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## Marriage, Property & the Affective Family [comments]

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# Marriage, Property & the 'Affective Family'

Lloyd Bonfield

Discerning transitions in the emotional content of family relationships is a daunting task. In *The Family, Sex and Marriage in England 1500-1800*, Lawrence Stone has accepted the challenge exploiting 'every possible type of evidence' to detect an evolution in social attitudes.<sup>1</sup> Reactions have generally been favorable; merits are thought to outweigh shortcomings.<sup>2</sup> Even his most derisive critic concedes that the book is 'important' because it is of topical interest and attempts to illuminate an area of history which has previously remained obscure.<sup>3</sup>

Perhaps the work's most thoughtful critic is E.P. Thompson who appears more troubled than other reviewers by the randomness of the evidence employed.<sup>4</sup> His primary concern lies with Stone's verdict on the 'lower sort of people,' querying the notion that those who left no literary record of their emotions towards their family likely had none.<sup>5</sup> While disclaiming any intention of setting an agenda for 'an alternative history of the family of the common people,' Thompson does note opportunities for research.<sup>6</sup> Until these sources are exploited, he finds Stone's conclusions premature. What has been accomplished according to Thompson is to have stirred up a good argument.

Thompson reaches a similar verdict with regard to the gentry and peerage. Stone has selected a source and used it ably, but he has ignored alternative evidence that might support the literary. Other sources must be considered, and in particular Thompson decries Stone's failure to employ legal records to a significant extent. Specifically, Thompson questions Stone's reliance upon a rather dated investigation into marriage settlements given the

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1. Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (London, 1977) 10.
2. See reviews of Stone's book: Keith Thomas, *Times Literary Supplement* 21 October 1977, 1226; Joan Thirsk, *Times Higher Education Supplement* 28 October 1977, 16; Christopher Hill, 'Sex, Marriage, and the Family in England,' *Economic History Review*, 2d ser., xxxi (1978) 450-63; R.B. Outhwaite, 'Population Change, Family Structure and the Good of Counting,' *Historical Journal* 22 (1979) 229-37; Paul Slack, *English Historical Review* xciv (1979) 124-26.
3. Alan Macfarlane, *History & Theory* xviii (1979) 103-26.
4. E.P. Thompson, *New Society* 18 September 1977, 499-501.
5. *Ibid.* 500.
6. *Ibid.* 501.

'critically important' nature of the arrangement.<sup>7</sup> Few would disagree with the notion that the financial treatment of family members embodied in the marriage settlement is in some way related to contemporary notions of the institution and the individuals who compose it.

Without such corroboration Thompson is less comfortable with the capricious marshalling of literary evidence. Indeed Stone has questioned elsewhere the reliability of writings on contemporary attitudes towards marriage by remarking: 'Such were the theories; but what of the facts?'<sup>8</sup> The purpose of this paper is to illuminate the 'facts' with regard to marriage settlements from the mid-sixteenth to the mid-eighteenth century and to highlight the transition in wealth transmission and distribution which they embody. Having done so, we may relate the shift to Stone's thesis and also speculate upon other reasons for change.

## I

Settlement upon marriage was not new to early modern England. Financial arrangements had been an integral part of the marriage process from at least Anglo-Saxon times through the later middle ages.<sup>9</sup> What occurred during the course of our period, however, was a considerable shift in the scope of the document.<sup>10</sup> Initially, the marriage settlement dealt with the immediate financial concerns of the impending union: the provision of adequate income to support the prospective household; and the stipulation of maintenance for the bride should she survive her husband. Around the turn of the seventeenth century, a further purpose was assumed: the transmission of the greater proportion of the patrimony to the next generation. Finally, about a century later, the settlement adopted the role of a wealth distribution, as well as a transmission device. By establishing portions for the children to be produced by the marriage, it became what modern lawyers might call a comprehensive 'estate plan.'

The simplest method of illustrating the transformation in settlement practice is to create an hypothetical landed family, protect it from low fertility and severe mortality,<sup>11</sup> and describe its estate plan through the

7. *Ibid.* 500.

8. Lawrence Stone, *The Crisis of the Aristocracy, 1558-1641* (Oxford, 1965) 617.

9. For a brief sketch, see Lloyd Bonfield, *Marriage Settlements, 1601-1740: the Adoption of the Strict Settlement* (Cambridge, 1983) Chapter 1.

10. *Ibid.* Chapters 3-5.

11. Historians who have discussed marriage settlements in the abstract assume that fathers survive to the marriage of their male heir and therefore direct hereditary transmission upon that event. See, e.g., H. J. Habakkuk, 'Marriage Settlements in the Eighteenth Century,' *Transactions of the Royal Historical Society*, 4th ser., xxxii (1950) 15-30; Stone, *Crisis of the Aristocracy*, supra note 8, 549-60. Those who have investigated particular families appreciate that demographic reality (limited life expectancy and high age of marriage) left heirs in control of their estates. See, e.g., Christopher Clay, 'Property Settlements, Financial Provision for the Family, and the Sale of Land by the Greater Landowners, 1660-1790,' *Journal of British Studies* xxi (1981) 18-38.

period. Let us begin around the middle of the reign of Elizabeth where we find the male heir at marriageable age.<sup>12</sup> It is likely that a settlement will be executed upon his marriage that effects transmission of part of the patrimony to him and provides a jointure for his bride. The heir is granted an entail, a barrable, and therefore broadly speaking, an alienable interest. What father has done, and we have assumed he is alive because we have bestowed longevity upon all family members, is to have lopped off part of his own holding and given it to his son. Father retains control over the remaining portion of the patrimony to support his own family and to provide a jointure for his wife should she survive him.

Now having advantageously disposed of his eldest son, let us suppose that father has another son and a couple of daughters who have survived to majority. For father to secure a match for his daughter requires raising a portion; to marry off a younger son obliges father to bestow some land or income upon him, albeit modestly as befits a younger brother. If appropriate sums cannot be raised out of income, father must either grant part of the patrimony to the child or alienate land to raise cash. Having retained absolute control over a large portion of the patrimony, he is free to choose either course. The amounts to be disbursed are at his discretion with decision reserved until the time for distribution. Should he be carried off before the appropriate moment, he may direct provision by will. In either case, the will is the document that transmits the remaining portions of the patrimony, presumably to the male heir.

Having sketched the estate plan of the Elizabethan family, the manner in which property passed between generations, we may analyze its nature. The most striking aspect is that it is piecemeal. Upon each marriage (or perhaps the attainment of majority in the case of a younger son) part of the estate or its capital value passes from the control of the senior generation to the junior. Upon father's death, the residue devolves upon a selected heir save for the jointure interest of father's wife that passes upon her death if she has survived him. A second characteristic of the estate plan is the quality of interest that passes to the children. Those who receive land, and significantly, the most substantial recipient, the male heir, receive entails—interests that are barrable. The eldest son may sell off all or part of what he has received at will, subject only to his wife's jointure right. Admittedly, this is unlikely because father retained control of some of what the heir may consider his birthright, and father might be inclined towards disinheritance if he believed his heir to be profligate. Yet the potential remained, unless perhaps the heir had no siblings.

This question of alienability raises a final aspect of the estate plan. It is the level of control over his family and its wealth that father exercises

12. The family studies in Mary E. Finch, *The Wealth of Five Northamptonshire Families, 1540-1640*, Northamptonshire Records Society xix (Oxford, 1956) and J.P. Cooper, 'Patterns of Inheritance and Settlement by Great Landowners from the Fifteenth to the Eighteenth Centuries,' in Jack Goody, Joan Thirsk and E.P. Thompson, eds., *Family and Inheritance* (Cambridge, 1976) 192-233, have been relied upon to fashion an Elizabethan pattern of transmission.

throughout his life. It appears to be considerable. First, there is control over the estate; father is seized of an entail and may therefore dispose of land for his own purposes. Secondly, there is control over his children; father portions off the estate as he chooses, thereby determining the social and economic fates of his progeny. Finally control is pervasive; father retains it until his death, particularly over his male heir, because the final installment of the birthright is forthcoming only in father's ultimate direction: his will.

With these aspects of the late sixteenth-century estate plan in mind, we may proceed a further generation or so to investigate the early seventeenth-century pattern.<sup>13</sup> Again we assume that father survives to direct the events, a supposition that becomes increasingly less likely during the course of the century.<sup>14</sup> Although he continues to retain a critical measure of control over his 'surplus children,' his younger sons and daughters, the pattern of settlement that came to be employed in the early seventeenth century diminished parental control of the heir. Upon the marriage of the eldest son, a settlement is executed in which father commits a far larger share to his eldest son. The present interest in the patrimony is divided: father retains a life interest in a segment, eldest son receives a life estate in the residue. The future disposition of father's share is secured because a life estate in remainder (i.e., following the death of father) is limited to eldest son. Jointures are provided for their wives (mother and daughter-in-law), and the entail is settled in the eldest son produced by the marriage.

Having transmitted the bulk of the patrimony to the male heir, what is to become of the surplus children? One of two courses is adopted: a clause is inserted allowing father to provide a specific amount for his younger sons and daughters out of settled land, or father retains a segment of the estate in fee. In either case, the option of endowing his surplus children, as with his Elizabethan ancestor, remains discretionary.

The significant difference between the two patterns of estate transmission, lies in the level of control over the eldest son. Transmission remains piecemeal, although less so with respect to the heir because a much larger proportion is committed to him upon marriage. Control over him is

13. For a fuller explanation of the settlement habits of the peerage and gentry, see Bonfield, *Marriage Settlements*, supra note 9, Chapter 3.

14. The following table is based upon T.H. Hollingworth's 'The Demography of the British Peerage,' supplement to *Population Studies* xviii, no. 2 (1964) and 'Mortality in the British Peerage Families since 1600,' *Population* xxxii (1977) 323-49.

Table I. *Model for Resettlement in the British Peerage, c. 1600-1740*

<i>Father born</i>	<i>Father marries</i>	<i>Eldest son born</i>	<i>Eldest son marries</i>	<i>Father's <math>l_x</math> (life expectancy in years) at birth of eldest son</i>	<i>Median age at marriage for eldest son</i>
1550	1574	1578	1602	27.1	24.3
1575	1599	1603	1627	26.4	24.4
1600	1624	1628	1653	26.9	25.6
1625	1651	1655	1681	24.9	25.2
1650	1676	1680	1706	25.2	26.2
1675	1701	1705	1733	26.2	28.4

diminished because the threat of partial disinheritance has been largely removed. The position of younger sons and daughters, however, remains virtually the same: father controls their economic destinies and exercises his discretion at the time for distribution.

In addition to this modification of the level of control, the quality of interest held by the male heir, and indeed by his father, has also changed. Both hold life estates instead of entails. Although in theory the holder of a life estate could alienate only to the extent of his interest, that is to say, he could grant to another an estate for his own life, principles of the land law gave eldest son the power to alienate in fee because the remainders following his estate were contingent.<sup>15</sup> Why the interest limited in the male heir was altered is unclear, but it must be remembered that the law was fluid. When the alteration was first devised, draftsmen may have thought the remainder could not be defeated and significantly, there was debate on this point amongst common lawyers even after it appears to have been resolved by the judges.<sup>16</sup> It may therefore be suggested that the purpose of the change was to secure prospective transmission of the greater portion of patrimony between generations and not to prevent dispositions by the life tenant.

About a half-century later, the latter could be accomplished through the institution of trustees to preserve contingent remainders.<sup>17</sup> This technical development rendered the marriage settlement more viable as an estate transmission device, but perhaps more significantly, around the turn of the eighteenth century the marriage settlement also became a prospective wealth distribution device. Upon the marriage of the male heir, not only were shares specified for father and son, jointures provided for wives, and entails secured in the eldest son produced by the marriage, but trusts were created to raise portions for surplus children. Although the present father had to provide portions for his children, younger sons and daughters produced in the next generation were taken care of by the settlement. In following generations, each subsequent settlement provided for a prospective complement of younger sons and daughters.

Having illustrated the eighteenth-century pattern, it may now be contrasted with the Elizabethan mode. A significant change in estate planning strategy had occurred. First, transmission and distribution were no longer piecemeal, the marriage of the male heir assumed a pivotal role in both hereditary transmission of the patrimony and distribution of familial wealth. The whole estate could be placed under settlement because provision for family members was now comprehensive.<sup>18</sup> Moreover, distribution was secure. Trustees to preserve contingent remainders insured that the patri-

15. For an explanation of the reasons why and the means by which alienation could be accomplished see R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, 4th ed. (London, 1975) 192–95.

16. See Bonfield, *Marriage Settlements*, supra note 9, 33–34 for a discussion of this question.

17. Habakkuk, 'Marriage Settlements,' supra note 11, 16–18.

18. Land acquired by father after settlement could be disposed of at his discretion.

mony would descend to the eldest son produced by the marriage, and trustees to raise portions were charged with the responsibility for securing the mandated provisions.

The final element observed to be a product of the Elizabethan pattern was control. Father dealt with his own surplus children's claims upon the estate as economic prudence and, perhaps, parental prejudice dictated. Father's absolute discretion with regard to the amount of provision, or indeed whether there would be any at all, however, was severely circumscribed by the eighteenth-century settlement. If the ability to bestow economic largesse enhanced a father's influence over the choice of his child's marriage partner or vocation, father after the turn of the eighteenth century was less of a power to be reckoned with. Disinheritance was impossible; the power of the purse removed. Although he might add to a child's endowment, father could not deprive his offspring of the amount specified in his marriage settlement.

## II

In sum, the estate plan adopted by landed society employed the marriage settlement as the linchpin of a secure, prospective and comprehensive scheme. We may now consider the extent to which the modifications observed can be explained by the transition in family structure and relationships proffered by Stone. Indeed an analysis of settlements provides a useful test of Stone's thesis because he has admitted unfamiliarity with the substance of marriage settlements after about 1660.<sup>19</sup> Through the scrutiny of a another source, we may give the 'quite different authority' to Stone's hypothesis that Thompson sought.<sup>20</sup>

Stone has written so much about the family that it may be appropriate to restate briefly some of the salient points in order to narrow our focus. Stone argues that during the earlier part of the sixteenth century, the English family was an extended one, characterized by strong kinship ties. Although his dating of the first transition is not precise, sometime during the course of the hundred years after 1550, the family became nuclear in structure and patriarchal in nature. A second shift occurred in the eighteenth century, perhaps earlier in the squirearchy and the bourgeois. At this time the authority of the father broke down giving way to a more egalitarian family structure bound together by affective relationships.<sup>21</sup>

Can we relate the changes in estate transmission and distribution to the alteration in the nature of the family; are the aspects of settlement practice consistent with Stone's typologies? Stone considers the primacy of patriarchal family to have been from the middle of the sixteenth to the middle of the seventeenth century.<sup>22</sup> The estate plan employed by the elite can, I

19. Stone, *Family, Sex and Marriage*, supra note 1, (Penguin edition, 1979) 25.

20. Thompson, *New Society*, supra note 4, 500.

21. Stone, *Family, Sex and Marriage*, supra note 1, 4-9.

22. *Ibid.* 7.

believe, be fairly described as patriarchal: father is in charge. He decides what income his heir will receive upon marriage; he portions out the financial resources of the patrimony to his surplus children as he sees fit; and he retains power to dispose of those segments that he has not granted until his death. In short, father controls familial wealth until he chooses to distribute it. At his death, one patriarch is substituted for another: male heir assumes the role with respect to his own family. This plenary economic power must have enabled fathers who so desired to exercise considerable influence over fundamental questions regarding the marriage and vocation of their offspring. Stone regards such control as a constituent of patriarchy,<sup>23</sup> and the elite's estate plan seems to have been contrived to further it. Admittedly, control over the eldest son was diminished after the turn of the seventeenth century when the marriage settlement effected comprehensive transmission. Granted that after 1660 the inclusion of trustees to preserve contingent remainders circumscribed powers of alienation. Yet the effects of these changes were somewhat limited because father continued to determine the proportion of the patrimony under settlement. With regard to provisions for his surplus children, he retained discretionary powers.

If the developments of the seventeenth century had limited effects upon the position of father, around the turn of the eighteenth century, when patriarchy began to give way to 'affective individualism,'<sup>24</sup> father's control over his patrimony and wealth distribution within the nuclear family diminished considerably. Most immediate decisions were removed from him. Comprehensive estate transmission upon marriage was adopted by landed society. Because all of the estate would pass to his male heir in tail upon his death if a settlement were not executed, father was encouraged to come to terms with his eldest son regarding a present redistribution of the patrimony when he came of age or entertained thoughts of marriage.<sup>25</sup> Father was bound to carry out the designs of a previous generation with regard to his children's portions because they were specified in his own marriage settlement. No longer could his generosity be governed by practical economic concerns; the sword of disinheritance could not be brandished as a means of persuasion.

Though aspects of patriarchy may not have disappeared completely, the economic underpinnings appear to have been crumbling. Father's role with respect to the patrimony became more akin to one of manager rather than

23. Ibid. 178–91, 244. If landed society passed from an open-lineage form to patriarchy, one would expect settlement forms to have been modified in the sixteenth century. One might argue that the entail was 'lineage' oriented because before around 1500 it could not be barred. Entailed land passed to remote male relations rather than daughters or a selected male heir (like a son-in-law) in a prescribed manner. Such was legal theory, but what of the facts? Regrettably few studies have been done on estate transmission in the fifteenth and early sixteenth century.

24. Ibid. 7.

25. The strict settlement limited an entail to the eldest son produced by the marriage in each generation. For an example of the legal form, see *Bridgeman's Conveyances*, 2d ed. (London, 1690) 92–97.



one of lord. Economic control over children was curtailed; the harshness of the custom of primogeniture, itself a symbol of patriarchy,<sup>26</sup> was mitigated by the indefeasible portions granted to younger sons and daughters in the marriage settlement. These were the ramifications of the alterations that we have considered, and broadly speaking, the pattern fits well with Stone's transformation in family relationships. One might posit that a more egalitarian family, bound together by affective ties, would require a more rational and secure system of wealth distribution to replace an arbitrary and capricious scheme based upon patriarchy.

Perhaps a more tangible indication of the commitment toward a more egalitarian treatment of family members is the proportion of resources allotted to surplus children. Stated another way: a more equal, though not necessarily proportional, distribution of wealth amongst siblings would seem to support Stone's position.<sup>27</sup> Some light, though admittedly rather a dim one given the information recorded in settlements, can be shed upon the matter by estimating the proportion of an estate's capital value given in portions to surplus children. Only four settlements allow such a calculation, but the ratios of portions to capital value are relatively generous: 1/5, 1/3, 3/8, and 2/5.<sup>28</sup> Moreover, in cases where no male heir survived, a situation not uncommon in the eighteenth century, significant increases in daughters' portions were often directed: 1/5 to 1/4, 3/8 to 3/5, 2/5 to 2/3, with 1/3 not being increased.

That substantial increases in daughters' portions were directed where no son was produced confirms another aspect of Stone's view of the alteration in structural aspects of the family. Such a course indicates a preference of one's daughter or daughters over the maintenance of the patriline. Surely settlers realized the financial implications of requiring their collateral male

26. Stone, *Family, Sex and Marriage*, supra note 1, 157.

27. Admittedly, Stone does not adopt this view arguing that the strict settlement 'preserved a highly inegalitarian distribution of family resources.' Ibid. 244. Stone appears to take this position because he believes that the property arrangements in the eighteenth century were directed towards preserving estate intact. Ibid. 44. Mortgages, however, enabled adequate provision for younger sons and daughters to be raised without selling off land. Moreover, an incoming portion from the wife of the male heir might compensate for outgoing portions to surplus children. Bonfield, *Marriage Settlements*, supra note 9, 115–18. Given the increase in the size of portions of brides which occurred during the late seventeenth and eighteenth centuries, it is difficult to understand how daughters who were not heiresses could have received large portions if there were not increased generosity.

28. The data set for this study consists of 226 marriage settlements executed by the peerage and gentry in Kent and Northamptonshire during the period 1601 to 1740. For an explanation of methodology employed to ascertain patterns, see Bonfield, *Marriage Settlements*, supra note 9, Introduction. Only the following settlements record the capital value of the estate: Kent Archives Office U120 T175 (1706), U791 T248 (1708), U1007 E134 (1719), U1175 T65 (1729), and Northamptonshire Records Office C(A) 62 (1726). In the families studied by Finch, fathers appear to be less generous unless they could raise the portions out of income. One might, however, attribute this to the lack of credit facilities rather than to emotional ties. *Five Northamptonshire Families*, supra note 12.

heirs to mortgage substantial portions of their estate. Moreover, nearly one-quarter of the settlements studied limit a division of the patrimony amongst daughters in preference to a collateral inheritance.<sup>29</sup> In addition to explaining the large number of landed heiresses and well-endowed brides, the eighteenth-century estate plan supports the notion suggested by Stone of a more ambivalent attitude towards kinship ties and the extended family.<sup>30</sup>

### III

The attractiveness of the connection between changes in the estate plan of the elite family and its structural basis should not cause historians to refrain from seeking other plausible explanations. The decision, it must be remembered, largely concerned economics, and it is therefore appropriate to seek economic explanations. One might, for example, posit that increased income in the hands of the elite accounted for the more generous treatment accorded the surplus child. Though plausible in theory, this hypothesis runs counter to the investigations of agrarian historians.<sup>31</sup> Rents and prices were relatively static during the eighteenth century. While the movement may not have affected families who were improving their estates, the alteration in the pattern of wealth distribution pervaded the elite.

If the trend may not be attributed to increased wealth at the disposal of the elite, what about the numbers who had claims upon it? After all, a society that produces fewer children can afford to be more generous to each individual. Parental affection could be indulged in the form of pounds, shillings and pence. Elites have been known to practice family limitation,<sup>32</sup> and while I am not suggesting that landed society consciously limited fertility in order to provide more adequately for those produced, a decline in family size may explain how the alteration was economically viable. Moreover, the recognition of alterations in demographic trends by an elite bent upon

29. Of 107 strict settlements, twenty four (22.4%) direct that daughters take in preference to collateral male heirs.
30. Stone, *Family, Sex and Marriage*, supra note 1, 221. Mrs. Bennett of *Pride and Prejudice* renown did indeed have cause to feel aggrieved because her daughters' dilemma appears to have been untypical. Having no brothers, the Bennett girls should have either received large portions or else divided the estate amongst themselves. Perhaps her anger should have been directed towards her own father who seems to have negotiated a bad bargain. I owe this observation to Professor Wrigley.
31. H.J. Habakkuk, 'English Landownership, 1680-1740,' *Economic History Review* x (1939-40) 13; G.E. Mingay, *English Landed Society in the Eighteenth Century* (London, 1963) 52; E.J. Jones, 'Agriculture and Economic Growth in England, 1660-1750: Agricultural Change,' in E.J. Jones, ed., *Agricultural and Economic Growth in England, 1660-1815* (London, 1967) 152-71. J.V. Beckett, however, suggests regional variation, 'Regional Variation and the Agricultural Depression, 1730-50,' *Economic History Review* 2d ser., xxxv (1982) 35-51.
32. See, e.g., L. Henry, *Anciennes Familles Genevoises* (Paris, 1956). Hollingsworth concludes that the peerage was practicing family limitation as early as 1650. 'Demography of the British Peerage,' supra note 14, 51.

protecting its economic base might generate a change in inheritance strategy. Demography may therefore have either provided part of the incentive for change observed, or it may have secured its feasibility.

The impact of population trends on wealth distribution should be examined before the settlements are accepted as evidence for the rise of affective relationships. Macfarlane rightly objects to Stone's selective use of mortality.<sup>33</sup> According to Stone, close relationships between parent and child, and between husband and wife were not formed because life was 'cheap' in the sixteenth century, and it was therefore 'highly imprudent to become too emotionally dependent upon any other human being.'<sup>34</sup> By portraying life as 'nasty, brutish and short,'<sup>35</sup> Stone explains 'cool' family relationships.<sup>36</sup> Perhaps by the late seventeenth century, life was no longer nasty or brutish, but it remained short. If a harsh demographic climate inhibited the development of affective relationships in the era of the 'Restricted Patriarchal Nuclear Family,' if it suffered from 'impermanence,' its successor type faced a similar obstacle.<sup>37</sup>

The failure of historians to deal adequately with demographic movements is not unique to Stone. Perhaps the line between demographic awareness and demographic reductionism is a fine one, and like Stone I hesitate to cross it.<sup>38</sup> Given the possible connection between demographic trends and transmission strategy, it is appropriate to speculate upon whether the alteration in the pattern of estate transmission and wealth distribution which we have observed may in part be explained by population trends.

Populations are either expanding, declining or self-replacing. What I propose to do is to consider the consequences of these three demographic patterns to determine the likely concerns of a landed elite that practices the modified form of primogeniture employed in England.<sup>39</sup> Admittedly, demographic variables render a prediction of the responses difficult. Low fertility generally accounts for population decline, but short-term variations may be due to high mortality associated with endemic disease.<sup>40</sup> Trans-

33. Macfarlane, *History & Theory*, supra note 3, 107.

34. Stone, *Family, Sex and Marriage*, supra note 1, 4.

35. Historians have been busily engaged in accusing each other of depicting life in pre-modern England in these terms without sufficient evidence and denying that they themselves adopt such a morbid picture of English society. I searched in vain for this precise characterization in Stone, so I cite Hobbes, who unhappily burdened us with the phrase. Thomas Hobbes, *Leviathan*, ed. A.R. Walter (Cambridge, 1935) 84.

36. Stone, *Family, Sex and Marriage*, supra note 1, 4.

37. *Ibid.*

38. *Ibid.* 81.

39. Primogeniture is a custom of inheritance in which the eldest son succeeds to all lands and tenements. Because land could be (and was) transmitted *inter vivos* and disposed of by will to other children, the custom applied only to lands which were not under settlement or devise.

40. The controversy over the causes of population growth during the course of the eighteenth century has been resolved in favor of increased levels of fertility due to a decline in the age

mission strategies might differ accordingly. Because the time at which mortality occurs may be crucial, age-specific mortality must be considered. Finally, it must be conceded that the analysis presupposes that fathers are surviving well into the majorities of their eldest sons and surplus children to direct the transmission of wealth. I have suggested elsewhere that this may have occurred infrequently during the period 1680–1740.<sup>41</sup> Although survival was more likely before 1680,<sup>42</sup> until the marriage settlement of the eighteenth century took effect, provisions for younger sons and daughters occurred most often by will; heirs came into the possession of their estates seized of an entail and executed settlements upon their own marriage. That they were providing for their children rather than grandchildren, however, should not alter the concerns of landowners that will be considered below regarding estate transmission or distribution.

The concerns of the head of an elite family in a period of population growth are two-fold. First, he would want to diminish the possibilities of a challenge to his estate plan. An expanding population in an elite with a relatively fixed number of slots increases the competition for resources and renders the scramble for them all the more desperate because inadequate provision likely results in a tumble down the social ladder. Father might therefore prefer to implement the transfer during his lifetime, as wills tended to be more susceptible to challenge. His second concern would be to provide something for his younger sons and daughters. The English elite never practiced primogeniture strictly, and the provision of some endowment might persuade the surplus child to acquiesce the overall plan. Because the estate's resources likely were stretched, postponement of distribution until necessary would be prudent.

The pressures of an expanding population therefore suggest advanced planning with regard to transmission to the heir, and flexibility with respect to provisions for younger sons and daughters. Where mortality is confined primarily to infancy and childhood, the age of majority or marriage might be the sensible moment for transmission to the heir. The latter would be particularly appropriate because financial arrangements were necessary to support the new household. It is unlikely that the late twenties or thirties would be a high risk period in an expanding population, but if the heir did die without having produced a male child, a younger son or daughter could succeed to the patrimony through a neatly drafted settlement.

The concerns that competition raises in an expanding population are largely absent in one that is declining. Here the elite does not produce sufficient males to replace itself, and the focus must turn towards finding a

of marriage of women. E.A. Wrigley, 'The Growth of Population in Eighteenth Century England: A Conundrum Resolved,' *Past and Present* 98 (1983) 121–50. For a of short term fluctuation, see E.A. Wrigley and R.S. Schofield, *The Population History of England: A Reconstruction* (London, 1981) 109–10, 332–42.

41. Lloyd Bonfield, 'Marriage Settlements and the 'Rise of Great Estates': the Demographic Aspect,' *Economic History Review*, 2d ser., xxxii (1979) 483–93.

42. See table, *supra* note 14.

successor. Again, if mortality is concentrated before the age of about twenty five, those producing an heir who reaches marriageable age may feel secure in providing for the transmission of the patrimony upon that event. For those less fortunate, or where high mortality exists later in life, the search for a male heir may be a lifelong quest employing daughters or remote male relations to secure patrilineal continuity. Advanced planning may not be feasible as an untimely death might cast asunder even the most careful estate plan. Rather than juggling numerous contingencies in a settlement, the landowner might prefer to appoint his successor in a hastily drawn deathbed will. Finally, concern for younger sons and daughters likely will be minimal. Few will be produced or survive to majority, and those males who do survive will either be actively sought as husbands for heiresses or adopted by childless landowners.

Thus our model for a declining population consists of a rather frantic search for heirs with little concern for the surplus child. Our third population is neither expanding nor declining, but self-replacing. Many of the pressures faced by the landowning elite under the previous models are not of concern. Although the landed class in the aggregate produces enough males, their distribution is likely to be uneven. Some families find themselves without male heirs; others have a surplus. What must be effected is a redistribution, but unlike the situation facing the landowner in a declining population, there is no dearth of candidates for patriline rebuilding. The issue of the timing of the estate plan's execution may be controlled by the nature of mortality in the population. If it is largely confined to infancy or childhood, majority or marriage might be most appropriate for transmission. But even if there is relatively high mortality in males in their twenties and thirties, the settlement could provide for alternate takers. It would only be where mortality was extremely severe, unlikely in a self-replacing population, that the number of contingencies that might be required would render the plan too awkward.

Moreover, the concerns of a landowner regarding surplus children are different. In an expanding population, the focus is likely to limit their claims, while in a declining population their paucity and favorable chances for joining the elite allows them to seek their economic salvation elsewhere. In our self-replacing population, few surplus children will be produced. One might therefore speculate that they would be either ignored or else treated generously. Because the tendency in the English elite has been towards provision, the latter course is both feasible and sensible given the numbers produced and the demographic trend. To maintain the younger son while he awaits a slot in the elite through marriage with an heiress or well-endowed bride, adoption or success in the professions might be prudent because it is possible that he may be called upon to assume the role of heir should there be an untimely death.

Admittedly the responses that I have suggested are crude. In the first place they demand at least an unconscious realization of the collectivity's demographic situation. Moreover, it has been assumed that fathers are surviving in droves to make rational choices at leisure. In fact they did not. To what extent does this demographic reality alter my models? I am not, I

think, caught in the same demographic trap that I have perceived others to be enmeshed: that fathers live to witness the marriage of their eldest son. Although survival affects the issue of control over the timing of settlement, there are few alternatives for an elite father other than to hope for longevity because after the advent of the trustees to preserve contingent remainders, the settlement of the estate could not occur before the eldest son's majority. At that time, if father survives, he may press his son to resettle, but he may lack sufficient bargaining power to require him to do so. It is only when eldest son wants to marry that he requires resettlement.<sup>43</sup> Thus, in large measure, control over the timing of settlement is influenced by the nature of the legal interest and the eldest son's consent. Responses to demographic trends outlined above merely concern whether it is feasible to effect resettlement at a particular time within these bounds. Moreover, the question of survival has little impact upon the pattern of provision embodied in the settlement. Had father survived, he would have endowed his grandchildren; a groom in possession of his patrimony provides for his prospective children. Although it has been suggested that future grandparents may be more inclined towards generosity,<sup>44</sup> the demographic implications are nevertheless the same.

Having speculated upon the concerns of our model populations, the demographic experience of the elite may now be summarized. Two questions must be asked: was the level of fertility given mortality producing an expanding, declining or self-replacing population; and secondly, at what ages was mortality concentrated? The first question may shed light upon the treatment of surplus children, while the second may have affected the timing of settlement. Employing the Hollingsworth data for the peerage, we find a natural increase in the numbers of the aristocracy from about 1580–1630, with a gradual slowing down by about 1660. Thereafter, for about the next sixty years, there was almost exact replacement.<sup>45</sup> With regard to mortality, Hollingsworth notes that it rose from 1630 to 1675, but the rise was exclusively confined to age group 5–25. Mortality above twenty five actually declined.<sup>46</sup>

These two trends may now be related to our models to determine the extent to which demography may have prompted, or at least explained, the feasibility of the transition in the elite's estate plan. If my hypothesis is correct regarding the treatment of younger sons and daughters, that an expanding population must gear its estate plan towards the exclusion of their claims while a static population may well be able to indulge them, the trends in estate distribution comport well. The period of strict control

43. Although his parents' marriage settlement did not provide income for him, it is likely that he could raise small amounts of capital by personal bond. Mingay, *English Landed Society in the Eighteenth Century*, supra note 31, 37.

44. Habakkuk, 'Marriage Settlements' supra note 11, 20.

45. Hollingsworth, 'Demography of the British Peerage,' supra note 14, 32–33.

46. Hollingsworth, 'Mortality in the British Peerage Families,' supra note 14, 326–27 (Tables 1 and 2), 347.

broadly parallels one of population growth. Admittedly, a generation or two of population balance occurred before indefeasible portions were widely adopted, but one would certainly expect some time gap before the elite reacted to change. Moreover, some families in fact did modify practice as early as the 1680s.<sup>47</sup>

The demographic trend likewise is helpful in explaining the shift in timing of estate transmission. Mortality was relatively low after the elite's marriage age. If a father lived to the marriage of his eldest son, he could be reasonably certain that his son would survive him. Because the demographic climate was not particularly harsh at that age, a manageable number of contingencies could be drafted into the settlement. Therefore, it was not necessary to arrange transmission on one's deathbed because of demographic factors. Whether it was so before 1600 cannot be demonstrated because of the scope of Hollingworth's work.

#### IV

It has been argued above that there is a fit between developments in the scheme of estate transmission and distribution embodied in marriage settlements and evolution in the emotional structure of family relationships proffered by Stone. Our investigation into the substance of marriage settlements has provided the corroboration for which Thompson so eloquently pleaded. Stone might argue that it was an alteration in sentiment that drove the elite in the early eighteenth century to their lawyers demanding settlements embodying their newly found affect.

The development of a crude model of the responses to demographic change that an elite might undertake was as much an invitation to caution as it was an exercise in understanding strategies of heirship. Attempting to isolate the causes of alterations, what we might call 'demand' factors in estate transmission, is perhaps as difficult a task as the one that Stone has undertaken. Affective relationships, if they developed in the manner that Stone has suggested, may have been responsible for the change. Family limitation may have been involved in promoting change. After all, the elite could have reacted to high mortality by increasing fertility. They chose otherwise. Perhaps it was because they wanted to provide more generously for those who survived; but perhaps they provided more generously because it was the most sensible strategy to adopt in periods of high mortality.

There is one further element that demands attention in our quest to make sense of this change in estate transmission and distribution, and it relates to the nature of the source. Marriage settlements are legal documents with a technical personality of their own. Legal historians revel in investigations of the intricacies of their mechanics, and it must be recalled that what occurred

47. In 1682 Sir Robert Filmer, Baronet, settled his estate upon the marriage of his eldest son with Elizabeth Beversham, employing a trust to raise portions even if his son produced a male child. K.A.O. U120 T173. William Courthope, Esquire, did likewise. K.A.O. U806 T80/B5.

was not exclusively a change in the economic substance of marriage settlements, but also a shift in their legal form. Different documents, executed upon different events, came to be used in estate transmission and wealth distribution; and different qualities of property interests came to be granted to different persons. Although these changes may have been prompted by various motives, we must remember that they were implemented through alterations in legal relationships.

To effect the changes observed required innovations in conveyancing technique and their acceptance by common-law judges. The land law was viewed by judges as a coherent body of rules that should resist change since improvement was unlikely. Innovation was rarely encouraged, and even minor modification in practice were carefully scrutinized and sometimes rejected. For example, during the century after the enactment of the Statute of Uses, various attempts at restricting the alienation of land in perpetuity were devised by lawyers and rendered invalid by common-law judges.<sup>48</sup> Landed society's 'demands' had to be played out within the confines of principles of the land law.

This does not mean that land law was not modified, but how it occurred is crucial to the historian who wishes to draw economic or social inferences from alterations in settlement practice. Change occurred through the efforts of lawyers involved in conveyancing. Perhaps their skills were marshalled in response to their clients' demands, but it is also possible that lawyers themselves stimulated demand. Because the land law was in a state of transition, lawyers were in a position to mold it by devising novel conveyances. Whether they succeeded required the agreement of another set of lawyers, the judges.<sup>49</sup>

Such an argument, that lawyers promoted change, might be more persuasive if professional self-interest could be demonstrated.<sup>50</sup> Those who have worked with marriage settlements in the early modern period must have noticed that increasing numbers of sheep gave their lives (or more accurately their skins) to the cause of orderly estate transmission. In short, settlements became longer and more complex. Lawyers assumed a greater role that undoubtedly was more financially rewarding: negotiations must

48. Bonfield, *Marriage Settlements*, supra note 9, 25–45.

49. Given the notoriety of the strict settlement, one might expect the mechanics to have been a technical revolution. In fact, it was not. A trust was limited to take effect if an attempt was made by the life tenant to destroy the contingent remainder in tail. Trusts had been used for other purposes in the sixteenth century. For a discussion of the innovation in legal mechanics and judicial acceptance, see *ibid.* 58–81.

50. In *The Crisis of the Aristocracy*, supra note 8, 632, Stone suggests that the increased complexity of marriage arrangements in the late sixteenth century may be attributed to professional avarice. In a recent book on the professions in late seventeenth-century and early eighteenth-century England (that appeared after this article was written), Professor Geoffrey Holmes stresses the profitability of conveyancing and moneylending to landed families by county attorneys. Geoffrey Holmes, *Augustan England: professions, state and society, 1680–1730* (London, 1982). For a definitive study of early modern lawyers, we await the publication of C.W. Brook's 1978 University of Oxford D. Phil. thesis.



have become more detailed, trusts needed to be administered, mortgages drafted and, of course, litigation ensued. Lawyers contrived the mechanics; landed society adopted them. One might suggest that the legal profession provided the persuasion as well as the technical inspiration for the innovations' adoption. It must be conceded that the elite had no aversion to the new system because they could have said 'no' to their conveyancers. Still, the influence of lawyers must be considered before relying too heavily on the notion of client demand based upon either sentiment or demography is accepted as explanation for changes in legal form.

To conclude, our scrutiny of the form and content of marriage settlements over the course of three centuries suggests a transition consistent with the trend in the emotional content of family relationships proffered by Stone. The fit between Stone's structural evolution and wealth transmission and distribution embodied in marriage settlements lends support to his hypothesis based primarily upon literary evidence. We have, however, sought to speculate further upon demographic and institutional explanations for the changes observed. Our crude model suggests that the pattern was demographically viable, and therefore perhaps selected, because of a fall in fertility after about 1660. Moreover, professional self-interest amongst lawyers must be further explored as an explanation for change. The 'excellent historical provocateur'<sup>51</sup> has indeed stirred up a good argument.

51. Thompson, *New Society*, supra note 4, 501.