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## Who Determines Children's Best Interests?

MICHAEL GROSSBERG

Danaya Wright's analysis of English child custody law is thoughtful and thought provoking. Through an excursion deep into English legal history, she not only contextualizes the *De Manneville* case but also convincingly demonstrates that child custody has long been contested and that those contests have always contained an incendiary mix of policies and practices. Wright's article documents that the key elements of custody conflicts—property, children's needs, and paternal and maternal rights and claims—have distinct and collective histories and that both defy easy analysis. In doing so, her essay makes it clear that these cases have always been difficult because they involve changing and clashing interests and because common law tribunals are the setting for their definition and application. Consequently, her essay is a compelling example of the benefits of locating a case in its particular place and time.

Wright's essay has a dual message. She argues that the significance and meaning of the *De Manneville* case have been consistently misunderstood; and then she contends that misreadings of the case illuminate substantive and methodological problems with our understanding of custody law in particular and legal history in general. Specifically, she maintains that analyzing *De Manneville* correctly reveals the resistance of late eighteenth and early nineteenth-century English jurists to notions of mother's rights and a best interest of the child standard in custody law. Documenting this judicial resistance uncovers "both the complex interrelationship between the law of custody and family relations and the role of law in maintaining patriarchal power structures despite ideological shifts that seemingly call for the recognition and protection of maternal claims to children."<sup>1</sup> These revelations, in turn, pose questions about the use of law as historical evi-

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1. Danaya C. Wright, "*De Manneville v. De Manneville*: Rethinking the Birth of Custody Law under Patriarchy," *Law and History Review* 17 (1999): 250.

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dence for social practices and attitudes and thus provide needed cautions to social historians about the use of legal evidence.

Wright's argument is built on the indisputable assumption that if the sources of custody law conflicts are revealed to be much more complex than previously assumed, then so, too, must be their meaning and significance in their time and over time. Following that logic, I would like to complicate the issues a bit further by probing a few parts of her analysis to suggest that the conflicts she so ably chronicles might be read a little differently. I want to do so by discussing briefly three issues that seem to me to be central to her argument: doctrinal standards, judicial beliefs, and comparative experiences.

At the heart of Wright's argument is the "Best Interests of the Child" doctrine. In many ways the doctrine itself is the primary story of the essay. Its rise, fall, and ultimate triumphant resurrection is central to Wright's assertions of non-linear change. In her reading of the doctrine's history, *De Manneville* is significant because it reversed a rising commitment to the best interest of the child standard and the maternal rights that must accompany it. As she puts it, *De Manneville* occurred when "courts were moving toward a more discretionary law that would accommodate the psychological and economic needs of all children." This meant that "the legal relationship of the parent and child would be mediated through the legal relationship of the husband and wife. Judges would focus on the disruptive potential of interspousal custody disputes as the evil to be avoided, rather than on the good of settling custody under a meaningful welfare standard."<sup>2</sup>

I wonder, however, whether Wright might present child welfare in the same nuanced way that she analyzes maternal rights and coverture. Her rendition of the best interest doctrine tends to turn it into a rather ahistorical set of practices and policies instead of ones constructed in particular historical moments. Such a formulation seems to assume a constancy in meanings of children's welfare and thus feeds the kind of ahistoricism associated with the Lloyd deMause school of children's history: the past not as a different place but a nightmare.<sup>3</sup> Alternatively, we might search that past to discover that conceptions of child welfare have a history and then link those changing conceptions to experiences of children and parents. Doing so would compel us to recover assumptions about the interests and needs of children embedded in an Anglo-American property based notion of custody rather than simply assuming that such a regime was in-

2. *Ibid.*, 257.

3. Lloyd deMause, ed., *The History of Childhood* (New York: Psychohistory Press, 1974). For a compelling recent analysis of the history of children, see Hugh Cunningham, "Review Essay: Histories of Children," *American Historical Review* 103 (1998): 1191-1208.

herently resistant to any notions of child welfare. Such a doctrinal reclamation project might well help us reformulate generalizations about major shifts in family law—such as the movement from property to nurture in custody law—in much broader terms by trying to understand issues like child welfare or children's interests as constantly changing and dynamic concepts. It is worth noting, for example, that even in one of the most egregious and heart-wrenching cases that Wright chronicles, *Rex v. Greenhill*, Lord Denman declared: "But I think that the case ought to be decided on more general grounds; because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age."<sup>4</sup> Such declarations clearly contain within them distinct notions of child welfare and interests as well as the assumption that paternal and children's interests are inseparable. Our challenge is to understand their meaning in 1836 and to historicize such contentions and the clashes that they helped provoke within the broader legal and family conflicts of the era rather than to assume a complete "disjuncture between social beliefs and legal rules."<sup>5</sup>

Such a reconceptualization of the history of doctrines like the best interest of the child rule is particularly critical for an argument like Wright's because her doctrinal exegesis straddles one of the great divides in Anglo-American legal history. The timing and depth of change in eighteenth and early nineteenth-century British and North American law remain central and contentious issues among historians studying topics from contract to labor relations to constitutionalism to family law.<sup>6</sup> As Wright notes, their multiple views are less and less easily characterized with formulations such as a shift from patriarchy to egalitarianism or by assertions that that legal change was either linear or uniform. And yet that insight ought to be applied to child welfare and the best interest doctrine as well. It may well be that rather than the emergence of a newfound recognition of an ever-present conception of children's interests, what changed in the era were both legal and social constructions of children and their welfare. In this context it is worth noting that the best interest doctrine itself has a rather checkered past that defies attributing to it a singular meaning. After surveying its history, Lee Teitelbaum concluded that the doctrine was an empty vessel into which the prejudices of the moment were always poured. Wright's deft analysis of the doctrine's legal parentage helps us understand why.

4. Cited in Wright, "*De Manneville v. De Manneville*," 293–94.

5. *Ibid.*, 302.

6. See, for example, David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (New York: Cambridge University Press, 1989); Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993).

The notion that disputes over child custody expressed in part shifting ideas of child welfare and thus parental rights brought about by political, economic, and social transformations suggests the need to examine the framework of custody law conflicts more closely and not just their outcomes. It may well be, for instance, that the best interest of the child doctrine ought to be considered as yet another example of the refinements that occurred in so many categories of nineteenth-century Anglo-American law.<sup>7</sup> Analyzing the doctrine in such terms raises the issue of judicial beliefs and practices because of the central role that common law judges played in the elaboration of nineteenth-century law. The role of judges as doctrinal creators is a particularly critical element in debates about the nature of legal change in this era. Wright tends to portray judges in rather stark terms. In the years before *De Manneville* she depicts them as examples of progressive thought because they slowly but surely recognized child welfare and maternal rights; in years after the decision judges become patriarchal defenders of the male authority who conspired to thwart progressive change. Judicial retrogression is clearly labeled: judges used the "rhetoric of children's interests" and they paid mere "lip service" to best interests doctrine early in the nineteenth century.<sup>8</sup>

I have questions about this portrayal of the English bench, not so much because I fault Wright's analysis of particular cases, but rather because her assessment of judicial intent fails to grapple sufficiently with the depth and logic of judicial opposition to the claims of mothers. The presentation tends to defang patriarchalism by implying that it had no intellectual and ideological mooring beyond the mere defense of power and thus could not resist a "real" best interest of the child argument. Such a depiction of judicial logic unduly simplifies the conflicts over male authority that erupted throughout Britain and North America in courtrooms and legislative chambers as well as in homes. And thus it also tends to downplay the breadth and severity of the disputes and chaos created by basic changes in family lives and family law litigation.

Wright explains her argument by declaring: "What I endeavor to uncover in this article is both the complex interrelationship between the law of custody and family relations and the role of law in maintaining patriarchal power structures despite ideological shifts that seemingly call for the recognition and protection of maternal claims to children. If law protects rather than breaks down paternal rights to children, during a period of rising maternal rights discourse, the role of law as evidence for making histori-

7. For an assessment of American family law in these terms, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985).

8. Wright, "*De Manneville v. De Manneville*," 249, 248.

cal claims about social practices and attitudes is open to question." I wonder whether the trajectory of change was as clear or as clearly linear as these words suggest. And I wonder whether recovering the full range of the custody contests—including the voices of litigants and lawyers—over parental rights and child welfare might indeed provide illuminating evidence for historical claims about social practices and attitudes by treating legal beliefs and practices as both products and sources of change in the era rather than as parts of an autonomous legal realm. Part of such a recovery project would be an assessment of the struggles over the morality and utility of separating the family into a collection of distinct individuals, each with his or her own rights, duties, and interests. In the 1840 Philadelphia d'Hauteville child custody case, for instance, the lawyer for the father rested part of his defense of patriarchal authority on the assertion of the fundamental unity of families and family roles. He argued that a woman who admittedly failed as a wife simply could not succeed as a mother. Family roles, he argued, were inseparable and bound together within a corporate whole.<sup>9</sup> And thus I wonder about the use of the modernization language of backward and forward to capture family law changes. Rather than arguing that law "took a backward, patriarchal turn," and that "we must question whether a growing egalitarianism occurred in family life despite the strict patriarchy of custody law, or whether the patriarchal imperatives of this and other so-called 'family laws' undermine historians' claims about social changes in the early nineteenth century,"<sup>10</sup> I wonder whether child custody and other family law contests might be presented in ways that recovered the full range of beliefs of the era and that analyzed why courts continued to be a central arena for such struggles.

Finally, and admittedly moving a bit beyond Wright's essay, I think that questions about the timing and meaning of doctrines and debates that ranged over decades and jurisdictions raise an important issue of method. As Wright notes periodically, Anglo-American custody law has a transatlantic past. Nineteenth-century judges, lawyers, and litigants were well aware of the legal cases and conflicts that raged throughout North America and Britain. So, too, are historians. And since in some quite revealing ways the trajectory of change differed in the United States, as did the nature of the debate, such a comparison can be used to pose questions about the connections between judicial intent and doctrinal change.

Particularly significant for building on Wright's argument is the fact that comparison highlights the historiographical significance of institutional structures. The American federal system in which each state had jurisdic-

9. Michael Grossberg, *A Judgment for Solomon: The d'Hauteville Case and Legal Experience in Antebellum America* (New York: Cambridge University Press, 1996), 97–100.

10. Wright, "De Manneville v. De Manneville," 253.

tion over domestic relations produced a range of custody and other family laws and thus exemplified the kind of legal variations that would lead Louis Brandeis to laud states as legal laboratories. Most significantly for Wright's argument, the various American jurisdictions and decisions fostered a debate that challenges assertions of a singular custody law. Britain's unitary legal order may well have stymied the use of the courts to stage such a similarly full debate, but comparison illuminates the larger context in which arguments by English mothers and their lawyers occurred and the possibilities of reading English custody precedents quite differently then and now. In particular, such a comparison seems to challenge the notion that custody law changes in the larger Anglo-North American legal world occurred in a clearly periodized scheme of progress, retrogression, and triumph.<sup>11</sup> At the same time, comparison may also provide a way to explore some of the key issues in custody law change that Wright identifies. For example, she notes in passing the potential significance of examining the impact of revolutionary change on family law rules like custody and the role of religion in domestic relations cases and conflicts. These issues are ripe for comparative analysis. In other words, comparison raises questions about the nature and meaning of Anglo-American law as a unified realm of legal rules and legal experiences. Putting custody law into comparative perspective would compel us to explain what sort of a legal world was this? How was it connected? And how and why did its various realms remain distinct?

As I hope I have indicated, I think Wright's essay is a significant contribution not only to the history of child custody law but to our efforts to understand how to explore the legal past. I have tried to suggest how I think her argument might be engaged and pushed a bit to deepen our understanding of both of these critical issues. Doing so is important for many reasons, not the least of which is the continuing reality that custody cases remain some of the most bitter and painful legal disputes in Britain and North America. Wright's essay helps us see why that has always been so.

11. For an American version of this argument, see Jamil Zainaldin, "The Emergence of a Modern Family Law: Child Custody, Adoption, and the Courts, 1796-1851," *Northwestern University Law Review* 72 (1979): 1038-89. For a different reading, see Grossberg, *Governing the Hearth*, chap. 7.