to notions of child nurture.[5] The makeover to a "best interests of the child" standard allowed both mothers and "surrogate" parents–that is, the state or an adoptive family–to circumscribe traditional paternal prerogatives. However, this power shift placed increasing options in maternal hands at the cost of having virtually the whole of family life supervised by what Grossberg called a "judicial patriarchy."[6] In the present work, Grossberg has excavated a single site both more deeply and more broadly. He centers his analysis on one custody struggle and has unearthed a cache of primary sources from the participants. But he also presents this case in the light of a wide array of cultural and anthropological studies. The range of sources he employs is truly sweeping. For example, in one stretch of five pages suggesting that trials are complex social performances that should best be seen in the "anthropological meaning of social dramas: events that reveal latent conflicts in a society and thus illuminate its fundamental social structures" (p. 89), Grossberg cites texts in cultural history, drama and rhetoric, journalism and mass media, anthropology, a contemporary newspaper account, biography, and legal discourse (see pp. 254-55, nn. 1-11).

In seeking both judicial and public vindication, Gonzalve had bet on the past, Ellen on the future of family life. But their trial took place, as all do, in the contested present. In rehearsing the scene, Grossberg nicely captures both the contingency of history and the delicate interaction of popular and legal norms. He does so by emphasizing how the determinative moments in the d'Hauteville social drama consisted of a dialectic of law and culture. Ellen significantly altered her legal posture from exploited wife to embattled mother in light of her counsel's discovery that Pennsylvania judicial precedent provided no recourse for wives *qua* wives, but did offer a safe custody harbor for mothers of very young children. But Ellen's strategy also owed much to the antebellum cultural milieu, which had already begun to sanctify a separate sphere for motherhood. And Grossberg shows that Gonzalve shifted his focus away from Ellen's improper conduct in refusing to recognize his sovereignty. In response to the narrow window of maternal preference opened by Pennsylvania custody cases, Gonzalve began to characterize his paternal rights as a check on standardless and unwarranted intrusion by judges into domestic arrangements. By expanding the canvas in this fashion, Grossberg succeeds on two fronts. He integrates client narratives into legal argumentation, and he incorporates the double helix of the law's "relative autonomy" and "partial independence" (pp. 121-22) into the larger narrative of social change.

Social changes often simmer for years before boiling over, and Grossberg's analysis also suggests that mental cruelty, far and away the most popular twentieth-century divorce ground, began its long gestation as a component of the antebellum cultural separation between the sexes.[7] The legal definition of marital cruelty did not encompass the intense anguish Gonzalve supposedly caused Ellen.[8] But Grossberg shows how, in her quest for custody, Ellen and her attorneys were able to leverage mental cruelty into an accusation that Gonzalve had violated the standards of the changing American family, an institution groping its uncertain way from an institutional past to a companionate future. But in the point-counterpoint of their public struggle, Gonzalve and his counsel leveled the charge that continues to haunt advocates of this expanded divorce ground: mental cruelty has no logical boundaries. An 1829 Kentucky court opinion, quoted by Grossberg, declared mental cruelty essentially non-justiciable, because of the law's inability to "ascertain the operation of particular acts, upon the mind, and then trace the influences of the mind upon the body, in producing disease and death" (p. 45). A century later, Dean Prosser acknowledged that mental cruelty "is an inevitable accompaniment of any marriage which has been a failure."[9] In Grossberg's telling, mental cruelty was primarily an element of the renegotiation of gender in the early Victorian era.

Finally, *A Judgment for Solomon* adds a needed case

study to the debate among legal historians about the changing contours of the public and private spheres in the development of the modern family, as well as to the related policy question whether the shift of the conjugal bond from status to contract can or should be reversed or at least significantly modified. Lee E. Teitelbaum argued a decade ago that very little of the "private" Victorian family was truly private. Courts and legislatures gradually eased out the private sphere in establishing hegemony over issues of child-rearing, education, marriage regulation, child custody, and spousal support.[10] Later, in a review of *Governing the Hearth*, Teitelbaum suggested that even Grossberg had not fully acknowledged the transference of functions from the household to the state regulator in the course of the nineteenth century.[11] By contrast, Jana B. Singer stressed the larger trend transforming family law from public to private ordering.[12] That debate has of late been subsumed into a discussion of whether Henry Maine's dictum about the relentless creep from status to contract applies immutably to domestic relations.[13]

Grossberg sidesteps the polemics pitting the rights-talkers against the communitarians, which have flared up in this context in current proposals to end or severely limit no-fault divorce, and to legislate two types of relationships: a marriage of "commitment" and a marriage of "compatibility."[14] Instead, he demonstrates the power of storytelling at junctures when the law is in flux (p. 104). Grossberg's talent at narrative discourse allows him to show that the relationship between law and social change is not susceptible to easy cause-and-effect analysis. Culture obeys only the law of unintended consequences, and we learn our lessons by approaching issues of social engineering with a healthy and historically informed measure of skepticism about our own abilities.

As readers of this review may have guessed, Ellen d'Hauteville won her custody battle. But the judges awarded only temporary custody. Because the litigation had exposed every private corner of her family to public view, her limited victory ensured that the family would be subject to "continuous judicial surveillance" (p. 165). In many ways, Ellen d'Hauteville's world has entirely passed from the scene. But she and we share a keen sense of life in a culture facing "continuous judicial surveillance." In a society deeply divided over gender roles and the permissible reach of the government into domestic relations, we should be wary of those too quick to grasp the mantle of King Solomon.

Notes

[1]. In an earlier article on the d'Hauteville litigation, Grossberg described one of his goals as highlighting trial courts as "arenas of conflict," the front lines for "conceptualizing legal institutions and rules as public sites for contests over the meaning and application of the law." "Battling Over Motherhood in Philadelphia: A Study of Antebellum American Trial Courts as Arenas of Conflict," in Mindie Lazarus-Black and Susan F. Hirsch, eds. *Contested States: Law, Hegemony and Resistance* (New York: Routledge, 1994), 154.

[2]. See, for example, James Kent, *Commentaries on American Law*, 2d ed. (1832), 193-94.

[3]. The best treatment of divorce in this period is Richard H. Chused, *Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law* (Philadelphia: University of Pennsylvania Press, 1994). For an argument that seeks to explain the more iron-clad sense of paternal authority in the antebellum South, see Eugene Genovese, " Our Family, White and Black': Family and Household in the Southern Slaveholders' World View," in Carol Bleser, ed., *In Joy and In Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900* (New York: Oxford University Press, 1991), 69-87.

[4]. Chapel Hill: University of North Carolina Press, 1985.

[5]. *Governing the Hearth*, at 234-85.

[6]. Ibid., 289-307.

[7]. See Chused, *Private Acts in Public Places*, at 87. On cruelty as the "dazzling success story of family law" because its plasticity allowed it to outperform adultery and desertion as the favored divorce ground, see Lawrence M. Friedman and Robert V. Percival, "Who Sues for Divorce? From Fault Through Fiction to Freedom," *Journal of Legal Studies* 5 (Jan. 1976): 79-80. Robert L. Griswold showed that a "less restrained" definition of cruelty emerged in appellate opinions as early as the mid-nineteenth century. He identified a shift from "social and moral considerations to medical and psychological criteria," as well as an emphasis upon "individual autonomy at the expense of social order." Griswold, "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1750-1900," *Journal of Social History* 20 (1986): 127.

[8]. Grossberg quotes the prophetic view of mental cruelty voiced by Ellen's father: "that moral tyranny which strikes its blows upon the mind, until it totters,

is thought fully equivalent to all that the body can be brought to suffer" (p. 27). David Sears' opinion was wide of the mark in terms of antebellum law, but he anticipated the precise contours of marital cruelty a century later.

[9]. "Divorce: The Reno Method, and Others," *Forum* 100 (Dec. 1938): 286-91.

[10]. Teitelbaum, "Family History and Family Law," *Wisconsin Law Review* (1985): 1135-81. Teitelbaum also objected to the whiggish view of a linear progression in American families from "little commonwealths" to regulated industries. On the Puritan family, see John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York: Oxford University Press, 1970).

[11]. Teitelbaum, "The Legal History of the Family" *Michigan Law Review* 85 (1987): 1052, 1062. There is evidence that, for children of poor and immigrant families, the interventionist state had become a reality long before the antebellum period ended. See, for example, J. Herbie DiFonzo, " 'Deprived of Fatal Liberty': The Rhetoric of Child Saving and the Reality of Juvenile Incarceration," *University of Toledo Law Review* 26 (1995): 855, 863-78.

[12]. Singer, "The Privatization of Family Law," *Wisconsin Law Review* (1992): 1443-1567.

[13]. See, for example, Milton C. Regan, Jr., *Family Law and the Pursuit of Intimacy* (New York: New York University Press, 1993); Barbara Dafoe Whitehead, "Dan Quayle Was Right," *Atlantic* 271 (April 1993): 47-84; Bruce C. Hafen, "Individualism and Autonomy in Family Law: The Waning of Belonging," *Brigham Young University Law Review* (1991): 1; and Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law," *Michigan Law Review* 83 (1990): 143.

[14]. See, for example, Barbara Vobejda, "Critics Seeking Change, Fault 'No-Fault' Divorce Laws for High Rates," *Washington Post* (Mar. 7, 1996): A3; 1995 Illinois House Bill 2095, called the "Marriage Contract Act," would have required that couples seeking marriage choose their level of anticipated fidelity to the connubial union. Those electing a marriage of "compatibility" could later terminate it under the tenets of no-fault divorce. But a couple who embraced a marriage of "commitment" could not legally dissolve it except by one partner's proof of the marital fault of the other. The difficulties of monitoring cultural trends are here apparent: in the midst of a large debate over the flow of family life from status to contract and perhaps back, the Marriage Contract Act attempted to re-institute status by means of contract. On pre-commitment restrictions generally, see Elizabeth S. Scott, "Rational Decisionmaking about Marriage and Divorce," *Virginia Law Review* 90 (1990): 43-44, 79-91.

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