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From the Salem witchcraft trials of the 1690s to the Rodney King and O. J. Simpson trials of the 1990s, highly publicized court cases have both disclosed and shaped changes in American society. In this volume, Michael Grossberg examines the d'Hauteville child custody battle of 1840 to explore some timebound and timeless features of American legal culture. He recounts how marital woes led Ellen and Gonzalve d'Hauteville into what Alexis de Tocqueville called the "shadow of the law." Their bitter custody fight over their two-year-old son forced the pair to confront contradictions between their own ideas about justice and the realities of the law, as well as to endure the transformation of their domestic unhappiness into a public legal event with lawyers, judges, newspaper reporters, and a popular following.

The d'Hautevilles' multiple legal experiences culminated in an eagerly followed Philadelphia trial that sparked a national debate over the legal rights and duties of parents and spouses. The story of the d'Hauteville case explains why popular trials become "precedents of legal experience" – mediums for debates about highly contested social issues. It also demonstrates the ability of individual women and men to contribute to legal change by turning to the law to fight for what they want.

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CAMBRIDGE HISTORICAL STUDIES IN AMERICAN LAW AND SOCIETY

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To my Parents and my Sister

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Solomon's Judgment

Then there came two women, that were harlots, unto the king, and stood before him.

And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house.

And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house.

And this woman's child died in the night; because she overlaid it.

And she arose at midnight, and took my son from beside me, while thine handmaid slept, and laid it in her bosom, and laid her dead child in my bosom.

And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear.

And the other woman said, Nay; but the living son is my son, and the dead is thy son. And this said, No; but the dead is thy son, and the living is my son. Thus they spake before the king.

Then said the king, The one saith, This is my son that liveth, and thy son is the dead: and the other saith, Nay; but thy son is the dead, and my son is the living.

And the king said, Bring me a sword. And they brought a sword before the king.

And the king said, Divide the living child in two, and give half to the one, and half to the other.

Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it.

Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.

And all Is'-ra-el heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment.

I Kings 3:16–28

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Preface

The d'Hauteville case is not the typical kind of case recovered from the legal dustbin and subjected to intensive study. It is simply not very important by orthodox legal standards. Its main event was a trial in a lowly municipal criminal court. And the case never reached an appellate tribunal, and thus did not become a binding precedent in the conventional sense of that word. Even its subject, a parental custody fight over a two-year-old boy, excludes it from the innumerable collections of great cases devoted as they are to crime, politics, and commerce. Yet the more I studied the d'Hauteville case, the more I realized that it had a particular importance.

As in innumerable legal contests from the Salem witchcraft trials of the 1690s to the Rodney King and O. J. Simpson trials of the 1990s, I discovered that the d'Hauteville case was not a single event in a courtroom but a set of multiple legal experiences that exposed timebound and timeless realities of American legal culture. The case began in an insular way, as a domestic drama must, with the rapid rise and equally fast fall of the d'Hauteville marriage. But as the fight for their son Frederick displaced their marriage as the central focus of Ellen and Gonzalve's relationship, the law assumed a greater and greater presence in their lives. The pair not only confronted contradictions between their own ideas about justice and the legal rules they had to learn, they also experienced the transformation of their domestic tragedy into a legal event with innumerable participants, from lawyers, judges, and legislators to courtroom spectators, newspaper reporters, and diarists. This startling metamorphosis raised the stakes of the case for the d'Hautevilles and everyone else drawn into their fight. As a result, the fierce battle Ellen and Gonzalve waged over Frederick led to numerous legal encounters that transformed their lives, while affecting the lives of many others; and it left a voluminous evidentiary record that can be used to recover the varied experiences that combined to create the d'Hauteville case.

Trying to interpret that record suggests that cases like this are very particular kinds of experiences. And experience is one of those

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troublesome words whose seemingly clear meaning masks confusion. I use the word as Raymond Williams did when he designated it one of the *keywords* of our language. To him, experience meant both the external influences to which people react and the interior consciousness of that reaction.[1] I want to add to his definition a recognition that the external and internal fuse to create individuals through their experiences. Using such a conception of experience underscores the reality that individuals are constituted through their experiences. Experience then becomes their history.[2] In other words, the evidence of experience includes records of both individual agency and the social systems that affect individual actions. As a result, trying to recapture legal experiences can bring an understanding of legal events not possible in any other way.

The d'Hauteville case became a legal experience worth recovering because of the relationship between the distinctive facts of the case and the particular setting in which it occurred. Two critical components of that setting are worth noting at the outset.

First, the d'Hautevilles fought over their son during an era of significant change in family life and gender roles. Years later, historians would look back at the bundle of changes occurring in late eighteenth- and early nineteenth-century households and announce that they had heralded the birth of the modern family.[3] At the time, however, conflict and confusion, not trend analysis, reigned in many North American and European homes. Most divisive were challenges to male power over households provoked by bourgeois visions of marriage as a companionate partnership and the family as a private refuge dedicated to child nurture and maternal authority. As the challenges rippled through families like the d'Hautevilles, countless conflicts broke out over how to construct new identities for spouses and parents. The struggles were so intense and the outcomes so unpredictable that battle after battle broke out between mothers and fathers, husbands and wives, and parents and children as well as between families and entrepreneurs, overseers of the poor, prosecutors, and other public and private agents. The debris of these troubled families offers the most revealing records of family change. In households like the d'Hautevilles', once silent assumptions about marriage, children, individual rights and duties, and all the other realities of daily life began to be voiced and defended. Challenges to existing power relations in the family had to be made plausible, as did their defense. The European and North American conviction that families constituted the bedrock institution of their societies made contests like the d'Hautevilles' even more troubling and momentous. Many Europeans and North Americans came to consider family conflict a telling indicator of

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their entire nation's well-being. What they found ignited hopes and fears that erupted into fierce debates about the very fate of the family. These debates continue into our own time.

Second, and equally – if not more important – for this study, Ellen and Gonzalve battled during a critical era in American legal history. Trial courts like the one in which the d'Hautevilles found themselves were the most visible symbols of a powerful postrevolutionary American legal system. For many early nineteenth-century Americans turning to law acted on beliefs and conventions already so deeply embedded in their culture that they were seen, when considered at all, as inevitable, indeed natural parts of their world. Since the Revolution, if not before in some provinces, law had tightened its stranglehold on American dispute resolution. As a result, while the disgruntled occasionally railed against particular statutes or specific judgments and attacks on lawyers might wax and wane, the American legal system wielded an immense power to frame and resolve many of the nation's most critical conflicts. Its power grew out of distinctive institutions, language, ideology, professionals, and rituals that somehow set the law apart from the rest of society as a distinct realm of experience and authority.[4]

Testaments to the newfound power of law proliferated during these years. Alexis de Tocqueville sailed across the Atlantic in 1831, surveyed the young nation, and then declared that in America every major issue eventually became a judicial question. Six years later, Abraham Lincoln, already seeking ways to bind together the contentious union, sermonized that law must be the nation's civil religion. Indeed becoming a lawyer proved so attractive that the growing number of attorneys easily outpaced the rate of American population growth at a time when it was the highest in the Western world. Lawyers not only seemed to multiply like locusts, law became the breeding ground for antebellum powerbrokers ranging from politicians like Lincoln and Daniel Webster, educational reformer Horace Mann, and even revivalist Charles Grandison Finney, to the innumerable mayors, land speculators, and other go-getters of the age. And countless other women and men affirmed the law's power year after year by pushing their way through courthouse doors as litigants, jurors, and spectators. Years later, historians would try to capture the growing power of law in these years with phrases like "formative period," "era of the release of energy," and "legal transformation." These labels suggest that much like the family changes of the period, those in law left an indelible imprint on the women and men who experienced them. They also suggest the emergence of debates over the place of law in American society that have continued to bedevil us as well.[5]

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The d'Hautevilles' varied legal experiences illuminate their era's legal and family changes as well as the critical connections between them. They do so by reminding us that such changes were composed of innumerable individual experiences. Like so many others then and since, Gonzalve and Ellen discovered that going to law was not a neutral process. Translating problems like theirs into the language and forms of the law had a profound and often unpredictable impact not only on the outcome of a case but on all those drawn to it. The transformation of the fight for Frederick from a private quarrel into a public trial, with an avid following, bitterly contested legislative battles, and divisive public debates, thus documents not just the incendiary character of family conflict but also the lure of the law as a means of solving disputes.

As the rippling impact of the case suggests, when it is considered as a legal experience the d'Hauteville case appears not as a single event but a series of encounters, each of which spun multiple stories, meanings, and identities for Ellen and Gonzalve, their families, and their lawyers, and also for others beyond their immediate circle such as judges, legislators, courtroom audiences, newspaper readers in Philadelphia, New York, and Boston, and countless other cities and towns. These experiences were simultaneously distinct yet interwoven; and they cannot all be recovered. But looking at the case as a series of legal experiences is the best way to understand what the d'Hautevilles' fight for Frederick can tell us about the place of law in American society. It helps us understand how a case like this one becomes, as Richard Wightman Fox said of another highly publicized nineteenth-century family law drama, the Beecher/Tilton adultery trial, "a culture-shaping and culture-disclosing event."[6]

The dual reality of popular cases as cultural shapers and disclosers is best recovered from the past as a form of microhistory – the study of singular exemplary events. Microhistory traces structural changes in a society through stories of the struggles in individual lives.[7] Through such an approach controversial cases reveal aspects of a legal culture obscured in studies of a larger scope. They also reveal how individual legal experiences illuminates the past they had helped create.

Yet legal cases are problematic kinds of events to put under the historical microscope. Despite the tendency of most legal storytellers to turn popular cases into mirrors of society, such cases are not mere reflections of the broader culture at a particular moment. Rather, they are particular kinds of social dramas that illustrate the interactive reality of all legal experiences. In a trial, as in other crucial legal encounters, external beliefs, interests, and other forces are siphoned through the peculiar rules, practices, words, and institu-

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tions of the law. Inside the law office, the courtroom, and the legislative chamber, they acquire distinctive meanings that are then broadcast back to the public through client stories, lawyers' arguments, witness testimony, judges' verdicts, legislative debates, and statutes. These in turn help construct popular images of social relations. Interactively, legal events become thus active shapers of a culture, not merely its reflections. For that reason, microhistories like this one, which pay attention to the law as a site for both cultural revelation and cultural shaping, show how such cases enter popular and professional consciousness to become part of the process of social change.[8]

However, the d'Hauteville case is but one of many, from the Zenger trial to the Baby M contest, that have captivated the public. In it are the vices as well as the virtues of a single tale. And its record is inevitably incomplete. Not only are the principal actors long gone, so are other sources. Letters have been lost, diaries discarded, notes cast aside, documents destroyed, impassioned declarations have floated away in the wind, private thoughts have died with their authors. The participants in the d'Hauteville case had an understanding of the fight for Frederick knowable only to them. Yet enough remains to reconstruct the story of the case and to probe its meaning. Although a historian like myself can never fully recover a story from the past, I can arrange its many shards into a mosaic that none of its participants could ever have completed. I can bring to the tale a sense of their multiple experiences of the dispute, of the meaning of its occurrence at this particular time and place, even the story of the years since it ended that have added elements to the tale unknowable to any of its participants. Their understanding of the story and mine are both partial. Brought together they make reconstruction possible.

I have tried to capture the experiences of the d'Hauteville case through what David Hackett Fischer has called a braided narrative. By that I mean considering the case as a problem chain. Each problem leads to a resolution that creates the next problem in the story. I have divided the case into a chain of six storytelling problems, each of which occupies a chapter. The solution to each problem leads to the next chapter of the story.[9] Each chapter thus has twin goals. It tells the next episode of the case, while suggesting what that episode can show us about American legal practices and beliefs. In this way, I have tried to meld the obvious appeal of a narrative with recent insights about the distinctiveness of narrative constructions.

My single braided story of the d'Hauteville case is composed of three different kinds of narrative. In each chapter, I rely as much

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as possible on the words of the case's varied cast of characters to describe their legal experiences and explain the impact of those experiences on their lives. These personal stories, best understood as *ontological narratives,* reveal how Ellen, Gonzalve, their families, their lawyers, and innumerable members of their audience tried to make sense of the varied experiences spawned by the case. But because the actors in the d'Hauteville case, like those in all past events, cannot tell a complete story, I fill in the inevitable gaps in their tales with other evidence and my own inferences to place their legal experiences in a more comprehensive context. In particular, I have used legal periodicals, cases, statutes, newspapers, and other public records to recover the dominant stories used by groups of people in the era to understand cases like this. These *public narratives* formed a critical and changing part of the setting in which the actors in the case experienced the law. Finally, my own presentation of the case through a braided story can be understood as a *conceptual narrative.* In constructing an analytical method of telling the tale, I have woven my interpretation of the case into the chapters both in the way I have braided the links of the story and through direct observations of my own and others. My approach has stylistic implications as well. Rather than setting off passages as indented block quotes, I have melded the words from these narratives together into the paragraphs of the story. Each form of narrative is critical to reconstructing the d'Hauteville case. Taken together, they also show how narratives, like the lives and experiences they recount, must be understood to be cultural productions as well as structures of meaning and power.[10]

Through these narrative forms, I present the experiences of the d'Hauteville case in the order in which they were lived. The case was a series of legal experiences of specific individuals who made choices at particular times that had concrete consequences. A narrative like this one can uncover parts of past lives not retrievable in any other fashion. By doing so it provides a revealing glimpse of the operation of American legal culture at a particular moment in the past. Similarly, recalling the sequential way in which the cast of characters in the d'Hauteville case lived their lives and the intricate webs of relations through which they understood themselves and others returns a necessary uncertainty to their story and its meaning as a legal experience. As in most trials, the outcome remained uncertain until the very day of the verdict. And, as in most controversial trials, disagreement over the verdict immediately engulfed the case. These time-bound uncertainties and disagreements were critical parts of the case, and only a narrative can recover their significance and that of the other major legal events of the case.[11]

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A braided narrative of the d'Hauteville case can serve another purpose as well. I want to use my story of Ellen and Gonzalve's fight for Frederick as an example of how to place popular cases and the varied legal experiences that constitute them in historical context. My intent is to present the d'Hauteville case as a model for contextualizing popular cases, and a brief for narratives as a way to probe the legal dynamics of social change. In particular, I want to argue that repeatedly in the past, as in the present, controversial cases like this one became symbolic contests that provoked and framed critical debates about social change. The d'Hauteville case allows me to do that through the medium of a dramatic narrative of one couple and their son. It offers a revealing example of how a dominant legal system collided with the actions of specific individuals and the press of timebound circumstances to ignite a legal conflict and kindle a series of revealing legal experiences. Such inherently particular and subjective stories from the past can begin to give us a legal history that recognizes the importance of the lived experiences of individual men, women, and children along with those of lawyers, judges, legislators, and legal writers.[12]

My goal is to bring the d'Hauteville case back to life and through it provide a glimpse of the legal culture in which it raged. I want to give readers a chance to experience this parental struggle as the maelstrom it was. Much of the power and social significance of a case like this comes from the way it forces every observer to identify with and judge the individuals at the bar of justice. I hope my narrative provokes similar reactions. In the end, only by reaching a verdict on Ellen and Gonzalve can the full meaning of their case be understood and the irresistible lure of the law be appreciated.[13]

Ultimately, the d'Hauteville case demanded the judgment of Solomon. Unable to divide Frederick in half, three Philadelphia trial judges had to decide whether Ellen or Gonzalve got the boy. The following pages try to tell why they had to make such a horrendous decision and to suggest the implications of their choice. It is a story at once bound to its own particular time and place, and yet also a tale of love, hate, and law that is universal and timeless.

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Acknowledgments

When I stumbled across the d'Hauteville case several years ago, I realized it was an engrossing story. As I worked on telling it, I have been the fortunate recipient of numerous forms of support.

I began writing about the case while a Fellow at the National Humanities Center; and I completed much of the research and writing while holding fellowships at the Newberry Library and the American Bar Foundation. In between, I received timely research assistance from the Library Company of Philadelphia and the National Endowment for the Humanities. Archivists and librarians at the Library Company, Historical Society of Pennsylvania, Newberry Library, Massachusetts Historical Society, and Case Western Reserve University helped me locate crucial materials about the case. Law librarian Christine Corcos was particularly unstinting in her efforts to track down information. John Winthrop Sears also provided useful facts about his ancestor Ellen d'Hauteville. The research assistance of Christopher Cronin was invaluable. I would also like to thank the Massachusetts Historical Society for permission to reproduce pictures of the Searses. Unfortunately, I could not locate a likeness of Gonzalve d'Hauteville.

As I worked on the case, I received helpful comments from participants in seminars at the Newberry Library and the American Bar Foundation as well as at the law schools of the universities of Texas, Wisconsin, Michigan, Chicago, and Pennsylvania. Equally beneficial were responses to presentations on the case I gave at the Social Science History Association, Law & Society Association, and the American Anthropological Association. I am grateful as well to my former colleagues in the History Department at Case Western Reserve, especially Carroll Pursell and Angela Woollacott, who heard me talk about the d'Hauteville case time and again yet were always willing to discuss yet another issue. Several friends and colleagues also took the time to comment on various versions of this manuscript: Ann Warren, Carl Ubbelohde, and Dirk Hartog. Finally, I am indebted to the editors of the Cambridge Historical Studies in American Law and Society, Arthur McEvoy and Christopher Tomlins, and to Exec-

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Writing about past families inevitably places a burden on present ones. Tina, Matt, and Ben have suffered through this project for too many years. But their support has been unwavering. I could not have completed this book without it nor would I understand its subject as well as I do.

I dedicate this book to my parents and my sister Gail. Through our experiences together, we bring our own understanding of family troubles and family law to the tangled tale of Ellen, Gonzalve, and Frederick d'Hauteville.

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