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CHILDHOOD AND THE LAW

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ABSTRACT

Minority and infancy are technical legal terms signifying legal subjects and statuses which are non-adult, less than 'full' legal persons because they are below the age of minority. How the law creates and sustains differences between the category adult and non-adult, between adulthood and childhood, how age divisions are made concrete and socially significant through the differential distribution of legal rights, protections, capacities and disabilities, provides the focal point of this work.

Drawing on recent theories of ideology, subjectivity and discourse analysis, we explore how the law, in defining subjects capable of participating in the law-making process, responsible enough to be governed by its rules, and with the attributes to initiate legal actions, can also, by a process of exclusion, constitute the subjectivity of 'the child'. The age lines bounding the child from the adult are arbitrary and historically transitory, they also apply differentially across genders. They are extremely useful because they tell us a great deal about the legal assumptions made about the rationality, responsibility and competence of children. When we begin to link age lines, with cognition/competence and legal capacity/disability across different branches of the law, we are offered a variety of definitions as to what is to count as adult and minor. The differing ages at which certain rights, obligations and responsibilities may be assumed provides us with the means of identifying the particular social relations and interests which each branch of the law privileges and preserves.

To this end, we explore in turn; the legal conception of infancy and minority, conceptions of consent and discretion and the effect of the age of majority; the system of inheritance as a process by which family statuses (crucially adults and minors) are preserved and reproduced over time; the social relations guardianship and parenthood and family membership and how these have become an intimate concern of the judiciary and the state; finally, the process by which children were made no longer subject to the full sanctions of the criminal law. These aspects of inter-generational relations are discussed within the context of the English legal system.

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This work takes up and expands on ideas as material previously published, in Fitz (1981) 'The Child as a legal subject', in Dale R. et. al. (eds) Education and the State Vol. 2, and in Fitz (1981) 'Welfare, the Family and the Child', Unit 12, O.U. Course E353. Some of the material in Part 2 of this work has previously been presented in Fitz and Hood-Williams (1982) 'The generation game: playing by the rules', in Robbins D. et. al. (eds). Rethinking Social Inequality. Aspects of the legal position of children in the U.K. covered in this work have presented in a more condensed, though differently organized, version in Hood-Williams and Fitz (1985) 'Minority status in Great Britain', in Hengst (ed) Kindheit in Europa'.

CONTENTS

INTRODUCTION

Prologue 1

' Childhood . . . 29

and the Law ' 54

Law ; towards a materialist account of the subject 78

1. Law and subjectivity 80
2. Sources and materials 87
3. Childhood and law 100

Notes 107

PART ONE THE INFANT, A MINORITY STATUS

Introduction 111

1. ' there is more than one full age ... ' 119
   - The age of majority 120
   - Conclusion; infancy and the ideology of childhood 157
2. Twenty one; 'The empire of reason ' 165
   - The transition in law, 1500- 1600
   - Abolishing 'the Feudal ' 182
3. Minors matter; the Latey Report 193
   - Reading Latey 197
   - Latey and its discursive practices 202
   - Discourse and subjectivity; a brief note 208
   - Continuities 210
   - Discontinuities 212
   - Conclusion 224
4. Competence and consent 228
   - Capacity 229
   - Competence 232
   - ' The philosophy of exclusion ' 233
   - Age and competence 237
   - Legal subjectivity and competence 241
   - Consent and age 243
   - The Gillick case 254
   - Conclusions 260

Notes 264

PART TWO MINORITY: TRANSMISSION AND INHERITANCE

Introduction 267

Inheritance practices; formal and customary 277

1. Property , real and personal 291

Real property , a time in the land 300

Personal property 311

2. Inheritance and the family; testate succession 322

Family ; system, forms and relations 323

Testate succession 339

3. Inheritance and the family; intestate succession 348

Intestate succession; personal property 352

Intestate succession;real property 356

Elements of the line 358

Primogeniture 368

Patriarchal property 373

4. Conclusions and speculations 378

Notes 389

PART THREE PARENS PATRIAE: THE STATE AS THE WISE AND SUPREME PARENT

Introduction; parens patriae 392

1. Family statuses, pre- 1660 398

2. Parens patriae and family patriarchs, 1660 - 1839 410

Statutory guardianship 410

Equity's jurisdiction over infants 417

Statute law and family relations 427

3. Mothers and children first ? 1839- 1886 436

Families and welfare 436

Chancery and the Welfare of the child 450

Family law in the 19th century, an overview 455

Conclusion 467

4. Post - 1886, children of the state ? 474

Case law and custody 486

Legislation on guardianship and cutody 492

Conclusion 510

Notes 515

PART FOUR MINORS, THE CRIMINAL LAW AND THE PENAL SYSTEM

1. Introduction 517
2. Mischievous discretion; children and criminal law 554
' Sufficient reason '; criminal responsibility 559
' Of sufficient age '; the criminal liability of children 571
The age of responsibility 574
The age of discretion 576
3. The birth of the juvenile 585
Locating the juvenile 589
The home and the street 596
Reforming the law enforcement system 608
Penal reform: the juvenile prisoner 615
4. From Parkhurst to Mettray; saving children from the law 627
The 'failure' of Parkhurst 627
The meaning of reform 631
Summary justice; the child of the courts 643
Conclusion 652

Notes 668

CONCLUSION 671

BIBLIOGRAPHY 681

OTHER REFERENCES 748

INTRODUCTION

'The law is the true embodiment
Of everything that's excellent.
It has no kind of fault or flaw
And I my Lords, embody the Law.
The constitutional guardian I
of pretty young Wards in Chancery
All very agreeable girls - and none
Are over the age of twenty-one.'

W. S. Gilbert, *Iolanthe*, Act 1.

PROLOGUE: 'Sociologists are creatures of their time' (Bernstein 1974)

Setting down the natural history of an intellectual project has the merit of allowing into the text one's early intentions, hesitations and difficulties. But there is another purpose; to clarify the direction of one's research and to explain the form it has taken.

It began with a simple and practical question. Why had I, as a classroom teacher, written reports on pupils who were due to appear before the magistrates of the juvenile court? I had no special training or competence to write out reports for the court; my authoratative statements rested upon an ascribed status in the legitimate institution, the school. It seemed a useful line of enquiry; if schools and juvenile courts were in a constellation, one with the other, what was the nature of the relationship? After a year immersed in the sociology of education (1976/77), I understood something about the process of schooling and the social functions of education, but I knew little about the juvenile court. The sociology of deviance was an established part of the sociology of education (ranging over Becker's account of pot-smokers, to Hargreaves' study of schooling and its resisters). Delinquency, labelling theory, (later superseded by 'critical criminology'); the methodology of participant observation all became part of our sociological baggage [1]. The process of juvenile justice though merited little serious consideration; perhaps it didn't exemplify any particular sociological paradigm.

There was, and is, an enormous body of literature addressing the recent history of juvenile courts, juvenile crime and its punishment, care orders and supervision orders at the disposal of magistrates, as well as fascinating social histories of juvenile delinquency. Much of it was in the periphery of the sociology of education. These were accounts produced in the domain of social work, social administration, and in law, either by practitioners in those fields or by academics in associated disciplines.

To return to the practical problem of the relationship between schools and courts, I tried to formulate some kind of enquiry into that relationship, in the form of an M.A. thesis proposal. The outcome of that research (Fitz 1978) was that schools, teachers, and their relationship to the juvenile court, ceased to be of any direct concern; the object of study was the court itself and the social group caught up in its processes - the juveniles. The immediate reason for the slippage, was at first sight entirely practical; the sheer volume of reading necessary just to understand the processes of juvenile justice and to see what the field of research surrounding it, looked like required a step out of the frame of education into the frame of law. Focussing initially on the 1969 Children and Young Persons Act, it was possible to follow through on one piece of social policy, its origin, implementation and effects. In hindsight, however, this involved a fundamental shift in perspective, moving from the sociology of education into the sociology of law.

The slide across to law was facilitated by the intellectual context of the sociology of education (conceived in terms of its theoretical orientation and research practices). There were continuities between schools and courts, education and the law. Both were considered to be institutions and social sites situated within a capitalist social formation (encompassing a capitalist labour process, giving rise to class divided society, sustained and reproduced by the state); a social structure which profoundly affected the character and functions of all institutions and social practices. Education or law, schools or courts, it didn't really matter because of the prevailing intellectual culture within the sociology of education; at that time (1977/78) we were predominantly pre, practising, or post-Althusserians[2]. An analysis of a specific institution or set of social practices really only provided us with a chance to do an exegesis on the state, ideology, the reproduction of the relations of production, a chance to display theoretical rigour, show off epistemological exactitude and worry about just

how relative our 'autonomy' was. Looking back, that Althusserian theoreticism was a black hole for students trying to put pen to paper; any account required an elaborate securing of epistemological flanks. Empirical enquiry became a risky business (more respectable to do theoretical critique), methodology was hardly a polite word (correct epistemological position was the guarantee of scientificity - all else was ideology). Regardless of the specific object of research, there was only one method which homogenized all social differences. It was actually difficult to engage with the 'dense reality' of social life and experience. We were more at home in the library 'reading' ideologies, 'symptomatically', or otherwise. That comprised empirical enquiry. It was ideologically unsound practice to make policy proposals however, in spite of our critical evaluation of each and every aspect of social policy or educational practice. Along with Althusser, Bernstein, Bourdieu, we were in search of 'deep structures'. The politics and practice of policy-making were phenomenal forms to be penetrated.

Theoretical remits aside, (implicit in the recognition that schools and courts were similar in status and function - as R.S.A.'s or I.S.A.'s) the continuity between juvenile courts and schools was also practically based. In common, they were concerned with the care, control and management of social groups defined in terms of their chronological age. To be concerned with the juvenile court is to be concerned with the social categories represented by reference to age and youth; 'juveniles', 'children' or 'young persons', 'infants' and 'minors'. So there followed broadly based concern to understand the historical development of these categories, especially conceptions of 'children' and 'childhood', something taken for granted by educators and sociologists of education. Bernstein a decade ago noted critically of classroom studies that 'The basic interactional unit of their study is <u>an inter-generational relationship</u>' (Bernstein 1974;147). I think he was almost alone in recognising that contests of authority, the process of transmitting school knowledge and the interactional process of

negotiating meaning were more than transactions between teachers and pupils, they were also relations of power and authority between dominant (adult) and subordinate (child) social categories.

Indeed this was the first move; to conceive adult-child relations like class or gender relations, in terms of power and authority, in terms of dominance and subordination. It is at this point that one ceases to pursue children and childhood simply in terms of chronological age, but instead to pursue these categories as differences; child and childhood only have meaning if we understood the categories adult and adulthood. In other words, we can grasp the quality of childhood if we can understand the social construction of the difference between adults and children, and, equally importantly, understand the nature of the social relations between adult and child.

Looking at the social formation through a grid of generational divisions asked the pertinent question; what was the material basis of that social difference? How was it sustained and reproduced? How would it be possible to give the adult-child relation an identity of its own, something as hard and material as class divisions and class relations, without reducing it to an effect of class? The way forward was to follow on the women's movement and the theorization of patriarchy, in order to appreciate that not all structures of domination and subordination, power and exploitation are generated by the capitalist relations of possession/non-possession of the means of production. This involves a fundamental shift; away from capitalistic relations of production and from the capitalist economy, to the structure and relations of the family, with two consequent effects. Firstly, it led to my initial engagement with family law and social policy directed at the family. Secondly, through family law there emerged a growing realization that not all of its categories, nor its history, could be satisfactorily explained by any instrumental reference to the 'needs and interests' of the ruling class. In fact, family law presented some awkward problems for theorizations of social change and transformation via reference to changes in the mode of production.

There was oneother intellectual current, visibly loosening the bonds of Althusserian theory, in the form of a critical deconstruction of the possibility of a general theory of ideology (Hirst, 1976), a deconstruction of 'interpellation' as a concept applicable only to class relations and their reproduction (Laclau 1977) and deconstruction of the necessary relations between class position and political practice embedded in the theory (Hindness 1977) . And there was a parallel development; an interest in Foucault and the practice of discourse analysis; a shift in interest and perspective but given solidity by the publication of a magazine fostering it as an intellectual and political enterprise (Ideology and Consciousness; No. 1, May 1977).

These were debates conducted at a fairly high level of abstraction and stand in stark contrast to the contemporary accounts dealing with childhood, of which there seemed to be comparatively few, and solidly empirical. Aries (1962) historical study, was 'holy writ', alerting us to the socially constructed nature of childhood through his discovery of the absence of significant boundaries between adulthood and childhood in the middle ages, and delineating how an awareness of childhood was fabricated during the 17th century. Pinchbeck and Hewitt's two-volume study (1969, 1973) of children in English society remains still the classic study of legislation, law and social policy directed at children and remains as a strong reminder of the tight relationship between the rise of strongly bounded and clearly identifiable social groups, and, the development of an institutional apparatus which sustains and reproduces their social visibility. Then there was de Mause (1974) psychogenic theory of history, wherein 'The history of childhood is a nightmare from which we have only recently begun to awaken' (p. 1). Like David Hunt's (1970) Parents and Children in History, de Mause's study is grounded in psychoanalytic theory. Hunt's book contains a substantive account of the early years of Louis XIII, based on a physician's diary of events.

These early studies are deeply flawed (see Stone, 1974), and I shall comment on this in the next section. They did, however, constitute a field of study, and needed to be engaged. In fact, however, in hindsight, these studies occluded our field of vision; there were large and charted areas of childhood studies, but these were located in studies of the family in history, 'child saving' commentaries on the state of legislation and social policy, and histories of childhood, youth and adolescence in U.S.A. (see Sommerville 1982; de Mause op.cit. for his bibliography). Children and childhood were not so much 'hidden from history' (Hendriks 1984), as excluded from prominence in English histories, with the notable exceptions of Pinchbeck and Hewitt (op.cit.) and J. H. Plumb's (1975) study of the 'new world' of childhood emerging in the middle and commercial classes in 18th century England. Yet we cannot say that the young were entirely neglected in sociological studies. There has been a tradition of'youth studies' encompassing a) 'the problem of the generations' (Mannheim, 1929, Eisenstadt, 1956), b) youth as a problematic category in social theory (Allen, 1968; Woods, 1977) c) youth culture and sub-cultural practices (e.g. Hall, Jefferson (eds.) , 1976; Dorn and South, 1982).

One way to explore theories of ideology <u>and</u> the social construction of childhood, to bring together theoretical and concrete issues was to make the child as a legal subject, the specific object of research. It was a means of bringing into constellation theorizing about childhood, the law, the state and ideology. Use of 'subject' here alluded to two principal theoretical interests; the function of ideology in the production of subjects, and, the material effects and consequences of legal subjectivity (in terms of its possession, loss or exclusion). In practical terms, this meant that it was possible to use the law's representation of 'the child' to illuminate the <u>formal</u> boundaries between adult and child over time to explore the question of historical specificity and transformation. Further, we could deploy the law's representations of the child to explore the functions and practice of <u>the law itself</u>. The legal subject 'the child' could be used as a tracer; to illuminate the character of dispersed texts, cases, practices, rituals and

discourses which constitute the law; to explore the process of the legal construction of 'the child' through the criteria and attitudes the law used to construct a particular subjectivity (early formulations reported in Fitz 1981a, 1981b).

While my previous remarks were somewhat critical of Althusser, it was well to remember the impetus that he gave to the re-examination of theories of ideologies, the relationship between ideology and the structuring of consciousness, the claims that systems of signification, representation and ritual were material practices - the very stuff of ideology - were worthy of investigation, both in terms of their own independent history and because of their power effect in and on social relations. The I.S.A.'s Essay (1971) stimulated a theoretical discourse which was at once infuriatingly abstract, while it also refined our understanding ideology, the state and 'the subject' and the relationship between these elements in a capitalist social formation. Trailing in his wake are bitter accusations (the ideological policeman of the PCF, anti-humanist apologist for Stalinism, itself without, and devoid of, human agency) (see Thompson 1979; Connell 1983; cf Anderson 1980). Yet for many of us, Althusser was the first engagement we had with Marxist theory. Cynically we might now recall, 'what a place to start' ! But we should also recall why the sociology of education was generally concerned with structuralist accounts of social and cultural reproduction (e.g. Bernstein (1975), Bourdieu (1977), Bowles and Gintis (1976) and Althusser (op.cit.).

The crucial object of analysis was the relationship between the education system and the class structure, but I think it is fair to say our concerns went beyond this and on to a broader issue. Namely, how were social divisions (not social 'difference') divisions between social groups standing in an unequal relationship to each other, in terms of the distribution of goods, (material and symbolic), in terms of access to power and authority, generated, sustained and reproduced? How are social systems which are oppressive and exploitative made durable over time, in

the face of reforms (educational, legal, economic) which seek to redress the more visible and contradictory inconsistencies and incoherences, which reveal the structure to be unequal and unjust. By social divisions here we do not only address differences in power, and authority, the relations of domination and exploitation fundamental to the social relationship between capital and labour in a capitalistic society. We live in a social formation divided along the lines of gender (encompassed as a relationship of men's dominance over and exploitation of women in a theory of patriarchy), along the lines of race, and finally along the lines of generation. It was an important project then, to describe, analyse and explain the existence of these social divisions, how they were imbricated in a variety of practices, institutions and experiences. It remains an important project still. Through Althusser, we began to get some purchase on the importance of the state, the crucial importance of ideology, the place of institutions and their function in keeping the structure in place (just by staying in existence) and, some inkling (imprecise, a 'black box', perhaps) as to the structuring of consciousness such that individuals were prepared for their 'places' in the system. Interpellation (Althusser) habitus (Bourdieu) mental structures/codes, (Bernstein), are all indexical of a process of structures structuring consciousness; they are concepts bearing tremendous theoretical weight and perhaps inadequate to the task. But at least they alert us to the considerable fact that a theory has to explain both the durability of a structure <u>and</u> human agency, however imperfectly individual theories achieve that end.

One reaction to the political pessimism inherent in 'reproduction' theory, having its roots in the 'culturalist' Marxism of E. P. Thompson (1963) was 'resistance theory' (e.g. Willis 1977; Clarke et al 1979). Reproduction theory where it was emptied of human agency provided little space for resistance, struggle or dissent; categories and meanings could be re-imposed unproblematically. But where were the dissonant voices, where do we find the evidence of social forces contesting

'reproduction'? According to the best known centre of 'resistance' theorising, (the Birmingham Centre for Contemporary Cultural Studies), the cultural practices and cultural production of (male) working class youth were one example. Another is the popular struggles (in the context of the social history education) and political organisations to be found contesting the form of provision of mass compulsory schooling (Johnson 1981). 'Reproduction' on this view was less self-propelled and more contingent upon struggle, which produces the form and character of social structures, which in turn shapes the kinds and forms of struggles, opposition and contest observable in any social formation.

Resistance, struggle and dissent at least permitted the possibility of change or transformation rather than 'reproduction'. The problem, however, is to define what counts as 'resistance' (chucking paper pellets at teacher, truancy, mucking about?) and where 'resistance' (as a political act seeking to contest and transform the structure of power and domination) really ends? (a homologous situation with Althusser's I.S.A.'s). Willis certainly dispelled the idea of 'the lads' being victims of an empty self-reproducing system; 'the lads' were actively shaping the school and their own educational and vocational destinies, but with theoretically predictable (and politically pessimistic results). Nevertheless, 'resistance theory' underscores the extent to which social divisions have to be constantly reproduced and re-made by individuals also having the capacity to 'unmake' and 'undo'; 'reproduction' therefore is made something more contingent, something which actively has to be achieved. It also undercuts any simplistic relationship between institutions engaged in the business of imposing meaning (the I.S.A.'s) and the unproblematic reception of those meanings by subjects (see Connell 1983; 150-154). There was also a price. Working class and male youth sub-cultures; the raw, spontaneous, creative and combative practices constituting it, took on heroic qualities. The equally divisive aspects of those cultural productions (a visible sexism and a silence about the fact that cultural

production,='white', 'cultural' production), in the early writings, somehow were overlooked. Culture and sub-cultures expressively flowed from the fundamental and dominating categories of class.

These interventions however were useful and necessary theoretical 'corrections' to reproduction theory, and certainly encouraged a greater degree of methodological pluralism. We cannot claim it encouraged a greater degree of theoretical pluralism. The CCCS work, in spite of its critiques of Althusserian structuralism, can be seen as being rooted firmly in that tradition (Connell op.cit; 224-225). For example, cultural practices, like 'texts', can be interpreted or read (by a knowing theorist) to reveal an underlying 'reality' (whose character is generally explainable by reference to a structural theory of class) (Connell; 225).

Note the continuities between reproduction and resistance theory; the dualisms of a) subject/social formation, b) phenomenal forms (cultural production/practice)/underlying reality (class structure), c), cultural production/specific class location. I note these instances simply to indicate how a theoretical framework seemingly in opposition to re-production theory, by one means or another carries on and re-creates the theoretical premises of the original. This is important because it goes some way to explaining the attraction of what we might call the discourse theoretic, for it seemed to provide a means of 'reading' texts, assessing the production of knowledge in terms of the power effects it produces, and an interesting way of problematizing the individual/society dualism.

By discourse theoretic, I refer to the work of Foucault (1977), Donzelot (1979), taken up and expanded by such writers as the Ideology and Consciousness Collective (1977-79), Sheridan (1980), Henriques, Holloway, Urwin, Venn and Walkdine (1984). Having its

intellectual roots in a variety of European traditions (psychoanalysis,semiotics, Saussurean linguistics, Marxist theorizing on ideology)(see Coward and Ellis (1977) and Henriques et. al. (op.cit.), its prime focus is on the production of meanings, the consequences of those productions, the constraints, limitations and relations within which the production of meaning takes place. There is one sense in which the theoretical object might resemble the realm, in classical Marxist theorizing, designated the superstructure. This would be misleading. One of its prime purposes is to problematize the theoretical 'break' between base and superstructure. To claim that meanings/knowledge/culture, as a region distinct from 'the base', implicitly recognises that 'the base' has none of these elements, nor is productive of them. This implies that the social division of labour in an enterprise (boss/worker) has no meaning, the shopfloor has no culture.

Much of the substantive work on law which follows in the subsequent chapters is located substantially within a framework of the discourse theoretic, so I shall eschew any lengthy review of its claims at this point. I have some reservations about writings which fall within this field of research which I shall briefly explain below, before distilling out the lines of approach I find useful and which I later try to put to work in a modest way.

I have to say that my reservations about the writings which drew on Foucault's work (virtually all the articles in <u>Ideology and Consciousness</u>; see also the journals of <u>Screen</u> and <u>Screen Education</u>) are personal reflections on encountering a complex and difficult apparatus of social analysis. We used to have an old seminar joke; 'entry by Paris Access Card only' to describe some of these writings. From hindsight, we were commenting on two things; unfamiliar intellectual traditions, and a peculiarity of style. Firstly, the background intellectual traditions of the discourse theoretic, psychoanalysis, semiotics and structuralist linguistics made it difficult to appreciate quite what was going on. These were disciplines in which we had no formal grounding

(the formal and abstract theorising which went with structural analysis was certainly not alien; after all, we routinely engaged with Bernstein and Bourdieu). Certainly, it was an impressive and demanding framework of analysis but there was an underlying suspicion; where was the theoretical advance, what would this tell us about the social divisions which were the focus of our work, what precisely was the politics of it all, what was its potential? Was this yet another impediment to substantive investigation?

The second obstacle was more trivial, but on the whole a problem. The writings constituting the discourse theoretic (and this includes Foucault's) required you to embrace not only a theory but also a particular style of writing. It becomes a serious point when stylistic flourishes begin to obscure meaning, and, when it is difficult to separate substance from style. There seems to be a touch of elitism about an approach where one is required to deploy the concepts <u>and</u> mimic the magisterial style of a Parisian belle-letterist (e.g. Rose, 1979; Jones K. and Williamson J. 1979).

These comments are not meant as substantive criticisms. They are reservations I had about discourse analysis and reservations I still hold. Why then pursue it, what was attractive about it, other than it being a) French b) novel? Why bother with Foucault at all? The reasons are somewhat instrumentalist, perhaps wholly pragmatic. I think Foucault provided the means of analysing the data (collected from case law, legal text books, government White Papers, prison records and so on) concerning children and the law. Moreover, he provided the impetus to include data that would have been or marginal interest to legal historians working in the field, and provided a means of organising data in a way that is radically different from and an advance on some atheoretical social history. The effects in this work are most concentrated in a short appendix on juvenile convicts in Van Diemen's Land, attached to Part Four below. My concern now is to set out briefly

those aspects of Foucault's work which I found attractive, partly because of their explanatory power, and partly because they provided organising principles around which to construct an enquiry.

1. At the heart of the corpus of Foucault's writings are four substantive studies, into, the foundations of modern medicine (The Birth of the Clinic, 1973), the social classifications of madness and reason (Madness and Civilisation, 1967),the historical transformation of criminology and penal practices (Discipline and Punish, 1977), and the social construction of sexuality (History of Sexuality, 1979). To these detailed analyses, theory is both secondary and subservient (Sheridan, 1980; 213), yet theorizing (as any one even only vaguely familiar with these works will know) is not absent. Theory is not an iron cage; there are no imperatives that things can only be this way; there is no command that the orders of determination are already known only therefore need to be applied (c/f Althusser). The order of things privileged substantive research; a positive inducement to go and do likewise.

2. The focus of Foucault's studies were institutional complexes; e.g. ('the clinic', the beginnings of modern medicine), the rise of the penitentiary (a substantive part of the disciplinary complex) and the rise of the asylum (the institutional site for the classification of the mad). To leave it there however is much the same as claiming that Marx wrote about factories and Weber about bureaucracies. In Foucault, they are a point of departure; a means to trace out the relationship between the rise of the human sciences, the position of an institution with respect to deploying and amplifying particular knowledge systems and the consequences this has for the social body. Note, however, that these social sites are of irreducible importance for Foucault; their character and effects need not be causally related to pre-given configurations of political power and authority. Quite the contrary, the institutions of which Foucault speaks are perfectly capable of generating and distributing power relations within societies, creating effects which are not 'secondary' and

which need to be subsumed under 'class' or 'state' power, but they are instead autonomous, material social forces, requiring description and analysis in their own terms. In effect, this is quite the reverse of the Althusserian procedure, where 'the last instance' is always already present (see Assiter, 1984).

3. One considerable effect for those of us who wished to investigate the institutional complexes hitherto assigned to the superstructure was that Foucauldian style analysis freed the data of research - the dispersed set of texts and documents constituting a delineated area of thought and practice - from a science vs ideology dichotomization. Moreover, those who produced the texts or based their authority and practice in them, the professionals, specialists, experts and practitioners whose competence was both judged and circumscribed by their knowledge of the texts, no longer had to be 'relocated' in terms of their class position before their material effects could be judged. Similarly techniques, technologies, professionalism and expertise need not be inserted into place as classed practices before assuming political importance, precisely because the exercise of legitimate know-how was, inherently, a political practice. Therefore, intra-professional and inter-disciplinary disputations (e.g. Lancaster vs Bell in monitorial schooling, or the separate vs separate and silent system in the organisation of penitentiaries) over relevant knowledge and practice are first order problems precisely because these are struggles to exercise domination over other individuals or other social groupings.

4. Displacing ideology with the notion of 'discursive practices' has several theoretical effects. Firstly, it marks a shift away from the chain of meaning (embedded in the Marxist use of 'ideology') wherein 'real relations' are represented in phenomenal forms. 'The real' is always already given (class relations). 'Representatio[n] in these terms is unproblematic (i.e. there is a clear correspondence

between what is to be represented <u>and</u> the means of representing it, ergo,language ritual, symbol,forms of signification are totally neutral or trasnparent - mere conduits, with no independent effect). Decouple what is to be represented from the means of representation then necessarily problematizes the area of signifying practices and their separate effect. In short, signifying practices themselves evoke meanings, construct identities and therefore become socially significant. Moreover, they are themselves socially constructed and also partly determine what could be said, and by whom. To take one illustrative example; the legal notion of 'benefit of clergy' (a device which allowed felonious 'clerics' to escape the gallows because as men of the cloth there was a presumption of the absence of criminal capacity or intent). One legal test of the accused clerics 'authenticity' was to ask him <u>to read</u>; a signifying practice which ruled out a considerable proportion of the population in feudal and early modern England. (It was a legal device which became increasingly unreliable when, as it did, it became common to coach prisoners in the dock to recite off by heart the test pieces used by the Courts). I use the male indicative here because women could not be clerics so the benefit of clergy provided no escape route.

The lineage of 'signifying practice' refers us back to structuralist anthropology, to semiotics, linguistics, and theories of cultural production (literature and film studies). In Foucault's work, the effect of its introduction is <u>to lower the unit analysis</u>; unimportant texts, minor events, forgotten regulations, ordinary and simple examinations and confessions emerge to trace out different trajectories and intersections of social practices in the social body. The second effect is to <u>expand</u> our sense of what is to count; as knowledge, data, evidence. In <u>Discipline and Punish</u> for example deploys records of an event such as the ritual slaughter of Damiens the regicide, the organisation of individuals in space, contained in the diagrams of the panoptican, the penitential timetable illustrates the organisation of bodies in time; records of military drill, procedures and instructions on calligraphy, all these are brought together in a network of circuits to explain the operation of a disciplinary society.

How then do we distance our accounts from mere untheorised collections of emphera; where does systematic description, analysis, and explanation enter? Here we introduce '<u>conditions of existence</u>' as a central conceptual tool.

5. Any object of analysis is multiply and complexly connected with other sites, practices and relationships, which affect the character and meaning of that object, without (contra Althusser) any one factor acting as a 'determining essence' (Wickham 1983; 469) . That is to say any object of analysis has definite 'conditions of existence' which shape its form, character and meaning . Introducing conditions of existence into an analysis has a three fold effect.

a) It avoids an object of analysis being reduced to the expression or reflection of some external essence, to which it corresponds more or less adequately (Wickham op.cit. 468).

b) It invites accounts of social phenomena based on the notion of multiple and complex determinations, without any one being held to be causal, at the expense of others.

c) Signifying practices exist within definite limits, and, their meanings and functions are dependant upon specific conditions of existence. Taking benefit of clergy as an example again, the importance of the act of reading is dependent upon us describing the other practices it is articulated to. Firstly, we need to know about the criminal law itself, and the existence of capital punishment. Secondly, the relationship between the criminal law and its categories, <u>and</u>, the Catholic church in feudal and early modern England. Thirdly, we need to know why reading as a skill was so narrowly distributed, such that if a man read, it could be reasonably assumed he was a cleric. Fourthly, and crucially, why the priesthood was all-male, which then explains the exclusion of women from the benefit of clergy.

Signifying practices then are bounded and their social significance can only be understood in relationship to other social practices to which they are articulated. There is nothing here to suggest that economic organisation of production the relationships of possession/non-possession of property, in various enterprises and or in family systems are unimportant or secondary. What it does problematise is pure economic determinism, because it presupposes that economic forms themselves have conditions of existence (legal forms of possession, contract, labour relations and so on) which powerfully construct 'the economic' as much as the physical and technological processes do.

6. There is a sense in which signifying practices may be seen as the building blocks of Foucault's diffuse conception of 'discourse'. Particular groupings of signifying practices construct the object of which they speak; the grouping, the unity of these practices gives us both the discourse (a regulated series of statements in the common sense meaning of 'discourse') and its social significance (what is being constructed and by what means). Foucault himself often as not uses discursive practices.

> '(which) are characterised by the delimitation of a field of objects, definition of a legitimate perspective for the agents of knowledge, and the fixing of norms for the elaboration of concepts and theories (Foucault 1977; 199).

'Discursive practices', he adds,

> 'are not purely and simply ways of producing discourse. They are embodied in technical processes,in institutions, in patterns of behaviour, in forms of transmission and diffusion, and in forms which, at once, impose and maintain them.
> (Foucault, op.cit.;200).

For Foucault, discourses are analytical tools for exploring the power relations of knowledge systems; a means for detecting the systematic exclusion of material events, behaviours, or persons; a means for detecting who could legitimately make statements about the social body, or, who could construct 'the norms' of a scientific discipline; a means to compare and contrast discursive practices across sites and across apparently exclusive domains of knowledge and practice (e.g. law, medicine, psychiatry, penal practice) (Sheridan 1980, 100-103).

For my purposes, the conceptualisation of discourse was a useful way of examining the law as an apparent unified structure with several elemental branches, but dispersed materially across a variety of sites (the hierarchy of courts, legal texts, rituals and symbols). It was a means of examining, in their own terms, what constituted the specificity of the common law as compared with equity, family law as against company law, criminal law as against say, welfare law.

It is a formulation which inherently directs one's gaze away from the lawyers' grandiose claims about the necessity of 'the rule of law' and 'natural justice' to the minutuae which construct the power of the legal system. The focal point becomes the technical points, the mechanics of the process, the little rituals, the seemingly trivial distinctions between say 'real' and 'personal' property, between 'actus reus' and 'mens rea'. The power of lawyers lie in their possession of the technical means (obtained either by apprenticeship or formal training or - in the case of modern day barristers - both) to render the complexities of social relationships into a form which the courts will recognise. This boils down to knowing which court to use for the pursuit of litigation, the appropriate form of writ or commission to enter, and what kinds of technical argument the courts consider legitimate. Whatever the jurisprudents say about 'rights' and 'justice', the materiality of the law lies in the petty technicalities, which exist in specific groupings (discourses) constituting the different

branches of the law, and thus the conceptions of 'rights' and 'justice'. The branches of law are each embodied in sites, knowledges and agents with each branch having a particular historical trajectory given in the changing relationship between site, knowledge and agent, and in the changing relationship between contrasting discursive practices. I illustrate this at length in the text, in an analysis of the competing strategies of common law and equity in reconstituting the notion of real property.

I therefore want to hold on to the idea that legal categories and technicalities are important (because they constitute the law's manifold discursive practices) and in order to display their functions. But the idea of discourses allowed me to think through the specificity of the different branches of the law, and, by comparison, indicate the differing ways in which they constituted legal subjectivity. It is to the theory of the subject I now turn.

7. One theoretical gain of Althusserian theorising was its explicit critique of humanism and the effects it had on social theorising. Humanism posits an essence, the human individual as an unbounded creator of social phenomena. At the common sense level, we perceive its effects in a phrase like 'it's only natural' (that men and women are at root competitive and acquisitive) which then explains socially constructed features of capitalistic nation states. It is a process which abstracts the features of the social body from an unproblematic rendering of the individual which lie at its foundation. The unitary, non-contradictory, rational individual (Henriques et al 1984; 93) is one of the key elements of Western liberal juridico-political theorizing, where 'the individual' is the unproblematic target of a state bent on shackling its freedoms and annuling its rights.

The critique of 'society' and 'human individual' as essences has its provenance in Marx and Engels; 'society' was explicitly regarded as an 'ensemble of relations' and a historically specific ensemble at that (given in the formulation, mode of production).

The process of individuation arises from antagonistic relations of production, which gives rises to a conception of the individual produced through the organisation of the economy and the means of producing surplus value. In these formulations, the individual is conceived only in terms of the processes of its historically specific production; 'human attributes' are not separated from the social relationships in which individuals are located. Ergo, there is no European 'essence' which finds its expression and shapes the culture, political forms and economic organisation of 'Western' democracies that in turn can be explained by reference to some immanent spirit. Social organisation; the structure of the economy, the means of producing the means of life from finite resources, a complex of institutions, language, forms of cultural signification and kinship, shapes our notion of what is 'human' and the attributes of the individual.

It follows that any society will produce social differences; the criteria of 'difference' will vary historically and geographically; it may be based on the ownership of pigs, kin relations, signification of gender, age or race, madness or sanity, or purity and delinquency. It is not given in advance how differences are transformed into antagonistic social divisions such that some attributes are more highly regarded than others; here for example the possession of birds of paradise feathers: there, the veneration of age and wisdom, or elsewhere, both. The production of social difference and social division will have definite conditions of existence so there will be variety across social groupings, both in space and time. One of the historic tasks of social science is to describe and explain social differences, social divisions and the relationship between them. There are profound disagreements as to how we might achieve this; the diversity of attempts and the antagonism between them probably constitute the discipline of social sciences. What we cannot escape from, however, is the considerable fact that social research constantly changes our view of 'the ensemble of social relations' and how we see the self of ourselves. At this point, we can return to the conception of the construction of the subject.

Subjects in Althusserian theory were the products of the ISAs, they were the bearers of a limited range of consciousnesses and were to function in support of the existing (capitalist) relations of production. The function of the ISAs was to reproduce the relations of production by reproducing subjects to be fitted into appropriate spaces within an already existing structure of positions. Human attributes on this view are unnecessarily limited and always on view only in relationship to capitalistic economies as the ruled (who hold an imaginary vision of their place) or the rulers; we have the Subject and subjects (who are ruled, and given their identity by the ISAs). I won't repeat the problems with this position already mentioned above. However, as Hirst (1979) and Cutler et. al. (1977) pointed out, you don't require an elaborate 'superstructure' to reproduce the relations of production; the existence of a specific organisation of an economic enterprise (with boss, foreman, worker) did this perfectly well. Secondly, not all subjects were human; corporate entities - companies, local authorities, state owned industries were perfectly capable of owning the means of production, initiating legal actions and so on.

Thirdly, it doesn't allow us to consider how social differences between men and women or adults and children are rendered as unequal social divisions without the intermediary conception of class. Fourthly, it invited an interpretation that, however 'relatively autonomous' the ISAs were, their knowledge systems interpellated subjects as always functional to capital, whereas some ISAs could equally produce 'resistances' to it (e.g. the family, the school, the university). Moreover, it is inconceivable quite how the social category of say, madness, is primarily or only functional to the interests of dominant economic classes.

The politics in Althusser are quite clear; the commanding heights to be assaulted and taken were the capitalist economy and the state and this could only be done through the agency of class struggle. The forms which classes take in struggle (parties, unions, associations) as Hindness (1977) showed were quite

unimportant; a problem in itself because the organisation forms were never 'pure' either in identity or purpose. Above all, however, Althusser's occluded vision of 'social formation' and 'subject' rendered an account only in terms of class divisions and economic agents. Foucault's choice of social categories to be described and explored, madness and reason, sexuality, criminality and penology and medicine and psychiatry is an immanent critique of Althusser's version of 'the ensemble of relations' and 'the subject' and so invited a much more complex account of each to be rendered. It also posited a different version of politics and power (see, for example, Minson (1980) Wickham (op.cit.)). The best summary of Foucault's oriention I know is in Dews (1984;77). It is, Dews claims:

> 'The analysis of modern forms of social administration, which Foucault has been conducting ever since Madness and Civilisation, combining the theories of a centralisation, and increasing efficiency of power with the theme of the replacement of overt violence by moralisation. Power in modern societies is portrayed as essentially orientated towards the production of regimented, isolated and self-policing subjects.'

On this view, the social relations giving rise to human attributes are far more diverse and complex than the Althusserian vision. The conditions of existence for the production of subjects will, summarily, include:

a. the content of modern forms of social administration (the knowledges they produce, their organisation, their techniques - embodied in regimes, timetables, available technology, their spatial arrangements).

b. the process of transformation of forms of social governance ('the replacement' of 'violence' with 'moralisation' i.e. the application of 'norms').

c. the forms of power invested in social sites (which are embodied in the classificatory systems used to produce a variety of social identities, the claims of each site to be the exclusive or legitimate authority to speak for or on behalf of individuals traversing it). To take a worked example (mathematically speaking). The 'minor' in law, may well be Daddy's darling within the family, the average scholar at school, a good inside forward at the hockey club but a client with a slight speech impediment at the clinic. Each site operates a specific classificatory system (which in turn has its own conditions of existence) such that persons are distributed around a 'norm'. Here we are speaking of the location of discursive practices at social sites constructing different facetsof 'the human' and thus producing the non-unitary individual human subject. These discursive practices equally produce 'socially recognised' categories (Minson, op.cit.;29) needing special treatment or regulation (in education, 'the gifted child', 'the disruptive pupil', while on other agendas it may well be 'the broken home', 'the single parent family', 'the abusive parent'). What is posited here is that there is no distinction between the categories of subject produced and the discursive practices producing them at specific social sites. It may well be that differences produced between subjects at one site will become the raw materials of discursive practices elsewhere ('the disruptive pupil' transferred to a special unit for example becomes 'subject' to a different kind of educative programme). Likewise, 'the delinquent' or 'the mad', may well emerge at the intersection of several sites and discursive practices (e.g. law and medicine) (Wickham op.cit.;479). Indeed, it could be argued that modern forms of social administration deploying seemingly 'natural' unproblematic categories such as 'the family' <u>across</u> different social programmes (c/f Land 1978)

produces the most socially significant effects because it is a category to which all social programmes and all individuals are made accountable.

What is socially useful about theorising the subject given the complexity of it all? I would like to approach that problem at three levels. Firstly, at the level of political tactics and strategy, if we accept that forms of social governance involve <u>more</u> than statutory and administrative instruments, we have to include into our analysis theories about 'the social' and theories about 'the human' (i.e. the content of the theoretical armoury of professionals and administrators). It may well be that some of these accounts have their material effects in and through legal, administrative and professional practices. Therefore it becomes 'political' to describe 'the subjects' and 'the social' inscribed in those discursive practices. Donald's (1981) analysis of the 'crisis' in education, Rose's (1979) analysis of mental measurement and Henriques et al (1984) attempt to deconstruct 'the subject' of developmental psychology are all pertinent examples here. I don't want to imply that analysis is political practice only if it is done this way, simply to say <u>that there are a variety of means by which we are subjectified, socially identified and morally regulated, all of which are open to deconstruction and de-constitution</u>. What is involved is to ask new questions about what constitutes power, and politics simply by 'lowering' the threshold of analysis from 'global' sites such as capitalism, class relations and state formations, without ignoring their considerable social importance.

Secondly, in terms of broad sociological practice, the conception of knowledge-producing agencies which take as their object social relations and social practices, inherently produce and sustain notions of 'the social' and 'subjects', suggests an open approach as to how social differences and social divisions are reproduced. Discursive practices are themselves productive

of social difference and social division; they don't reflect or correspond with 'real' relations but are part of them. In other words, the social categories produced in discourse are not one thing and 'real' people and behaviour is another, for our knowledge of 'real' people and concrete practices is itself a resight of an ensemble of signifying practices (embodied in language, reason, cultural and bodily signs). Thus, at the time of writing (late 1984) Mrs. Thatcher's support of the National Coal Board against the demands of the National Union of Mineworkers, her insistence that pits stay open, a quiescent attitude to unemployment at the expense of storing up revenue for a tax cut and so on do not reflect Tory Party policy; it is the very stuff of it. They are policies productive of social divisions (the working miners vs the violent pickets, those in real jobs' vs those in parasitical (state) occupations vs the unemployed), embodied in the production of subjects. The category 'unemployed' for example arises at the intersection of two major discursive formations, one being the classification of occupational statuses, the other being the programme of social welfare. In the latter, being unemployed has significances beyond being out of work, it means a measure of entitlement to fiscal benefit. The 'real' situation of being out of a job as a lived experience may well be a miserable and undignified position but is only so within the context of the complex calculations of capitalistic economics whose theories and practice on the one hand posit a certain amount of unemployment for strategic purposes while denying social and economic support for the casualties so that the arcane notion of 'pressure' may be put into play.

It seems to me that we can dislodge the old distinction of 'real relations' and 'phenomenal forms' by asking how real relations can become known without first being signified, however complexly, in some kind of discursive practice be it the wage form, the marriage contract or the legal status of guardianship.

Thirdly, and instrumentally, theorising of the subject lies right at the heart of anlaysing the law as it relates to children and childhood. Here we have a specific example of one of the major forms of social governance, the legal system, producing forms of social difference and creating socially divisive relationships between categories of subjects. That process itself appeared to be an interesting theme for exploring the law and how it functions, and the effects it has on and for the subjects it renders incompetent as agents. Althusser's original conception of 'subject' drew upon the provenance of the legal term (Assiter, 1984) (though English lawyers are more inclined to speak of legal person or legal personality). One can see the attraction of the legal terminology for a theory of ideology founded on the construction of a fictive subject that the law itself invests with content and limited forms of agency/rights to act in certain ways - initiating litigation etc.).

I will not dwell on theories of legal subjectivity here, for that area will be covered in Section 3 of this Introduction. Suffice for the moment to say that analysing the law in terms of the process by which subjects are constructed doesn't mean that the analysis of the law ends there. There are Marxist theories for example which set the law in the context of the state; an apparatus which provides the state (and by extension, the ruling class) with a monopoly on the legitimate use of violence (e.g. Althusser). Another strand sees the law in terms of its class content; the extent to which its categories (crime, contract, property) maintain and support capital-labour relations (e.g. Pashukanis 1978, Edelman 1979). These are pressing problems in the sociology of law and should not be bracketed out unnecessarily. However, my object of analysis is primarily relations between generations which require a different orientation and other tools of analysis like the theory of the subject.

In conclusion I want to raise the question as to whether the substantive study of the law and childhood below, could be labelled Foucauldian? I think not, for several reasons. Firstly, Foucault makes use of a regulated series of concepts such as 'archaeology', 'oeuvre', 'discipline', 'episteme', 'statement', 'enunciation','grids of specification', 'surfaces of emergence', 'positivity', (a collation of terms he once called a 'bizarre machinery') (Sheridan op.cit. 103). They don't make an appearance in all his substantive work all the time, and he appears to feel free to drop them if they seem not to work. There is nothing new in this procedure. In Marx for example in his brilliant studies of the commune and the Civil Wars in France, he takes those parts of his theoretical framework as are necessary to illuminate and analyse a concrete social situation (Marx 1973, 1974). Like Foucault, he was given to the arresting image when necessary to make a point (I'm thinking here for example of his description of the French peasants being like a sack of potatoes). For a work to be bracketed as Foucauldian it would have to make a more systematic use of his theoretical tools than I have done here.

Secondly, I have some reservations of Foucault's periodisation, a more or less complex use of 'before' and 'after';the classical age or the ancien regime in contrast to the disciplinary society. Again, nothing unusual about this; we only have to think of Marx and Weber and the elaborate edifices built on 'pre-capitalist', 'capitalist', 'pre-industrial', 'industrial' (and post-industrial) social formations. Foucault's historical classification may well have some purchase on French history but can look decidedly ahistorical in the English context. In the grand sweep of European history, for example, I am somewhat sceptical about the modernity of 'the disciplinary society' that arises with the growth of complex forms of administration. I am thinking here of the organisation of the inquisition in the Middle Ages; the massive attack on the 'heretics' by the Roman Catholic church.

While the signifying image might well be the auto de fe (the trial and burning of the heretic), behind it stood a complex administrative machinery, collecting, recording, sifting and storing information on the populations in towns and rural areas (Lea, 1900, A History of the Inquisition of the Middle Ages, Vol. I). In this respect, 'specific procedures of individualisation, a specific technology of power, and a new political anatomy of the body ... subtle mechanisms of discipline ... and their insertion throughout the social body in the form of a generalised gaze' (Smart 1982, 128) which signify 'the disciplinary society', can be said to be present at the end of the 13th and at the beginning of the 14th century.

Nevertheless, we do have to account in the English context for the decline of capital punishment, whipping, branding, the stocks and the rise of the penitentiary and the rise of a regime of 'treatment' at the expense of 'retribution' and on these matters Foucault proved a useful guide (see for example Ignatieff, 1978) .

In one other respect, Foucault's history, focussing on the grand 'discontinuities' had limited utility for this project. For what is striking about legal categories in English law is their longevity. There is no easy division historically between Feudal law and the law under capitalism, between an ancien regime and 'modern' society in this matter. Indeed, one of the interesting themes which unfolds below is a recuperation of just how much of 'the feudal' remains in the legal categories currently deployed in law, especially in family law.

Thirdly, I continue to deploy (and this relates to the point above) Marxian categories (mode of production, class in terms of possession/non-possession of the means of production, exploitation, state and civil society, Feudal-Capital historical divisions, for example) for the purposes of intelligibility. For me it is also

the language of inequalities; of power, of material and symbolic goods. They remain analytically useful categories which can be reworked (as in the case of the family as an economic system) without losing the cutting edge of pointing up systematic social injustice. I spoke earlier of lowering the threshold of what is counted as political but there are moments when we want to hold on to a distinction say, between the institutions comprising the state (as a site at the intersection of publically funded bodies) and the organisations and institutions of civil society (like the family or the trade unions) however much the latter are said to be 'incorporated' or invidiously invaded by the values of the former. There are always points in time when they are 'up against' each other as are the organisations which speak for and on behalf of determinate social groups. While I am aware of the limitations of the Marxist categories, we cannot deny their historical tradition and current utility providing the necessary means for critical commentary and this is why I continue to use them. In combination with other analytical concepts laid out above we can move away from an object of analysis which is wholly about capitalism and the social relations and practices said to be founded on it, to more complex views of the social.

'CHILDHOOD ...

Probably the most commonsense understanding of children and childhood is based on the biological differences which exist between adults and children. Such an approach stresses children's physical and mental immaturity, and their vulnerability and helplessness. Writers from Rousseau onwards celebrate childish innocence, spontaneity, and the ability to experience the natural world quite differently from the way in which adults experience it [4]. Because of their physical and mental immaturity,

children are therefore assumed to be necessarily dependent on adults - usually their natural parents - for the necessary means of life, in the form of food, clothing and shelter. Relating childhood to biological programming seems to us quite natural; thus an extended period of early life free from the cares of working and making a living is more or less regarded as unproblematic, even as a natural right attaching to a particular social group. This conception of children and childhood is firmly embedded in most if not all western industrial social formations.

We can question this seemingly 'natural' or biological approach to children and childhood by referring to the research produced by anthropologists and social historians. Anthropological studies, probably the best known and most accessible of which are by Margaret Mead (e.g. Mead, 1943), suggest that childhood is a socially and culturally specific category. Her studies of societies in New Guinea and Samoa suggest that 'western' childhood is <u>not</u> a trans-cultural phenomenon (i.e. we cannot generalise our conceptions of childhood across other cultures). The passage from childhood to adulthood in other societies is often marked by what are called 'rites of passage' or initiation ceremonies, often related to puberty. The status of childhood and that of adulthood are clearly delineated. However, this does not mean that other forms of childhood are free from 'adult' responsibilities, such as contributing by labour to the social product. More often, the opposite is the case; children are expected to make some contribution to the material well-being of the social group, taking part in collecting or gathering food, looking after younger children, etc.. Childhood is not free from productive activities. The anthropologists therefore problematize the necessary and 'natural' connection between stages of biological maturity (often expressed in age) and the responsibilities and status of children and adults. In other words, the young in some societies cease to be 'children' at puberty and assume the status of adults; furthermore, they may never have experienced a 'childhood' as we conceive it.

Recent research by social historians focussing on 'western' childhood has convincingly demonstrated that our notions of childhood are historically specific, and cannot be easily generalised back to the past[5]. These historians have also demonstrated that different social classes constructed the notion of childhood in different ways and on different chronological scales. Childhood was not a universal phenomenon prior to the nineteenth century. Forms of childhood existed before then, but it is important to realise that they were specific to certain social classes. However, as Pat Thane (1978) points out, there were variations in the form of childhood even within social classes. What historical research points to is the socially constructed nature of childhood, in opposition to the notion of childhood being a 'natural' biologically programmed category. This does not mean that we should dismiss the 'biological' completely. The babe in arms, for example, is highly dependent on adults for the means of life. However, what social historians have demonstrated is that there is nothing natural or biologically necessary in the extension of that initial dependence, for instance to the age of sixteen or eighteen .

Children, and the collective representation of their social location embedded in the notion of childhood are problematic categories. The inference of status and location draws on biology and sociality; they are categories emerging as it were at the intersection of 'nature' and 'culture' and as such, have presented problems to writers of anthropology[6], social history, philosophy and juridico-political theory, psychologists (clinical and developmental) and to sociologists. The biological cannot be dismissed completely because we are confronted by segmentsof the population whose synapses are in the process of connecting up at a rapid rate, whose bones are malleable, who are as yet incapable of human reproduction, and who are still 'growing', unlike other segments of a population where these biological processes have slowed down or declined. Biology is

not an invariant either in time or space; pubescence or menarche demonstrably changes over historical time (with a possible link to change in diet). Perhaps a super-abundance of steroids or hormones in diet could produce 'adult' characteristics in young children (as they can produce secondary sexual characteristics across genders in adults). Recognising that there are biological differences within populations, that humans age and die becomes sociologically significant when attempts are made to infer that social differences and divisions are somehow determined by an invariant sub-stratum of biological factors.

The long held tension between 'nature' and 'culture', nature being one thing, culture another is most evident when the categories of analysis involve the difference between men and women, child and adult, and racial difference. The important point is to recognise that biological factors in human life are socially organised in a variety of ways . If we think of more recent classifications of what is meant by 'death', past struggles with legal definitions of what was meant for a foetus to be counted as a social person with 'a right to life', then even basic biological 'facts' are not free from social description and prescription. As Hood-Williams (1984) in his critique of Mannheim succinctly puts it;

> 'Instead of properly studying the social categories men-women, adult-child through the structural relations that construct them there is too frequent reliance upon the so called 'fundamental (biological) facts'. (Hood-Williams, 1984;43).

Quite so. We have to construct categories of child, children, childhood in relationship to other social categories, adult, adulthood. The meaning of each emerges through contrast, and through opposition.

I shall take as a starting point, then, that to be of a certain age or biological 'stage' is not in itself sufficient to designate a subject as a child. Childhood is a position or status accorded through definite means; in some societies it is that age prior to certain rites of passage, often related to puberty. Currently, western childhood is given through a series of political and legal exclusions (not being able to vote, having no property rights, etc.). It is positively confirmed by cultural artefacts (children's books, children's clothes, music, TV programmes etc.), and by a series of time/place relationships (kindergartens, nurseries, schools) which separate the child from the adult, and the child from other dependants (the aged or the sick). It also entails a formal separation from work, giving rise to an extended period of dependency, usually on (natural) parents, reinforced in and through a complex relationship with the state.

The implication of this approach is that, if we assume childhood is a position or status accorded through definite means, the object ofstudy becomes the 'definite means' through which childhood is constituted. Here I am referring to the set of social relations and social practices by which the social category, childhood, is supported and maintained, and I am focusing specifically on the knowledges, discourses and institutions associated with the constitution of childhood. This in turn should allow us to grasp the means by which children are constituted as subjects separate and different from adults, and to understand the complex of mechanisms by which this separation is produced and maintained.

We shall begin with a consideration of Philippe Aries' Centuries of Childhood (1962), still probably the major text confronting those who wish to understand the constitution of childhood. Aries takes as his source a variety of cultural artefacts; texts on astrology, education, child-bearing;

paintings of family groups; religious iconography; illustrations of clothes and games. He maintains that collectively these artefacts suggest that in medieval Europe, childhood as we know it did not exist; after infancy - which lasted from birth to the age of five or seven years - people moved straight into the world of adults. Aries provides a wealth of information from a variety of sources to illustrate this point. For example, he quotes from a medieval text which uses age classifications in a very different way from that in which we now use them:

> 'The first age is childhood when the teeth are planted, and this age begins when the child is born and lasts until seven, and in this age that which is born is called an infant, which is as good as saying not talking, because in this age it cannot talk well or form its words perfectly, for its teeth are not yet well arranged or firmly implanted, as Isidore says and Constantine. After infancy comes the second age ... it is called pueritia and is given this name because in this age the person is still like the pupil in the eye, as Isidore says, and this age lasts till fourteen.
>
> Afterwards follows the third age, which is called adolescence, which ends according to Constantine in his viaticum in the twenty-first year, but according to Isidore it lasts till twenty-eight ... and it can go on until thirty or thirty-five. This age is called adolescence because the person is big enough to beget children says Isidore. In this age the limbs are soft and able to grow and receive strength and vigour from natural heat. And because the person grows in this age to the size allotted to him by Nature. (Yet growth is over before thirty or thirty-five, even before twenty-eight. And it was probably

> even less tardy at a time when work at a tender age mobilized the resources of the constitution earlier on).
>
> Afterwards, follows youth which occupies the central position among the ages, although the person in this age is in his greatest strength, and this age lasts until forty-five according to Isidore, or until fifty according to others. This age is called youth because of the strength in the person to help himself and others, according to Aristotle.
>
> (Aries, 1962, p. 19).

He goes on to say:

> 'In Medieval society the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The <u>idea of childhood</u> is not to be confused with affection for children; <u>it corresponds to an awareness of the particular nature of childhood</u>, that particular nature which distinguishes the child from the adult, even the young adult.
> (op.cit. p. 125).

According to Aries, the idea of childhood began to emerge in the sixteenth and seventeenth centuries. Representations of children begin to appear then, showing them dressed in clothing which is different from adult garb and also showing children and adults playing different games. But, more importantly, the young just out of infancy were being ascribed

with a particular nature, and he suggests that it was the construct of particular social groups.

> 'We have studied the beginnings and development of two views of childhood. According to the first, which was widely held, children were creatures to be 'coddled' and childhood was held to last hardly beyond infancy; the second which expressed the realization of innocence and the weakness of childhood, and consequently of the duty of adults to safeguard the former and strengthen the latter, was confined for a long time to a small minority of lawyers, priests and moralists (my emphasis).
>
> (op.cit. p.316).

In the sixteenth and seventeenth centuries, the idea of childhood was crystallized through the realization of children's innocence and weakness. These ideologies did not merely exist as 'ideas' expressed in texts but came to exist materially in the form of schools and academies, and in practices such as the censoring of children's reading materials and the disciplining of their behaviour within these institutions. These institutions simultaneously marked off those who attended them from full participation in the adult world. Educational institutions were not as age-specific as at present, but to be a scholar was to have a status different from that of an adult. As Aries says: 'To say that someone was of school age did not necessarily mean that that person was a child, for school age could also be taken to mean the limit beyond which a pupil had small hope of success' (op.cit.; p. 317).

The practice of having a large age range in the same educational institution did not die out until the nineteenth century. Along with the development of educational institutions, Aries notes the growth of a scientific pedagogy:

> "The real innovators were the scholastic reformers of the fifteenth century, Cardinal d"Estouteville, Gerson, the organisers of the colleges and pedagogicas, and finally and above all the Jesuits, the Oratorians and the Jansenists in the seventeenth century. With them we see the appearance of an awareness of the special nature of childhood, knowledge of child psychology, and the desire to devise a method suited to that psychology." (op.cit.: pp 317-18).

Educational establishments of the seventeenth century were not the sole province of any one class; the working class made little use of them; for the nobility formal schooling was only one form of apprenticeship among others which included military training. But, Aries argues, if schools and colleges were not yet the monopoly of one class, they were the monopoly of one sex (op.cit. p. 318). 'Apart from ... domestic apprenticeship, girls were given virtually no education. In families where the boys went to college, (girls) learned nothing.' (op.cit. p. 319). For girls, 'the habits of precocity and a brief childhood remained unchanged from the middle ages to the seventeenth century', (ibid). In families of some property and substance, girls were married off at twelve and thirteen years of age. By the age of ten, Aries comments, 'girls were already little women; a precocity due in part to an upbringing which taught girls to behave very early in life like grown-ups' (ibid).

One final and important point noted by Aries is the connection between educational institutions and social life outside them: 'The essential difference between the medieval school and the modern college lies in the introduction of discipline. Discipline was gradually extended from the colleges to the private pensions where the schoolboys lodged, and sometimes to the town itself, though generally without any success in practice' (op.cit. p. 320). Furthermore, 'This discipline not only took the form of better supervision inside school, but it tended to force parents to respect the complete school cycle.' (ibid).

In spite of the richness of Aries' work in terms of the variety of sources he uses to develop his arguments, and the lines of approach to the study of childhood suggested in his book, his research is by no means unproblematic. For example, his use of cultural iconography (the representation of children in paintings and illustrated books, and on religious masonry, etc.) supposes a necessary correspondence between artistic conventions of representation and the social world which informs the artist's mode of representation. Yet artistic conventions are by no means fixed and are susceptible to changes which need not necessarily reflect, or correspond with, the existence of social categories outside an artist's representations. Social historians (Stone 1974) are also somewhat wary of the way in which Aries leaps about in time and space, drawing on sources from markedly different social contexts of various nation states in order to argue the emergence of childhood in the seventeenth century. Moreover, as Martin Hoyles (1979) points out, the creation of childhood, for Aries, was the work 'of a small minority of lawyers, priests and moralists' - an account which privileges ideological changes over changes in the mode of production, the process of proletarianization, the stratification of society by class. Nevertheless, it was largely Aries who put the study of childhood as a socially constructed category back on the agenda of

the social sciences. I think that he does demonstrate the importance of the connection between the development of institutions, and the knowlege which informed their practices, and the rise of a new and different social category, that of children.

There are two serious problems with Aries' model of historical change, namely the change from 'medieval sociability' to 'enlightenment individualism' (Stone op.cit.; 27). The first concerns his presentation of the undifferentiated character of cultural life in the middle ages; that adults and children dressed alike, played the same games together and generally intermingled homogeneously. Now this may well be true in some respeets, but is profoundly misleading in others. From the evidence of the legal practices I cite below in the body of text both church and state drew a very clear distinction between adults and infants, in respect of church and civic rights and responsibilities, in terms of property rights and in terms of criminality responsibility. In the case of the church, that distinction prevailed wherever the Catholic Church dictated the features of religious practice. In the late 13th century, we learn that under the inquisition, 'in places much suspected of heresy every inhabitant must be cited to appear, must be forced to abjure heresy and to tell the truth, and be subjected to a detailed interrogatory about himself and others' (Lea 1900, Vol. 1; 402). All except those who had not reached 'the age at which the Church held him able to answer for his own acts' (ibid). In Toulouse, Beziers and Albi, this was assumed to 14 years for males, 12 for females; elsewhere it was anyone over 7 years old, in other regions, 9½ for girls, 10½ for boys (Lea; 403). So the absence of childish garments, a lack of sentimentality towards children does not diminish the socially significant divisions which existed between adults and children in the middle ages in England or in Catholic Europe. Crucially, these remarks somewhat undermine the general thrust of the argument, that of childhood being a recent invention.

Secondly, Aries' brave attempt to trace out the history of the family as a sentimental institution (in many respects the most difficult kind of history to write precisely because it takes on psycho-sexual relations as the object of analysis) is gravely flawed. The family before the 16th century, Aries argues, was more a 'moral and social reality' than a sentimental one (Aries;p.356). Children were sent to wet-nurses, apprenticed out (either to great estates to learn the accomplishments of nobility, or to master craftsmen to learn a trade, according to status). This rise of the family as a sentimental institution, displacing the older 'reality' corresponds with the child returning to the bosom of the family; wet-nurses came into the home, apprenticeship was abandoned in favour of schools, children kept apart from the corrupting influences of adult life outside the dual enclosures of the school and the family (Aries, p. 357). He continues, this 'also corresponded to a desire on the part of parents to watch more closely over their children, to stay near them to avoid abandoning them even temporarily to the care of another family' (ibid) (my emphasis). As soon as the 'family centred itself on the child', we are given both the form of the modern family and character of modern childhood. On this view, the agents of change are predominantly 'the desire of parents', an essentialism posited in the existence of some atheoretical psychic domain. As Stone pertinently observes, where are the 'ever-encroaching ... institutions of the modern state' to which the family, from the middle ages to the nineteenth century (sic) lost many of its older functions' (especially its welfare and caring functions). He argues that 'the power of the state undermined the influence of the kin, and thus increased the isolation and privacy of the nuclear family. This process can hardly be called the rise of the family but rather its reorientation to serve a narrower, more speicalised function' (Stone 1974 27). In short, where is the state in Aries' account? One only has to think of Pinchbeck and Hewitt's two-volume study of children in English society to perceive how state policies

crucially determine the location of children in civil society and how these policies mobilise conceptions of children and childhood to reorientate families to a 'more specialised function'. This is a theme I take up and develop in Part Three of the text.

Summarily, though there are some problems with Aries' history of childhood, his ground-breaking work lies in his attempt to identify how children came to be viewed as subjects with socially identifiable cultural and emotional needs (affection, coddling, discipline) and attributes. He grasped the conception of childhood being causally related to the rise of discourses on psychological development, the development of schools, the changing practices of middle class and aristocratic families (abandoning apprenticeship, abandoning out-house wet-nurses), and the practice of excluding the young from certain areas of social practice by enclosing them within the guiding confines of the family and the school. In the last instance however, he is talking about male children, by his own account, girls rarely left the bosom of the family anyway - they remained with their parents or left to set up house under the dominion of their husbands.

For Aries, then, the emergence of childhood as a socially recognised stage in the life cycle is evidenced by the benign indifference to children displayed in the medieval family giving way to the privileged status accorded to children in 19th century family relations. He is careful to argue, however, that 'there is a connection between the concept of class and the concept of the family' (Aries; 398). He then goes on to locate in class terms, 'the modern family' (the enclosed, privatized family, where parents and children are most intimately connected, where outsiders are excluded, where the family is 'morally ascendant' over other social sites). In his thesis, this family form emerges in middle class

families, and with it the 'modern' attitude to children and childhood. Childhood is a protected space in which children are coddled, disciplined and regulated because they are treasured and privileged. Upper class families and working class families contrarily retain some of the old modalities of attitudes towards children. The old practices of apprenticeship (in 'the big house' for the children of nobles, the house of the guild master for the working class and petty bourgeoisie) are retained. The young here continue to mix in crowds, form peer group alliances (Gillis's (1974) bands of wandering young men, Yarborough's (1979) Bristol apprentices) and continued to enjoy a certain amount of unregulated moral space and social and cultural autonomy. At the point at which Aries tries to connect 'family' with 'class' we appreciate the extent to which his account lacks any substantive material either on working class family life or working class childhood. It is at this point also that the historians who followed Aries take diverging courses.

We can identify three broad approaches to the study of childhood and youth in history. There are the family historians who are concerned with parent-child relations and how these change historically (e.g. Stone, 1977; Flandrin, 1979; Anderson, 1971, Laslett, 1972, Demos and Boocock (eds), 1978; Haraven, 1978). There are historians using oral and written biographies of childhood (the best attempt to recuperate the working class accounts 'missing' in Aries and Stone) (notably, Burnett, 1982; Thompson, 1981; Vincent, 1979, 1981). There are historians predominantly concerned with social movements and institutions whose object was the education and control of the young (e.g. Walvin, 1982; Pinchbeck and Hewitt op.cit.; Platt, 1969; Humphries, 1981; Dyhouse 1981; Horn, 1974).

From these sources we have a convincing record of the variability of childhood (the length of dependence, education, work and family experiences) across classes. We only have to compare the drudgery of young labourers described in Marx's Capital (Vol 1), Cruickshank (1981) and in Walvin (op.cit.) with the contrasting experiences of the gilded young in aristocratic and bourgeoisie families to confirm the differences (e.g. Slater's 1976) account of the Verney family, Wohl's (1978) studies of upper class Victorian families, Thompson's (1981) biographies of Edwardian childhoods and Lawrence Stone's (1977) account of aristocratic families).

The very heterogenity of feelings and attitudes about and towards children, the variety of child-rearing practices, the different kinds of autonomy granted to the young, to me seems to undermine 'the psycho-genic' history of childhood presented by de Mause (1974). We no longer practice infanticide on a large scale, no longer brutalise our children, he argues, because parents are increasingly able to 'empathise' with their children, because parents are better able to 'regress' to the psychic age of the child. This historical process and the changes in parent-child relations are independent of other social, religious or economic factors. 'Mere mystical nonsense', comments Stone (1974;30), and I have to agree. de Mause's model of historical change is located somewhere in the psyche and implicitly requires us to believe that all parents at particular points in time and in all places become equally empathetic, when social historians are displaying quite the opposite. We might want to admit the trans-cultural existence of the sub-conscious, but then to write out the material existence of religious, judicial, economic and customary practices which shape and pattern parent-child relations, in favour of one determinant, is ahistorical, essentialist and overly dependent on a Whiggish idea of 'progress'.

There is a productive tension between the idea of heterogeneous childhoods in the past and the convergence thesis implicit in the accounts of Aries, Stone, Pinchbeck and Hewitt, and Walvin, to take some typical examples. How do we think through the increasing social separation of childhood from the social milieu of adulthood, in all classes?

We can identify two major forms of explanation. The first, developed by Stone and Aries considers that childhood emerged in the 'modern family' practices in the upper stratas of society, in tandem with broader changes (development of psychology, changes in religious attitudes towards children, the promulgation of child-rearing manuals, pedagogical practices within schools) which then seeped down to the lower orders. Secondly, that the length of childhood as a dependant protected space was articulated by the ruling classes and then <u>imposed</u> elsewhere via the mechanism of the state (through juvenile courts, poor law regulations, policing the streets, regulating the hours of work, regulating economic activities, compulsory schooling) (e.g. Platt, op.cit.; Humphries, op.cit.; Hoyles, 1979). The first theme accents the coming into existence of children as objects of familial love, protection, regulation and discipline; the second accents 'the public' construction of the child's social location, as an object of protection, and gives us the means to identify the mechanisms as to how one view of childhood became generalised. Both are useful contributions to the history of childhood but limited in the respect that categories of age are treated as secondary to a concern to unravel the emergence of 'the sentimental family' or as secondary to an analysis of class antagonism conducted in and through the complex of the state. Whereas Stone and Aries dwell at length on the young of ruling class families, Platt and Humphries consider at length the control of the working class young. We need to shift our focus to an analysis

which takes as its object the similarities that exist between the young in aristocratic and in working class families in order to apprehend the character of inter-generational relations, across classes.

The social division between adults and children, the difference between categories of age and generation are to be properly located in the field of family relations. Here, the differences between adults and children are grounded and made effective both at the level of personal relations and in terms of structural, durable oppositions. This proposition I hope to explain and defend at length in the text which follows. 'It is impossible', argues Stone (1974;30) 'to study children in isolation from those who killed them off or fed them, beat them or fondled them, namely their parents'. To which we should add, 'or other adults or social agencies given the powers to act as if they were 'natural' parents '. If there is 'a history of childhood', it is to be found in the social processes by which children are excluded from areas of social practice while at the same time rendered subordinate to the category adult. Childhood emerges at the intersection of social practices which exclude and subordinate the young, thereby differentiating this stage of life from 'adulthood'. Children are the subjects produced by the same multiple means of exclusion and subordination. It is within familial relations that inter-generational relations are made effective, given their character and then become 'the raw materials' of discursive practices in other sites.

Customarily and formally, the nature of the parent-child relation may be described in terms of provider-dependent, protector-protected, controller-controlled. The parental obligation to maintain and protect gives rise to corollary

rights to discipline and control their dependants. That relationship has been transported to other sites (the work-place, the school, the reformatory, the orphanage). It is a relationship which is visible across class-specific family forms. The material situation of the family will determine precisely how the relations of power and dependence work out. Within aristocratic families, for example, it may well be a relationship secured by the timing of the release of estates or other family goods to young family members while in working class families the relationship may well be based on the length of time to which labour services accrue to family elders. The intra-familial relations are not and never have been purely inter-personal exchanges but are produced, maintained and recreated by property law, by family law, by social policy and by customary practice. The law of real property means that minors can never control estates (even though they may 'own' them), their parents or surrogate parents do so. In the contracts of apprenticeship, minors enter the trade of master-craftsmen (and historically 'his' household) but became subject to a regime of training and discipline entirely familial in character, where the master assumes the parental right to beat young workers. One aspect of being a child means precisely being in someone's care and custody, that some social agent is standing 'in loco parentis', acting as, or as if it were the parent. The similar status of the married woman (under the potestas) of her husband, and the child is readily apparent here.

The proper study of childhood then requires us to re-cast view of the family, to move away from Aries' history of changes in sentiment to a view of the family as an ensemble of relations entailing positions and relationships of power and control, dependence and subordination. Familial relations

then are not 'given' but are located at the intersection of economic practices, property law, family law, laws concerning the protection of children and the law of inheritance, to take some of the more pertinent examples. We are required to map out the relationship between male heads of households, women-wives, sons and daughters; dis-aggregate the constructs of 'parent' and 'children' in order to display the weft and warp of the network of power and authority, dependence and subordination between genders and between generations. It is for this reason that the following substantive account of the construction of the child in law appears to be an analysis of family law. Yet when we turn to the legal categories of 'infant', 'minor', 'heir', 'child', and so on, the object of analysis, 'the child', appears only in opposition to 'parent', 'guardian', and in relationships of 'guardianship', 'custody', and 'wardship'. The legal categories themselves create and maintain social divisions between subjects by age and by gender. On closer inspection there is no unitary category of 'parent' (husbands and women-wives are accorded quite different statuses, powers and obligations) or of 'child' (boy sons and girl daughters are subject to quite different modes of regulation, and this will vary across classes according to the possession/ non-possession of the means of production, for example.

Yet we can still argue that all boy sons and girl daughters by custom and law share a broadly similar location in respect of their parents <u>or other adults</u> who are accorded a status to act <u>as if</u> they were parents. Transferring parental status to other adults or social agencies is precisely what the legal system accomplishes, by conferring on them the same legal rights over children that natural parents have acquired. To me, this process is far more sensitive to the processes by which one form of childhood becomes a generalised status in western social formations than is the culturalist theories

of Aries or Stone, or the class control theories of, say, Humphries or Platt. It is actually much more sensitive to means by which boy children and girl children are differentially disciplined and regulated. It is far more explanatory of the generational qualities of the relations that inhabit the institutions of the state (schools, juvenile courts, reformatories etc.) concerned predominantly with the training, treatment, regulation and discipline of the young. To take a brief but pertinent example; schools retain the right to discipline children (in some cases, beat them up) in profoundly familial ways. To my knowledge, no capitalist employer retains the right to beat wage-labourers, so in this sense, schools and other institutions dealing with young are in many respects operating with very un-capitalist modes of authority and control; class theory therefore has very little to say about the kinds of power and control exercised within these institutions. It is therefore possible to argue that there are considerable similarities between the regime of the public school and the regime of the reformatory even though these are institutions populated by the young of vastly different family and class backgrounds.

Through familial relations we can begin to apprehend the quality of inter-generational relations, and the material foundations which generate their specific character. But this is by no means an exhaustive account of what constitutes childhood. The other part of this enquiry must concern the means by which formal and public boundaries constitute the limits of childhood and construct certain subjects as children. What is the complex of social practices and the institutions which mark off one social grouping as children, so as they are socially identified as being separate and different? We can present these summarily for the English context.

a) Subjects under a certain age (of majority) are excluded from the ownership of certain kinds of property. This gives us (historically) the categories of 'infant' and 'minor'. In the past the ownership of property determined voting and other civic rights (jury service) and as such minors were precluded (with certain exceptions) from participating in the polity.

b) Beginning with the 19th century Factory Acts, subjects under a certain age were gradually excluded from the process of waged labour. The Acts were never entirely effective, but the long term result has been to exclude the young from full-time paid employment, thereby increasing and ensuring their dependence on parents (and increasingly (in the 1980's) on the state).

c) The rise of compulsory schooling (effective from the 1880's) and the raising of the school leaving age (currently 16 years 3 months) effectively separates school aged subjects from the world of work; while requiring them to attend sites of learning and discipline away from and outside the domain of the family.

f) The Youthful Offenders Act (1854) and subsequent changes in the criminal law and penal system (the formation of the juvenile court system in 1908) provides age-specific forms of trial and punishment, distinguishing between 'the child', 'the young person' and 'the adult' in terms of legal subjects.

g) The development of a comprehensive system of protection for the young against neglect and abuse (e.g. Custody of Children Act 1891, Children and Young Persons Acts 1933, 1969) has enabled state and private agencies to intervene in family life, thus emphasising their privileged and protected status.

h) Welfare policies (School Meals Act 1906, Medical Inspection 1907) separate out a social group for identifiably different forms of support and maintenance, again based on age.

i) The 'licensing' of sexual relations and the age of marriage. The ages of consent, discretion and marriage function to permit adult control over important areas of minors' lives on the one hand, while at the same time sequencing boys and girls into adulthood along different time-scales[7].

The above represents a series of exclusions and prohibitions constituting a social group (by age) as children. Precisely where the age linesfall, and how they vary historically is a matter for further determination. How age lines relate to boy children and girl children varies across genders and across time. However, all children by definition suffer from a series of exclusions and prohibitions regardless of class or gender. The above list represents 'the definite means' by which they are rendered non-adults. In this way, English society develops its highly age-stratified character.

The 'history of childhood' can be recounted by tracing out the development of the practices which divide adults from children, which renders childhood as a protected, dependent and subordinate status. The means by which the boundaries are solidified and policed, by the emergence of institutions directed towards the control, treatment, management and well-being of an age-specific group, provides an analytic account of what is expected of children and of what they are expected to be.

Unlike Aries, this approach places the complex institutions of the state at centre stage, those institutions being implicated as agents in the formal and public definitions of what is to count as 'the child' and 'childhood'. They are

the means by which the boundaries between 'adult' and 'child' are put into place and effectively regulated. They are the means by which we can explain and explore the conception of 'the child' as a non-unitary subject, and retain the sense of a general distinction between adults and children.

I would not want to claim that the means by which the legal system delineates the child as a subject provides an exhaustive account of 'the history of childhood'. That it does systematically divide subjects along lines of age, the significance it has for subjects on either side of the age-lines it constructs, (the rights, duties and obligations with which these subjects are either invested or denied), makes the law's sayings and doings an essential element in any such 'history'.

I have purposely eschewed any precise definition of children and childhood in terms of chronological age. I have tried to speak of these categories defined only in terms of an objective social group and social location that are 'not adult'. This leads to the question, what is the difference between child and youth or adolescent given the existence of youth studies as research practice in sociology and a prominently sociological concern with the category youth and adolescent (Gaskell, 1983; Willis, 1977; Springhall, 1983/4; Humphries, 1981; Dorn and South, 1982; Smith, 1983, 1984; Hall et al., 1976, McRobbie, 1978; Woods, 1977; for example).

What I define as children and childhood would certainly subsume many of the subjects and practices that in other accounts are labelled youth, adolescent or youthful. The

problem is not, however, entirely nominalistic nor one that can be settled by reference to age lines alone. Because I am concerned predominantly with legal categories elsewhere, I rely on 'infant' or 'minor' as a general referent (subjects below the age of majority), but I am not adverse to labelling this status as childhood (non-adulthood). As the age of majority historically was drawn at the age of 21 and 18 years respectively, clearly it encompasses subjects and practices that other social scientific discourses count as youth and adolescence. This means that these other discourses need to be assessed to discover what actually constitutes youth or adolescence. All that we share is a concern with the young (age unspecified), but there are significant differences as to how constitute the material differences and relationships between 'the young' and 'the elders'.

Springhall (op.cit.) being a notable exception, the field of youth studies largely comprises a) accounts of youthful cultural practices (styles of dress, music, dance, street behaviour) constituting a distinct social grouping, comprising an opposition to the cultural practices of elders; b) youth as distinct category in the labour market, suffering high rates of unemployment, experiencing considerable difficulties in getting a job and subject to the regime of specialist institutions concerned vocations training (Youth Opportunities Programme, Youth Training Scheme). The latter approach has had considerable effects in the sociology of education, with a renewed interest being shown to the school-to-work transition.

The problem with youthstudies concerned with cultural practices, as Hood-Williams (1984) notes critically, is its reliance on a very Mannheimian conception, namely identifying generational groupings on the basis of a shared system of beliefs and values

(given through their adherence to distinctive styles and cultural forms). That project is unherently unstable because of the diversity of cultural forms and styles adopted by the young (punk, mod, rocker, hippy, new romantic) and because some belief systems (political allegiances organised around political parties, animal rights, CND, Friends of the Earth) are profoundly cross-generational, and are diversely distributed within the category youth. The early CCCS work on youth (Clarke et. al. 1975) actually told us very little about the material location of youth through it (and later work, e.g. Woods 1977 had a great deal to say about class (the basis of accounting for the diversity of youthful cultural styles).

We have to acknowledge I think that at the end of the day, the street-wise lads probably return to the mundane but powerful existence of the household, where the allocation of space, the timing of meals, and the distribution of familial goods is largely out of their hands. And there also, we meet their sisters, for given the absence of girls at sub-cultural sites, we have to assume (for reasons unspecified) that their sisters didn't leave the house at all. As the field of study unfolded, we learn that youth as a category is riven by class and gender but it never really gave us the basis for generating why youth is 'a stable category sharing (a) similar social location'(Hood-Williams; 43). I think the procedures I have set out above, locating the field of study as part of the study of familial relations articulated to state practices and institutions goes considerably further towards this end than does the culturalist studies of youth, and indeed, subsumes it.

How youth is articulated to the labour market, the growth of age-specific training schemes are both relevant and immediate political issues. The framing of the issue; analysing YOP and YTS initiatives predominantly in terms of capitalistic attempts; to overcome a major crisis in capital accumulation, and, to re-impose its discipline on the labour force by sustaining high rates of unemployment and through the ideology of 'vocationalism' in schools and training course, sets the scene largely in terms of class conflict. There is an alternative analysis, I think, which is more sensitive to the inter-generational issues involved. The new vocational schemes can be seen as a means of re-inforcing and extending the enforced dependence of the young, on their parents and on the state (i.e. extending childhood). Read in these terms, the recent (December 1984) moves to reduce student grants, the Manpower Services Commission proposal that school leavers accept training or lose benefits, the continued refusal to introduce Educational Maintenance Grants (other than on a very local, highly discretionary basis), and now the Gillick case, all constitute attempts by sectors of the state and civil society to redefine the limits of childhood, by extending parental authority and parental responsibilities. On this view and without losing the context of 'the crisis of capital', we can more readily appreciate the generationally specific effects of these social policies.

<u>'... and the Law'</u>

The three 'greats' of sociology each brushed with the law. Marx and Durkheim wrote extensively about it without developing any general theory of the law [8]. Weber's application of his typology of authority to the Occidental legal systems produced perhaps the most systematic and comprehensive account of the three. His collected writings on the law provide a sophisticated history of the legal thought, legal institutions and the legal professions in the West. For

Weber and Durkheim, the law existed as a social phenomenon to be described and explained through the application of more general tools of sociological analysis. For Marx, the law-in-general was conceived as the juridical expression of the more fundamental relations of the material base. The law enters his work, however, more concretely, as a series of analyses of specific pieces of legislation used to generate an account of specific laws and their social functions [9]. My orientation to the law does not draw extensively on these sources so I shall eschew any elaborate criticandum so that I may locate more fully the background to my approach and choice of method and materials.

I shall try to identify and describe three approaches to the study of law and indicate why I want to distance myself from these positions. These are a) the 'crude materialism' of Marx and Engels, b) the liberal jurisprudential support of the Rule of Law, c) the radical-demystificatory critique of the capitalist and bourgeois legal orders. I do this within the context of the unfolding of recent attempts (within the last decade or so) to identify and explain the socsial origins and character of the law and the attempts to analyse its functions, which have now become an embedded part of modern sociology and social theory. I deal with these approaches somewhat summarily because I am interested here only in outlining some theoretical traditions which I drew on but want to move beyond; the intellectual matrix as it were of my own substantive account of the law.

Recent sociological attempts to theorise the law are grounded in two other developments; a) Marxist theories of the state (put seriously on the agenda by the Poulantzas-Miliband debate in 1972 (see also Jessop 1977, 1980 , Holloway and Picciotto 1977 , Therborn 1984 , Offe and Ronge 1975 , Offe 1972)., b) Marxist theories of ideology (e.g. Althusser 1971 , Poulantzas 1968, 1978 ,

Therborn 1980 , Larrain 1982 , Williams 1976 , Hirst 1979 , Blackburn 1972). It is not surprising that out of the two enterprises, concerned with a general theory of the capitalist state, and the elaboration of and critique of a general theory of ideology that Marxist theory turned its attention to the law as a specific instance founded at the intersection of the state and ideological practice.

It is possibly correct to claim that in the early 1970's Marxist theory paid little attention to the law. From 1975 onwards, however, there has developed a large body of literature on Marxist perspectives on the law (Hay et. al. 1975, Thompson 1975, Hunt 1976, Balbus 1977, Fraser 1978, Hall et. al. 1978, Chambliss 1979, Cohen 1978, Fryer et al. 1981, Cotterrell 1979, Benney 1983, Burns 1980, Hirst 1979, Kinsey 1978, Klare 1979, Redhead 1982, Santos 1979, Sugarman 1981, Sumner 1979, Tushnet 1982, Gavigan 1981). Marxist theory on law solidified (in the English context) in 1979 when the British Sociological Association Conference of that year (Warwick University) took as its theme law and society (see Fryer et. al. 1981 for a selection of the conference papers). Its critical mass was extended by the publication of texts such as Fine et. al. (1979) Capitalism and the Rule of Law, Edelman's (1979) Ownership of the Image, Pashakanis (1978) Law and Marxism: a General Theory, Cain and Hunt's (1979) collection of Marx's scattered writings on law Phillips's (1980) similar attempt to collect Marx's observations on law and by Collins (1982) excellent overview of Marxism's attempt to theorize the law, in Marxism and the Law.

These writings deal with the law at different levels of abstraction, at different levels of generality (varying from the abstract derivation of the law and capitalism from economic properties of the capitalist mode of production (Pashukanis) [10] to detailed accounts of historically specific events (Hay et. al., Thompson, 1975). Given this diversity,

sustain it and with changing forms of law and their relationship to changes in the material base, only rarely have they got to grips with the specificity of the Rule of Law (in terms of its content and functioning). By this, I mean that one rarely finds a critical account of the central principles used by liberal jurisprudence to discuss and justify existing law, legality, and legal relations.

The best (and highly accessible) critical account I know of, written from a Marxist perspective is by Hugh Collins (op.cit.) and I shall draw on his work here.

Collins begins by admitting that there is a paucity of Marxist jurisprudence, not surprising in his view, because legal rules and legal institutions are tangential and peripheral to a body of theory focussing on 'the economy and corresponding power relations within society' (p. 10). He then argues, 'To demand a general theory of law from a Marxist is to ask him to run the risk of falling prey to what can be termed <u>the fetishism of the law</u> (p. 10, my emphasis). Legal fetishism, he argues, has three significant features:[11]

1. The thesis that a legal order is necessary to social order. Legal rules are the centre-piece of social life, providing the organising principles for peaceful social intercourse. Legal rules provide a norm and thus provide 'the foundation for exchanges, reliance, safety, privacy...'. Without these rules it is argued, either enshrined formally in a legal system or in some similar coercive system, the social order would disintegrate. (p. 11).

(made manifestly more difficult by the internecine debates between Marxists) can we specify what Marxist theorizing on the law looks like? Without reproducing the immense complexities of the debates between Marxists we can highlight some of its insights schematically, by returning to the objectives of Marxist theories of the state and ideology. We do no theoretical violence here because some of the prominent theorists (Althusser, Poulantzas, Jessop, for example) address the law as part of their theorizing of the state and ideology.

The objective of Marxist theories of the state comprises a critical attack on the nature and function of the bourgeois state. Its aim is to show that the bourgeois state is not the ideologically neutral or benign set of institutions and practices which operates on behalf of all social groups (by mediating struggles and conflicts, guaranteeing the rights of all citizens, acting as the repository of universal values and beliefs, for example). Quite the contrary. Its juridico-political, economic, social and welfare institutions and practices are the product of past struggles between economic classes but whose nature and function represents predominantly the needs and interests of the economically dominant groups. On this basis, therefore, it cannot be 'captured' or 'used' as the means for achieving social transformation; in the Leninist tradition, it must 'wither away' or else be replaced by other forms of social administration. To this core of ideas, there are a variety of accommodations, however, which have considerably advanced our understanding of the precise unfolding of the forms of capitalist states (e.g. Jessop), considered the relative autonomy of the state from the material base (Althusser, Poulantzas, Offe) or seek to show a more optimistic version by indicating the extent to which the working class benefits and shapes the nature and function of modern capitalist states (Therborn, 1983, 1984). Whatever the problems

attending Marxist theorizing of the state, its approach has considerable explanatory power when we turn to the reproduction of social divisions (the unequal distribution of revenues collected by the state between capitalist enterprises and individuals with desparate social needs, for example), and in our consideration as to how capitalism continues to survive as social formation (where the needs of the capitalistic economy set limits to forms of social and welfare administration, and to the character of relations between agents, all being subject to the values of 'profit' and 'market' relationships). It has also demanded that we think of state form <u>in relationship</u> to specific historical conjunctures, <u>in relationship</u> to economic formations, <u>in relationship</u> to class divided societies. This means that state forms are not lifted away from 'the social'; its history is not to be found only in the logic of an autonomous unfolding of rationality, or in the teleology of liberal juridico-political theorists. Above all, we are made aware as to how particularistic interests and values can assume universal meanings through institutions and practices which seemingly serve all facets of society.

In the strengths of Marxist theories of the state lie also its weaknesses; its privileging of the state as a product of class struggle and its function as re-securing the relations of production, the place it has in providing the means of continuing the extraction of surplus value and supporting the accumulation of capital limit the horizons of what can be said about the state. I shall carefully distance myself from some of these positions but I want to hold on to the <u>critical</u> usage of 'bourgeois' state with 'capitalist' functions, terms which speak of undesirable and unjust social practices.

The main propositions of Marxist theories of the state apply with equal force in Marx's conception of ideology (see Rose 1977, Larrain, 1982). In Capital I, for example, bourgeois economic categories (price, profit, wage form) are phenomenal forms which conceal the exploitative system of capitalistic extraction of surplus value. These categories 'mask' or 'conceal' the real relations of the economic base, and do so on behalf of and serve the particular interests of capitalists. Larrain (op.cit.) argues that the extent to which these economic forms and practices mask or conceal exploitation thus serving to hide their contradictory nature (a seeming exchange of formal equivalents - labour power for wages) renders them ideological in Marx's terms because these are forms and categories which serve the exploitative classes. In this sense, Larrain argues, 'ideology' is a 'negative and critical concept' (Larrain; 6-9).

I have to say immediately that, Post-Althusser, ideology has become defused, and has lost some of its 'negative and critical' connotation. The specific meaning which Marx attaches to the term in the German Ideology and other early writings has been supplanted (Larrain; 7). Ideology has more recently become 'an objective level of social reality' (Larrain; 8); material because it is embodied in social practices and has real effects (therefore cannot be 'false'), and functions to interpellate or produce subjects. Yet in spite of these re-writings of the concept, ideology in Marxist theory retains some of its negative and critical elements. In Althusser, for example, interpellate subjects are allocated to places which support the structure of capitalist relations of production. The concept of ideology also refers to the process by which particularistic values are rendered as universals and, in a class-divided society, the particularistic values or world views presented as univeral values are produced by and work in the interests of the economically dominant classes. If the concept ideology

loses this last characteristic, I think we could agree with Larrain that it loses its 'negative and critical' function and by extension, is not Marx-ian, or Marx-ist.

We are now in a position to elicit what is meant by a Marxist theory of law.

There are, I think, two limbs to a Marxist approach to the law; the first is explanatory, the second, critical. The first limb attempts to describe and explain the origin, character and social function of historically specific legal practices, relations and institutions. The second limb is 'critical' insofar as its objective is the de-construction of 'bourgeois' law as an ideologically neutral representation of universal values and aspirations. The centre-piece of this system is the liberal writings on jurisprudence, particularly the idea of 'The Rule of Law'.

1. 'Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into law for all, a will, whose central character and direction are determined by the economical conditions of existence of your class.'
Marx and Engels, Manifesto of the Communist Party, 1848, quoted in Phillips, 1980;40.

'At a certain stage of their development, the material productive forces of society came in conflict with the existing relations of production, or ; what is but a legal expression for the same thing - with the

property relations within which they have been at work hitherto.'
Marx and Engels, Preface to a Contribution to the Critique of Political Economy, 1859.

The main propositions about the law made by Marx and Engels are as follows. Firstly, they emphasize the classed character of the law. Secondly, the law is an ideological element of the superstructure (the realm of modes of thought, sentiment etc.). Thirdly, legal forms and institutions are economically determined insofar as they correspond with the material mode of production, and as changes in the mode of production occur, new legal forms and institutions are called into existence, predominantly but not only, at the behest of economically dominant classes. The economism or 'crude materialism' (Collins 1982; 22;23) of these propositions has long since been criticised by all varieties of Marxisms, but nevertheless, it is present in Marx and Engels and informs their analysis of bourgeois legislation. Taking these propositions uncritically, one can see how easy it is to slide into the position whereby the law becomes merely an oppressive system, an instrument expressly in the hands of the bourgeoisie, brought into being predominantly as a mechanism to ensure that class's continued power and domination.

Collins notes three problems about 'crude materialist' accounts of the law. Firstly 'there is no analysis of the relationship between law and other social institutions' (p.23). Relations between the family and law, or moral and legal ideology are ignored. They fail to examine the links between the law and the state and it fails to examine the interaction between moral values and the content of legal concepts. In other words, some content

of bourgeois legal concepts may well be of universal value and worth preserving. Secondly, he argues, 'an analysis of the functions of law is entirely absent. No reason is offered to explain why the law is needed to express the relations of production. In addition, the role of law in controlling relationships such as marriage which are outside the processes of production (sic) is beyond the horizon of an economistic perspective' (ibid). Thirdly, he maintains, 'the fashion in which the material base determines the form and content of law remains crudely formulated ' (ibid). Reflection theory, expressed in terms such as 'determines', 'expresses', 'arises', 'corresponds', etc. are suggestive but hardly explain how social practices are transformed into legal system.

Collins' objections to crude materialism condense the lines of attack to be found in more recent Marxist theorising of the law. Crucially, these theoretical objections have provided the launching points for a far more subtle and elaborated attempt to provide a materialist theory of the law. Approaches which seek to elaborate; the relationship between the law and the state (e.g. Hunt 1976), the law as an ideological form constituting agents as unpersonified and non-unitary legal subjects (Hirst, 1979), the law as part of the social relations of production as opposed to superstructural equivalent of them (Thompson 1975, Fine 1978), the law and its relationship with institutions ignored by crude materialism, namely family law (Gavigan 1981, Smart 1984). All these approaches share one thing in common; they define their own position in contrast to and in comparison with crude materialism without necessarily stating why they begin there at all. What binds the variety of approaches into a coherent field is the political current which distinguishes Marxism from other social theories; a project which

inherently concerns itself with power, modes of domination, systems of exploitation, how these are socially held, achieved and reproduced. It relies on a conception of the economically dominant classes being the most politically powerful. How economic power is transformed into political forms is one of the basic objects of analysis of materialist accounts of the state, the law and ideology. One of the problems central to Marxist theory however is that relations of domination and subordination, exploitation and dependence, is its privileging of class relations. How then do we theorize about and act on social relations, including legal relations, which cannot be reduced to class terms and how do such relationships articulate with or are necessary to capitalist relations? Patriarchal relations and inter-generational relations, for example?

It is possible, I think, to adopt and adapt certain strands of Marxist theorizing of the law to a more adequate materialist account of the law, without jetisoning its classed character, by retaining the idea of relating legal forms and institutions to economic systems and state forms by arguing that class divisions are not the only social divisions in historically specific social formations. Social divisions between men and women, adult and child also are legal relations and as such are present in the legal system, giving it shape and character. In short, I would hope to retain the 'negative and critical' aspects of the Marxist theorizations of law, while extending its horizons.

2. The Rule of Law, legal fetishism and jurisprudence.

> 'Law. 1. The written and unwritten *corpus* of rules largely derived from custom and formal enactment which are recognised as binding among those persons who constitute a community or state, so that they will be imposed upon and enforced amongst those persons by appropriate sanctions.
> 2. One of the rules of law ...
> *jurisprudence*. The science or philosophy of law.'
> Curzon (1979). *A Dictionary of Law*

These are quotations taken from a dictionary of law I have at hand and usefully illustrate the ideologically neutral representation of law and legal relations which Marxism seeks to deconstruct. There are good reasons for taking a closer look at constitutive elements of what is termed the Rule of Law. Firstly, it is an all-pervasive organising principle embodied in legal practices and legal institutions. Secondly, the Rule of Law is part and parcel of political rhetoric directed at civil society used to sustain and support existing parliamentary political, policing and legal practices. Thirdly, sociologists immersing themselves in legal categories, are in grave danger of themselves beginning to think legalistically (i.e. defining social relations in legalistic forms of description) . Fourthly, while Marxist theory has been concerned with the relationship between legal forms and economic relations, with the relationship between political power and the legal forms used to

2. 'Law is a unique phenomenon which constitutes a discrete focus of study. Legal systems are not simply types of a broader species of systems of power, but they possess distinctive characteristics' (p. 11).

a) 'There are regular patterns of institutional arrangements associated with the law such as the division between the legislature and the judiciary'.

b) Lawyers communicate with each other through a distinctive discourse, though the exact nature of legal reasoning remains controversial (p. 11).

c) Legal systems are not simple arrangements of force, exercised by one group over another, because legal rules are also normative guides to behaviour which individuals follow without the presence or absence of overtly coercive officialdom threatening sanctions for failure to comply with the law.

3. The doctrine of the Rule of Law. Schematically, 'the core principle of the doctrine is that political power should be exercised according to rules announced in advance ' (p. 11), and once announced, or legislated into existence, all should abide by them, and the rules should function to constrain the weak and the powerful alike. The Rule of Law does not require laws to have any particular content, only that universalistic principles (i.e. everyone should know the rules and play the game) should apply. Collins' formulations on the Rule of Law are deliberately schematic here because he wanted only to demonstrate the connection between this doctrine and the general features of legal fetishism.

The fetishism of the law, Collins argues, is a 'pervasive feature' of political and social theories outside the Marxist tradition and also underlies the general theories of law which are commonly to be found today. I think we could add that it is also a pervasive belief in common-sense understandings of the social order and the social structure.

Marxists would stand outside the liberal jurisprudential tradition because they acknowledge the classed character of the law, whilst critical of any claim that legal rules represent universalistic values and would deny that the law is an autonomous sphere of social thought and practice because it must be seen as an expression of other determinations. These claims however would not let Marxists off the hook entirely. Firstly, legal institutions, legal discourse and legal relations do exist, do have material effects in the way social life is organised. The paucity of Marxist jurisprudence has meant that, until recently, Marxists have not really taken seriously the specificity of the law. By this, I mean legal categories (other than those concerned with property, labour relations or crime), legal institutions and legal discourse itself has received little attention by a general refusal to take on these facets of social life, critically on their own terms. It still remains a problem to provide a concrete knowledge of how the law operates, how legal categories shape and divide classes and individuals without resort to a more or less mediated reliance on the 'essence' of class instrumentalism. Secondly, there are aspects of the doctrine of the rule of law, aspects of legal fetishism which need to be taken seriously. Precisely

what aspects of the Rule of Law are negative, socially undesirable and ought to be transformed? To what extend is the concept of 'formal equality' of bourgeois law an illusion, to what extent is the concept of the formal equality of subjects in law socially necessary to free and socially and economically democratic social orders? Collins work is extremely useful here because he indicates the value of getting 'inside' legal fetishism, to appreciate its system of values as a precondition of their de-construction. On this basis, I now turn to his specific snalysis of the Rule of Law.

We begin by saying, 'Because the system of political power is so dependant upon public and positive law it is often referred to by the term the Rule of Law which is at once a description of the State in ideal' (p. 135). There are three connected strands of moral judgement contained in this ideal. The Rule of Law doctrine holds;
a) to a preservation of the neutrality of the state between competing interest groups and classes. Power resides with those who satisfy the constitutional requirements are neutral with respects to persons, ignoring might, privilege or economic advantage (p. 135).
b) that 'laws are sovereign in their determination of the issues of who should hold political power and how it can be exercised'. The constitution will also lay down the procedures by whish laws are to be made, and no subject can 'arrogate to himself the power to ignore them or to dispense with laws without due process'. Legal procedures are to be paramount and to be followed even at the inconvenience of the dominant class (p. 135).

c) that laws are publically available, be readily understood and are to be enforced according to their obvious meaning. Citizens and officials should be able to discover their respective rights and act on them with the confidence that, where necessary, the courts will uphold them' (p. 135).

The ideal enshrined in this doctrine, the image that it seeks to present argues Collins, is that law is a set of rules 'above petty political conflict and remote from the control of particular groups or classes' (p. 135). On this view, justice is guaranteed because the law neturally applies the same set of (knowable) rules to every person or agent, irrespective of personal or economic circumstance. Secondly, the operation of the law must be seen to be impartial in the application of rules by its officials and that these rules are applied through the use of judicial logic without resort to considerations of social justice or personal gain (Collins; 136). In short, the Rule of Law doctrine asserts the apolitical character of the legal system and asserts the autonomy of the law through the existence of neutral rules governed by the application of judicial logic.

The immense value in Collins' short account lies in the way he specifies the organising principles of a very powerful ideology, embodied in liberal jurisprudence. He has outlined aspects of the law rarely addressed explicitly in Marxist theories of the law. He enlarges our conception of what the object of analysis should be by highlighting organising principles internal to the law, legal thought and practice. Finally, he outlines a position that those seeking to present a materialist account of the law must try to avoid, otherwise the law ceases to be an object of analysis and becomes an unproblematic element of the social order.

The Rule of Law doctrine defines how liberal jurisprudents specify the object of their knowledge (the legal rules) and how that object may be evaluated (apolitical neutrality, logical application of the rules, universal meaning and applicability). It is an object and a practice that can be criticised in any number of respects. How Marxists would view the claims of this doctrine are elaborated above, so I shall pass on to other critical approaches. The doctrine may be criticised;

a) in respect of the class and gender membership of the officials (i.e. the judiciary) (Griffith 1977, Miliband 1969, Macdonald 1977), who are generally drawn (the upper reaches of the law anyway) from 'the establishment' and are generally male, thereby calling into question the very idea of an apolitical judiciary.

b) in respect of the market forces operating in the provision of legal services; due process can be expensive thus precluding sections of the populations from making use of lawyers and pursuing their rights in court.

c) in respect of legal discourse, which is mystificatory and thus alienates the law and the legal profession from civil society, while making it difficult for citizens to know what their rights are and how they might be protected. It can be argued that this mystification is deliberate and systematic.

d) in respect of the operation of legal logic which is far less profound and rigorous in practice than the doctrine supposes (see Murphy and Rawlings, MLR, 1981, 1982 for a critical look at legal logic at work in House of Lords' judgements).

These critiques of the law enlarge our sense of the impossibility of the 'ideal' in a social formation fundamentallly divided along lines of class and gender, along lines of power and authority.

The kind of criticisms of the Rule of Law made above may well accept the idea of the perfectability of legal practices, that the ideal is fine but imperfectly realised (possibly best exemplified say by the NCCL and by Michael Zander's journalistic commentaries on contemporary legal issues). The idea of perfectability contrasts strongly with the approach I turn to now.

Alongside the critiques of law which emphasize the contradiction between the ideal of the doctrine and the reality of law in practice, there is another approach to the law; the 'left' radical-demysticatory orientation. This is exhibited in the new 'left' criminologies, most notably Taylor, Walton and Young (1973) The New Criminology; Quinney (1973) The Critique of the Legal Order, Chambliss W. and Mankoff (1976) Whose Law? What Order?, Bankowski and Mungham (1975) Images of Law. The approach is not entirely limited to crime and law, but includes critiques of social welfare law as well (e.g. Biernie (1977) Fair Rent and Legal Fiction, Ginsburg (1979), Class, Capital and Social Policy. More recent examples occur in National Deviancy Conference publications, (1979) Capitalism and the Rule of Law, (1980), Permissiveness and Control. The radical critique of the law is by no means a homogeneous body of enquiry and this is difficult to characterise simply.

The publications' titles indicate the nature of its discourse; predominantly Marxist in orientation, the objects of knowledge are law in relationship to capitalism, the capitalist state and the bourgeois political order. The 'new' criminologies critically effected a shift away from crimonogenic theories of crime, to a focus on the creation of the rules which made some behaviours criminal, to a concern with the social and economic location of the law-makers and to a more explicit concern with the social, economic and political context of law making and breaking.

The prevailing view of the law is class-instrumentalist; legal categories aid and abet the continued processes of capitalist accumulation whilst the character of the legal system indicates the ideological and coercive work it does on behalf of the bourgeoisie to control and oppress the subordinate classes. Certainly, the later writings in this field (e.g. Young 1980) are critically aware of the crudity of these formulations, but I think it can be fairly claimed that this is its major orientation. The nature of the radical critique of the law, and its limitations can be seen by turning to three writers expressly concerned with the radical theories of law (Fraser 1978, Hunt 1980 and Collins 1982).

Fraser's concern is with the practices of radical lawyers and their anxiety to 'demystify' the law as a crucial part of their political practice .

> The process of demystification is seen by most radical lawyers as essential to the emergence within the oppressed classes of a rational awareness of their real interests and historical role. That belief in the primary significance of legal demystification leads to a powerful tendency to reduce radical legal theory to a kind of systematic expose of the sordid reality of the capitalist legal order ... The rush of emotion that accompanies the experience of demystication, the feeling that at last, one has discovered eyes with which to see, usually received expression in the belief that because the forms of legality are ideological shams, the sub-

> stantive inequality and domination experienced by the working classes can obly be overcome by abandoning legal discourse altogether and turning to more genuine forms of political action aimed at building up working-class organization and proletarian power. (Fraser; 150-151).

Like Fraser, Collins (op.cit.) is acutely aware of the dilemma of radical lawyers; required to work within legal institutions, follow legal rules, while remaining aware of their non-universalistic character ('to be a Marxist and a lawyer promises to be a contradictory or schizoid existence', Collins; 139). Unlike Fraser, however, Collins endorses a programme of demystication but with definite limits;

> 'What is needed is a programme for the demystification of the neutrality of the liberal political order, and its replacement by an appreciation of the class structure or government. The most vital areas for this ideological struggle will occur in practices only tangentially concerned with law, but since the form of law routinely endorses the Rule of Law ideology it merits a Marxist critique. This must be the principal aim of Marxist jurisprudence'. (Collins; 141).

Quite so, but Collins here looks as if he exemplifies precisely what Fraser is criticising, to the extent that the focus of analysis and ideological struggle shifts away from the law to 'practices only tangentially concerned with law'. Collins escapes insofar as he is not concerned with or contented by a systematic expose of the sordid reality of the capitalist legal order but seeks to criticize the fundamentals of its basic ideological form, the Rule of Law and fetishism of legality.

For Alan Hunt (1980) the radical critique of law '... is essentially an orientation or even a mood or stance' at its present stage of development (p.34). He continues:

> The term 'radical' is used to designate a self-conscious challenge to orthodoxy which takes the form of a denial of orthodox thought. The essentail challenge is to the assumption of the desirablity and naturalness of the law. Challenged is the assumption of the neutrality of law as a necessary expression of a well-balanced and integrated society. Denied is the integrationist assumption of law as an agency of conflict resolution ... The radical critique tends to proceed through the negation or reversal of conventional wisdom ... Law is not an agency of integration but is the creator and amplifier of social inequality and dis-equilibrium, and is the bearer of class bias and privilege'.
> (Hunt; 35).

He then seeks to distance himself from two characteristics of 'the radical critique' paradigm; its 'verbal militancy' (p. 38) which results in an unanalysed connection between 'law' and 'oppression' (ibid), and, its idea of 'praxis' (deriving political practice from theoretical practice, a la the National Deviancy Conference), where the 'authenticity of the deviant act' gives rise to the espousal of prisoners' movements, gipsy rights, etc.(p.38). On this view, he argues (somewhat similarly to Fraser) the analysis of law is reduced to 'expose of the crimes of the powerful' and/or 'law for the poor' and/or an obsessive concern with minority groups and their rights. Whereas, the target of Fraser and Collins' analyses are the radical lawyers, Hunt's concern is predominantly with radical academics .

The plausibility of the radical and demystificatory approach to the law is strained on several acount. Firstly, as Fraser suggests, the tendency towards journalistic expose displaces any theoretical grip on the more mundane, routine legal practices which silently imbricate themselves into everyday discourse, social practice and social relationships. Secondly, the predominant concern is with the classed character of the law, a view which invites us to conceive the legal system purely as an expression of 'bourgeois' interests, at the expense of all others. Thirdly, the law is conceived largely as a confidence trick, that its formal offerings of equality and justice are false, an ideological sham. The task therefore is to render the law as a phenomenal form, masking and supporting 'real relations' which lie beneath it. On this view, the law has no independent effects at all for the real object of analysis lies elsewhere. Fourthly, the radical mode of reasoning (contained in its challenge to all aspects of bourgeois legal orthodoxy)

posits an alternative vision of a utopian social formation where no rule of law would be necessary, and which would not need policing. Fifthly, we are invited to exchange one form of class justice for another, thus we dissolve all the 'distortions' of bourgeois law but without any specification of what forms, 'due process', trial and evidence, or justice, would take. Or alternatively, we are offered models of community justice, justice as espoused by de Sousa Santos in h is studies of Portugal and South America, for example. These versions however have to be set beside less romantic forms of community justice; the punishment squads in Northern Ireland. Any vision of the necessary superiority of working class, community based justice entirely disappears here . Finally, we are given a notion of the law which is visited upon the working class, that for them the law is of little consequence other than its oppressive presence because it does not serve their needs or interests. By extension, any policing represents an intrusion, a surveillance of their social practices. More recent evidence suggests otherwise; recent crime surveys report that working class communities <u>are</u> seriously concerned about crime, law and order and lack of policing because they are more likely to be the victims of petty theft, burglary, assault etc. than their middle class counterparts[12] .

The radical critique is 'negative and critical' but also nihilistic and somewhat romantic. E. P. Thompson (1975) foreshadowed the objections to it in his 'Rule of Law' Conclusion to <u>Whigs and Hunters</u> (p. 258;269). In some respects he argues the law <u>is</u> everything that the radical critique claims it to be: 'a phenomenon of ruling class power and hypocrisy' (p. 259); it was a weapon in the hands of a particular class, and it was used to impose class power (p. 262).

But it is a view he rejects on two counts. Firstly, the law is not only of superstructural phenomenon, it is not only an instrument of the ruling class. It is also part of the economic base; legal relations are fundamentally a part of the economic base, and is so because it constitutes the forms of possession and non-possession ('I found that the law was at every bloody level' was one of his more pungent remarks; Thompson 1978; 288). The law he finds to be a medium of struggle between classes, a cultural and social system which shapes and constrains the social practices of the powerful as well as the subordinate. Secondly,and more controversially he opposes the nihilism of the radical critique . The rule of law, he argues, is not to be dismissed as an 'ideological sham' (p. 263; 265); the notion of 'the rule of law is itself an unqualified good' (p. 267). The true comparison which has to be made is 'between arbitrary extra-legal power and the rule of law' (p. 265).

On these counts, Thompson distances himself from crude materialism and from naive revolutionary praxis. He then argues that the law constitutes an arena of independent study, that it should not be consigned to the existence of merely reflecting pre-given class relations:

> 'For class relations were expressed, not in any way one likes, but through the forms of law; and the law, like other institutions which from time to time can be seen as mediating (and masking) existent class relations (such as the Church or the media of communication) has its own characteristics, its own independent history and logic of evolution'. (p. 262).

For a materialist account of the law to be materialist we have to take Thompson's last statement at its face value; we have to discover and construct the law's characteristics, independent history and logic of evolution. By these means, we can discover 'the forms of legal domination, past and present' (Fraser, op.cit.; 183), place it within the context of other forms of social and economic power but without reducing the law to a simple reflection of them.

Summarily, I have tried to set out three positions on law: a) crude materialism and reflection theory, b) liberal jurisprudence and the fetishing of the law, (c) the nihilistic view of law posited in the radicals critique, and indicated why I want to distance myself from each of these approaches. My purpose now is to suggest ways of providing a concrete knowledge of the operation of law, of understanding how legal forms, thought and practice are proactive in shaping social relations and social divisions. I do so within defined limits because my object of analysis remains the law in relationship to children and childhood.

LAW; TOWARDS A MATERIALIST ACCOUNT OF THE SUBJECT

I now turn to focus specifically on the study of law. How do we take the law as an object of analysis, how can we present an account of the concrete processes of the law which avoids the problems association with reflection theory and the problems attending legalistic accounts that privilege the autonomy of legal practices, thought and logic?

The materiality of the law lies in the real effects it has for the subjects it produces; to be rendered a criminal, a company, a bastard and so on are legal productions which have wider social and economic significances. To describe and analyse the range of intersecting practices and discourses that produces legal subjects, and to understand their specific conditions of existence requires us to engage directly with law as a productive and signifying system, with independent effects. Privileging the law as a discursive realm for the production of legal subjects avoids the problem of being required to produce a general theory of law, because the law in general has no material existence (it is not a unified system and has a diversity of effects for the plurality of legal subjects it produces). As a means of analysis it has the practical merit of precisely conceiving the law as a disparate range of practices and institutions whilst retaining an approach which is generalisable across a range of legal subjects. Here I focus on the legal subjectivity of children, also to an extent the subjectivities of married women, but it is a method not limited only to those categories, nor only to human individuals (one could produce an account of 'the charity' or 'the trust' for example).

The structure of this section is as follows. Firstly I shall explore further the idea of legal subjects and criticse the kind of subject found predominantly in reflection theory. Secondly, I shall discourse sources and materials relevant to the study of law. Thirdly, I shall explain how these aspects shape the body of the work.

1. Law and Subjectivity

Utilizing the theory of the subject helps make sense of the English legal system, which is a very dispersed body of texts, institutions and professions. The law is a heterogenous entity, concretely embodied in legal rules, in a diverse range of courts, symbols, rituals, practices, writings and institutions . Unlike Continental systems, English law is uncodified (there is no general statement of first principles in a written constitutional form, policed and governed by a Supreme Court, in England); it has material existence as common law and equity , as public law and private law, criminal law and civil law; courts exist in the form of Parliament, High Courts, Crown Courts, County Courts, Magistrates Courts (which are hierarchically arranged, and displayed as such in the appeal process by which decisions in lower courts can be reviewed by courts of a higher jurisdiction [13]. Legal texts exist as statutes, law reports of selected cases, legal commentaries, parliamentary reports, each producing differing effects (statutes and case law may 'make' laws, enunciate legal rules and pronounce on legal practices; legal commentaries may produce dicta but in no real sense 'make' law and cannot be used as precedent, though they may inform present and future legal practice). We may obtain a theoretical purchase on these diverse practices, institutions and texts by seeing them as the very material which constitutes legal subjects. By these means, we privilege the materiality of the law and can speak of its effects without reducing them to mere reflections of pre-given social relations and forces.

On the other hand, we must recognise that the elements comprising the law, past and present, have their own conditions of existence; the law cannot be disembodied from the totality of other social practices. The criticisms here, directed at liberal jurisprudents do not extend to the foremost practitioners of the history of the law, the legal historians (e.g. Holdsworth, 1903; Stephens 1914; Pollock and Maitland, 1968; Radzinowicz, 1948). I would want to distance myself from the inherent telology of those accounts, from the Whiggish historiography of progress and continual enlightenment and their implied defence of the necessary rationality of the development of the law. But from them we can learn a great deal about the dynamic of the law constantly transforming and adapting itself through a continued evaluation and critique of its own practices. The accounts provided by legal historians make it impermissible to reduce legal rules, institutions and the practices of legal personnel simply to the expressions of political and economic divisions of power and authority which lie outside the law. For the materiality of the law, and of current legal practice and procedure, can only be understood only if we recognise what the law once was, and acknowledge the diverse sources of contemporary jurisdictions and practices. For us to understand why certain legal anachronisms still have a material effect we need to appreciate the inputs, from Roman Law and ecclesiastical law, past methods of legal training, the jurisdictions which existed alongside the mainstream of common law and equity (e.g. the law merchant and customary law; see Walker, op.cit. 6-72).

Engaging with legal historians produced for me a dissatisfaction with Marxist accounts of the law, surprisingly in areas where Marxist analysis seemed to be most relevant

and where its tradition was strongest, namely in the law of property . My objections are somewhat different from those posed by Hirst (1979). Whereas he properly claims that Marxism's theorisation of property fails to take account of corporate bodies as bearers of property rights, and as subjects endowed with the attributes of economic calcualtion and with rights to initiate forms of legal action, my objections are based on the rather large gaps between Marxist theorising of property and the contents of property law as presented in the legal texts. The consequence of this is that reflection theory simply fails to come to terms with the significant fact that the dispossessed, and the non-possessors of property were and are not only the working class, but considerable numbers of the aristocratic and bourgeois classes, namely married women, infants/minors, and the mad.

Turn where you will to legal texts on property (typically Blackstone Vol. 2, 1766, Dicey 1963, Cheshire 1962) and you will find the relations between an object and its possessor is intimately bound up with the means by which property can be transmitted; sale, gift or inheritance. It is the latter, the laws of inheritance which are almost entirely missing from property relations as they are analysed by Marx and Engels , Pashukanis (1978) and G. A. Cohen (1978) , to take some pertinent examples. Reflection theory demands a correspondence between the economic subjects of capitalism, who are formally free to enter relations of production and exchange, and legal subjects who are equally formally free to hold and exchange property (be it goods or labour services (i.e. the relations of production generate their equivalence at the level of legal subjectivity) . Yet the law itself, customary law, statute and case law has never recognised this to be the case, either in feudal or capitalist modes of production. The effect of the law

itself has been to produce classes of persons, legal subjects, unable to hold, sell or transmit by testatacy or inherit property (this apart from the formal rights granted to economic subjects to transmit property which they have never been able to possess or accrue). My objection is that if you ignore the significance of these legal exclusions, you are not producing a materialist account of the law, but an abstraction of it. The law under capitalist relations of production does not produce unproblematically subjects with formally equal abstract property rights (the equivalent of its theorization of economic subjects); in the sense the law is not purely reactive, but has its own independent effects, exampled by the laws of inheritance. [14]

Clearly, inheritance laws have conditions of existence with which Marxist theorizing has all too rarely engaged.

While I would not wish to claim that the whole process has been bracketed off as a non-economic process, (to claim that inheritance does not involve economic relations is patently absurd), the relative <u>unimportance</u> of inheritance, as a process and as a system of social relations, is indexical of the privileging of class relations at the expense of familial and personal relations as they regulated by law, together with a disregard for the forms these relations assume in law. Inheritance profoundly concerns familial relations (the economic and personal standing of men and women, elders and infants), the laws pertaining to inheritance have diverse sources, drawing on canon law and common law, and have real effects, (historically 'postponing' women as heirs in favour of male relations for example). These are consequences of the law in operation and do not flow unproblematically from class relations external to it.

There is a second difficulty which is debated throughout this work, which concerns the problem of periodisation and specifically, the feudalist-capitalist dichotomy. Refusing to accept a periodisation based on fundamental changes in the mode of production inherently means confronting the relationship between base and superstructure. The thesis that transformation of productive forces brings about changes in the relations of production and in turn brings into existence changes in the superstructure (necessary to sustain a particular economic structure) - changes that can be explained by reference to the economy - (a summary of historical materialism) is of great utility in describing <u>some</u> aspects of legal change. In other respects, it and the periodisation of historical change that attends it, is quite inadequate.

One example, developed more fully in the text, will serve to display the problem. The relations of possession/non-possession of real property (landed estates) closely map the thesis of historical materialism. The Tenures Abolition Act 1660 signals the end of the feudal system of land tenure (land held in return for personal services) and <u>formal</u> beginnings of land conceived as a commodity, to be freely exchanged at the market, and to be held in exchange for money rent (a simplification which must serve for the moment). Here, we have a fundamental legal change which can be adequately explained by changing productive forces and by changes in the relations of production (for simplicity, a shift from strip agrarian agriculture to enclosures, from peasant to capitalist relations of agricultural production).

However, the complementary legal form, the laws of inheritance, <u>do not</u> display anything like the same temporalities of transformation. Indeed, the laws of inheritance as we shall show, are profoundly resilient to the unfolding histories of modes of production. It

is possible to show that feudal modes of transmitting property down the family line, in its principal features, continued unabated until the 20th century. In other words, there is no necessary relationship between the unleashing of new productive forces and the rise of new legal forms of regulation of property or of personal relations.

This problem can be overcome by taking legal texts as the objects of analysis rather than relying on the histories of modes of production which construct accounts of economic subjects before generating accounts of their legal equivalents.

The general method of privileging economic subjects and then trying to abstract a legal equivalent has several limitations, not the least being a rampant economism and class essentialism.

These problems are exampled by Pashukanis (op.cit.) in his attempt to derive the legal form of bourgeois law from the commodity form. His work can only be very crudely glossed here . For Pashukanis, the legal subject 'is the very atom of juridic theory', and the law is a relationship between subjects. Pashukanis' legal subject is the analogue of the economic subject (as a possessor of a commodity equivalent, meeting other subjects at the level of exchange). The legal form comprises subjects as bearers of rights, meeting in dispute over the possession or pursuit of rights. His abstract derivation of the legal form from the commodity form realises two related problems.
First, the legal subject is a simple read off from the economic subject, thus allowing no real space for the processes of legal subjectification. Secondly, rights seem to be constituted outside the legal system, which therefore has no effect in constructing these rights; that is, rights take on some form of extra-legal quality. Rights are constructed in and through the legal system,

and definite limits are placed on subjects by the law. The right to vote, is not some universal quality assumed at the age of majority; certain subjects cannot vote; votes can be cast in only a stipulated constituency; there are residential and nationality qualifications etc..

To recuperate the effectivity of the legal system, we can consider Hirst's proposition (1976;401).

> "Legal subjects are entities created through legal recognition which are capable (in forms of law) of initiating actions (suits, please, etc.) and of supporting certain statuses (possession, responsibility, etc.). Such subjects exist only relative to legal recognition (they cannot exist in law otherwise, other entities are represented only as a possession of subjects or object of dispute between them). ... To be denied the status of a legal subject is not inconsequential, it is to be unable to initiate legal actions or to support the consequences ..."

The status, rights, privileges and disabilities afforded the legal subject are not given outside the legal system but in it and through it. Therefore it is necessary to recognise the specificity of the elements of the legal system in order to account for the differentiated subjectivity of individuals, corporate bodies, etc., for it is through the play between the various elements, that differentiation is constructed, and further, that we can begin to understand the contradictory nature and location of the child as a legal subject.

This work then is refusing a theory based on the law in general, for as such, the law has no materiality. The law exists as a dispersed set of practices, institutions, texts and agents. Rather we shall treat the law as a discrete but related set of discourses; each discourse specified by the objects of which it purports to speak (marriage, property, contract, criminality, etc.), and each operating with a definite set of categories, concepts and notions and each discourse producing definite effects. There is little doubt that legal discourses, in English law, are hierarchically arranged; land law for instance provides a definite limit to space allowed for transformations within other areas of the legal system, as we shall later indicate.

We shall consider legal subjects as constituted by, and having a definite position in relationship to separate and different discourses. This we hope will allow the multiple legal subjectivities possible for a social agent to emerge, and to display some of the contradictions involved. Such a procedure will also display, in spite of an apparent diversity, the unity of the position of specific subject (for example, children) over the totality of legal discourses, and make some proposals about the regulating principles which seem to inform the unequal distribution of legal capacities.

2. Sources and Materials

> "Until then I had thought each book spoke of things, human or divine, that lie outside books. Now I realised that not infrequently books speak of books; it is as if they speak among themselves. In light of this reflection, the library seemed all the more disturbing to me. It was then the place of a long, centuries

> old murmuring, an imperceptible dialogue between one parchment and another, a living thing, a receptacle of powers not to be ruled by a human mind, a treasure of secrets emanated by many minds, surviving the death of those who had produced them or had been their conveyors."
> (Umberto Eco, In the Name of the Rose, 1980;286).

I offer here a summary and descriptive guide to legal and literary sources of law I use most extensively. The principal legal sources of English law are legislation and judicial precedent (Walker, 1980;86). The law-creating agencies are therefore parliament and the judges presiding in court, and every rule of law created in the past may be changed or modified either by parliament or the judiciary (Walker;87).

Every legal source has a corresponding literary source: for parliament, it is legislation published as statutes or as Treaties (on international matters); for judge-made law, especially with respect to precedent, law reports. For lawyers, those practising or constructing legal history, legislation and case law represent the primary sources. However, there are certain textbooks which are indirectly primary sources (notably Littleton, c. 1481, Coke 1628 , Blackstone 1765), that is to say they may be cited as 'books of authority', a text the judiciary counts as a legitimate citation of precedent and practice. In past times these were often original sources of common law, a text where the lawyers might find the relevant precedents in the absence of nationally agreed forms of reporting cases heard. Their antiquity does not diminish

their relevance today; we find reference to these texts in Halsbury's Laws of England and not infrequently in modern case law. Walker argues that there are a dozen books universally accepted (i.e. by nations states with an English common law tradition, generally ex-colonial states in North America, Australasia, AFrica) as books of authority, mostly written by authors who were, or had been judges. We can assume for all practical purposes that there are in fact three primary sources; statutes, law reports and books of authority. Beyond this, there are modern text books, produced predominantly by academic lawyers, and each branch of the law will have its 'book'(s) which acts as guide, practice manual and standard referent[15]. Where the persuasive arguments of these books run counter to the principle stated in case law and reported in the law reports, the principle contained in a precedent or judgement will always prevail (Walker; 162). I have drawn extensively on each of these sources, and in practical terms I use modern legal textbooks as if they were a primary source because of the important function they perform in the training and practice of the legal profession, though I acknowledge the formal distinction between legal textbooks and primary sources of law.

Were it so simple! There is clearly a very technical and highly political relationship between the two forms of law-making, legislation and judge-made law[16]. In the hierarchy of courts, no lawyer would gainsay the fact that in formal terms parliament represents both the highest court of the land and the most important source of law. However, the English legal system acknowledges that judges have the power to interpret statute law in cases before them where the material circumstances of the case require it. Moreover, in common law, judges are bound by principles of precedent which guide their decision-making, but these precedents were themselves established

by judges in times past [17]. So judges effectively are pulled in two directions, by parliament and by their predecessors.

Though they are unlike the Supreme Courts in nation states having a written Constitution (setting down the first principles of the rights, duties and obligations of the state and the individual), where the judiciary goes back to the first principles to ajudicate any case, and retain the considerable power to veto any legislation which does not accord with these principles, judges here retain considerable capacity to shape the material effects of legislation, and to shape legislation in the making. As Doreen McBarnett argues, "... the fact that legal decisions not only settle cases but make law somehow seems to have failed to permeate general consciousness", (McBarnett 1982;412). The relationship between the two processes of law-making abound in the law reports and legal textbooks where they assume a literary discursive form. On these grounds it is permissible to take these as primary data for the study of law, as a source for discovering the principles imbricated in the construction of legal subjects.

I do not dismiss out of hand participant observation studies in court of law; the invisible 'codes' on the one hand, and the highly visible symbols and rituals on the other that create and sustain the hierarchical relationship between legal personnel, and between the majesty of the law and supplicant citizens standing before its authority [18]. But I am not willing to describe one as real and concrete, the other as ideological. abstract or imaginary; both approaches - a concern with written forms, and observation and analysis of the trial process - are capable of discovering governing

principles, the rules of order. Whereas practitioners and historians of law would be concerned only or primarily with their own primary sources, sociologists would set these in a historical, political, economic and cultural context and would further employ social theory as a means of generating any analysis.

One feature of the texts that function formally as primary sources, including books of authority, and legal texts, is that they assume the form of a mini-history. This is a feature of each case appearing in law reports, and is predominantly an acknowledgement of the powerful presence of judges making law. In pursuing any line of enquiry, therefore, one is constantly driven back through historical time. The expertise of lawyers is still required to determine precisely if, how and when new rules of law have been made; for me this was the function of modern legal texts. I still find it difficult to view a reported case 'cold' (without commentary) and determine with any precision which rule of law is at stake and how it was (if at all) transformed. I found that as I read the law reports, however, I became less indulgently voyeuristic, ceasing to be concerned with the material events discussed, and increasingly interested in the legal principles used to settle the case. They do retain an elusive character and a mystique, which is itself significant.

Doreen McBarnet (op. cit.) argues that 'case law is an exceptionally esoteric body of knowledge', and continues:

> "But the mystique of case law lies not only in the esoteric nature of professional knowledge; it lies in the very particularistic and _post hoc_ form it takes. Case law makes

> law by establishing precedents
> at the same time as deciding cases.
> But the precedent is both estabished
> and applied in relation to the facts
> of the particular case in hand.
> Since every case is, or can be made
> out to be, unique, this means that
> what there is in relation to that
> case, whether it will continue an
> established line of reasoning or
> establish a new refinement cannot
> be known in advance ... you literally
> never know what the law is."
> (McBarnet; 412-413).

She concludes that the law isn't simply elusive because of the lay person's lack of legal knowledge, it is elusive _per se_ (ibid).

McBarnet discovers certain regularities in the discursive form of case law which illuminates how case law operates concretely. There is an inherent cleavage between the abstract (the celebration of the abstract rules of law, the recitation of precedent, justice _in abstractio_) and the concrete (the material events of the case). This allows certain rights, duties, and obligations to be simultaneously celebrated and denied (her particular example concerns civil rights vs. the extension of police powers) (p. 414). Politics enter at the point where the material events disappear under the abstract principles, or where contradictions are negated by 'exceptions, provisos and qualifications' (ibid). The power of case law form, she argues, resides in the fact that it can render both the abstract principles, and exceptions to it as law! (p.414).

Herein also lies the enormous power of the judiciary. Over and above the legitimate powers they have to make judgements that are binding on the parties concerned in a particular case, they have enormous capacity to ease their way around contradictions between the abstract and the concrete. By small adjustments, the law can be made to follow new and different directions. In doing so, the judiciary can argue that they are being entirely consistent with an (imaginary) 'out-there', 'societal changes', economic practices, 'new realities', etc., which have rendered previous decisions obsolete (knowledge of the 'out-there' being brought to their attention by the novel circumstances of the material events they have to adjudicate).

In this sense, case law can be of enormous benefit to social scientists, insofar as we have a written record of material changes taking place in forms of social relationships and cultural and economic practices, and a detailed account of how the law responded to them. A snapshot as it were of a social and judicial event at a particular point in time, where case law stands as 'event' at the intersection of law and civil society and illuminating our insights into both. Case law does allow us to look both ways. It is both an 'event' and a 'record'.

Case law has to be used with caution, however, for it constitutes only part of the concrete process of the law; there are always social forces, registered in forms of parliamentary political representation, producing laws in the form of statute, providing an antidote to overly legalistic accounts of historical events.

How then do these literary legal courses impact on a sociological account of law? Firstly, the existence of two streams of law-making (parliament and courts) makes the law an elusive object. One is never entirely sure that one has quite understood quite what its concrete operation was because of the continuing complexities of the relationship between a statute and the judicial interpretation of it.

This is made manifestly more difficult by the divided jurisdictions of the courts (common law, equity, admiralty, chancery, probate, ecclesiastical courts and so on). These divisions each have different series of law reports so it is only with the guiding commentaries of legal text books that one can produce a kind of narrative.

Secondly, I referred to the sources being in the form of mini-histories. As such, one is constantly referred back to past events and cases in order to trace out the development of a legal rule, technicality or practice. These are not anachronisms but points of departure from which modern law develops. If this account is predominantly historical that is partly because the materiality of the law demands it to be so.

Thirdly, the history of law presses on us its own rhythms and periodizations. Sometimes it is marked out as periods between significant pieces of legislation, sometimes it is not, because case law is running ahead of legislation. All that some statutes achieve is to consolidate what case law has already achieved by other menas. In other 'histories', very important aspects of legal change go virtually unrecorded elsewhere. I am thinking here of the Judicature Acts 1873-75 which consolidated the streams of common law and equity into one system of High Courts and Courts of Appeal. Here, where there was a

conflict between law and equity, the rules of equity were to prevail (see Holdsworth, op.cit.; 640). I know of no Marxist account which has taken this significant development as its object of analysis, though the story is fascinating because it involves the rooting out of the patronage and profitability which attended 'the Old Corruption' (see Holdsworth; 255-264, 416-428).

Fourthly, the divided jurisdictions provided conclusive proof that legal subjects are non-unitary; there is no one all embracing system which works in a unified manner to construct subjects in an uncontradictory form. The generative mechanism is not the law as a system, but the diverse legal discourses which constitute it. The search for 'the child' in law begins not with the juvenile court but in the law relating to property. Take an early example; Bingham's (1816) The Law of Infancy and Couverture. The definition of the infant is always given in its relationship to property, rights of tenure, forms and means of inheritance, the obligations and duties of parents and guardians. The book appears to be saying more about these aspects than about the infant, a subject which appears to be a by-product rather than an object of speical attention. It is only more recently that legal text books speak of the child and the special privileges and protections it is accorded in law (see Bevan 1973, Hoggett 1977). From this point of view, to find out about the child in law we are required to turn to the law of property, inheritance, the family and criminal law, per se. It is here that we find children's civil, criminal and economic privileges and exclusions being created by a diversity of legal discourses.

Finally, as to the texts themselves, I have not attempted any analysis on the lines of a linguistic analysis in order to discover hidden structures. I am concerned with 'surface' features insofar as I have read them in terms of their effects as productive of legal subjects. That is to say I am predominantly concerned with, and how, certain attributes characterise particular subjects and how this in turn qualifies or disqualified as legal subject with specific rights of action. Further, I am also concerned to relate texts to other, and sometimes, pre-existing practices, so that we may appreciate the social matrix in which particular meanings arise and function.

REFERENCING

Because of the arcane and mystificatory form of legal citation, I offer a very brief guide to the referencing of sources. I draw here on Walker (1980; 87-163) and Hood Phillips and Hudson (1977; 168-191, 246-259).

a. Legislation

A statute is usually cited by its short title and calendar year (e.g. Guardianship of Infants Act 1886). Equally, statutes may be cited 3 Hen VII.C.1 (3rd year of Henry VII's reign, first statute passed of that year).

b. Law Reports

Law reporting in the form recognisable today began in the 16th century and its organisation was reformed in 1865; most current series commenced in 1866 or later. It is here that lay people find most difficulty.

i) The Year Books 1272-1535

Written in 'law French' (though they are available with a simultaneous modern translation) the Year Books are the earliest form of law reports we have. The legal profession regard them as rather variable in quality though they do excite some speculation as to origin and purpose. I make little direct use of them, preferring to draw on Pollock and Maitland's (1968) 2 volume, History of English Law Before the Time of Edward I, a text of considerable authority and cited by medieval historians.

ii) 16th Century to 1865

Reporting here was undertaken by barristers or judges who wished to report cases. They vary in quality and reliability, and because the name of the series follows the name of the reporter, these are the nominate reports. Citation here follows the pattern, Bevan v. McMahon (1861) 2 Sw and Tr. 230 (parties to the case, year, Swambey and Tristram (reporters) Vol. 2, page no.). These have now been collected (though not all) and reprinted in the English Reports or Revised Reports and cited E.R. or Eng. Rep.

iii) Current Law Reporting

From 1865 a Council was established to produce quickly and cheaply reports of the decisions of superior courts (Walker; 154). The Law Reports are reported by barristers (a precedent is citable only if it is vouched for by a barrister who was present in court when a judgement was given) (Walker; ibid). Each division of the High Court has its own series, the citation indicating which division heard the case (e.g. Barrington v. Lea (1972) 1. Q.B. 326 (Queen's Bench). The Times Law Report (TLR), Criminal Law Review (CLR), Modern Law Review (MLR) will report cases also and may sometimes be cited if no record exists elsewhere in the 'official' reports.

c. Books of Authority

Of the books of authority Glanville's treatise De Legibus et Consuetudinibus Anglicae (C. 1187) and Bracton's (C. 1250) book of the same name ('Of the laws and customs of England') are the earliest. Not referred to directly by me, they are important legal sources for Pollock and Maitland. Littleton's Of Tenures (C. 1481) as the name suggests, is a substantive account of the English land law; 'an ornament of the common law, and the most perfect and absolute work that was ever written in any human science' according to Coke (Walker op.cit.; 160). Edward Coke's presence in English law is difficult to over-estimate; as scholar (producing the authoratative series of Coke's Reports (Co. Rep.) 1600-15, the 4 Institutes (treatises)), and practitioner (Chief Justice of Common Pleas, Chief Justice of the King's Bench in 1606, and 1616 respectively) (see Hood Phillips and Hudson, 1977, 174-75, 252;254). From 1628 on, Coke published The Institutes, probably the most frequently cited authorities in English law. The First Institute was the commentary on Littleton, and is commonly cited Co. Litt. (Hood Phillips and Hudson; 252). His exposition was incredibly valuable as a rigorous attempt to set out the principles and procedures governing early common law. Between 1765-69, William Blackstone produced Commentaries on the Laws of England, based on a series of lectures given at Oxford. Book I, 'The Rights of Persons', Book II 'The Rights of Things', Book III 'Private Wrongs' and Book IV 'Public Wrongs' deal with all aspects of English law (though Blackstone was a common lawyer, so equity and 'civilian' law gets short shrift). In the absence of relevant statute or guiding precedent, he is still cited here, while in the USA, the history of law usually begins with a recitation of Blackstone because its common law was founded in Blackstone's time (Hood Phillips and Hudson; 257).

This is by no means the full recital of books of authority, but those cited in my account. Sir Matthew Hale's (1780) History of the Pleas of the Crown, Hawkins (1716) Pleas of the Crown, are other books considered to be authoritative, for example.

It has to be said that the books of authority I refer to were written for and by practitioners of the common law and functioned as treatises bringing together as a ready source of reference the legal rules exposited in common law courts, often in conflict with the manifest intentions of sovereign and parliament. Jeremy Bentham wrote a contemporary Comment on the Commentaries, a criticism of Blackstone's celebration of the common law tradition of judge-made law. His rebuke to Blackstone was on the grounds that in a context of representative democracy, there was little to celebrate in a system of law-making where the law makers were non-elected and unaccountable. His observations are interesting in two respects; books of authority are fairly arbitrary attributions - they are authoratative because the legal profession and judiciary count them to be. Secondly, and in a wider context, the general thrust of Bentham's critique deserves to be read by advocates and critics of a Supreme Court system for England.

3. Childhood and Law

I have taken as my primary material, the documents, texts and cases which have governed the practices of the judiciary and the legal profession. Those materials have pressed on this work its structure and provided the principles by which certain branches of the Law are covered at length while other aspects of social life legally regulated have been given very little weight. My main concern has been to explore how legal and judicial ideology and practice constructs a relationship between the age of legal subjects and their legal attributes and how this affects their status in respect of other legal subjects. In this respect, I have remained fairly narrowly on the terrain of the writings and practices of the law.

To this work, there are four major divisions, a structure which closely follows the divisions with the law itself as it pertains to minors. Like conventional legal sources and authorities, I deal in turn with: (1) the categories of infancy and minority, the age lines which describe them and the legal attributes relating to them, (2) the laws of inheritance which are the context for the production of divisions between heirs and bastards, the distinctions between male and female minors of the family and for reproducing social divisions between elders and minors, (3) the laws pertaining to parents and guardians and describe how the state assumes the legal rights once held exclusively by the former, (4) minors and the criminal law, especially with the distinctions made between adults and children in matters pertaining to criminal responsibility, guilt, innocence and punishment.

The content of Part 1 is virtually self-selecting. No discussion could adequately proceed without the technical definitions of infancy and minority. Nor could we proceed without defining the relevant chronological ages in law. Much the same can be said for the choice of contents in Part 3. Large portions of the laws relating to children take place within the general conspectus of family law. Here the legal rights, obligations and responsibilities of parents are defined. In so doing, however, family law constructs a normative view of the status of minors and their relationship to parents and guardians. No account of the legal subjectivity of children would be complete without reference to the means by which the criminal law conceived of and dealt with them. To discuss only the civil law without reference to the system of crime and punishment would have detracted from the multi-faceted construction of the legal 'child'. The material in Part 2 which refers to the laws and system of inheritance however appears to be somewhat unconventional and less self-evident for inclusion.

Extended discussion on the laws of inheritance partly arises because the primary materials, especially the common law texts, discuss technical definitions of infancy in the context of those laws. More importantly, however, there are theoretical considerations which merit an extended discussion of the laws of succession. I argue that as property is passed down the generations, so is a system of statuses and positions. The inheritance laws can be understood not only as the means by which property is transmitted, but it is also the means by which powerful social divisions, between elders and minors, male and female are reproduced and the means for elaborating the categories of legitimate and illegitimate children. The laws of succession therefore invited an extended discussion as to how family statuses and relations are transmitted over time.

The structure I have adopted is one which can be readily understood by practising and academic lawyers, and by judges. The divisions are those produced by lawyers and they represent broad areas which the legal profession specialise in. The boundaries between the fields of knowledge are those they acquire (tacitly) in their training.

The strength of this approach is four-fold. Firstly, it remains immanently faithful to the materiality of the law. The categories of the law inhabit the writing of the analysis, forcing one to engage critically with those categories, their mode of production, their value system and the tacitly acquired assumptions that go with them. Secondly, while one is forced to submerge oneself in judicial ideology, legal phraseology and lawyers' definitions of social life, one is constantly reminded that these categories have practical and concrete applications. By these definitions, people are disinherited, deprived of the custody of children, put in jail and so on.

Thirdly, the categories of property law, the criminal law and laws of inheritance for example, construct subjects bearing rights and attributes or suffer exclusion and disability, specific to each discursive regime. The legal rights and attributes, the exclusions and disabilities are real enough and they are produced <u>in law</u>. They are not the product of second order analysis. So in staying close to legal texts and case law, the many faceted nature of legal subjectivity slowly emerges. Finally, in retaining conventional divisions between major branches of law, we are able to compare and contrast the rights and attributes accorded to minors <u>across</u> those divisions. By these means, we are able to show how each branch differentially

distributes rights, attributes and capacities by age and by gender. We are then able to appreciate how and why boy and girl minors of different chronological ages are subject to differing modes of exclusion and regulation.

There is a price for staying on the terrain of the legal system. Using legal texts and case law as the predominant forms of primary material for the analyses of minors and minority inevitably excludes other social processes, central to the 'history of childhood', which have a legal dimension. The development of compulsory schooling, the exclusion of minors from the workplace, the welfare services developed for and on behalf of children and the formation of the modern juvenile court from 1908 through to the present day, all are fundamental to any complete description and understanding of 'modern' childhood. These social processes and their associated institutions are the very material of boundaries creating adults on the one hand, children on the other. They have a legal dimension because everything from compulsory schooling to the juvenile court is enshrined in statute law. Why then exclude these processes from our analysis? There are two general reasons.

Firstly, there is the practical problem of defining the scope of one's study. If we take as our important primary material the documents, texts and cases which inform the practices of the judiciary and the legal profession, necessarily we bracket out sources and materials which would underpin the proper analysis of compulsory schooling, employment and the provision of welfare for children. Each of these areas would require a thesis length discussion.

Secondly, in the legal materials we have taken as our primary sources, education, welfare and the employment of children were for centuries simply subsumed under the laws pertaining to parenthood and guardianship. In law, these aspects of children's lives were simply not that important in the legal subjectivity of children. These were jealously protected areas of concern for and powers exercised by parents and guardians. Why and how this was so, I elaborate in Part 3. As I argue, it is from the 19th century onwards when the state, assuming the mantle of parens patriae, first formulated in Chancery, that the education, employment and welfare of children became important public political issues as opposed to private spheres of concern best left to and regulated by the family.

I have treated the education, welfare and employment of children as matters really of social policy rather than as issues central to the construction of the legal subjectivity of children. By this, I mean the education, welfare and employment of children speak of the provision of services, protection and economic assistance designed however imperfectly, to be enriching, life enhancing and to meet their specific and basic material needs. None of these policies, enshrined in legislation fundamentally altered the minors' rights to pursue their interests in courts of law and none of the measures fundamentally altered the means by which the law formulated the relationship between age-lines and legal attributes. The Factory Acts of the 19th century, the early Education Acts, and the various Acts concerned with the protection and welfare of children, extend already existing differences between adults and minors. What they critically achieve, however, is the right of the state and its agents to pursue the interests and protection of children against the wishes of parents, in and through the courts of law. Minors effectively remain the passive objects of legal disputes conducted by adults.

Unlike conventional legal accounts and most radical sociological accounts, I pay relatively scant attention to the implementation and operation of the juvenile court system. My approach is unconventional in two senses. Firstly, I have focussed on aspects of the law and courts of law which on face value, have little to do directly with children as legal subjects. In conventional terms, the legal regulation of children currently largely takes place through the operation of the juvenile court system. However, the categories of the law and 'the juvenile' operational in these courts have their antecedents elsewhere. Conceptions, that children need protection against adults (including parents), that juvenile delinquents need different modes of trial and punishment, that juvenile courts should function as family courts, can only be explained if we look to what was going on in other courts of law historically. Dingwall and Eekelaar (1984) argue that 'the twentieth century has seen no fundamental innovations in the categories of children whose welfare may be thought to require some state intervention', (p. 95). They continue that the Children's Acts including and since the 1908 Children Act, were 'essentially measures of consolidation and re-enactment which modernised powers and definitions first set out in the nineteenth century or earlier legislation', (ibid).

My later work on the Chancery Courts and their contribution to the shifting balance between the rights of parents and the state seems well justified in light of these views.

Secondly, the legal regulation of children in the juvenile court still actually tells us very little about substantive divisions between adult and child in respect of relations of possession and non-possession of property, inheritance,

contract, marriage rights, age of discretion, age of consent and sexual relations and guardianship. It is interesting to recall that juvenile courts are magistrates' courts and so in the legal hierarchy are still subject to the values and rulings of superior (High) courts. To lose sight of this is to lose sight of the whole tradition of judge-made law.

In sum, I have eschewed any direct 'history' of the juvenile court, but I have sought instead to locate its historical significance in the context of the unfolding inter-generational relationship of adult and minor. It is an institution which hardens the boundary and which contributes to a sense of 'difference' between these social categories. The juvenile courts formalise a boundary between adults and children in law, but does so along lines well in evidence in advance of the Childrens Act 1908 and the Children and Young Persons Act 1969.

NOTES

1. Hargreaves (1968), Becker (1971), Young, J. (1974), Taylor, Walton and Young (eds.) (1975).

2. The two key texts were Althusser (1969) For Marx, and (1971) Lenin and Philosophy.

3. While one celebrates social 'difference' (diversity, variety, plurality), 'division' has a negative connotation. How social formations create divisiveness out of 'difference' such that some groups are marginalised or oppressed has always been a concern of social science.

4. For example, William Blake's poems collected under the title 'Songs of Innocence'. On the representation of children in classical and commercial art, see Fuller (1979) 'Uncovering Childhood', in Hoyles, M. (ed.).

5. See P. Thane (1981) Childhood in History, and Hendrik (1984), Review essay, 'The history of childhood and youth'.

6. See Hirst and Woolley (1982). Their account of the way various writers have dealt with 'feral' children is illuminating (p. 43-58).

7. The Gillick case is an illustrative example (Guardian 21 and 22 December 1984). The Court of Appeal's ruling that it was illegal for doctors to prescribe the contraceptive pill to girls under 16 without parental consent is an example of the 'licensing' of sexual practices.

8. For a full discussion of Durkheim and Weber on law, see Alan Hunt's (1978), The Sociological Movement in Law. It is this work I draw on here. See also Rheinstein's edited collection of Weber's writing on law, in Max Weber on Law in Economy and Society (1954). Further discussion of Durkheim's writing on law and its indexical relationship to forms of social solidarity can be found in Clarke M. (1976), 'Durkheim's sociology of law, and Cotterrell R. (1977) 'Durkheim on legal development and social solidarity.'

9. For collections of Marx and Engel's writings on law, see Cain and Hunt (1979) and Phillips (1980). The latter is particularly useful in displaying Marx and Engel's discussion of specific pieces of legislation.

10. The so-called 'capital-logic' approach. See Holloway and Picciotto (1977) and Jessop (1980; 47-50, 84-90).

11. The liberal jurisprudential theory that Collins has in mind is represented by H.L.A. Hart (1961) The Concept of Law, R. M. Dworkin, (1979), Taking Rights Seriously, L. L. Fuller (1969), The Morality of Law, J. Raz (1979) The Authority of Law, R. Unger (1876) Law in Modern Society (Collins; 147-149). See also, Hunt (1981; 53-61) for a critique of American jurisprudence.

12. Young and Kinsey (1985) 'Crime is a class issue', New Statesman, 11 May 1985.

13. For the divisions between common law and equity and for the structure and hierarchy of English courts, see Walker and Walker (1980) and Hood Phillips and Hudson (1977).

14. Pashukanis (1978) provides a pertinent example of the form of argument here:

> 'Capitalist property is basically the freedom to transform from one form to another, the transfer of capital from one sphere to another for the purpose of gaining the highest possible unearned income. This freedom of disposition inherent in _capitalist property is inconceivable without the existence of propertyless individuals in other words, of proletarians_.' (p. 127, my emphasis).

Whither married women, infants and the mad? It is this kind of essentialism that we are trying to counter by reference to inheritance, for example.

15. A few relevant examples here include the encyclopaedic Halsbury's _Laws of England_, Cheshire's _Modern Real_ Property, Latery, _The Law and Practice of Divorce_, Anson on _Contracts_, Bromley's _Family Law_, Bevan's _The Law Relating to Children_, Topham's _Real Property_. These books run into several editions (e.g. Latey 13, Topham 10 are examples I have to hand). Often as not, the author became part of the citation as modern editors revise and update according to current legislation and practice.

16. Judicial interpretation of statute is said to take place according to certain rules. 'Interpretation' is simply the process whereby meaning is assigned to the words in a statute' (Walker, op.cit.; 99). However, there is a process technically called 'construction' which 'is the process whereby uncertainties

or ambiguities in the statute are resolved' (ibid). The general rule that judges are required to follow is 'to ascertain the intention of parliament' (Walker; 102). The whole process becomes highly political when parliamentarians argue (as in the GLC Fares Fair policy) that judicial interpretation does _not_ accord with parliamentary intentions. For an account of how arbitrary the meanings attributed to statute can be, see two articles by Murphy and Rawlings (1981, 1982), 'After the Ancien Regime: the writing of judgements in the House of Lords'. _MLR_ 44 (6), 45 (1).

17. The technicalities of precedent are very complex. Principally it concerns the citation of a judgement or decision in order to justify a later case. There are different degrees of precedent, each more or less binding, and in the hierarchy of courts, precedents of superior courts are binding on inferior jurisdictions. For an extended discussion, see Walker (op.cit.; 129; 141). The theory of precedent rests upon an understanding that judges must abide by a rule of law; past judgements _per se_ so establish a rule which must be adhered to by later judges.

18. See, for example, Pat Carlen (1976) _Magistrates' Justice_.

PART ONE

THE INFANT; A MINORITY STATUS

"If then there can be a case where it can be for the advantage of one man to be under the power of another, it must be on account of some palpable and very considerable deficiency, on the part of the former, in point of intellects, or (which is the same thing in other words) in point of knowledge or understanding."

Bentham (1789) An Introduction to the Principles of Morals and Legislation

INTRODUCTION

The English legal system, from the earliest times through to the present, has drawn a broad distinction between the legal subject of 'full age' and the infant. This is the function of the age of majority; an arbitrary age line fixing subjects on either side of it. It is the prime division that we have in law clearly distinguishing between the adult and the child. Childhood formally ends when a subject reaches the age of majority. But in writing this difference the law simultaneously constitutes specific forms of social relationships between these structural positions which have profound economic, political, social and personal consequences for individuals allocated to these categories.

However, the age of majority renders only a crude distinction between adults and children; infants are further divided by notions of discretion and consent, drawn at various chronological ages - often gender specific - and which operate to make opaque the legal attributes of what comprises adulthood and childhood. Infants of a certain age are legally ordained with some adult attributes, whilst simultaneously being denied others. Infants can and could marry, but not vote; procreate legitimate children but not devise familial property to them; be old enough to vote but not freely participate in homosexual relations; be capable of violent sexual assault but be legally incapable of rape [1]; enter the labour market but not sign valid contracts.

The law's infant then is not a unitary category, but divided and internally inconsistent. One of the broad themes we shall address directly will be how the legal system creates and manages these internal inconsistencies.

Broadly, the legal subject of less than full age suffers two general disabilities, which the law often presents as 'privileges' it extends to those of tender years. Firstly, the dispossession of property. Secondly, personal subordination to the dictates of particular adults. Two other legal categories bearing similar disabilities - historically, the married woman, and the mad, are rendered child-like precisely because of their enforced economic dependence and personal subordination. This will be the object of our second line of analysis, to explore the incapacities of legal infancy and to indicate the basis of those incapacities, and to note how the law re-writes them over time.

A third broad theme acknowledges the legal system's capacity as an ideological system with a unique power and position to render class and age and gender specific interests as universal categories and values. Perhaps this is best illustrated by the manner in which the age of majority has been cast in law. Everyone becomes 'of age', but the means by which 'full age' was formulated had particular relevance for very few.

Finally, we shall address what is the most commonly experienced form of adult-infant relationships, that of the parent and the child. Unlike the psychological theorising of the relationship as a personal-affective bond, we shall be concerned with some of the harsher aspects of it, because the law's rendering subsumes parent-child relations as particular species of the generic guardian-ward relation. We asserted earlier that personal subordination is a broad characteristic of infancy. We shall argue that it is precisely through notions of guardianship, that the personal subordination of infants is secured.

We are in the last analysis dealing with legal categories which have social functions and social consequences. Like most legal rules and sanctions, we may well only become aware of the limits placed on social action when we run up against them. And yet their subtle effects extend beyond their mere coercive power because they enter social relations and individual consciousness at multiple points and in a variety of ways . To write about

the law is to reveal something of the underlying structures constituting what is 'the social'. Simply recognising that not all social groups have the power to make laws and enforce them, and that not all individuals have the necessary symbolic and material capacities to pursue their rights (or protect them) in the manner which the law prescribes, is a partial step towards understanding that law is not neutral either in its mechanism or effects. A particularistic study of infancy can only go so far in displaying the law's articulation with economic and political structures of power and authority. It cannot say it all and neither should it do so. It is the case, however, that the legal infant, the age of majority, notions of discretion and consent, legal notions of reason display patterns which can be wholly explained by reference to the unequal distribution of economic and political resources. A sociology of law, if it is to be a sociology rather than a straight legalistic account must acknowledge the social context within which legal systems are embedded. Trying to balance this against the need to tease out some of the technical details about the law's character leads to some awkward accommodations. This is perhaps one of the virtues of focussing on one particular legal category because it does allow us to acknowledge the complexity of the determinations at work in and through its construction.

To this end, we have consciously taken the law's categories to work with; as given, but not to be taken uncritically. Usefully, these categories tell us how the law does its work, signals something about the values and the social order that legal rules, principles and doctrines sustain and reproduce. This account eschews a straight legal history of the age of majority but it is unashamedly historical. Legal categories have a history, both in the sense of passing through time and in the sense of continuities and changes in the social effects they produce. If anything, what the study of legal infancy reveals is the longevity of the legal categories in which it is an embedded part.

INFANCY; A LEGAL ACCOUNT

> "The law of the thirteenth century knew, as the law of the nineteen century knows, infancy or non-age as a condition which has many legal consequences; the infant is subject to special disabilities and enjoys special privileges."
> (Pollock and Maitland II; 438)

Infancy in law is a 'technical' word; infancy describes that period prior to the age of majority and is given through a series of incapacities or exclusions. The denial of the right to hold property - in land or written transfer; the incapacity to be a full party to a valid contract (including marriage); the exclusion from public office; the incapacity to make testamentary dispositions - collectively describes the legal infant. The possession of these capacities conversely describes the 'full' legal subject. Proscribing the use of alcohol, tobacco, street trading, sexual relations to persons deemed to be under the age reinforces the separation of the infant and the adult [2]. Currently, the age of majority is 18 years (Family Law Reform Act 1969), though historically, it and the notion of infancy display remarkable transformations.

Putting systematic periodisation to one side for the moment, let us pursue the diversities of infancy observable in the history of the law. In the 13th century for example, we find the following:

> "There is more than one 'full age'. The young burgess is of full age when he can count money and measure cloth; the young sokeman when he is fifteen, the tenant by knight's service when he is twenty-one years old. In past times, boys and girls had soon attained full age; life was rude and there was not much to learn ... In later days our

> law drew various lines at various stages in a child's life; Coke tells us of the seven ages of woman; but the only line of general importance is drawn at the age of one and twenty; and the infant - the one technical word that we have as a contrast for the person of full age - stands equally well for the new-born babe and the youth who is in his twenty-first year."
> (Pollock and Maitland Vol. II; 438-39).

Infancy is a <u>general</u> condition attaching to the young and has meaning only in its 'contrast' to the person of full age. But let us pursue the 'difference' in Coke's (1645) writing on infancy;

> "Note that the full age of a man and woman to alien, demise, let, contract, is one and twenty years. Before this age a man or woman is called an infant ... and certain privileges he hath in respect of his infancy."
> (Coke, <u>1st Institutes</u>: 1818 edit:170).

A 19th century commentator elaborating on the different stages within infancy records:

> "A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, and may choose his guardian, and at twenty-one is at his own disposal and may alien his lands, goods and chattels. A female, also at seven years of age may be betrothed, or given in marriage; at nine is entitled to dower, at twelve is at the age of maturity, and therefore may consent or disagree to marriage; at fourteen, is at years of legal discretion, and may choose a guardian; and at twenty-one may dispose of herself and her lands."
> (Macpherson 1842;337).

Finally, in the 20th century context, we may consider the Latey Report (the White Paper preceding the 1969 legislation re-writing the age of majority), which had as its brief:

> "... to consider whether any changes are desirable in the law relating to contracts made by persons under twenty-one and to their power to hold and dispose of property, and in the law relating to marriage by such persons and to the power to make them wards of court."
> (Latey Report 1969;13).

These dispersed texts display the subjectivity of the legal infant through their various incapacities, incapacities which separate them absolutely from the full legal subject. Infancy is defined in the negative; a 'lack' of the capacities which are differentially distributed around the age of majority.

For something like 600 years, in spite of its historical fluidity, the age of majority functions in a similar manner; it becomes the point of origin of a legal classification whereby subjects emerge as <u>either</u> infant or adult [3]. The <u>process of allocation</u> to the structural position of adult and minor is based on an arbitrary chronological age line. By custom, through the courts and latterly by statute, it will be apparent that the age of majority has been fixed variously at 14, 21, and now 18 years; the legal disputes have focussed on <u>where</u> it should be drawn, not whether it should <u>exist</u>. The age line, juridicially determined, has specific, social, economic and political effects; determining and limiting, privileging and protecting, defining and distributing the possible social relationships of both adults and infants and thereby, contributing in a significant way to the fabric of the social.

But if the texts cited above display the continuity over time of the age of majority as a significant feature within the classification system of the law (thereby continuously producing and reproducing the subjects adult and infant),it is also the case that at certain periods (in the 13th through to the 17th century, for example,) there appears to be more than one 'full age'.

The age of majority, wherever it is drawn, does mark a formal rite of passage from status to another, from one generation to the next. It is a legal status which descends on the bearer with the coming of age. No acts of bravery or courage, no evidence of menarche nor any secret initiations or markings on the body are required, as in many other cultures. Nor does the attainment of adult status depend upon 'emancipation' (discretionarily given to children and slaves) from the potestas of the father, under Roman law (Pollock and Maitland II; 438). It signifies the de jure flight from 'perpetual tutelage'; though for women at least, that is a state of grace historically reimposed through marriage contract, and for members of the working class, resecured through the non-possession of the means of production.

Let us now explore more fully the character and form of infancy in English law. It will be apparent from the passages cited above that the legal infant is not the product of learned jurists debating what 'ideal' rights and protection should attend an undifferentiated legal subject called 'the infant' . Rather the process involved the discursive positioning of subjects in relationship to determinant theoretical (legal) objects. Infancy is constituted as a legal category only in relationship to discourses 'about' land law, tenure, contract, wardship and marriage. This enables us to understand the fractured and contradictory position of the legal infant. For, though the age of majority has a timeless quality - it is always already present in law- the specific qualities of infancy, the attributes of

which inhere in the notion of infancy can and do change over time. The character is determined by the particular combination of incapacities and privileges operative at any period of time, as we shall show here and in the following chapter. We shall now elaborate a more substantive account of infancy by looking at 3 distinctive historical periods. By this means, we can begin to map the specificity of the infant in English law, and discover which capacities are being distributed and the modality of the distribution process.

It may seem curious to devote so much of the following to the technical intricacies of feudal law, but we do so precisely because present day categories of adult and minor were either written by or in reaction to those early formulations. Moreover, these feudal categories are of considerable longevity. In later episodes we have eschewed any lengthy formal statements about what infants could and could not do for sake of brevity. Instead, we shall concentrate on the conditions under which the law reformulated the age of majority. This has the advantage of displaying the law's temporality; its categories, modes of action, and the interests it serves. The law has a rhythm not entirely consonant with the grand historical sweep theorised through changes in the mode of production.

CHAPTER ONE: 'THERE IS MORE THAN ONE FULL AGE ...'

Our focus will be with some aspects of the common law in feudal and early modern England, up to 1660; a broad sweep of historical time, a timespan somewhat alien to social and medieval historians, concerned with detailed accounts of local custom, social practice and institutions over much shorter periods. How we can then disregard their historical practices? With difficulty, and out of necessity but with some justification. For our theoretical object is legal infancy, signified most powerfully by an age line, or rather a plurality of age lines, one of which, the age of majority, has real import. We are not so much concerned with dividing historical periods by 'events' but understanding the conditions of existence through which the age of majority was constructed, and, how it continued to function long after those particular social relations changed.

In one sense, we enter the historical time that lawyers elaborate. They write out the common law rules as though chronological historical time did not exist. It is not important. Their time acknowledges only two periods; that time after a new principle or rule is elaborated and the period when the 'old' principle operated (be that only 10 days or 10 years). And if no new principle doctrine, rule or principle but only marginal shifts of interpretation arises, then passing centuries are of no consequence; infancy is a case in point.

We dwell on the common law because it is in this branch of the legal system that legal infancy was elaborated; not in law merchant, nor in borough courts, nor in the manorial courts, and only later by statute. If we look at present day books concerned with infancy, we are referred back to the common law's definitions of it [4].

The fundamental reason why the early formulations of infancy have their longevity, the reasons why the significant age lines remain unchanged lies in the character of common law itself, its power to impose its definitions in other branches of the law, and the particular circumstances allowing common law lawyers

to protect their own material interests and those of their clients through its courts and specific forms of action. As long as the common law was able to assert itself as the primary means by which landed property (to which political power and authority was attached) was to be regulated, guarded and preserved in the hands of those in possession of it, then it was able to float its definitions of legal relations and legal subjectivity into all other areas of the law. The period-isation here acknowledges a time when the common law's primacy was virtually unassailed.

As a discourse, the common law is a curious beast. In structure, its nature,comprises a complex interplay between case law settling specific disputes, by reference to specific forms of action (writs of trespass etc.) and by reference to precedents often as not set down in a few authoratative texts. In one sense legal discourse here is self-defining; an 'authority' is one that the legal system counts as an authority and legal debates, inflections of meaning, shades of interpretation rotate around a common core of 'given' authority. On age lines for example, we find a text such as Blackstone's Commentaries in the mid-18th century merely citing at length what Coke had to say nearly a century earlier, referencing in passing sub-stantive cases (which are more than likely cited Coke anyway). There is little dispute about relevant 'ages' or their legal effects;so for economy we have declined the practice of authorial and authorative overkill. Citing multiple texts saying much the same thing may well make an immutable case in law but hardly advances our understanding of the principles structuring the social relations between adults and infants.

1. The Age(s) of Majority

A brief digression. As a general principle under feudalism, the status of subjects for legal and civil purposes is determined by the individual's relationship to land; as a tenant, great or small, or as a landless labourer. Town dwellers are accorded a status, regulated by local custom not by common law. The law of status and the law of tenure are knotted together; the 'unfree man is an unfree tenant' (Pollock and Maitland II;359); the free man holds a free (though not necessarily 'freehold') tenure. Free tenures can be divided into three broad kinds (though each contain several sub-species); military, spiritual and socage . We shall be concerned primarily with military tenures; tenures held in return for services broadly military in origin (services including the provision of one or more foot soldiers, attending the lord's court, fighting personally at his side, or paying a cash equivalent, and, socage tenures. Tenures in socage are defined because they are non-military and non-spiritual. Services rendered were agricultural in origin; working on the lord's desmesne directly, paying over so much of one's produce as rent, or paying an annual sum in lieu of these putative services. Tenants knew with some certainty what their renders were to be from year to year .

Villeins, or the unfree, in contrast to the above 'free' tenancies are unfree because they hold unfree tenures. The difference is in many respects technical, and the lived experience of the free tenant holding a small quantity of land may well have been almost indistinguishable from a tenant in an 'unfree' plot. The difference resides largely in the fact that the free tenant could protect his tenure, have his disputes arbitrated in the king's courts; the unfree tenant could not. Being a tenant 'at will', the villein was required to pursue his legal battles in the court of his superior lord (even though this land was not protected there against the lord). Villein land was to become what we later called copyhold land; held from the manor and protected by custom, ancient

rights of possession, and local hundred and manorial courts, not through common (or the king's) law.All tenures had these things in common; depending upon the requisite services being rendered (in person or its equivalent in cash or kind), the entry fines being paid (at the entry of a new tenant, e.g. the heir succeeding the ancestor), the tenures were secure and heritable: they could not be freely devised, nor could substitute tenants be installed, nor could sub-tenants be adopted, without the consent of the superior lord (again, in practice, not without some fine or relief being paid). In the case of military tenures, however, the arrangement of collecting personal services or their equivalent was extended to (under the cloak of protecting the land from alienation by sub-tenurial subterfuge) controlling the marriages, wardships etc. of infants of sub-tenants. By contrast, military tenures whilst having more ways of collecting money from sub-tenants than socage tenures, were also regarded as more burdensome tenures than socage land holdings (i.e. superior lords could employ 'the seven great fruits' (Blackstone) of military tenure to raise cash at times other than crucial points in the life cycle (births, marriages, death) [5].

A sketch only of the relationship between tenure and status, but necessary, in fact central to any understanding of legal notion of 'full age'.

For the most important meaning in law of 'full age', arises from the age at which an heir could assume seisin (possession and use) of an estate in land. And so we can have until 1660, more than one full age; for military and spiritual tenures one and twenty years, for socage tenures, at 14 or 15. There is some dispute between authorities here. Coke argues that 'full age' is attained at 14 (1st Institutes; 9th edition 1685;88), as does Blackstone (Commentaries I; 461-462) on the ground that at this age, tenants of socage land pass out of guardianship. Pollock and Maitland (above) and Latey (1969;21) say 'full age' is acquired at 15. For our purposes, we shall assume the latter age, for the sake of consistency, and certainty: the age line is useful only in contrast to the military age.

By way of summary then, we can state the following:

1. Full age, the age of majority, is regulated by the form of tenure; for military tenure it was 21; for socage tenants, 15. These are the recognised ages at common law, for these are the tenures adjudicated by real actions in the king's courts.

2. Note the absences. Villeins become of age by custom, regulated through the local courts, but no age is specified by the major commentators. Serfs, the landless peasantry, and likewise the townspeople in one sense have no specified full age in common law for the assumption of a real estate in land is not at issue.

3. Land, regulated by common law, can only be held and controlled by those over the age of majority. In the case of land devolving, because of the death of an ancestor, to an heir, below the age of majority, whilst seisin rests with the heir, control and use of the land was assumed by the infant's guardian, until the attainment of (the appropriate) age of majority. Infants of whatever relevant age may 'own' but not dispose of the fundamental means of production (i.e. land).

4. Deriving directly from the legal problem of what was to happen to land destined for an infant, is the whole complex structure of guardianship and wardship - the system of personal subordination. The law of infancy and the operation of majority is actually much more obscure and opaque than points 1-4 suggest. There are a number of problems we have to address. Firstly, why did the common law settle upon these age lines. Secondly, the gradual submersion of the lesser 'full age' under the knightly age of majority. Thirdly, the 'full ages' of women as opposed to men. Lastly, the articulation of economic dependence, arising out of dispossession, with the system of personal subordination written through the laws of guardianship and wardship.

1. Why the ages of 21 and 15 were settled upon as common law full age remains speculative and obscure. For males in 'barbarian' Northern Europe, the Romans reckoned the age of majority at 15, when young men were able to bear arms (Latey op.cit.:21). Riche's essay (1973) argues similarly, as does James (1960). By the time of the Magna Carta (1215), men entered service as knights at 21 and were therefore able to hold knight's tenure. Legal historians have generally adopted the line that the age of majority rose as a response to changes in military hardware. The mounted knight, clad in heavy armour, it is argued, required a degree of physical strength acquired only after early youth. There may well be a practical claim in this line of analysis, for entry as a knight did bear the notion of military service - fighting for one's lord, taking part in judicial combat - as well as the ritual attendances at the lord's court. Commuting military service and personal attendance at court to cash equivalents (i.e. scutage) as a means of rendering service to hold tenure seems well established by the middle of the 12th century (Pollock and Maitland II; 262-76). Paying <u>scutage</u> - payments in lieu of military service was a means of rendering service in cash rather than turning up in service of the king with say forty armed men. The introduction of scutage may well have brought about the downward spread of military tenures with each sub-tenant liable for an aliquot part of a knight's fee (Pollock and Maitland II, 266-67). Whatever, the age of majority did not change with commuting of service to cash but retained its ancient meaning.

The scheme of things by which the great barons held a particular tract of land in return for supplying the king with a fixed number of mounted armoured knights seems to have been the work of the Conqueror. What is more striking is the fact that there were probably only 5000 such men. 'The whole feudal array of England would be in our eyes been but a handful of warriors.' (Pollock and Maitland II, 259). Whatever the weight given to the military age by the common law, the military 'full age' would have only directly affected a small part of the population; its more common effect accompanied the spread of land held by 'military' fee, rendered more generally in cash payments rather than in service.

For the 'common people' the 'rustic' age of 15 (Latey op.cit.;21) was the age of majority, the age at which they could inherit and take seisin of an estate in land . And this is probably true for free and villein tenures. That common folk were sufficiently able to take on and manage an 'agricultural' tenure at this age, to cope with the rigours of animal husbandry and breaking ground, speaks strength and skill but clearly of a lesser order than the demand of military combat. Degrees of maturity are being expressed largely in terms of physical strength (the ability to manage the sword or the ploughshare. But age itself acquires a symbolic value, not merely in the sense that elders are to be venerated because they are old, wise and experienced, but because the tenures to which each full age relates were hierarchically ordered. The noble tenures so called were predominantly military, though not exclusively so. (Blackstone, Commentaries II; 62 ; Pollock and Maitland II; 229;356).

The authoratative accounts of 'full age' and its origins strongly suggest that the classification of adult-infant, in the end, is based on two axes, one of physical strength, the second - only lightly touched on - being cognitive ability. The social construction, taking place and made effective through commonlaw classifications is determined by the system of feudal tenure, and is really an extension of the general principle that tenure strongly determines all forms of status.

2. Let us recall that socage tenants at 15 had proprietary rights in land. At this age, land could be inherited, the title passed and was held to be good. Rents and services could be collected from sub-tenants, if any, and tenancies protected in common law courts. To this extent, at 15, socage tenants were capable of owning, managing and reaping the benefits directly from the means of production. They are free of guardians.

But though

> "the tenant in socage has no guardian, he is still for many purposes a minor". (Pollock and Maitland II; 439).

Coke is able to announce, without demur from later commentators,

> "Note that the full age, according to common speech is said to be the age of twenty one years." (*1st Institutes* 9th edit.;79).

As in a legal and popular sense, the full age of tenants in socage was of lesser importance than the age of majority at 21. The submersion of the socage 'full age' under the knightly age of majority seems to arise partly through the way in which the land law dealt with proprietary rights. While there is little dispute that infants in the 12th and 13th centuries could have proprietary rights in land - the seisin passed to them - actual control and use of the tract was at the behest of the father, or guardian or superior lord, they could not alien or devise it. And this seems to be the position of a 15 year old tenant of socage land. Their possessary right seems to encompass only holding legal title, occupation, use and enjoyment. The other side of possession - the right to dispose - by sale or testamentary disposition - absolutely, was seriously doubted in Bracton's time (1250-58). Any sale, gift or other form of alienation could well be reviewed and reneged on when an infant reached the age of 21. Whether contracts signed by infants (in the case of land) were valid at the point when the infant attained the age of 21 was never entirely settled in law for several centuries after Bracton, but this is a matter which we shall return to below. In this manner it would seem that the knightly age was pressed upon the common law in general; full age meant that full possession obtained in the matter of land.

But the question must now be posed; where are the infants without property, where are the infants who inherited nothing but the privilege of having their labour appropriated? It is not too strong to suggest that they are invisible in the texts on infancy. As a comment on the law, the absence of the property-less infant gives considerable weight to the claim:

> "But here again we have a good instance of the manner in which the law for the gentry becomes English common law."
> (Pollock and Maitland II; 439).

In terms of the distribution of capacities, the right of 'full' possession of land becomes the key to understanding the common law age of majority. It is, in the last analysis, a class specific definition; the origin of why 21 is much less important than the means by which it was sustained as 'the age' of adulthood, and this was created and reproduced primarily in relationship to property - particularly, though not exclusively, land.

We can now begin to appreciate that land law is central to the production of the legal infant. The protection and orderly transmission of land from one generation to the next is perhaps the crucial determinant of the position of the infant in law. We should not consider this concern for the sanctity of land as a simple reflection of feudal or pre-capitalist legal discourse. For example, Latey's review of the evidence presented before the Select Committee displays exactly the same concern:

> "It has been urged on us that in relation to land law which is such a basic feature of our legal system, there must be no room for uncertainty; that is the basis of the bald provision in S.1.(6) of the Law of Property Act 1925, which creates an absolute prohibition against the holding by an infant of legal estate in land."
> (Latey 1967;99).

A striking statement, some 700 years on from the early formulations and settlements about the age of majority.

The age of majority, in sum, is a chronological divide bearing several messages about the infant. The line is riven with notions about physical strength, degrees of maturity, attainment of skills and assumptions about cognitive abilities that the infant lacks. Within the law, however, these assumptions are crucially orientated around a particular point - the land, and who will be in possession of it, direct its use, management and disposal. Full age means full possession - rights of 'ownership', use, benefit and disposal (as much would be allowed in a feudal system of tenurial occupancy). Infancy is status defined in common law by the exclusion from full possession of the means of production. In terms of intergenerational relations, the social relationship between the adult and the infant is profoundly economic (the old possessor, the young dispossessed), in which infancy emerges as a relationship of legally constituted dependancy. The cultural wrappings of lack of strength, maturity, skill and cognitive ability are not so much window-dressing but are the reference in which the common law shrouds the infant's continued status as an economic dependant, and as we shall see in later texts, continually calls forth to defend a quite arbitrary, class specific age line.

3. What the common law judges to be majority and infancy, draws primarily on the male point of entry to adulthood (the ability to carry swords and lances, to manage the plough). Given that its obsessive concern was with the destiny of land, and that the destiny of land in the laws of inheritance (see Part 2) was to be male heirs, with women taking only in their absence, then the universalisation of the male age line should be no surprise. But what of women and their passage to adulthood. The significant age lines are of a different order. Perhaps the clearest way of demonstrating this is to return to Coke. Writing of tenure by knight's service, he notes:

> "But if a tenant dieth, his heir female being at the age of 14 years or more, the Lord shall not have the wardship of the land nor of the body, because that a woman of such age may have a husband to do knight's service, but if such heire female be within the age of 14 years, and unmarried at the time of death of her ancestors the Lord shall have the wardship of the land holden of him until the age of such heire female of 16 years." (1st Institutes 9th edit. 1685;75)

Pollock and Maitland referred earlier to Coke's seven ages of a woman. According to Coke:

> "A woman hath seven ages for severall purposes appointed to her by law; as, seven years for the lord to have aid pur file marier; nine yeares to deserve her dower; twelve years to consent to marriage; until fourteen years to be in ward; fourteen years to be out of ward if she attained thereunto in the life of her ancestor; sixteen yeares for to tender her marriage if she were under the age of fourteene of her ancestor; and one and twenty yeares to alienate her lands, goods and chattels." (Co. Litt 78b, quoted in Pollock and Maitland II; 439).

For the female infant, legal subjectivity articulates to a different set of values. Whereas the male infant/adult divide refers to physical strength and common definitions relating to land law, for the female infant, life is periodised through the stages of marriage alliance; dower, consent, contract. Formally, there are two possible flights from infancy; attaining the age of majority, and marriage. However, customarily while the female infant moves out of wardship and guardianship earlier

than the male infant, she never in practice moves out of domination; the domain of the lord/ward/guardian merely precedes the dominion of the husband. The marriage laws, entailing for the married woman (under the doctrine of 'one flesh') meant an extended form of infancy for them (separation from property, loss of legal capacities to sue) etc.. The formal attainment of the age of majority in this sense does not necessarily mean the de jure and de facto acquisition of the legal capacities of the adult, unlike the male flight from infancy. Though we know specifically of no such instance, the common law permitted the marriage of a male infant at 14, to an 'adult' woman over twenty one, and for her to enter his dominion with her land and goods passing over to his ownership and control!

The female infant's legal subjectivity is considerably more complexly defined than that of the male infant, and, it can be argued, her age of majority is significantly less important given the multiplicity of the stages of infancy which she must pass, and the multiplicity of points at which her life cycle was regulated. For while the 'ages' of dower, consent, marriage etc. may be read as permissions or rights to do and act, the majority of female infants in practice had little control over these crucial moments (see Middleton 1981).
The significant moments, the 'ages' of the female infant, are constituted by the overlap of three complexly related legal discourses. Firstly, the one we are by now familiar with, contexts the female infant within the land law, as a dispossessed or putative tenant ('she may alien her lands, goods and chattels ... etc.). Secondly, heavily dependant on ecclesiastically ordained law, there are the ages at which she is participate in various stages of consenting to marriage. Thirdly, and intricately related to the above, she is constituted as a dependent subordinate through the complex law of wardship and guardianship (which includes the rights of parents and superior landlords to dictate her availability for marriage, marriage partner, and ultimately regulate sexual practices).

It is an intriguing question as to why the common law so carefully maps out the various stages of the female infant. The common law's concern was of course to reconcile two potentially competing social forces; on the one hand the superior tenant's interest in retaining control of tracts of land held from them and the services, dues or renders which went with it; on the other, the marriage contract, by which all a married woman's property devolved directly to her husband's ownership use and control[6]. On marriage, a husband potentially gained both property and labour services (directly from his spouse, and potentially from the couple's offspring); paradoxically, this represented a potential loss to a superior landlord, of property, services and renders, and labour services, not only of the woman but of her (potential) offspring. The other side of the contract, of course, was that for superior landlords or husbands, marriage accrued (potentially) a larger stock of labour, the possibility of legitimate children, who by the laws of inheritance, would provide a certain destiny for tenures in the future, and future labour services, and sources of renders in cash or kind. To secure all of these, in absence of parents as natural guardians, the law elaborated a complicated system of wardship and guardianship to oversee both the property and the body of the parentless infant (which included especially the control of marriage).

Condensing around the figure of the female infant, juridicially protected and stage-eased through life by the drawing of age lines, we begin to appreciate outlines of principles of structure and agency in the English variant of feudalism, to appreciate the intertwining of destiny of tenurial land, the status of individuals as present tenants of or future heirs to it, the importance of preserving (the feudal notion of reciprocal rights and duties) intact the present and future labour force on it, (producing their own subsistence and reproduction, and a sufficient surplus to pay for the incidents of tenures).
Land holding, law making and law giving - (common, civil and ecclesiastical) was almost an entirely male enterprise. Women appear, in judicial discourses at least, in two guises - as a threat (the means by which land might be diverted away from

its allotted destiny, through marriage) and as a necessity - through their procreative capacity, producing future heirs and future labour services. To this extent, the female infant is circumscribed by three systems of regulation; that of her parents, that of the superior landlord and finally the Church.

4. But let us now make these observations substantial. To catch the interplay of three integrated discourses giving the female infant its meaning, specificity and the social consequences arising, let us pursue briefly the 'ages' of women. We can usefully introduce here legal notions of discretion, consent, issues of wardship and guardianship.

> "Seven years for the lord to have aid pur file marier."

One of the 'fruits' of military tenure, the occasional raising of a 'tax' allowed the superior lord to demand from his sub-tenants to 'aid', a render of cash, at the marriage of his eldest daughter, and at the knighting of his eldest son (Pollock and Maitland II, 349-50). Majority for the male, marriage for the female bears the same meaning, leaving the absolute dominion of the father. That aid could be claimed at such an early age for 'the marriage' of the lord's daughter can only be understood by reference to medieval marriage laws and wedding ceremonies.

It had been settled by the end of the 12th century by theologians that the fundamentals of a valid marriage was the mutual consent of contracting parties (Outhwaite 1981, Hyams and Brand 1983, Searle 1979, Faith 1983). The Church would accept such plights, made at the Church door, at other public ceremonies, or in private (whether or not witnesses were required is not clear). Individuals of any status, kings to serfs were equally capable of contracting a valid marriage; no temporal official could invalidate it. No sexual intercourse was required to consummate the contract, no exchange of gifts were spiritually required.

The Church's view of what constituted a valid marriage clearly flies in the face of the feudal relations of enforced dependence and mutual obligations; individuals were 'free' to contract valid marriages, regardless of their parents' or landlord's wishes.

However, individuals marrying without the requisite consents, from parents or lords were burdened with two material threats; disinheritance by parents, disseisin or distraint of familial lands by the lord (Searle 1979). Common law and manor law would hold marrying without these consents as good causes for parents disinheriting potential heirs, and for lords to take the land of sub-tenants who permitted a marriage to take place without his prior consent.

This had a material bearing on the age of marriage. Espousals, the giving of consents between contracting parties, always providing the interests of lords and parents were being served, appear to take place, if necessary, (to secure alliances of property and power) below the age of seven (Pollock and Maitland II; 392), that is below the age which the Church traditionally accepted individuals to be competent of taking communion and of having sufficient capacity to understand Christian doctrines of good and evil. Equally, marriage in any one of its stages, from the first espousals, through to presentation at the church door, could well be prevented by lords wishing to retain the profitable right of wardship, through to the age of 16 for women, 21 for men (in the specific case of military tenure).

Common and manor law resecured what canon law potentially took away, that is the rights of parents and lords to control the entry of infants into married status. And it is here we begin to see the interplay between the control of property and the control of persons. For in controlling marriage, lords and parents controlled who was and who was not to be recruited to the family economy of landholding and labour.

In this respect the common law is quite clear; those holding by military tenure absolutely require the lord's permission (granted directly, or given to parents) to marry, and this was so for those holding directly from the king as for lesser knightly tenures. Symbolically, it acknowledges the services due to the superior lord; materially it protects the lord's profitable rights (which could be sold or traded) in the wardships and marriages of those in service to him (see Blackstone II; 67-68; Pinchbeck and Hewitt I; 1969; Chap. IV).

For the 'unfree' those holding 'at the will of the lord' and governed through manorial courts, villein marriages required not only the lord's consent, but many also paid merchet. Merchet was a payment made by a dependant peasant for a licence to marry off his daughter (Searle 1979;2). We can only acknowledge briefly here the debate about merchet in Past and Present about the character and function of merchet by medieval historians. The areas they contest and the positions they take signifies multiple meanings and functions of merchet and its importance. Summarily, Searle (1979) argues that merchet is 'about property'; merchet was collected only from peasants with substantial holdings in land. Firstly, as a form of tax on doweries of land and or chattels which removed from the lord some portion of his material wealth. Secondly, merchet functioned to control the entry of husbands on to his sub-tenancies, ensuring that they owed fealty to him, and no other lord. Thirdly, payment of merchet was held as good proof, that a villein actually held his land 'at the will of the lord' and not by any free tenure (a confirmation if you will of subject and dependent status).

Hyams and Brand argue that merchet was a means by which a lord could add small windfall taxes to his coffers; merchet was one amongst several other profitable rights which a lord may choose to exercise, and therefore worth collecting on substantial holdings. It also had, they argue, a further function. In face of the Church's construction of marriage as a contract which

could not be invalidated by lords temporal, the marriage fine served to restrict the movement of villeins on to and off the lord's desmesne.

Faith (1983) explains merchet in terms of the wedding ceremony; the merchet was a form of licence, publically 'registering' the marriage of villeins, a means of signifying the lord's approval. She confirms with further substantive evidence, that merchet functioned to provide good proof of the distinction between villein and free status.

These differing interpretations collectively give us some sense of the stakes involved, firstly in the espousals, in the confirmation of marriage (if any) at a later date. The personal subordination of minors is indissolubly linked with adults, parents or lord, pursuing their separate and diverse interests in tying land into the family, and families into the land.

Middleton (op. cit.) addresses the issue of the seigneurial control of marriage from a slightly different aspect, lightly but interestingly addressed by Searle. Marriage as construed by the church, as regulated by the lords temporal and as viewed from the community begins to impose norms about licit sexual activity. There were formal means for fiscally punishing premarital fornication (the leyrwites or lecherwites) by young women (Searle op.cit. 26-29, Faith op.cit.; 147). Middleton suggests that young women were doubly bound and doubly controlled in their sexual activities by parents and landlords, again both pursuing their interests in the land-line nexus.

We have strayed some distance from aid pur file, but we do so to demonstrate the relative unfreedom of the infant and how limited was the room for manoeuvre. Larger interests are at hand within the construction of chronological ages. Issues of property, power and authority are the proper means of seeing the relations between generations. In a real sense, part of the

notion of property is that of the body of the infant ; as a possession owned and controlled by parents and seigneurial lords. The capacity to consent to marriage, in reality is a capacity only exercised within the limits defined by parents and superior lords.

"... nine yeares to deserve her dower"

Dower functions primarily as a form of pre-mortem inheritance; giving land, chattels or cash to a daughter on marriage takes away from the stock of familial goods, and removes from the heir possessions which would formally become his on entry to his ancestor's estate, however great or small (Searle op.cit.). Several problems immediately attend us. Women had proprietary rights, perhaps stronger claims to familial property than we commonly assume. A sister of a deceased heir took the inheritance to the exclusion of her uncle (a dead ancestor's brother) she could be a land holder in her own right, and could alien (by sale or testament) goods and chattels - but these rights have two provisos. Firstly, this applies to women of full age; secondly, to feme sole - the unmarried woman.

If a girl took dower at nine, to whom did it belong; did she have proprietary rights in it? The ownership of dower was and remained a moot point in law (see Pollock and Maitland I;420-28). Prior to the common law settlement of the division of property in marriage (the rules seemed fixed by the middle of the 13th century) customarily what women took into the marriage, they took out at its dissolution, with the husband having the use of and fruits of such property (Pollock and Maitland II; 423). As for 9 year olds; it is unlikely they had anything like proprietary rights in full. A transfer of land would be deemed invalid, though she may have been able to give, by her own hand, a chattel. As for the dower, the marriage contract after the middle of the 13th century, the land or goods would pass to her husband's possession and use, if not directly (because he may well be under 'the age'), then mediated by the husband's guardians.

Given these constraints, perhaps we should conceive dower at nine as a stage in the affirmation of the espousals. For the transfer of property was a mark, a necessary sign that the contract was approved by parents and landlords who were now both prepared to let property pass into a new household.

"Twelve yeares to consent to marriage".

The age of consent is inextricably bound up with the age of discretion. The lines are of singular importance in the grading of infancy, second only to the age of majority, when infancy ends. So for the moment, we shall address consent and discretion together. For females, as Coke notes, "Consent" is construed in terms of marriage. In common law male infants attain the age at 14 years, which is located as the age of consent to marriage, and, the 'years of discretion', (e.g. Coke 1st. Instit.;123) There is no authoratative dispute on this point.

Imbricated in the law's construction of consent and discretion are several tangled themes which we shall attempt to tease out. Firstly, the lines signal the age of valid marriage. Secondly, they address issues of physical and mental maturity. Thirdly, they address issues concerning validity of contracts. Lastly, the age lines address a partial move away from the 'imbecilic' private life of the infant to a stage where infants acquire (merely by achieving a certain age) the requisite capacities to hold some public offices (apart from the proprietary rights of socage tenure).

The mode of construction of discretion at common law is signalled by the legal capacities the infant assumed on attaining the age of 14 years. Let us be clear what an infant at the age of discretion could do. Bingham (1816) lists the following:

1. "... an infant is capable of such offices as do not concern the administration of justice, but only require skill and diligence; and these he may exercise himself when of the age of discretion, or they may be exercised by deputy, such as the offices of park-keeper, forester, gaoler etc.".

2. They might be a lord of the manor and grant copy-holds, not withstanding their 'non-age' for in this matter they are only instruments of custom.

3. They might consent to a valid marriage (at 12 years for girls, at 14 years for boys).

4. At 14 years, they might be sworn in as witnesses.

5. At 14 years, the infant moves out of wardship in socage tenure and may choose their own guardian.

6. Though there is some dispute here, female infants at 12 years, and male infants at 14 years may make wills of personal property.

7. They could bind themselves as apprentices.

8. They could contract for the supply of the necessary means of life but not luxuries.

9. Over the age of 14 years, in criminal law infants were regarded as having 'full' criminal capacity therefore stood their trial, and could be executed for crimes committed (see Part 4 for an extended discussion).
(Bingham; 57-100).

Bingham's later text, like Coke and Blackstone before him, asserts without demur that the age of discretion is 14 years. The female infant in all but two cases (marriages and wills) was governed by the same line. Like the age of majority, the age of discretion is by extension the male age, even though in significant areas, the female line fell at an earlier age. This however is the work of the common law system. It functioned to universalise one age as the age of discretion, when the earlier ecclesiastical law, from which the very notion of consent and discretion were drawn, celebrated a variety of different ages of consent; its very imprecision being at odds with common

law's perceived need for a clear and concise line. Moreover, it is to the pre-history of ecclesiastical law we must turn in order to understand why infants at 12 and 14 respectively were considered to have limited capacities to treat, through the law, with each other and with 'full' legal subjects. The key area where the common and ecclesiastical systems met was marriage; the first being primarily concerned with the sanctity of the contract, the second being concerned with licit sexuality and procreation - both systems together embody the regulation of property and control of personal relations. The age of discretion crucially mediates the legal subject's position in relationship to both objects, which is why it is such a crucial point in infancy.

To reiterate, simple consents given at espousals in the Church's eyes constituted a valid marriage (see also Brooke 1981, Ingram 1981, Flandrin 1976). At common law, the marriage, because it was a contract, could be valid only if the parties were at the age of consent (Blackstone I; 436-438). Blackstone sets out the position so:

> "By common law, if the parties were of the age of consent, there wanted no other concurrence to make the marriage valid; and this was agreeable to the canon law (ibid)".

How then did the age of consent become 12 and 14 respectively. How was this to accommodate the ecclesiastical doctrine that two consenting parties of whatever age could contract a valid marriage? The Church and the Kings's law after all were regulating two quite separate things; in the first case an unlawful marriage was a sin, in the second, an unlawful marriage constituted an invalid contract.

The main lines of canon law doctrine are well set out by Pollock and Maitland.

> "At the age of seven years, a child was capable of consent, but the marriage remained voidable so long as either of the parties to it was below at which it could be consummated. A presumption fixed this age at fourteen years for boys and twelve for girls. In case only one of the parties was below that age, the marriage could be avoided by that party but was binding on the other."
> (Pollock and Maitland II; 390).

And they add, "this doctrine was accepted by our courts" in the 13th century (ibid).

Note the ecclesiastical construction, consent plus consummation. If the marriage was not consummated, the union could be dissolved, for it was reckoned by the church never to have been completed, and this provided the only sure claim for a divorce in ecclesiastical courts.

Common law adopts the same structure but infers somewhat different meanings, whilst adopting the canonical presumption about age.

> "The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgement in parties contracting; a fortiori therefore it ought to be avoid this, the most important contract of any. Therefore if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and when either of

> "them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court."
> (Blackstone I; 435-36).

What the canon law takes as its referent in the second stage, the capacity to consummate, the common law renders in terms of attaining reason. The age of consent in common law marks the passage out of 'the imbecility of judgement'. And by legal logic, the age of consent in marriage (which it declares at 12 and 14 for female and male infants) because marriage is a contract, thereby infants are consecrated with sufficient capacity to enter a limited range of other contracts. So at 12 and 14 parties consenting to spousals at an earlier age simply had to agree or renege on their earlier agreements for the marriage to be valid in common law. And there is considerable evidence that some chose the latter.

As an example, take the following. John Bridge aged 13-14, had been forced into an espousal with Elizabeth Ramsbotham, aged 11-12, to save his father's bond. When the time came for her consent to the marriage, she refused, arguing that he never treated her lovingly, and recalled:

> "...the first night they were married, the said John would eat no meat at supper, and when it was bed time the said John did weep to go home with his father ... Yet nevertheless, by his father's intreating, and by the persuasion of the priest, the said John did come to bed to this respondent in the night, and there lay still till in the morning, in such sort as this deponent might take unkindness with him, for he lay with his back to her all night."
> (F. J. Furnival, Child Marriages, Divorces and Ratifications ... 1561-66, quoted in Outhwaite op.cit; 9).

Ingram's (1981) essay on spousals litigation 1350-1640 notes a declining number of cases over the period. However, throughout this period, church courts were confronted by plaintiffs from all social statuses (apart from the very rich and the very poor) seeking adjudication on the status of their spousals union. Because the church allowed a variety of ceremonies, words, customs, recognitions and promises (its liberality causing no end of uncertainty) equally to constitute a marriage, it was possible on attaining the age of consent (and later) to go before the church courts and overturn the simple consents at espousals, to unbind oneself from one's child-spouse. Or it could be a means of affirming in law, what was already known by the community, that two people were in fact married .

The point at which parties were able to ratify the consents given at earlier espousals was a point of considerable tension between the church and the crown, between children and their parents. The church's view that consent between contracting parties was all that was required to form an indissoluble union, flies in the face of temporal authorities concerned to control marriage because it involved (potentially) the devolution of land. The church's construction of consent did give considerable discretion to 12 year old girls and 14 year olds boys to marry against the wishes and interests of their parents and those in seigneurial authority.

We acknowledged earlier that against the church and common law's recognition of infants capacity to consent to marriage, there were the formidable powers of regulation by disinheritance, a case where social facts could run against the tide of judicial acts. We know that where it suited parental interests, infants well under the age of consent were 'married' to further the political and property interests of parents and seigneurial authorities (e.g. Pollock and Maitland II; 398-399: Furnival op.cit.). Can we judge with any certainty that canon and common law rights available at 12 and 14, were acted on immediately.

Stone would argue no; it was rare, he states, for infants to run against their parents wishes, until the end of the 16th century, (Stone L. 1977; 183). Taking the demographic evidence gathered by the Cambridge Group for the History of Population and Social Structure (using the variety of methodological tools involved in 'family reconstitution'), Laslett in sum argues that it was uncommon for women to marry when very young. He argues that one of the characteristics of Western marriage was the lateness of the age at which women first married (Laslett 1977; 39). He continues (drawing on a variety of historical demographic evidence) "It is accepted that no country in the West had ever had mean age at first marriage for woman as low as 20 years, or at least for no sustained period of time...". (Laslett;40). As far as we can discern (and we must acknowledge some of the problems of 'aggregation' hiding diversity of ages at first marriage) what the law gave through the age of consent and discretion, other social processes instantly removed.

One factor which accounts for this, certainly in the early modern period (and probably in feudal times c/f Laslett;48) was that while infants were 'of' the family of their natural parents, they were not necessarily 'in' it. From the age of about 10 years onwards, the majority of infants (of whatever status) probably moved into other adults' households as servants, apprentices, companions, boarders, lodgers etc. (Laslett;43-45: Flandrin op.cit;61-65). The infant's relationship there was more than a labour relation; entering the potestas of the patriarch meant that he controlled the possibilities of sexual liaison as well as the possibilities of marriage. A second factor, not to be discounted, was the custom of marriage being formally sealed only when the dower changed hands (Ingram op.cit.;46), indeed being an 'economic pre-requisite' (Flandrin) for marriage. For female infants without land, or whose parents could not provide some small chattel, many years of servitude were required to amass even the small capital sum for a marriage dowry (Flandrin op.cit.; 184-85). These then are some of the

underlying explanations of the dissonance between the common and canon law age of consent and the demographic facts, or at least as much as we know of them. To this extent, the common law and ecclesiastical authorities were mapping out structural spaces, located by the logic of their own ideologies, having little relevance to the majority of the population.

Underlying and justifying the age of consent and discretion are the referents of maturity. In the church's view, maturity reads as sexual maturity, whereas the common law operates with notions of rationality - a measure of which is attained (by quite circular argument) at the age of discretion (anyway defined by the law). Our first observation, that the crown simply adopted and adapted for its own purposes the ages presumed at canon law indicates the fusion of two quite separate discursive orders embodied in the age of discretion.

Ecclesiastical maturity is entirely embodied in capacity to consummate the marriage union. However, sexual practices in marriage had to serve the ulterior purpose of procreation (Middleton op.cit.; Flandrin op.cit.), a possibility only after the onset of menarche and puberty (and further evidenced in the declaimations against pre-marital fornication, concubinage, anal intercourse and contraception). We cannot say with any certainty whether the ecclesiastical imputations about the age of sexual maturity was grounded in reality. Laslett's essay on the age of menarche speculatively draws some conclusions about Western menarche, the onset mostly occuring between 13 years and 15 years (Laslett 1977; 227). However, the ages of consent do provide us with some idea about ecclesiastical views on licit sexuality and sexual practice. Moreover, it provides us with an explanation as to why consent and discretion are distributed at gender specific ages. The church's discourse on maturity is precisely about the capacity for biological reproduction, and its ages approximate the lower limits of that capacity.

The purely naturalistic and biological ages in canon law are taken up in common law, but reworked as approximations of marital aptitude and cognitive abilities. The 'code' word in common law is 'imbecility', a quality (asserted but never fully explicated) distributed around the age of discretion, which significantly is drawn at 14 years, the male line of maturity, ergo the female infant could consent, but not bear the capacity of discretion. Discretion subsumes consent; to have legal capacity of discretion reads off necessarily as possessing the capacity to consent. Maturity in common law signifies the attributes necessary to be a party to a contract (marriage, apprenticeship, supply of necessities but not luxuries). It marks the partial acquisition of legal 'reason'.

Under a common ideology of consent, both systems were able to reconcile their separate logics. Agreeing upon a staged entry into a union which both systems counted as valid, there could be little dispute and no contradictions between the union comprising freely consenting parties entering a binding personal and affective relationship whose primary motif was procreation (the church), and the union premised as a contract entered into between free and equal legal subjects (the law).

What the ideology of consent clearly spells out, and a reason why 'the age' is of considerable importance, is the fact that both systems posit the infant as a subject with attributes of rationality, and a limited power to enter one binding contract (marriage) without the intercession of, nor guarantees from adults. It marks out in theory, a <u>de jure</u> space for autonomous decision making, potentially free of parental and seigneurial control. But what is also abundantly clear, is that temporal authorities, through the mechanism of the common and manorial law also had the means to delay the effectiveness of the capacity to consent, and, through wardship doctrines (see below) to extend infancy until the full age of 21 years.

Moreover, the ideology of consent, working through canon-common law accommodation over marriage ('the basic contract' - Blackstone), has its effects in the sphere of contract law and the rights of infants to assume a limited number of public offices. Not all infants were the recipients of the law's beneficence, however.

For female infants, the possibility of ever moving out of infancy, in the sense of being economically and personally 'free' of adult (male) control was doubly reduced by the loss of legal autonomy on entry into marriage, which paradoxically, the common and canon law construed as a means of stepping out of infancy. Furthermore, as Pollock and Maitland remind us, women of full age are absent from the landscape of public offices. The proprietary rights extended to _feme sole_ did not qualify her as juror, justice, steward or bailiff. We cannot suppose then that female infants ever became 'park keeper, forester or gaoler', even after attaining the age of discretion and thereby acquiring the necessary 'skill and diligence'.

The common law doctrine of validating unions by accepting the mutual consents of those of sufficient consent never entirely solved the paradox embodied in the female infant heir and the threat she posed to 'familial' property. She could marry _without parental consent_, and the common law would accept the validity of the contract. It took statutory intervention (4 & 5 Ph & M C.8; 1557) to overcome the common law's inherent contradictions. This Act made it unlawful for 'any person or persons to take or convey ... a maid or woman child under sixteen years, out of or from the possession or custody or governance, and against the will of the father of such maid ... (or his testamentary guardian)"(ibid.: see also Blackstone I;437). The head notes of the act make it quite clear who and what was specifically being protected, and what it was against. Legislative concern was with

> "... maidens and women and children of noblemen, gentlemen and others ... having left to them ... lands, tenements and heriditaments, or other substances in goods and chattels, for and to the intent to advance them in marriage (for they) sometimes approached, entreated by persons of lewd demeanour ... that for rewards buy and sell maidens and children, secretly allured and won to contract matrimony with the said unthrifty."
> (4+5 Ph. and M.C. 8).

The entrapment of female infants into clandestine marriage,(pre-1753), itself a problem for the rich, provided the legislative initiative which required all female infants under 16 to have prior consent of parents or guardians, simultaneously resolving some of the contradictions of the common law's doctrine of granting marriage by the infant's consent only. Hence the nobility was able to remove at a stroke, not only a potential threat to their estates, but to require their consent before a daughter married, thereby formally extending parental control and marriage. No such impediments were placed on the male infant.

Though we have been addressing issues here in discourses about marriage and age being written and solidified by the middle of the 13th century, the principles then set out remained almost intact until 1929 (Bromley 1976, 5th edit.; 30). The principle that on reaching puberty (the legal age of which was 12 and 14) either party could avoid a union entered into at an earlier age, was overturned by the Marriage Act 1929 (Bromley op.cit; 30-31). This statutory intervention required both parties to be over 16 years of age. Secondly, any marriage to which either party was under the age was void and not merely voidable (Bromley ibid).

The considerable autonomy that the common law allowed infants in choosing their marriage partner was interrupted only by statutory intervention, primarily to protect infant heirs against clandestine marriages which endangered the transmission of familial property down the line.

"... out of ward ..."

> The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the proper person to educate and maintain him in his infancy."
> (Blackstone I; 68).

Blackstone's pungent declaration neatly encapsulates several aspects of wardship. It was a profitable incident arising out of holding tenure of military lands. The parentless infant heir (heir, strictly speaking refers only to those with an inheritable claim to real property) entered the wardship of the lord from whom his ancestor's held their fee. During the infancy of the heir, the lord enjoyed any income and profits from the heir estates, but was equally bound to provide the necessities of life, offer protection and provide the rudiments of an education appropriate to the heir's status. These are the bare outlines of a very lengthy and complex position in common law, sufficient at this point to suggest the nature of the social relationship between the guardian and ward.

One futher important principle. Having the custody of the ward's body and estates, the 'military' guardian could sell the marriage of his ward, though the marriage could not be of a disparaging kind (i.e a free person could protest a binding union with an unfree subject). (Pollock and Maitland II; 318-319; Blackstone II; 70-71). A ward could not marry without the lord's consent, and by the Statute of Merton (1236), lords were given efficient remedies to protect their interests in controlling the marriage of their wards (Pollock and Maitland I; ibid., Blackstone I;71).

The selling of wardships and marriages, put simply, meant that the guardian was paid a sum, no doubt fixed by market forces, by an outside party wishing to enjoy the profits and use of the infant's estates, or in the case of marriage, a sum paid for

the privilege of entering an alliance with an estate of land. It was on these common law principles, that Henry VIII was able to erect the whole corrupt assemblage of the Court of Wards in 1540 (Pinchbeck and Hewitt I; 1969;59), enabling the Crown to tap the revenues of the feudal ward and marriage market .

At best, the parentless infant heir was a pawn in the game of marriage and property alliances, at worst a mere chattel to be traded for the best profit. The common law rights of military lords served to invest military tenures with yet another profitable 'fruit' through the horse-trading of wards. But Henry VIII's statutory intervention (in part, a response to the appropriation of ecclesiastical lands) provided the machinery for the Crown to raise revenues (the Court tended to set the exchange price at a ratio of the annual value of the ward's land) but it also became the institutional means for a larger number of speculators entering the market, not for the purposes of alliance but for short term speculation (Pinchbeck and Hewitt I; 61-62). Moreover, officers of the Court made considerable profits out of their unique position in the 'negotiations' (Pinchbeck and Hewitt I; 61).

The early history of wardships allows us to grasp several themes which re-emerge in slightly different contexts in later parts of this work.

1. It is the infant with property which is subject to the attentions and protections of seigneurial authority, the Crown and the common law. There is nothing to suggest in the early law of wardship that lords or the Crown expressed any interest in wardship (the reciprocity of pecuniary privileges in return for protection) of the bodies of the landless infant (Pollock and Maitland II; 445).

2. The relationship between the guardian and the ward is both an economic and personal relationship, in which a ward is subordinate to and dependent on the guardian until a ward reaches the age of majority. Parent-child relations were regarded in law as a species of the guardian-wardship relationship (Blackstone I;460-461).

3. Guardianship as profitable right, where the guardian has rights over the use and profits of the ward's land, is extended to cover notions of couverture in marriage. Thus, we have a homology between the adult guardian-infant ward, and, husband and wife (Pollock and Maitland II; 444: Blackstone II; 67).

4. The presumption that the Crown was the guardian above all guardians, and should protect those who have no other protector, and thus it is the king's courts, resting on the king's perogative and delegated authority, which are to oversee the parentless infants and the mad (Pollock and Maitland II; 445).

5. To be out of wardship implies being out of the direct control of seigneurial, parental and Crown authority, to have the capacity to pursue economic and personal relations free from these supervening powers. It is one of the fullest descriptions we have of what the law constitutes as a 'full' subject. In the strongest sense, the meaning of infancy in law bears notion of being subject to the will of the parent - natural or surrogate. And for the infant heir to a landed estate (held by military tenure) the law cannot conceive one being 'out' of ward.

The timing of the passage out of wardship therefore brings into play the interests and values of those profitably holding infants in wardship. These timings are somewhat different for wards of tenure by military fee, and socage, so we shall deal with the latter below. For the landless, they were never strictly in wardship, though certainly not free of adult authority. Clearly, the longer the guardian had the profitable rights of infant's estate the better for him. Hardly a burdensome incident of tenure. As a ward moved out of guardianship, either

by attaining full age, or by marriage, the lord was entitled to collect as his due a fixed portion of the annual value of the land (Blackstone I; 69-71), one of the occasional windfall revenues collectable by military lords.

Male infants as heirs to military tenure moved out of wardship at the age of majority. Marriage appears to be no release because by common law they could not take seisin of their estate(s) until attaining the full age. Why the age of infancy ends here we have discussed earlier, so we shall pursue it no further. The late passage out of infancy here can be judged either in the law's terms, as the age which has to be reached before an infant can assume the onerous responsibilities as knight, or, read as a chronological line drawn quite advantitious late for the guardians of such wards.

The age at which the female infant moved out of ward is somewhat unsettled. Blackstone argues that she moves out of ward at 16 years and 'takes the delivery of their lands out of their guardian's hands' (Blackstone II; 68). Macpherson, like Coke, argues that a female heir could remove herself at 14, though seigneurial control could be extended by another two years in order to find a suitable marriage partner (p. 9). Pollock and Maitland's review of medieval authorities owns up to some ambiguity; it was unclear until the middle of the 13th century whether wardship ended at 14 or 21 years (Pollock and Maitland II; 320). Later law draws the line at 16 years for certainty (see James 1957;4). One thing they are clear about, marriage with her lord's consent put an end to wardship. However, she moved sideways, from the guardianship of the lord to the couverture of her husband.

The technical intricacies of the female infant moving out of ward signalled in the variety of ages above, speaks of the tangled interests focussing on the body and the property of the female ward. Judicially, the female infant could move out of the lord's dominion several years earlier than a male ward,

(they could marry at 12, take their lands as feme sole at 16). It was clearly in seigneurial interests to marry off his female ward, to forge the best property and political power alliance possible, to secure the future interests of his sub-tenancies, while he had the power and judicial authority to do so (i.e. before the infant reached 16 years). On the other hand, delaying the marriage as long as possible meant his continuing profitable rights in her estates. A further consideration of course was the production of heirs and offspring to provide a secure destiny and continuing labour services for his lands; the earlier the marriage, the greater the possibility of producing offspring. Note that these possibilities refer to the seigneurial interests; profitable rights of guardianship do not permit the later constructions attached to the relationship wherein the object of the guardian-ward relation was the welfare and interest of the infant.

The wardship of the female infant allowing ultimate seigneurial control of her marriage means, of course, the patriarchal control of female sexuality. Guardians were given in law specific rights to protect their wards against 'ravishment' (clandestine marriage, seduction), (Holdsworth Vol. 23; 3rd edit. 1923;512). Ravishment writs were issued as offences against the guardian as an intrusion on his profitable rights in property and the potential labour of his ward. But the writs also gave considerable formal leverage or guardians to control the sexual relations of their wards.

Thinking through the guardian-ward relationship, we can only conclude that it continues by other means, the law's subjugation of the infant to the control and authority of adults other than their natural parents, as though they were their parents. Whereas canon law justifies filial obedience through biblical references to the divine and natural order, the common law's continued concern is to protect the property of landholders by handing over to them the custody of the body of the ward, but drawing on that early and more ancient theme of filial obedience. The locus of the law's concern with the female infant

is with her potential as marriage partner, capable of procreation, and this theme resurfaces strongly through the seigneurial control over their wards' marriage, and the potential problems it poses for the continuing land-line nexus.

Seigneurial control of the parentless infant, set out in common law principles, universalises one significant characteristic above all others. The destiny of the infant's body and property is to be decided by the patriarchs; the lord takes control of the heir ahead of a surviving mother (Pollock and Maitland II;320); their marriages are his to give or sell for his profitable right; their wardships are for his benefit; the marriage alliances are his to negotiate. The natural mother quite simply disappears in the early law on the wardships of infants who were heirs to military tenures.

There were concerted attempts in the early part of the 16th century by landholders, especially the bourgeois purchasers of noble estates and monastic lands (Tigar and Levy 1977; 202-203) to remove the feudal incidents of wardship, dower, marriage etc. attached to their purchases. Common law lawyers devised means to escape the aids, reliefs, dower etc. by creating equitable estates in land (Topham (10 edit.); 1947; 77-81). Land was conveyed to a friend or trust but secretly the uses and benefits belonged to a third person - the ancestor's heir, wife or other party (see Topham op.cit.; 79). Such manoeuvres considerably reduced the potential cash income of superior landlords and were thus clearly against their interests. It also meant a loss of revenues to the Crown (Tigar and Levy op.cit.;209). In combination with the gentry and the common lawyers in the House of Commons, Henry VIII passed the Statute of Uses. Feudal privileges and incidents were resecured, but at a price. Persons entitled to the benefit of lands conveyed became the legal owner (thus allowing freer transmission of property);

transmissability of land by will virtually ended; finally, the Statute 'preserved to the common lawyers their mystical domain of real-property estates in land as well as the technical and profitable delights of conveyancing',(Tigar and Levy; 210).

The Statutory solution to common law contradictions preserved for the moment the ancient privileges of military tenure. and seigneurial control over wardship and marriage. Already, however, we are beginning to see the decline of the iron grip of common law rules on real estates, through the intervention of statutes and by the landed gentry pursuing their cases through equity in the Chancery Courts. And it was in these sites that the later definitions of infancy, guardianship and wardship were to be determined.

Socage tenure did not involve the burdens or privileges of wardship and marriage. The parentless heir did not become the chattel of seigneurial authority to be traded on the market. An infant's estates and person fell to the next of kin who could have no claim on the inheritance (i.e. the mother or her kin). Guardianship in socage did not bear the same meanings we outlined for military tenures. It was not quite the same profitable right. Neither the marriage nor the wardships could be profitably sold; if they were devised the guardian had to 'account' to the ward for any money raised in the transaction, which had to be returned to the ward, at the time they moved out of wardship. As did any profits arising out of the ward's estates over and above the expenses incurred on the ward's behalf.

Wardship in socage ceased at fourteen years of age (Blackstone II; 88). At this age, infants could choose their own guardian (a necessity if any property was to be disposed of on behalf of and for the benefit of an infant). The comparison here with military tenures is quite striking and confirms a general principle: that which the common law most highly values it protects

by delaying the passage of infants into adult status. In the case of the infant without property, they are simply absent from the common law writings on wardship. Where an infant without property became a party to litigation, the common law anyway was simply prepared to let them recruit a prochein ami, or guardian ad litem, for that specific case, otherwise, it was prepared to let them fend as best they could (Pollock and Maitland II; 444). Their prime guardian, was their guardian by nature - the father - as he was so-called in common law; the parentless, propertyless infant was of no real concern to the common law. However, they were of concern to the state when they became a charge on the parish, and the effects were not about providing protections and liberties, but about the appropriation of their labour, and personal autonomy. But then the regulative institution comprised not the family, nor the common law doctrines, but the workhouse, or the employer.

In the very absence of propertyless infants lies one of the substantial messages about the law operating as ideology insofar as it represents the interests of the particular as the universal values of all. To seek out what it is prepared to protect and what it excludes from its ambient cloak of protection - the infant heir as against the landless labourer - is equally revealing the law's origins, purposes and material function.

"... and at one and twenty years"

At 21, women assumed full proprietary rights; within the limits of her tenurial obligations she could alien her lands and chattels. But only as feme sole; the married woman could not do any of those save with the say so of her husband. The female adult, the 'full' legal subject was the woman who attained twenty one and remained unmarried. A terse, but nevertheless complete statement of the common law's regard of women. Perhaps, we should conclude with Blackstone's comment on the married woman,

for like the infant,

> "...the disabilities, which the wife lies under, are for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of England." (Blackstone, Commentaries I;445).

CONCLUSION: INFANCY AND THE IDEOLOGY OF CHILDHOOD

The common law's writing on infancy, its formation of categories and age lines, important because these colonise all other branches of the legal system, is actually a discourse on property, in which legal subjects emerge as entities in relationship to and referenced by proprietary rights in and over property. Even where the common law is concerned to fix marriageable ages, though it draws upon ecclesiastical precedents (established by the clerics for their own obvious purposes), the concern with the union is primarily about its status and function as a contract, with potential effects on the devolution of property. It displays no concern with the rituals or ceremonies attending marriage, with the wider social and cultural forms of community celebrating the union, its quest remains only for the certainty and precision that mutual consents are valid.

Concerned as it is with minimal ages at which subjects may acquire alien by sale or testament, parcels of land or goods and chattels, subjects below the age which the law determines to be competent are invested with qualities of imbecility and a lack of skill and judgement. The ideology asserts that age lines function to protect the infant's property from 'improvident ruin'. By contrast, the common law displays no similar concern about minimal ages at which infants may work or labour. The law's concern is with relationships of possession and non-possession and not about labour relationships, in that no privileges and protections are advanced on the infant's behalf. These areas of social life are left to the governance of the infant's natural protectors - the father and the master. Likewise, the law has no <u>formal</u> rules stipulating who shall be the guardian of a parentless, landless infant, and in litigation the propertyless infant shall fend as best they can to procure a 'legal friend'.

If the common law's interest in the infant reads a little more than the carefully stage-managed entry into the ownership of the means of production (signfified in taking the seisin of tenure, limited ability to contract, followed by the 'full' proprietary rights to devise property by sale or testament), then the process of differentiation between subjects (adult and infant, the heir and the propertyless), is a process of hierarchichisation being pursued along two different axes. Firstly, the process of inclusion and exclusion (who has and who has not proprietary rights over real estates, who can and who cannot call on the law for it to protect their persons and property without the intercession of a guardian). Secondly, the celebration of valued status by prolonging the period of protection afforded to the infant. The noble tenures, most valued, are the last taken up; the offices of public importance and esteem are the last available. Age is functioning not only as a marker in the acquisition of reason, but equally as a sign of social significance or perhaps more precisely, a mark of an individual's significance to 'the social'. Thus the knight-errant assumes his responsibilities at one and twenty, the sokeman takes up husbandry at 14 years, the age of labour is unregulated. Paradoxically, the early acquisition of (albeit limited) proprietary rights at 14 years for the socage tenant is also a mark of lesser prestige.

Within these two axes, signifying as they do aspects of class and generation, the third process of differentiation plays out the separation between male and female infants. Her ages of consent, moving out of wardship acclaim her maturity - to choose a marriage partner, to choose a guardian, to take her inheritance - at an earlier time than male infants but conversely celebrates both her low esteem and the certain destiny that the law, guardians and parents will accord her. It is but a short step from daughter to wife. What the common law gives in terms of proprietary rights on the one hand, it takes away from the married woman on the other. In a strong sense, the destiny of the woman was always to be a ward; of her father or his testamentary representatives, or of the lord until she married, and after that her husband. Only as a widow was she endowed

with the legal capacity to direct her own life, (but as Middleton (op.cit.) argues, there was immense local communal pressure on widows to remarry), or as feme sole and unmarried was she really 'adult'.

The law's doctrine of guardianship as a profitable right gave the natural and surrogate patriarch's power over the estates and the body of their wards, the authority to use and direct the flows of profits from the estates and to trade wardships and marriages as exchangeable commodities. In extremis, such a doctrine applied to military tenures only, however, it supplied, the principle of parental rights and authority over all children. While heirs to socage land and the landless infant could not be traded to the same degree, the principle still held that any social relationship, unauthorised labour relationships, sexual liaison, or clandestine marriage constituted an offence against the patriarch, by depriving him of his natural and legal rights which would accrue to him either through the heir's body, estate or labour services. What the common law actively accomplished was the magical transformation of the divine rights a father had over his children, to legal rights over the body and estate of his offspring. Filial obedience demanded by the Pauline writings on the family and the demands made by generations of clerics and theologians on behalf of the patriarch's right to govern 'his' family takes on material force through the common law doctrines of guardianship and wardship. Moreover, by statute his rights to direct the lives of his offspring could be passed on, by testament, to other guardians of his choosing, against the wishes of the wife. Likewise, seigneurial control of the wardships and marriages of his wards, could be left as a profitable right to his descendants, much as he would will his beasts and estates. The law's process of commodifying social relationships in this period marks its distance from the later conceptions of where the welfare and interests of the child are held to be paramount. The writ of 'ravishment' that fathers could bring against those attempting to enter a sexual or un-authorised labour relationship with his ward is homologous with

the writ of trespass that a landowner brings against interlopers on his property, pursued in similar forms through the same courts.

But we are already beginning to see a feature of adult-infant relationships which we dwell on later, the transferability of patriarchal authority over infants from one structurally located position to another (father-lord-testamentary guardian). Again, the early doctrines here refer us to the land law and tenure, especially military tenures. For in securing the welfare of parentless infants, 'military' landlords also secure and are given rights to do so, the destiny of their tenancies. What the law lays out are the rules concerning the appropriate person to have care of the infant and estate. Now it is the case that different kinds of tenure involve different forms and kinds of guardianship but it nevertheless underwrites the social process that all infants fall under some form of guardianship and this is true for a prince regent as for a domestic skivvy in a common household. The logic of the common law doctrines on guardianships strongly suggest that rights over the infant ward's person are incident upon the need to regulate the infant's estate until such times as they have the capacity to determine their own destiny. This is joined by a second line of reasoning that wards are property which might be 'ravished'; therefore guardians are given the means to protect their interests. But it also means that like property, wards become a transferable commodity - they can be given away, sold or left by will and testament. Whatever, the law maps out a career in which the infant will always be subject to the personal subordination of some adult. But more, the guardian-ward relationship brings together the two aspects of infancy - economic dispossession and personal subjection, which itself is equally transferable, in common law doctrines, from one patriarch to another.

These findings cause some further considerations on the current understanding of 'childhood as a recent phenomena'. As a lived reality, this view of childhood has considerable merit. Without re-telling the considerable differences between childhoods at various historical periods, however, what the study of infancy alerts us to is the antiquity of the distinctions being made between adult and infant. These distinctions may not be observable if we take the evidence of cultural iconographers such as Aries, at face value. Social and cultural significations such as clothes and games may well display few differences between adult and child. It may well be that children were not marked off by their exclusion from certain social spaces, the inn, the workplace, the bedroom and did circulate quite freely in these social areas and engage in social activities as though they were adult. It may well be true that children located in past social formations were thought of quite differently from the way in which we view children as a social group now.

In terms of periodisation, there are those like Aries that take the view that as soon as we can discern a body of texts (moral impramaturs to parents, pedagogical texts etc.) specifically addressing the special needs of children and outlining a proper programme of instruction and development in the context of particular institutions formulated around the notion of 'youth', we can begin to see the emergence of modern childhood. We can, by sifting the evidence on psychological studies of youthful development pin-point the emergence of degrees of childhood - evidenced, say, in the American formulation of the concept of 'adolescence' (Gorham 1978). We can, by tracing the emergence of legislation and subsequent institutions, the hardening of the social and cultural boundaries between adult and child (the factory acts, mass compulsory schooling). The social and oral historians have alerted us to the diversities of childhood; it is not a unitary category, but one riven by class and gender, a stage of life differentially experienced. Give the strength of these diverse lines of analysis, what limited claims can we make through the analysis of legal infancy?

Primarily, we have mapped out the formal structure of inter-generational relations, exhibited as legal rules. The legal infant, formally distanced from the ownership of the means of production and personally subordinate to adult guardians, locates the character of the social relationship of power and authority between generations. It is revealing of who has the power to direct the destinies of others, to pace the stage-easing entry of others into public life, to change legal and social categories. We have to add immediately that not all adults have the equal capacity to manage these things (an effect of class and patriarchy), but equally the knight-errant and the plough-boy and milkmaid stand in a homologous relationship with their immediate male seniors. Like class-relationships, inter-generational relationships are 'objective', independant of the will of individual actors. This is not to eschew agency; clearly all sorts of voluntaristic accommodations are and were possible; children did refuse their parents' choice of marriage partner, ousted parents as their guardian, struck bargains in the face of their lord's interest, fornicated outside marriage and so on. We might read this as 'resistance' to adult power but the structure of infantile economic and subordination was continued by legal means, secured if necessary by outright violence. Ages of consent, discretion and majority function more or less unabated. Celebrating the riotous acts of (male) apprentices may well signal class and generational reaction to oppressive labour relations but hardly disturb the nature of the inter-generational relations.

The longevity and resilience of legal categories, elaborated in feudal England, but effective until well into the 20th century can only be explained by reference to the fundamental categories of class and patriarchy within which inter-generational relations are located. Infantile dependence and subordination is constituted within the law preserving proprietary rights in land, and to a lesser degree, the laws regulating personal property. Inheritance laws and common law rules on marriage map out the lines of patriarchy, which in turn provide the fundamentals of the differentiation between male and female infants.

It is within this structure of intergenerational relations then that these writings' concern with 'childhood as an ideology' - childhood emerging at the times when children were assumed to have special psychological and affective needs - have to be situated. We cannot neglect the importance of the history of the ways and means by which children were thought of and written about as cultural, social and moral beings. At the same time, however, neither should we ignore the material relations which existed between adults and children long before 'the discovery' of childhood and which remain with us in spite of recent reports of a 'disappearing' childhood [7].

CHAPTER TWO

TWENTY ONE; 'THE EMPIRE OF REASON'
THE TRANSITION IN LAW, 1500-1660

The transition from feudalism to capitalism represented in Marxist theory as a major shift from one mode of production to another, remains a formidable theoretical object in social theory and historiography. Problems reside in agreeing upon (a) the social and economic relations characteristic of feudalism and capitalism, (b) the social forces, balance of power and the sequence of events thought to determine a long term historical change. There is considerable debate amongst Marxists about the constitutive elements the historical social formation designated as 'feudal', (see Hilton 1978). Within that debate, however, there is a common focus upon (1) the forces of production, (2) the relations of production, conceived as the social relations extant between landlords and peasants. Against this, there are two non-Marxist approaches to feudalism. Firstly, the historians'view' of feudalism, seeing it 'no longer the description of a whole social order but of certain specific relationships within the medieval ruling class', (Hilton op.cit.; 30), specifically the relationship between land tenure and the obligation to render service. This is also very much the legalistic interpretation, found, say, in Pollock and Maitland. A second approach seeks out elements of capitalistic social relations within medieval society, in order to argue against the mode of production analysis, as a means of demonstrating the falsity of 'the break'. The most formidable exponent here is Macfarlane. His Origins of English Individualism (1978) seeks out examples of formally free labour, a market in land, examples of legal subjects formally contracting sales of commodities, production for the market, a mobile labour force selling its labour where it could, as a means of demonstrating the existence of capitalistic relations always already existent in feudal England. As Hilton's short and brutal review points out, however, 'Macfarlane's picture of medieval England as a country of small, competing entrepreneurs entirely omits the fact of lordship, the concentration of the ownership of land in the hands of the nobility, the gentry and the clergy

and their exercise of manorial jurisdiction over the rural population. This is not irrelevant to the argument about the existence of the peasantry, for it is one of the defining features of the class that it bears on its shoulders the burden of the state, the aristocracy and the Church'. (Hilton 1980;111).

Not all non-Marxist medieval historians are ill-disposed to the Marxist focus on seigneurial-serf relations. Recent studies have added to our understanding of that relationship even though their concerns have been with social customs and practices, over short time spans, and on a less grand scale than advancing new theories and knowledge about class relations per se [8].

Debates amongst Marxists concerned with the character and form of feudalism revolve around the discovery of the mechanisms, social processes and theoretical determinants which account for its demise, and from the precedents and ruins of which arose capitalist social relations, the formation of the 'revolutionary' bourgeoisie, the modern state, and the working class. By extension, Marxist concerns have also focussed on the period 1640-1660 [9], the moment of institutional change, a flash point in the history of the relations between competing (putative) ruling classes - the landed aristocracy and gentry up against the newly emergent bourgeoisie - signified in momentous clashes between Crown and Parliament in the struggle for political power and authority, running in parallel with redefinition of equality and democracy exemplified in the political debates and struggles taking place within diverse sites such as New Model Army and in political movements such as the Levellers.

> "The transition from feudalism to capitalism (writes Hobsbawm) is ... a long and by no means uniform process. It covers at least five or six phases. The discussion of this transition has largely turned on the character of the centuries between the first clear signs of the breakdown of feudalism (the 'feudal crisis' in the 14th century) and the definitive triumph of capitalism at the end of the 18th century'. (Hobsbawm 1978; 163).

Hobsbawm's quiet reminder is that we are looking at a time span of some four centuries, when the old order had not quite died and the birth of a new order had not been accomplished. In this view, we are looking at incredibly long-term changes, complexly connected social processes, given in a variety of accounts, slightly different accents and emphases.

For Marx and Engels, capitalistic relations develop from two broadly separate sites in feudal society. Firstly, from the transformation of feudal relations of possession and modes of organising agricultural production, indicated by the change from the manor and desmesne into modern capitalistic farms. In Marx's words:

> "The history of landed property, which would demonstrate the gradual transformation of the feudal landlord into the landowner, of the hereditary, semi-tributary and often unfree tenant for life into the modern farmer and of the resident serfs, bondsmen and villeins who belonged to the property into agricultural day-labourers, would indeed be the history of modern capital."
> (Grundrisse 1973; 252-3).

Here, Marx abstracts several related processes. The transformation of feudal relations of possession (tenure for performance of service) into land held as private property (with full proprietory rights of possession, use and alienation) is the first. Secondly, redefinitions of land use; a move away from virgate (arable strips) and common grazing land into enclosed grazing land. Third, the dispossession and destruction of the peasantry and formation of day labourers, 'loosed' for the market, selling labour-power as a commodity. At the end of the process, lord and villein confront each other as farmer and labourer, over land as a means of production, in relations of unequal exchanges of equivalents, thus the extraction of surplus value.

Secondly, in parallel (not in series), Marx notes the development of towns as centres of petty manufacturing, sites of financial speculation, as entrepots for overseas trade and conquest. 'The point is', writes Neale, 'that agrarian capitalism and petty production did not develop after feudalism - they were integral to it ...' (Neale 1975; 18). It is in the towns, with their guild organisations, exchanges, merchants' tribunals and judicial courts that the bourgeoisie have their economic base and develop their own forms of political organisation and basis of power and authority.

Clearly, the relationship between town and country is symbiotic (the common lawyers made their money out of the complexities of the law of land tenure, the landowners were a source of revenue for speculative trade ventures at home and overseas and beneficiaries of it); towns could be a source of employment for landless labourers etc.). But there were consisderable tensions between the mercantilists, manufacturers, financial speculators and the aristocratic landowners and the gentry. The former were fettered by ancient forms of law which did not have sufficient forms or variety of actions to suit the complexities of trading ventures at home and overseas (Tigar and Levy; 265). And so long as political authority at the national level, concretised in Crown and its executive councils, and in Parliament, remained as institutions representing and protecting the interests of landowners, then the statutory consolidation of emergent forms economic relationships, and, the political recognition of a shift in the balance of economic power were somewhat limited. The Civil War continued these political and economic antagonisms by other means.

In all this, the legal system became an instrument of change and a site of struggle, between landed interests and the emergent bourgeoisie, between the common lawyers and the Crown. Any statements about the relationship between legal and economic relations, between changes in the legal system and changes in political

structures, and the relationship between classes pursuing their interests, and transformations taking place within the law necessarily lack any theoretical precision. We cannot with any certainty advance any precise statements about 'determination'; did for example changes in the organisation of agriculture cause the re-writing of the law of tenure, or, was it the case that the machinations of lawyers facilitate the capitalising of land and the social relationships pertaining to its ownership and use . At best, we can highlight some of the salient shifts in the development of the legal system, partly as narrative, partly to condense the balance of forces at play in these changes.

1. Common law procedures were unwieldly and inefficient in dealing with disputes over contractual obligations to provide goods and services at some future date (modes of exchange which are the very basis of commodity production, exchanges and distribution and financial speculation) [10] . Effecting a mortgage on a landed estate, for example, involved the cumbersome procedure of reconveying the capital sum and interest to the mortgager before the due date set out in a covenant. Simply by absenting themselves, mortgagers could take whatever had been paid, with any shortfall providing the means for them to keep the repayments and redeem the estate (Walker op.cit; 50). Besides these particular weaknesses, the common law had not the means of adjudicating cases involving merchants trading abroad. All contracts made abroad, bills of exchange payable overseas, damage to cargoes, negligence and neglect of goods in transit on the sea etc. were all civil suits to be brought before the Admiralty courts (Holdsworth Vol. I, 1931, 5th edit; 552-553). The use and form of writs as the basis of common law action, while useful devices for the defence and enforcing rights over certain types of property, especially land, simply fettered the common law's ability to deal with new forms of commodity and financial dealing.

2. From about the middle of the 16th century, partly in response to the common law's weakness, rigidity and formality of action, in Chancery, the judiciary began to lay down the rules and maxims of equity . Equity developed the rules concerning beneficial use or 'the trust', equity of redemption, the injunction and specific performance - all binding on the person rather than on the object of possession. Chancery provided a subtlety and flexibility of action and provided new remedies that the common law courts could not provide [11]. They looked at the parties' intentions in the matter of contract rather than merely adjudicating the formal lettering of an agreement and whether or not the covenant was enforceable. Equity stressed a just arbitration rather than the legally correct one. The forms of action available were clearly more responsive to the needs of landowners seeking to evade the restrictions on devising land and avoiding the feudal incidents attendant upon any sale or purchase. For the merchants, traders and petty manufacturers, the Court promised the means of adjudicating complex forms of exchange obligations.

3. To Admiralty and Chancery, the common law's response was two-fold. Aggrieved at 'outside' judgement of their legal practice and at the potential loss of income, posed by the threat of clients seeking guidance and remedies in other legal domains, by case law, the common law developed, out of its writs of trespass and assumpsit, its own complex rules of tort and contract law (Walker, 1980; 36-40).

The second response brought the common lawyers into political conflict with the Crown for what the lawyers sought was not only to have the perogative courts (of which Chancery was one) declared to be invalid, to be deemed not courts of record, but to destroy the very fact of Crown perogative itself . By reasserting the very basis of their material existence through their attempts to become the one and only system of law, the

common lawyers developed a legal ideology seeking the curtailment of monarchical powers by arguing for a thorough-going destruction of all the institutions which were the legal/political/administrative instruments of the Crown - the Council, the Star Chamber, the Court of Wards and Liveries - and by extension, Chancery and Admiralty.

There is a curious paradox in the history of the common lawyers' struggle with the Crown. Tigar and Levy put it this way:

> "While it was indisputably true that parliament and the Common Law courts had on a number of occasions protested royally sponsored innovations, much of the common lawyers' protest, at least before the 1500's, was in the name of their erstwhile clients, the nobility and the gentry, and against the use of special jurisdictions and special rules to foster commerce at the behest of the bourgeoisie ... <u>the merchants had been mostly on the other side of the battle, supporting the creation, by means of royal power,</u> of courts that would apply civil-law-based rules relating to mercantile and shipping practice." (Tigar and Levy op.cit.;265: my emphasis).

If the Crown perogative courts especially under the Tudors had served the merchants and the bourgeoisie well, why then the shift in alliance. Why did the bourgeoisie join the Common Lawyers against the Crown?

4. One line of thought is advanced by Tigar and Levy. "The Tudor institutions had served as the bourgeoisie's hammer against feudal resistance, but the spread of economic relations based upon contract, and the protection of property relations in the Reformation settlement, meant that there was no need for Tudorism after 1600." (Tigar and Levy; 266). This is only one side of the matter. For Tudorism, represented through the

absolutist institutions of the Council and the Star Chamber was Janus-faced. On the one hand the Crown derogated the privileges of the common law courts and delivered efficient and fair adjudication, but on the other, derogated the rights of individual legal subjects to a fair trial, especially in trials which were decidedly political. In the Council and the Star Chamber, the Crown acted as legislator, executive and judicial inquisitor. As the latter, its guilt-finding process, modes of proof, absence of jury and rights of cross-examination laid it open to common law attacks about its arbitrary and political character which set it aside from the 'law of the land' (Tigar and Levy; 266-67). By such appeals, common lawyers were able to argue, with some success, that their system, was the law of the land and by the ruling of Magna Carta, not even the King was above it. The ideology of universal applicability of the (common) law provided one of the foundations of the alliance between common lawyers and the bourgeoisie and a combined struggle against the dark side of perogative rule. The Council was abolished in 1641: the Star Chamber and all institutions of like jurisdiction, fell in 1660, effectively dismembering the machinery of Tudor absolutism (Holdsworth I; 514-515) and making way for the separation of the judiciary, the legislative and the executive, a crucial balance of powers observable in a variety of modern liberal-democratic states.

5. As for the legal system; the common law changed by re-writing old procedures in new forms, appropriated from the law merchant the rules to deal with commercial and financial transactions, broadened the base of its clientele - bringing into its jurisdiction the bourgeoisie in addition to its traditional business of land conveyance. But the Chancery courts were not replaced; the rules of equity were not diminished. Moreover, with the reconstitution of Parliament as _the_ legislature, the writing of law increasingly became the business of the Commons, not the judiciary. Judges were now to be appointed by Parliament, not the Crown, symbolically anyway unbinding the law from the Crown.

6. The bifurcation of the judicial system into two main branches, (common) law and equity, with lesser tribunals (the law merchant, Admiralty) and, its lack of codification gives the English legal system much of its particularity. For Max Weber these characteristics rendered a useful theoretical object. How was it, that a nation which first developed a modern capitalistic economy did so and yet retained an 'irrational' legal system whose structure and practices were decidedly feudal? (Weber 1954; Chapter VII; Hunt 1978; 122-128). We have argued that the transformation of feudal social relations of the estate into the modern capitalistic agrarian enterprise sharpened the distinctions between law and equity, to the extent that the conflict extended beyond mere intra-professional rivalry, into the realm of parliamentary political conflict and into struggles between parliament and the Crown. Now where this has some relevance to Weber's writing on 'the England problem' of law, concerns the structure of the legal profession, or more precisely its segmentation (see Weber 1954; Chapter VII, VIII, IX).

The failure to develop 'rational' legal forms (in its purer form, signified by the codification of civil and criminal law, the development of legal theory, and, professional training in special law schools or universities) Weber explains, can be accounted for by the peculiar nature, organisation and training of the English legal profession(s). (Hunt op.cit.; 111). Summarily, 'English lawyers impeded not only rationalisation, but also codification and rational legal education' (Hunt;III).

But how do these divisions between law and equity, between common lawyers and 'civilians' (equity lawyers) account for the retention, in Weber's words, an 'irrational' legal system in the face of the development of a capitalistic economy and a 'modern' bureaucratic state? What follows is the briefest of accounts.

Firstly, law and equity are manifest in different sites; each jurisdiction has its own Courts, judges and officials (Kings Bench, Common Pleas etc. c/f Chancery as the centre of equity). Secondly, the modes of initiating actions and court procedures are different; in law, actions begin with writs; in equity, with the originating bill. Thirdly, the common law is concerned with the question as to whether the writ is formally a true bill and whether subsequent actions have (or not) fulfilled the formal letter of the law as laid out in writ. Equity pursued intentions and justice rather more than merely measuring actions formally against the lettering of deeds and agreements. Fourthly, lawyers and civilians each had guild-style modes of training; apprenticeship on the job as it were, (rendering the law 'irrational' immediately in Weber's terms, in the absence of special law schools) through which new entrants were inducted into the skills, competencies and mystiques of one or other branch - law or equity (Weber op.cit; 201). Lawyers and 'civilians' 'come to have a vested interest in the retention of archaic and formalistic features, and thereby constituted the major impediment to the rationalisation of English law' (Hunt;III).

Now this division is quite unlike say the division between modern corporate lawyers, criminal lawyers and constitutional lawyers, for here we are describing specialisms developed after a common grounding (in law schools and faculties under the guidance of academic lawyers) in a variety of forms of law (see Halliday 1983; 321-327). We are speaking here of exclusive training in one branch of law, to the extent that any outside colonisation, derogates not only the procedures and practice of law or equity, but threatens the 'vested' (read 'pecuniary') interest of the practitioners concerned with it.* Nevertheless, as we acknowledged earlier, external forces (the commodification of land, the development of urban based trade and manufacturing enterprises, the extension of overseas trade) forced the common

*Weber here is quite explicit; English lawyers, he argues, are not only guild but income - orientated (Weber;208).

lawyers to innovate and adapt in order to retain the custom of the landed gentry and to provide services for the bourgeoisie. Here lies the nub of the problem, for each branch of the legal profession; how to retain its institutions and forms of legal action and procedure (which gave each branch its identity, mystique and claims to specialised competence) while at the same time innovating and adapting with sufficient speed to ensure that their clients' needs were met. In other words, pecuniary interest lay in retaining the feudal; keeping with the 'archaic' and 'formalistic' practices of old (in order to retain professional identity), but developing, adapting and innovating them (finding ways for example of turning the writ procedure into a form of contract) such that feudal procedures were appropriate to the development of a capitalistic economy. We have to acknowledge that the legal profession managed the conumdrum remarkably well; the formal division between law and equity was not dissolved until the implementation of the Judicature Acts 1873-1875, (Holdsworth Vol. I; 638-642). In terms of Weber's problematic, the English legal profession evidences the lack of 'determination in the last instance'; their intra-professional rivalry gives the law a trajectory of its own.

While intra-professional rivalry may account substantially for the retention of archaic and formalistic legal practices, we should be aware that it simultaneously produced change in legal forms and in legislation.

A combative Chancery effectively limited the extent to which the common law could 'float' its definitions and meanings into other branches of the law. To substantiate this claim, we shall refer to the Statute of Uses (1535) and Tyrrel's Case (1557). Largely as a result of intra-professional competition, the parliamentary allies of the common lawyers enacted the Statute of Uses, which gave common lawyers jurisdiction over all landed estates, some of which Chancery had earlier held to be within its jurisdiction. The common lawyers benefited to the extent that all conveyances of legal estates in land had to be conveyed by the rules of common law. What was enacted mean 'that whoever

had the beneficial use or trust of land should take legal estate'; in short, there could be no equitable interest in land (i.e. no one could have the separate 'use' of land, separate from the feudal incidents which attached to seisin). Therefore, conveyancing could not fall under the jurisdiction of Chancery (Topham op.cit; 81-83).

Chancery was able to break the common lawyers' definition of 'legal estate' in Tyrrel's Case (1557), when it allowed that land might be subject to two 'uses', the first being the 'legal estate' (attached to which were the feudal incidents of aid, relief, fine etc., and rights to inherit); the second 'use' being a beneficial interest or 'equitable estate', (allowing someone to enjoy the fruits, in kind or rent, without being subject to the feudal dues) (Topham;84-85). To illustrate:

> "Jane Tyrrel, in consideration of £400 paid by her son G, bargained and sold the land to her son G, to the use of herself for life etc." (Topham; 84).

In effect, son G was seised of the land, while Jane Tyrrel occupied it and had use of its fruits and revenues. On her death, the land would pass to son G, for his disposal.

Technicalities aside, once the Chancery lawyers established that a second 'use' in land was permissible (in effect, creating a 'trust'), they opened the door to fathers wishing to convey life estates to children. It allowed them, for example, to convey, on marriage, an estate in land to their daughter 'for life' (which effectively passed, by common law, to the daughter's husband), whilst the 'legal estate' remained in the hands of the father. At the same time, of course, the Chancery side opened up a whole new field of business, in 'the trust'. Chancery also effectively broke the monopoly of common lawyers over conveyancing; the lawyers still retained the conveyancing of legal estate, either by sale or will. But <u>its</u> definition of 'ownership' and 'property' were effectively limited.

It is a signal that Tyrrel's Case is 'about' land, and that it should involve the demise of feudal definitions of property and ownership. It took another 300 years for the consequences to work their way through, and while it could not claim to be the origin or root of the notion of 'the trust', the principle of the judgement had profound effects on property itself and the subjects who could own it, establishing, as it did, for example, the notion that married women might formally have an estate exclusive to their use. And this occurred while the common laws rules dictated that a wife could own no property, save that which her husband allowed her.

Acknowledging the divided character of the English legal profession in this period, we are also forced to recognise its location between the state and civil society, between the state and the economy. Lawyers are at once officers of the courts and are therefore bound by its rules, but they are also petty entrepreneurs. As such, they are private practitioners touting for business in the market. The legal profession could not therefore, be a neutral relay between the various elements of the social formation set out above. Pursuing a client's interest may well have the consequence of bringing about a change in direction of the law itself (though here we have to understand the unique position of case law and the power of judges to make law in the English system). Likewise, the categories of law within which lawyers work, shapes their responses to social and economic issues, a consequence of which is to surrender to legalism, all questions of morality, justice and conduct brought into the realm of litigation. Herein lies one of the unique powers of the law, and the unique position of its practitioners, rendering, as they do, all social and economic issues into a language - and a discursive form - which courts will recognise and listen to. So long as that knowledge remains exclusive to them, then their vested interests are secured. Suffice then to add, that lawyers and 'civilians' actively pursuing their own particular brand of law, play no small part in carrying through archaic and formalistic and 'irrational' forms of law into the earlier modern period and beyond.

7. The last broad narrative theme concerns the <u>legislative</u> regulation of labour which is of some moment to the ages of infancy. A crucial theme in Marx and Engels writing on the transition, the period 1349 to 1601, running from the Statute of Labourers (when agricultural labourers were forced to hire themselves out - at 'open markets' - by the year, for wages fixed for town and country) to the Elizabethan Poor Laws (requiring the incarceration and forced labour of those able to work but unemployed, by the parish), evidences on the one hand the expropriation of the peasantry and the establishment of new forms of disciplinary labour (see <u>Capital 1</u>; 686) 'The Bloody Legislation against the expropriated', Marx called it, detailing the whippings, floggings, brandings and executions written into the statutes as fit punishments for unlicenced beggars, vagabonds and for those willing but unable to find work (<u>Capital 1</u>; Chap. 28). Out of this came new practices and institutions on to the social landscape; the almshouses and hospitals for the aged and sick, the forced apprenticeship of poor and vagabond children, the justices of peace as the agents responsible for the relief of the poor, and, for fixing wages and prices. The secular, state authorities emerge as the agents for the provision of welfare, combined with their role as regulators of economic relations, formerly the province of civil society. And it is this unique combination of dispensing welfare and regulating wages and enforced apprenticeship, tying together two discreet systems (on the one hand carried out formerly by the Church, on the other, subsuming the social regulation of wages and labour, which formerly fell exclusively under seigneurial or guild control) on a <u>national</u> basis under the aegis of the State which makes this new form of regulating the poor distinctly 'modern' and un-feudal.

For the landless infant, for children without property, who represent the great silence in common law writings on infancy, the potential consequences of all this legislation was enormous. Take as an example the Act of 1547, which two recent commentators note, was 'the most savage legislation of the century',

(Pinchbeck and Hewitt Vol. I 1969; 96). They note its provisions, quoted at length here:

> "Recalcitrant vagabonds who refused to work were to be branded and enslaved for two years. A second offence brought slavery for life. Their children 'which might be brought up in idleness might be so rooted in it that hardly may they be brought up after to thrift and labour', as well as any beggar children of between five and fourteen years of age found wandering about on their own, might be taken away from their parents, or 'keeper' by 'any manner of person' who promised, in the presence of one of the constables of the parish and 'two honest and discreet neighbours' and a justice of the peace, to bring up the child in some honest labour or occupation, until 20 years of age in the case of a 'woman child' and 24 for a 'man child'. Should the apprentice run away and be recaptured, the master might put the child in chains 'and use him or her as his slave at all points' until it came of age. During such period of enslavement, the child ranked as personal property and could be disposed of 'after such like manner as he may do of any other of his movable goods or chattels."
> (Pinchbeck and Hewitt Vol. I op.cit; 96).

Subsequent legislation in 1549 and 1572 removed the 'taint of slavery' (replacing stocking and whipping for runaways) and allowed marriage to be a cause for girls to slip their enforced apprenticeship (Pinchbeck and Hewitt op.cit.;97).

Besides illustrating the brutality of 'the bloody legislation' and serving to remind us how narrowly focussed the common law 'privileges and protections' were, it also introduces age lines in a form not previously considered, namely those concerning the age of labour.

Enforced apprenticeship could begin as early as five and continue until the age of 24. Learning to labour clearly has different principles from the capacity to hold property. The Act is quite clear that the principle of providing care and protection was premised on a child becoming industrious and productive, even for 5 year olds. The upper age limit is taken from the London guild customs of not allowing anyone under the age of 24 to become a master craftsman in their own right, to prevent overhasty and ill-advised marriage (Dunlop 1912; 70).

Paradoxically, infants could not voluntarily indenture themselves as apprentices until 14, at the age of discretion. On doing so, they received no wages, the benefits of craft training and board being thought sufficiently beneficial to the infant, and it was in this status they remained for seven years at least. Again, however, the age of majority in this context, falls at 24 in London and not at 21; at the time they are eligible to enter the guild as a master, and to become a citizen of the borough. The informal guild regulations were consolidated into legislation of The Statute of Artifices (1563) which allowed justices of the peace to fix wages and to enforce the training of young workers in skilled industry (Dunlop op.cit; 52-70. Pinchbeck and Hewitt Vol. I; 98-99). It fixed 24 as the age at which apprenticeship ended on a national basis, in line with previous legislation on enforced apprenticeship.

The apprenticeship system was directly beneficial to the system of petty commodity production in small workshops, supplying cheap labour at a regulated cost. Moreover, not only did masters control the conditions of labour but also the

private lives of their apprentices (see Dunlop op.cit.;55). 'In his indentures',for example, 'he had to promise good conduct and civility, and abstentions from games such as dice and cards, and the "haunting" of taverns.' (Dunlop ibid.)

In other respects, their labour was quite un-capitalistic in character; they were not free to move from workshop to workshop (though they could be traded), they worked for subsistence and not wages, nor could they easily switch from one trade to another.

In sum, the statutory obligations on children of the poor and propertyless were to work, quite the reverse of the 19th century factory acts. Age itself was no protection from the dull routine of production. Night work was expressly forbidden (Dunlop op.cit.) but apprentices were expected to work a 12 hour shift from 6.00 a.m. to 6.00 p.m. (with a 3.00 p.m. finish on Saturdays, and festivals). Again, conditions varied locally and between guilds, who by custom set down the conditions of labour and susbsistence.

Again, paradoxically, the labour and poor laws of the late 16th and 17th century (the Act of 1547 being a prime example) confronts common law as to the custody of children. For the poor laws expressly permit the state to acquire the custody of children of parents who were not only vagabonds but also too destitute to keep their children. This was the outcome of the Act for the Relief of the Poor 1597 (Pinchbeck and Hewitt Vol. I;98). In a terse but interesting conclusion, they add:

> "Where parental rights clashed with the security of the State and with the welfare of children, as in the vagrant and criminal sections of the Community, they were to be overriden. And in principle, the State

> "accepted the responsibility for securing the proper treatment and training of children into whose care the law had entrusted them." (Pinchbeck and Hewitt; ibid).

But there is a larger principle involved here because we can begin to map the considerable divergence between forms of law regulating the children with and of property, as opposed to children without families to sustain their existence. In the first case the common law (and later equity) holds the parental rights over children as sacrosanct, the very basis of good order, ensuring both the continuity of the family across generations and the destiny of the property it holds. In the latter case, those who are a charge upon the parish are to become its property, by statute, and to be set to work at the earliest possible moment to earn their subsistence, in spite of and without regard to the wishes, rights and privileges of their parents.

ABOLISHING 'THE FEUDAL'

To this narrative, there are perhaps two legally relevant capstones; both are pieces of legislation, both significantly 'abolish' elements of the feudal past. The first is the abolition of the Courts of the Star Chamber and High Commission, in an act passed by the Long Parliament in 1641 (16 Car. 1 c.10). Parliament at the same moment asserted its right to be called at triennial intervals and asserted its authority to determine the form and the volume of tax collection. With the demise of the perogative courts, the common law's procedures in criminal matters (modes of proof, cross examination, trial by a jury adjudicating permissible evidence) map out the claimable rights of the legal subject 'freed' from the arbitrary forms of arrest, trial and punishment formerly available to the Crown. These procedures locate the law as the custodian of individual liberties against the State's arbitrary powers to curtail them. It is this structural location, the apparent separation of the courts from the legislature and of the executive, standing as the

guardian of civil liberties which gives the law its considerable ideological leverage as neutral arbiter, and as power broker between the State and the individual. As the forum of adjudication, its definitions of justice - observing the correct procedures, following the set form of trial by inquisitorial cross-examination - became per se the guarantors of civil rights [22].

The second, the Tenures Abolition Act 1660 (12 Car. 24 C.1) discharged all 'tenures by homage, escutage, voyages real and wardships incident of knight's service.' The noble feudal tenures held by knights service were abolished at a stroke, and were turned into 'free and common socage'. This legislation was retroactive to 1645. The Courts of Wards and Liveries, established by Henry VIII to soak money out of military wardships was also repealed, chopping off a useful sources of revenue and patronage to the Crown. To argue that this marked the end of the feudal order of landholding would be absurd. Real estates of land were still 'held' but as socage land, freed of the more irksome feudal dues and obligations (wardships, marriages, escutage) but as yet, by statute anyway, not entirely 'free'. However, the ancient fetters of feudal tenure were dealt a telling blow by this legislation. The statutory removal of feudal incidents facilitated the process already under way in case law and conveyance practice whereby holders of the old military estates were converting their holdings into private property for exchange on the market.

INFANCY AND ADULTHOOD; AFTER THE TRANSITION

This Act also rewrote the age lines of infant and adult. Paradoxically, although each and every tenure was treated as common socage, the age of majority was in fact fixed at the chivalric age of twenty one years. The reasoning behind this is rather interesting, because in its efforts to protect estates no longer under the direct control of military guardians, the law rewrote and enlarged the notions of guardianship.

With the dissolution of military tenures, the military guardian-ward relationship was also dissolved. The patriarchal authority once assumed by seigneurial lords was assumed by the father. The position post-1660 as expressed by Blackstone was as follows:

> "... guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then in both cases, he is presumed to have discretions, so far as to choose his own guardian. This he may do unless one is appointed by the father, by virtue of the Statute 12 Car II C24, which, considering the imbecility of judgement of children of the age of fourteen, and the abolition of guardianship in chivalry (which lasted till the age of twenty-one and of which we shall speak hereafter), enacts, that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant ... till such a child attains the age of one and twenty years." (Blackstone I; 462; my emphasis).

Children at fourteen are too imbecilic to manage estates ergo they must (as was the case in military tenures) have a guardian, who shall now be the father. As a celebration of patriarchal power the Act is quite astonishing in its effects. The mother disappears; she cannot appoint a guardian. If custody passes to another person, the mother has no say in the forms and means of education, religious upbringing or material well-being of the child. Moreover, the destiny of children can now be determined from the grave, for the father could now specify who would be the testamentary guardian of 'his' unmarried children, and that individual assumed the father's authority. Or as

Holdsworth puts it, 'this empire of the father continues even after the father's death', (Holdsworth II; 446), even against the wishes of the mother. This Act incapacitated a mother's right to appoint a guardian until 1886 (Holdsworth II; 459). so while the Patriarch changes in substance (lord to father), a common law relationship becomes statutory right, the effects remain constant, except that all infants are legally dependant subordinates until the age of 21.

The universal extension of infancy to 21 years is a mere ripple effect of standardising forms of land tenure and the writing of a unified form of guardianship. Having custody of the person, in principle, meant having control of the person's property and so economic and personal subordination was now to end at one common age. Unlike the feudal relations of wardship, where there existed some tension between the father's rights to determine the destiny of his heir and land and the lord's right to assume the control and use of them, post-1660 all these powers now vested in one person, the father. In this sense, the age of majority was now to signify not only the assumption of proprietary and civic rights, but equally, it signifies the passage out of the father's potestas, which post-1660, effectively blocked the infant's entry into the wider public sphere[12].

> "... the power of the father", writes Blackstone, "I say, over the persons of his children ceases at the age of twenty one; for then they are enfranchised by arriving at the years of discretion, or that point which the law has established (as some must necessarily be established) when <u>the empire of the father, or other guardian, gives place to the empire of reason</u>."
> (Blackstone I; 452; my emphasis).

Thus the age of majority, bears meanings along two axes. Firstly, as in former times, it functions as an index, an arbitrary line, over which the infant passes and magically attains the attributes sufficient for autonomous being in economic and civic life as the 'full' legal subject. Second, the passage out of infancy concretely means the end of the exclusive dominion of the father or his surrogate. The meaning of 'adult' therefore emerges from the coupling of the acquisition of reason to termination of patriarchal authority. For the mad and married women, adulthood is never achieved, even after the formal passage out of infancy; the former have their legal capacities suspended in favour of the Crown and State, the latter have their legal subjectivity suspended during the life of their husband.

This Act is the limit case of the father's jurisdiction over his children. His claim to custody is held good against seigneurial authority, against his wife, against his kin and against the State, but only so long as he was not a vagrant or destitute. The later law of guardianship, covered in Part 3, is largely the narrative of the State and mother asserting counter claims against the father's absolute powers. However, from 1660 until the 19th century, the law protected the sovereign powers of the father over his children and buttressed its position with ideological support from the clergy and from juridico-political theorists such as Filmer. The privileges and protections offered to the legal infant in this period are mediated through the potestas of the father. Their relationship with other sites constituting the social is routed through his consent. Without it, a father had the formal capacity to force his bidding by the means of the Courts.

Post 1660, then, the infant's personal subordination was secured by statutory means to the will of the father. What was their position with regard to property relations, civil rights and privileges incident upon their infancy. The salient points, presented summarily, are as follows:

1. Infants cannot be sued except under the protection and with the benefit of the defence of his guardian (Co. Litt 135 b; Blackstone I; 464: Stephens Vol. II; 444-5). But an infant can sue either by his guardian or through his prochein ami (a 'next friend' who is not his guardian).

2. Generally, an infant can neither make any conveyance or purchase that will bind him, nor enter into a binding contract (with certain exceptions stated below) (Co. Litt. 171 b; Blackstone I; 465: Stephens II; 455: Anson ;119).

3. An infant cannot be sworn as a juror, nor sit in Parliament, nor hold any public office of pecuniary trust, or of a judicial kind, nor vote or act as a member of a Corporation, constituted for public purposes - in short, 'do no legal act'. (Stephens II; 455: Blackstone I; 465).

To these general disabilities there are several exceptions. As Blackstone sums up, 'It is generally true, that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract, that will bind him. But still to all these rules there are some exceptions; part of which were just now mentioned in reckoning up the different capacities which they assume at different ages ..." (Blackstone I; 465).

Of the exceptions, the most complex problem arises in the matter of contract[13]. Two general principles hold. Infants have sufficient capacity to enter a valid contract of marriage (at 14 for males and 12 years for females). Secondly, contracts

involving the supply of 'necessities', appropriate to the infant's position in society, which are 'beneficial' to the infant (food, clothing, articles of educational necessity, tools of trade), are binding on the infant; they must pay for them under the terms set out (Anson op.cit. 125-126; Blackstone I; 466; Stephens II; 108-109). Also, the infant may bind himself as an apprentice - this training being regarded as wholly beneficial - at the age of fourteen, for a term of seven years (Blackstone I; 465) . Male infants may (post 1660) by deed or will appoint guardians for his children if they have any (Blackstone I; 465).

In the matter of real estate, the principle of feudal land law still holds good; namely, that any conveyance made in infancy can be rescinded at the age of majority .

Generally, although infants are to an extent exempted from liability for a mere breach of contract, there are no such privileges in injuries of other kinds. Violence against the person is an act for which an infant can and could be held criminally responsible, even though under the age of majority (see Part 4). Also, actions may be brought to recover damages for their <u>torts</u> (trespass, slander) - civil wrongs damaging the interests of other persons (Stephens II; 457).

This compendium of infantile privileges and capacities we see in Coke, Blackstone and Bingham - texts spanning three centuries and much in evidence - with few minor changes - in Anson's <u>Contracts</u> and Halsbury's <u>Laws of England</u>, in the 20th Century.

The capacities infants did have may be summarised as follows:

1. They had the capacity to contract valid marriages. However, Lord Hardwicke's Act of 1753 required the father's (or his guardian's) consent before infants of any age could be validly married (26 II Geo. C.33: Blackstone I: 436-37).

2. They could sell their labour, subject to the father's consent (for he had the right to appropriate their children's labour, and protect that right under a writ of 'ravishment')[14]

3. Certain kinds of contracts - involving the supply of necessities - could be entered and be held binding on both sides.

4. Male infants could appoint guardians for their children.

5. Infants were held to be criminally responsible for their crimes.

In sum, though the period of infancy was extended, the several capacities and incapacities constituting infancy changed very little post-1660. The old age lines of discretion and consent still continued to operate, but in respect of marriage, with much less force after the statutory requirement of 1753, requiring parental consent for any infant to be married.

Nor did the law develop any coherent theory concerning the competency and rationality of infants. The infants' capacities and incapacities rested upon the antique precedents of age lines of discretion and consent, rather than be re-assessed against any measurable or identifiable unit or quantity of reason or skill. Only in criminal law, did judges use a test of rationality (see below Part 4). Being below the age of 14 or 21 was sufficient to render an infant 'immature' and 'imbecilic'.

We have argued in the Chapter and the one preceding, that capacities and incapacities of infancy, though rhetorically referring us to the want of reason and lack of discretion of infants rarely go further than citing the ancients on this matter. But we have also argued that the fractured and contradictory character of the infant (signified by the complex age lines operating within infancy) is patterned, rational and explainable if we refer to the concepts of class and patriarchy.

For the age lines and the capacities appropriate to them don't really celebrate stages in moral or psychological development. Rather, they function as convenient lines by which the law might conduct its business efficiently and even more as 'safe points' in the life cycle when particular economic classes are willing to delegate familial property to a younger, succeeding generation.

Now clearly, this line of reasoning must posit a subject bearing some qualities of rationality or competence, able enough to conduct (for capacity does imply agency) a modicum of business, however large or small. But in the absence of any general theory of rationality and competency in the law on infancy, all that we can really underline is character of <u>the distribution</u> of capacities and incapacities. The law's logic generally runs as follows; an infant is given various protections and privileges, these being consequent upon their tender years, lack of experience and want of understanding. On this basis, they are protected against themselves (and the consequences of 'improvident ruin') and against unscrupulous adults by being denied the capacity to sell land, sign (many) valid contracts and consent to marriage without parental approval. Undeniably, fair and just (protecting the weak and incompetent) but equally undeniably paternalistic. But all infants are <u>not</u> equally protected: they could sign away their right to <u>paid</u> labour through the indenture of apprenticeship, they were free to enter the labour market as exploited labourers, and free to enter the sphere of unpaid and unprotected labour as wives. No lack of capacity, nor privilege and protection here. Rationality and competence in law do not derive from a theoretical basis of psychology and moral development but are determined by the needs and interests of social groups seeking to protect their property - family nexus, and to use the labour of others, whatever the age of the labourer.

An overly pessimistic view, one which undervalues the positive side of the early entry of children as autonomous subjects on to the stage of social life?

An alternative reading, fashionable in writings on 'kids lib' and on children's rights uses the evidence of past childhoods as means to assert the competence and rationality of infants, which by recent statutory rulings, have been consistently derogated. They alert us to the evidence that children in past times could and did get married, went out to work, became economically self-supporting and so on; in other words, in many respects they were adult-like. While this line of argument usefully buttresses lines of thought that childhood is socially constructed and subject to historical fluctuations, that childhood is not naturally or biologically 'given', it is also a little ingenuous and overly romantic. For, as we have outlined in the foregoing, few infants became 'adult' in the areas of social life which really counted - in the administration of justice, the formulation of laws, the owners and controllers of the means of production (and if Laslett is correct) few became formally married - except when it suited parental interests - when very young. Their competence and rationality were defined in terms which in no way really challenged the wider spectrum of class and patriarchal interests within which inter-generational relations were, and are, constituted. In the end, using the social history of childhood in this way, to argue that children in the past had a larger scope to determine the conditions of their own existence, unfortunately ignores the multiple means that adults had in law for overriding the volition of infants. Moreover, it ignores the class specific patriarchal qualities of past notions of competency and rationality, which simultaneously protected children with and of property, but permitted the exploitation of the labour of those without it.

Perhaps it is sound political strategy to argue that because children in past times were sufficiently competent to do 'adult things', contemporary children are equally capable and competent of doing them. But it is a strategy which pays the price of theoretical precision. For it asserts the homology of past and present social practices without reference to the structures within which social practices take place. Moreover, it is blind to the discursive elements within which past notions of competence and rationality were embedded. We shall return to these issues at the conclusion of this section.

What the Act of 1660 achieved was a unified age of majority, a line which all infants had to cross, irrespective of their status as property or non-property holders, or the conditions under which their land was held. In this sense, at least there was a formal equivalence, in law, between all infants and all adults (but not formal equality), in respect of attaining majority.

Equally important was the effect of synchronising the attainment of property rights with formal passage out of the patriarchal domain of the father. Materially and symbolically, the 'full' subject, the bearer of reason becomes signified by their absolute rights to property and the autonomy of self against the power of the father. A status which de jure all adults enjoy but de facto, not all achieve.

CHAPTER THREE: MINORS MATTER; THE LATEY REPORT

The object of our enquiry in this Chapter is the Latey Report, or more fully, The Report of the Committee on the Age of Majority (1967 Cmnd 3342). In the classic British tradition, this Report created, managed and amplified a particular issue (in this case, lowering the age of majority from its traditional line at 21 years) prior to legislation being introduced to parliament. Committees such as that chaired by the Hon. Mr. Justice Latey, by taking evidence from a variety of interested parties, or groups whose interests might be affected by its findings, allow some sort of consensual view of a particular topic or issue to 'emerge'. Its claims to authenticity (based on the expert evidence heard and/or reported), and the kind of recommendations such Committees make, stake out in advance the parameters of the parliamentary and public debates which succeed it. The discussion document - parliamentary debate - implementation process has long been the legitimate and legitimating process of changing social policy in the UK.

The narrative in this case is disarmingly straightforward. The Latey Report was published in 1967. It recommended reducing the age of majority to 18 years. In 1969, the Family Law Reform Act changing the age of majority, required precisely one sentence to implement Latey's recommendation; changing the age itself was something done almost in passing.

This, of course, is not the whole story. We need to set the Latey Report in a slightly broader context. Synoptically, the Report and the Family Law Reform Act which followed ought to be viewed as a part of a package of legislation, which at the time (at the end years of the 1960's) seemed 'liberal', permissive, progressive - journalistically anyway - celebrating youthful emancipation, sexual spontaneity and greater individual freedom. Lowering the age of majority coincided with the introduction of no-fault divorce, the decriminalisation of all juvenile offences, abortion law reform, decriminalisation of

homosexuality between consenting males over 21, and recasting the law of prostitution. Whether the legislation was as permissive as its opponents argued, or merely introduced new forms of social governance and control (National Deviancy Conference 1980) is a debate which need not concern us here. There is of course no necessary reason why lowering the age of consent need be a radical, permissive or liberalizing policy. That it was seen to be so speaks of the images of youth promoted and held at the time. Perhaps it also represents the symbolic value of the age line and the way it shapes commonsense views of maturity, discrimination and judgement.

Changing the age of majority was a more fragmented process than it first appears to be. We have argued earlier that the very notion of infancy is itself composed of discrete elements, formulated through incapacities to hold and devise property, be parties to contracts, the inability to marry without parental consent, and exclusion from judicial and political office. Policy-making practice in 1969 reinforces this view. Looking at 1969, in that year culminated (in legislation) three politico-juridicial enquiries focussing on the young.

1. In the 'criminal field', reports such as Children in Trouble - preceding the Children and Young Persons Act 1969, constituted the juvenile offender in terms of discovering the causes of juvenile crime. The Act itself effectively decriminalized juvenile offences, raised (to 10) the age of criminal responsibility and laid out the ground rules for local social services to administer care and control.

2. A Speaker's Conference, assessed the claims of 18 year olds to be eligible to vote in local and parliamentary elections, and to serve as jurors. These are issues pertaining to the 'civic field'.

3. Finally, the Latey Report, covered terrain more familiar to us; assessing at what age should young people be able to marry, make binding contracts, own property, and no longer be liable to be made wards of Court, i.e. questions situated in the 'private' field (as opposed to the public or civic field).

Although three separate investigations about the young took place, in one respect all were concerned with a common problem; rationality, responsibility, competence, judgement, and discrimination, and, the extent to which these attributes were or were not 'possessed' by infants, and at what age. In effect, each enquiry, in the criminal, the civic and the personal/private field, separately and together were concerned with the question of, what is an 'adult', and what is it to be adult?

Each investigation had to produce a 'difference', to differentiate a class of subjects with the attributes of rationality, responsibility and political judgement from subjects not fully, or only partially possessed of these attributes. For it is on this basis that the law historically based the distribution of legal, criminal and political capacity of individuals. We have indicated that the relationship between legal capacity and mental or intellectual competency is hardly systematic or consistent; rather the posession of competency <u>and</u> distribution of legal capacity each have to be judged in terms of class and patriarchal interests represented in the law of property, in family law, and as we shall describe later, in criminal law. Nevertheless, trying to connect competency to legal capacity is a principal feature of legal ideology and its constitution of legal subjects. It is part of the <u>rational</u> appeal of the law and as such provides a backdrop to the historical development of the age of majority.

Producing the difference, circa 1969, between adults and infants, (like preceding legislation in 1660) never simply distinguished between two social categories. Rather, such legislation socially

produces relations of power, positions of dominance and subordination. The differences between adults and children therefore are not simply distinctions between subjects and non-subjects, but is a system of power and authority relations which has a history equally as hard and concrete as the relations between classes and genders. Like class and gender, intergenerational categories are constantly reworked, contested, compromised and reformed. At particular conjunctures, age lines are drawn, the categories fixed (temporarily) in relationship to each other, institutionalised and protected by legal sanction and exclusion. What the Latey Report provides is an insight into the knowledges, arguments, ideologies, rhetoric and interests at play, firstly in producing the modern distinctions between adults and infants and secondly, the means by which the system of power and authority between generations are reproduced.

For immediate purposes, we shall postpone any discussion of the Children and Young Persons Act, its provisions being more relevant and more logically placed in the context of our later writing on the juvenile court. Similarly, changes in the civic field (stage-managing the entry of 18 year olds into parliamentary political participation) will be addressed obliquely at the end of this chapter. We do recognise, however, that the juridico-political investigations of youth were taking place across a broad spectrum; the Latey Report, however, was the one document fundamentally concerned with the age of majority.

READING LATEY

Redrawing the age of majority is a <u>constitutive</u> process; constitutive in the sense that lowering the age line from 21 to 18 years transmits to a slightly younger age cohort, legal capacities which enable them to participate in social and economic relations hitherto out of bounds to them. In this respect, the Latey Report, like other social policy initiatives has its creative aspects; in this case re-writing 'the social' to the extent of potentially expanding the population of those entitled to 'full' legal capacities. By arguing that social policies are 'creative' it should be understood that 'creative' does not equate with 'progress' or 'liberation' or greater freedom and more equality. Rather, social policies are eminently about changing or maintaining relations between the state and civil society, changing or maintaining relationships between the state and the individual, or between the state and the family, (~~and about changing or maintaining relationships between the state and the~~ individual, or between the state and the family,) and about changing or maintaining or enforcing relationships between person and person. The content of such policies may well concern the distribution of fiscal benefits provided by the state but the ideological and creative aspects of the policy will be contained (a) within the assumptions about the social order implicit in social policy itself (e.g. the 'normal' family), (b) within the kinds of social relations, social units or groupings to which money will be directed or from which benefits will be explicitly witheld.

Social policies are necessarily regulative; certain social practices and social relations are permitted, supported or sanctioned - fiscally or otherwise. However, this is a different argument from contending, as some Marxist functionalist writings tend to (e.g. Althusser 1971, Adams 1978) that all social policy is social control; whereby 'the social' is controlled via the

legal and administrative complex of the state, by economically dominant groups. Where, in other words, the state is reduced to a committee of management acting on behalf and in the interest of capitalist fractions. This line of argument ignores two crucial points.

1. Social policies may contain assumptions and express interests not reducible to class; patriarchal power and authority, generational relations, aspects of race and ethnicity.

2. Social policies may well be called for by and benefit directly subordinate groups and may well arise from long and determined struggles against the interests of ruling groups and fractions (see Corrigan 1977).

There is nothing wrong in pluralist accounts of social policy formation which argue that policy emerges from a contested struggle between a multiplicity of interest groups <u>always providing</u> that we acknowledge that not all interest groups have equal political power, equal access to the levers of the state bureaucracy and an equal voice in forming social and state initiatives (see Fitz 1980 for a longer account). It is important that we recognise that we are speaking of social policy emerging in the context of capitalistic economy, a class-divided social formation, with institutional complexes such as the Church, the law, state administrative bureaucracies, definite forms of political representation which through their presence, history and practices, limit the possibilities of re-writing social relations.

Situating Latey as social policy is an important step, for the age of majority becomes a concern to a wider audience than lawyers. What was predominantly a legal category is transformed into a political issue, too large and too important to be left to the lawyers to adjudicate. Moreover, the legal aspects of the age line, in the Report become only part of the economic,social and

cultural ramifications which are attached to changing it. This is evidenced in the composition of the Select Committee and the range of evidence and the range of 'expert' opinion gathered in the Committee's proceedings.

But what of the structural limitations we spoke of earlier? Their presence is immediate. Firstly in choice of Chairman. The Hon. Mr.Justice Latey, High Court Judge, author of a classic text on divorce (Latey 1973) senior member of bench concerned with family proceedings, later to become senior member of the Family Division of the High Court. In Latey, the person, two lines of meaning coalesce; the age of majority is still to be regarded, though not exclusively, as a legal matter: secondly, the age of majority is 'about' infants and about families. There is no necessary reason for the choice of a judge, nor that he be an expert in family law. Without being conspiratorial, the choice is and was significant. Secondly, the terms of reference. The subjects under consideration were the following:

a) What should be the minimum age at which young people should marry (now, i.e. 1967, 16)

b) At what age should they be able to marry without first obtaining consent of their parents (now 21).

c) At what age should they no longer be liable to be made Wards of Court.

d) At what age should they be free to make binding contracts (now, for the most part, 21).

e) At what age should they be free to own and dispose of property (now 21). (Latey; 16).

capitalist economy. Adulthood equates with a specific form of agency in civil society, where subjectivity entails 'freedom' to choose but to bear the consequences of individual choice (be it an unbearable marriage or a disastrous commercial venture). By contrast, childhood is the realm of the unfree, those whose existence and happiness is to be secured by the mechanism of paternalistic protection.

On this analysis, however, the equation of 'formally free' subjects with adulthood should not blind us to the salient fact that freedom is construed with the bounds of legal ideology; freedom is consonant with <u>individual</u> agency and capacity, with formal capacity in the sphere of <u>private</u> property, and with the formal liberty of entering a marriage or not (for only in marriage do partners assume a legal relationship with formal and guaranteed claims one against the other; no other union bears such clear contractual weight). If nothing else, the formal freedoms of adulthood are being demonstrably shaped by the structure of the law itself, by the way in which it disperses capacities over several fields, by the way in which the law assumes an idealistic economic and personal equivalence between individuals as though all are equally able to choose, irrespective of class and gender.

The foregoing, somewhat abstract argument, that the structure of the law itself is imbricated in the precise form in which 'adults' (and conversely 'children') are socially constructed goes some way in demonstrating the kinds of definite limits within which subjectivities are fabricated. How then do we sketch in the other structural determinants and structural limitations shaping the emergence of adults and adulthood in the Latey Report. Are these effects observable in play on the surface of the Report? Do we have a method of teasing them out for analysis? If we use a form of discourse analysis, it is possible to map out the connections between elements of the social structure, the choice of the new age of majority and the emergence of the subject adult.

LATEY AND ITS DISCURSIVE PRACTICES

The useful thing about Select Committee proceedings and their final reports/documents is that they 'voice' the interests, opinions, theories and evidence of competing groups, so that we can examine not only their arguments and claims, but also the assumptions on which they rest, and the forms of knowledge on which individual and collective evidence is based. This is the first and most observable level of the discursive structure; the 'authentic' voice, given through straight reportage, of those who chose or who were called to give evidence.

The second level is not quite so transparent, for this comprises the 'rules' of 'grid of reference', by and through which appropriate voices are selected, hierarchized, weighted, transformed and combined into an authoratative statement/report about the social relations and/or social practices which are the object of the proceedings.

In effect, Latey (and other Commissions, Select Committee Reports etc.) provide an interface between the state (in the figure of the Select Committee) and civil society (represented through those organisations providing the evidence, opinions and theoretical and ideological armoury on which the findings of this Report)

From a pluralist point of view, the competing evidence and weight of opinion, that interests are allowed to compete and formally represent their views is the very stuff comprising the liberal democratic process in operation. The radical critique of this view, and one shared here, and sustainable in the analysis of the Latey Report, would argue that competing interests (a) represent only a narrow spectrum of interests, (b) that those interests are not equal, either in their power to persuade or in the resources that can be brought to bear to

The terms of reference are limited to the private field of civic law, explicitly deleting reference to capacity in criminal law and in the civic/public field, thereby continuing the dispersed notion of the legal subject. Moreover, the Report confirms the historical practice of non-correspondence between fields.

> "Changes in the civic field are (not) at all likely to follow changes in the private field even if we wished that they should. It is a very different thing to cope adequately with one's own personal and private affairs and to measure up to public and civic responsibilities."
> (Latey;17)

It is, in other words, one thing to be able to marry at will, quite another to be a full citizen. The non-correspondence of capacities, the distinction between legal subjectivity in a private capacity and full citizen is best exemplified in the figure of the married woman; on the one hand historically, post 1880 being granted limited property rights, but not achieving adult suffrage as of right until 1929. The grammar of the law's history is here being recycled through the mechanism of dispersing terms of reference and notions of adulthood over three separate fields.

More immediately, the terms of reference are explicit statements about what constitutes adulthood; the right to marry without consent, to be free of parental direction (which can be invoked by Wardship proceedings against errant children) to own and dispose of property and to make binding contracts. Broadly, adulthood invokes meanings along two axes; adults equate with subjects free to form new families and subjects who can actively participate (formally) in all aspects of a

influence the reporting/legislative process. For example, the pluralist view would concede an equal voice to all the individuals and organisations giving evidence (from Birkenhead Technical College to the Bank of England), without conceding the considerable fact that the process of consultation is taking place within a capitalistic social formation founded on and requiring the reproduction of the concept and material existence of private property and individual ownership, existing as a condition and guaranteed in law.

Now the danger of letting the radical critique run its course lies the tendency to reduce all individuals, organisations and institutions representing their interests to the Select Committee, to a more or less complex position wherein they act or speak as classed agents, representing only class interests. By extension, the ideological field, constituted in and through the ideas, knowledges, theories and sciences, called into play, say, in questions about reducing the age of 'free' marriage (marriage without the consent of parents or the Court) is reduced to reflecting or corresponding with or relatively autonomous from class interests. In a word, they have no separate or distinct theoretical effectivity, so that, for example, the law and its history, the mechanisms by which legal categories construct legal subjectivities has no presence other than to write class relations into juridicial relations. The consequences for the analysis of Latey would render its findings predominantly (and in more extreme cases only) in terms of seeing state activity and either maintaining or reshaping the balance of forces between classes and between economic agents: to wit, changing the age of majority concerns only and primarily economic agency, and to this extent the state acts to secure the interests of the ruling and dominant economic groups. The logic of the analysis, one step on, requires the state only to note the requirements of the economy; the other sites constituting civil society and its cultural and social relations and practices are banished from the analysis. For example, in Latey (and in much of the reforming/permissive legislation of the 1950's and 1960's) the Church is a major

voice in pronouncing on matters concerning the reorientation of 'public' and 'private' morality (see inter alia Hall;1980). The religious doctrines on the sanctity of marriage, its views of pre-marital sex, abortion, the age of consent, contraception allow churches (and even Althusser allowed the church historically to be a major ideological force) to insert their separate and collective voices in the formation of social policy concerning familial relations. Now it may well be that the Established Church, historically, and the Roman Catholic Church prior to it, and the dissenting chapels have, at one time or another, seemed to have been no more than particular economic and politically affiliated groups at prayer, where a particular form of worship and distinctive belief in God, closely maps a particular mode of ownership and productive activity. But one is not wholly reducible to, nor corresponds with the other. Religious beliefs, doctrines and dogma can contradict Mammon (and does so continuously) and on this basis claim to be universalistic and not particularistic, without being purely 'epiphenomenal'. Religious sentiment has an effectivity in reformist political process, separate from and different to the balance of economic forces.

The Latey Report, in this context, functions as a surface for the emergence of the new adult - the 18-20 year olds - providing the intersection for disparate voices (for even economic interests have to represent themselves discursively, expressing in oral and written terms what their needs and interests are) inside and outside the ensemble of state apparatuses. In terms of power, the state exercises it by setting the agenda (the age of majority is about owning property, and, free marriage) and by arranging legitimate statements in a Report to the legislative body. But the very process of listening to and selecting evidence for the legislative process is an acknowledgement on the one hand of the state's legitimate power to do so, and on the other, an attempt to substantiate a claim that the state is above civil society and a neutral arbiter of its disparate representations, and consequently its legitimate authority to announce new legal subjectivities.

How then to manage the reformist dilemma; to make recommendations which were on the face of it, more liberal, just and progressive than the electorate seemed to support. In one sense, there is no real problem. Members of Parliament, are and assert they are, representatives, not delegates, with considerable latitude to act as individual conscience dictates. Advocating and supporting causes in the face of popular opinion does not necessarily constitute electoral suicide. But this relies on the Report constructing a feasible basis for defending their choice. The method of constructing a second opinion in these matters is well-worn; turn to authoritative voices, the opinion makers, the opinion leaders, and to those groups with some expertise, knowledge or 'real' experience of the current situation. Choose those who really know and those interests will be directly affected. Looking at the groups listed as submitting written memoranda or providing other evidence, (taking alphabetically B and C's), we find, 'Bank of England, Bar Association, Birkenhead Technical College, Prof. A. P. Blaustein, Bow Group, British Youth Council, Centre for Group Studies, Chancery Bar Assn., Chartered Institute of Secretaries, Christian Science Churches, and the Confederation of British Industry' (Appendix 3; 160). Add to this, and quote lengthily,learned oral evidence and you have the basis of an authoratative statement, not merely an expression of popular (and democratic?) opinion.

This exercise is not unique to Latey and this kind of analysis is a bit like shooting fish in a barrel. But the point is a serious one. Managing consensus à la Latey defines and delimits the scope of the political process and determines who shall be a legitimate participant in policy formation. Narrowing down participatory voices, presenting their evidence as relevant and useful is not regarded either by Latey, Parliament or the public as un-democratic, anti-democratic, nor does it threaten the social order. What is striking is that the Report can present itself (in spite of the minority coda attached) as a natural and unproblematic contribution to participatory democracy, on the basis of which parliament can turn to the people and say 'Look, we did consult you'.

Let us be clear to whom the Report was addressed. The most important consumers were to be parliamentarians. In the last analysis, they could decide its fate - either by changing the age line, or consigning it to the dustbin of history. And yet the language of the Report is directed explicitly at the man on the top of the Clapham omnibus, 'the right-thinging individual', (Hall 1980;20). Its presentation is straightforward, journalistic, non-technical with sufficient topical and popular references to make it quite readable. But there was a central problem.

To convince the politicians of the rightness of its case, to catch the popular and authentic voice of public opinion, the Select Committee commissioned a public opinion poll. Let 'the right-thinking individuals' address the politicians directly; demonstrate to the elected representatives what their constituents had to say. However, in the NOP opinion poll appended to the Report (201-205), and in response to questions such as 'Legally you have to be 21 before you can sign your own Hire Purchase Agreement', 'Legally, you have to be 21 before you can buy or sell your own house', and 'Legally you have to be 21 before you can get married without permission of your parents or a Court', (and each question suffixed by 'Do you think 21 is the right age or not?'), 60-70% of respondents replied 'Yes , 21 is the right age to be able to do these things'. To the question as to whether 16 was the right age for marriage with parental permission, 50% replied that they would prefer the age to be raised! Clearly, a central disparity between the Report's recommendations and popular sentiment (as far as it can be said to be represented by the NOP survey - certainly the Committee did not go out of its way to destroy the NOP findings nor did it claim they were unrepresentative). Hence the strategic point of intervention was to be the MP's, regardless of mass opinion.

It is the first rule of the game; to be in authority (so as to speak, and more, to be heard) and an authority (to be a legitimate participant in policy making process). Along these lines the state and civil society interface in a network of circuits of power, exchanging evidence for legitimation, knowledge in exchange for participation.

One major consequence of viewing state and civil society as linked and complexly related, means that the process of constituting subjectivities (here, specifically demarking the adult from the infant) is not located purely at the level of state ideological practice. The sites and practices of civil society equally constitute human subjectivities (Laclau 1979, Urry 1981; 72). The Latey Report brings together the public andthe private in a unified discourse. Disparate voices are brought together in harmony to reposition the age of majority, to bring into being new cohorts of adults. The material of effects of the Report is to re-produce, and reproduce differences between adults and others (historically labelled infants, but in Latey and in Family Law Reform Act, called 'minors', a term adopted hereafter).[52] Note also the difference is structural, and non-elective (no individual over the age of majority can choose not to be an adult); structural in the sense that spaces are created to which aged individuals are allocated (much in the sense that gender is socially constructed, produced through differences entailed in language, clothes, productivity activities.

DISCOURSE AND SUBJECTIVITY; A BRIEF NOTE

Some ground-clearing propositions. From Althusser (1970) on, the basic proposition in one theory of ideology is that ideology is material; it is manifest through cultural signs, social practices, the existence of institutions and in the basis of their organisations. It does not float free as a 'cloud of ideas'. It is the only proposition not deeply contested by radical theoreticians of ideology. Secondly, ideology is always already with us; in the face of humanist essentialism, this proposition asserts that human individuals are socially created subjects, located in particular classes, spatial locations, engendered, ethnicised and aged-uniqued 'positiones'. Thirdly, positioning is not a process of role allocation (Urry op.cit;72). Rather, position is a site,from which through their social experiences, individuals make sense of the world and begin to act as creative and autonomous beings. However, the logic of the proposition suggests that individual subjects are not entirely 'free'; an individual's capacity to change social location runs in the face of structural imperatives (legal sanctions, institutional rules, economic structures) to remain 'in place' (as a man/woman, capitalist/worker, Londoner/Scot etc.). Fourthly, admitting human subjects are conscious, creative and imaginative admits that change (however limited) can take place; individuals can change positions (e.g. transvestism) and collectively disrupt the limitations of structures. Also, structural change can provide new and different spaces and positions, and new processes of allocation. Fifthly, the exact nature of the structural formation of individual consciousness, and the individual capacity to overcome and change structural determination has never been entirely settled (see part 2 below). It is entirely a matter of theoretical privileging (for political ends) to argue for the exact and precise degree to which consciousness is formed by structural considerations. On the other hand, the humanist approach, to accord total capacity to the constitutive individual entirely ignores the extent to which 'free' individuals are always already located within language, nation, culture and a mode of production. In the last analysis, to address the problem of ideology is to mount a critique of essentialism.

In the history of theorising ideology, the recent attempts by Foucault and his followers have attempted to overcome the problem of dualism between structure and subject. Marxists, highly critical of his rejection of a 'master discourse' (to wit, the ruling ideas are the social products of the ruling classes) have, in fact, taken aspects of discourse analysis as a means of understanding and theorising ideology. What then are its immediately useful and relevant propositions. Firstly, discourse itself, conceived here as a 'linguistic unity or group of statements which constitutes and delimits a specific area of concern, governed by its own rules of formation with its own modes of distinguishing truth from falsity' (Weeks 1982; 111). Its relevance to Latey is quite apparent for the Report is precisely about delimiting an area of concern, with its own modes of distinguishing truth from falsity, relevant evidence from mere opinion. Secondly, Foucault's (difficult) conception of 'assubjetissement'; which bears the dual meaning of 'subjugation' and 'subjectivity-creating' , where the individual is endowed with subjectivity - bearing such and such characteristics - and is subjugated (see Palmer and Pearson, 1983; 381). Subjects are produced through, differentiated and positioned in, discourse. Thus, the evidence given to and selected by the Latey Report is knowledge, producing subjectivities, differentiating between adults and minors, endowing aged-subjects with certain capacities and simultaneously excluding others from its distributive economy.

PRODUCING THE DIFFERENCE

To reiterate, the Latey Report comprises two major themes (at what age shall full ownership capacity devolve, at what age can the young freely marry - without parental consent), linked by a third. At what age are the young endowed with sufficient capacities of maturity and responsibility to exercise

judiciously the status of property owners and marriage partners. We have already noted the limited terms of reference (the Report is not to enquire into matters of criminal and electoral responsibility), a condition powerfully reproducing the legal ideology of dispersing capacities across separate fields of law, a condition which espouses the hidden agenda of re-creating legal subjectivities. This is the context for the process of production.

1. Continuities

Latey is a reformist text; it did not seek the removal of the age of majority, only redrawing the line at a lower age. To this extent, it reproduces a category of English law. Moreover, it sought to produce the age of majority as a line around which various capacities are distributed, whose possession distinguishes between the adult and the minor. These capacities determine the range of possible economic and social practices that individuals may freely enter (there is no imperative that either set must or should i.e. no role allocation). There are also no new capacities, rights or claims endowed on individuals, merely that a younger cohort might claim or exercise them. There is no new definition of adult and minor; the 'contents' of structural positions or spaces remain broadly the same.

Confronting the Committee, indeed the object of its existence was the historically given age line of 21. Excising it was premissed on locating its past and naming its origin and purpose. The history we receive in the Report is legal history: a precis of Roman Law, early English law (via a lengthy quote from Pollock and Maitland) through the Tenures Abolition Act to the Infant's Relief Act 1874. From which the Report concludes, 'the Irrelevance of Historical Causes'.

> "Grotesque as it may seem that the weight of armour in the 11th century should govern the age at which a couple can get a mortgage or marry today, the historical background of a subject does not of course necessarily tell us one way or the other about its present usefulness'. (p. 23).

In fact, the potted history is richly sprinkled with suggestions accounting for the longevity and the function of the age line (...'to stop an infant squandering his patrimony before he was 21' (p.22); 'elders of the 19th century were understandably alarmed at the idea of their hard-won capital being frittered away by irresponsible infants' (p.23); 'stories of golden spooned infants, prone to horse-flesh, dog-flesh, cigars, sparkling drinks, swell attire, betting' etc. ... (p.23).).

Infancy historically seems to be rendered along two lines; protecting the infant against his/her own gullibility and improvidence and, equally importantly protecting 'the estate' against the improvident ravages of the infant. Infantile legal capacity protects both subject <u>and</u> property. Much the same line of thinking explains the infant's lack of contractual capacity in the historical setting; the need to protect the infant and property itself. The representation of the infant through a history of the law programmes what has to be reconstructed.

Through the legal history (or at least a precis of it) infancy is attached to two related chains of meaning. Firstly, the ownership of land and property, from which golden spooned youths were historically parted. Secondly, the gullibility of youth and the need to protect them from unscrupulous money lenders. In sum, the aristocratic, landowning images set the age of 21 in a particular context but which in turn then evokes two observable strategies.

1. To make irrelevant an age of majority which seeks to protect only gilded youths, owning estates in land.

2. To construct 18, 19 and 20 year olds as more mature than their historical counterparts, and therefore capable of exercising considerably more dominion over their private affairs.

Interestingly, the two strategies combine in two images which are constantly linked in the Report; marriage and mortgage.

DISCONTINUITIES

1. INFANCY; THE LEGAL PARADOX

> "There are two aspects of our changing society which have forcibly impressed themselves upon us through all our deliberations.
> The first, as we have seen in Part II, is the steep rise in recent years in the number of marriages of persons under 21; whatever view is taken about the desirability of such a trend, it is occurring under and in spite of the restraints which the present law imposes. Much of our evidence in this sphere reveals that in marriages contracted between infants - albeit with the blessing of their parents - many couples soon encounter the difficulty of being unable to buy or rent in their own name a home for the young marrieds, the great majority would not be in that position. The hazards of spending the first months or even years of young married life with in-laws or other relatives are self-evident. Secondly, the change in the economic structure that has occurred in recent years has resulted in a substantial increase in the earning capacity of the young; it is common knowledge and supported by our evidence that young persons of 18

> "and upwards are earning in employment a living wage not so much less and in some cases more than their parents".
> (Latey; 100).

So, the declining age at first marriage, and the considerable fact that the young are significant earners (and consumers) begins to make the old age line increasingly irrelevant (and contradictory to 'aspects of our changing society'). Indeed, the Report highlights the contradiction of the young being able to marry but not own property or enter contracts and the social consequences this entails for the 'young married life'. Moreover, as the Report continues 'The combined purchasing power of a couple both of whom are working is considerable but it is inhibited by the present legal restrictions and disqualifications' (Latey; 100; my emphasis). In a word, these 'restrictions' and 'disqualifications' also have economic consequences, not only for married life but for the economy in general.

The image of the golden spooned youth is replaced by a notion of minors as earners and as consumers - major economic agents in modern life. Furthermore, the Report argues the need for the protective legislation of the Infants Relief Act is to be sought for 'in the social history of the Victorian Ages (p.87). Its purpose of preventing heirs being relieved of their estates by unscrupulous moneylenders is largely irrelevant to present day circumstances because:

> " ... our present day society and its problems are far removed from those of the 1870's. Indeed, borrowing money on a mortgage to buy a house is today regarded as commendable, not disastrous. Moneylending is no longer the social evil it then was, and the activity of moneylenders are now regulated by the Moneylenders Acts 1900 and 1927.
> (Latey; 88 my emphasis).

Within the changing structures of modern capitalism, with the growth of new forms of credit (hire purchase, mortgage, retail credit cards and the like) the question of infancy turns away from protecting the young against their own gullibility and protecting the estate against interlopers, to the more contemporary issue of credit worthiness. The new definers of responsible economic agency are no longer the conveyancing lawyers but the Hire Purchase Trade Association and the Building Societies Association. For it is the latter who stand to benefit most by an expansion of the number of individuals potentially able to borrow money (and pay interest on it!). The figure of the Victorian money lender reappears in the evil guise of the slick door-to-door salesman, the smooth shop assistant and in the glossy promises of the mail order catalogue so that the very young still need protection. But the other side is positively encouraged; the 18 plus group are marrying, are earning and consuming and are responsible and ought to be on stage as full participants in economic life.

In the light of these observations, it is hardly surprising that the Report specifically recommended the repeal of the Infants Relief Act (which for all practical purposes had hitherto eliminated the possibility of a minor raising a loan on mortgage) and strongly recommended that persons over 18 should be able to hold an estate in land (99-101). In these matters, the crucial evidence came from the Building Society Statistics (p. 100-101).

The legal paradox of minors being able to marry but unable to own or dispose of property reappears in the Report's discussion of wills and testamentary capacity.

> "the case for allowing young people of say, 18 to make wills is a strong one. With many more people of that age marrying it seems only fair that they should be able to make provision for their families in the event of death. With their greater earning power they have more to dispose of and should they be enabled to make contracts and own houses as a result of the recommendations of this Committee there would be an even stronger case for giving them the power to dispose of property thus acquired. While the intestacy provisions would, of course, look after the young wife and children for the most part, there may be people with equally good claims or a dying youngster about whome he could do nothing - a fiancee or, for example, a foster-mother'.
> (Latey; 104).

The observable demographic determinism of the Report (the steep rise in the numbers of minors marrying) deters any simple reading of Latey in terms of pure economic determinism; the demographic and the economic constantly interconnect. Reducing the age of majority in response to capitalist interests in expanding the size of market for consumer goods, and credit, has to be seen in the context of the other strand of thinking in the Report, namely, that the economic advantages of being adult will help secure and preserve that other building block of the social order, the sound marriage. Note how the Report refers not only to individuals as owners and consumers, but constantly refers us to <u>the couple</u> with its combined earning power, needing a house and having property to dispose of (though the Report can never quite throw off the implication that familial property and the dependants are 'his' - see 104 above). The two arguments, that minors are important earners and consumers, and, that minors are marrying, come together as the most powerful argument against the retention of the age of majority

at twenty one, because the legal paradox of infancy, simultaneously undermines the sound marriage, and more,prevents its economic power from being fully realised.

2. 'FREE MARRIAGE'

> "Almost all our witnesses had a view about the age to marriage without parental or Court consent (which for convenience we call "free marriage"). (Latey; 46)
>
> "Marriage was the most difficult and the most important of all our subjects. It is the most important, because of its consequences: make the wrong contract and you suffer for a year or two, and perhaps make an adult trader miserable for a few months; make a wrong marriage and you may suffer for life and spoil the lives of your children after you ."
> (Latey; 43).

Why should Latey consider lowering the age of free marriage as such a tricky and fraught business? Seen in the context of contemporary legislation (divorce, birth control, abortion) the issue was located precisely on the plane of changing boundaries between the public and private, concerned with the extension of personal freedom in the face of ancient imperatives and institutional social control. It is difficult to see now why lowering the age of marriage - encouraging the young to embark on the most respectable form of social and sexual liaison, marriage - could be regarded as radical measure and indexical of a rising tide of permissiveness.

The Committee discursively presents three crucial problems:

1. Rising divorce, highest for those marrying earliest, even amongst those who married with parental consent (Latey; 46 and Appendix 8).
2. Free marriage seriously undermines the authority of parents to control the marriage of their offspring.
3. Responsibility; were minors sufficiently mature and responsible to contract free marriages.

It was along these lines that the Committee brought its arguments and organised its evidence to bear to reconstruct the 18 to 20 year olds as mature and responsible subjects, fit to bear the greatest responsibility of adulthood, marriage.

a) 'Marriage is no longer today a permanent condition' (Chancery Judges, in Latey; 46). Marshalling demographic evidence, Latey recorded the evidence of early marriage, and, the high failure rate of early marriages. Against the latter, however, the Report revealed that the divorce rate overall was only 10%, which meant that 90% of marriages were lasting (p.46). It did not go on to add that most divorcees actually go on to re-marry. Rather, it went on to assert that, for the most part, marriage was a permanent union for the young, and that the law should facilitate that social process and not stand in its way. In a sense, Latey stands social science against legal prejudice; allowing statistics to argue against judicial pessimism, social science to mitigate legal precedent. The authoratitive evidence came from the Registrar General, not the judges in Chancery. The framework of legal realism (which argues that the law must take account of and work within the evidence presented by social scientists) permeates the Latey Report. For example, its explanation of the cause of early marriage is founded in the earning power of 15-24 age group (p.44). This kind of evidence marks a considerable shift away from the other traditional source of

authority on marriage matters, namely the Church. Ecclesiastical opinion is never absent, in fact it is carefully sought and presented (see p. 48 and 58); however, the authoratative discursive elements are the 'social facts'.

The strong argument here would be to see Latey in terms of the secularisation of the family; the state marshalling 'objective' data about the social formation in order to assert the rights of new age cohorts to form new families. Latey therefore expresses a 'state' concern for the problem of young marriages, thus marking a further shift away from the ecclesiastical regulation of the private sphere. Such a claim might be too strong, for we have argued that this is an implicit recognition for the clerics to speak on family matters. However, there is a discursive shift away from the Church(es) as the sole and final arbiters of family policy.

b) 'She's leaving home'.

Sergeant Pepper was primarily entertainment; the Beatles probably never made any great claims about their standing as social commentators. It is touching, however, to see the sentiments expressed through the medium of pop culture (sneaking downstairs on Wednesday morning, scarpering off with somebody from the motor trade, leaving a sad little note - a narrative of youthful rebellion, but making no great claims to be so) emerging as a tale of fear in official discourse, whose abiding image and organising principle was Gretna Green (p. 48). An instantly recognisable parental horror story? The uncontrolled marriage to an undesirable partner.

The effect of lowering the age of majority on parental authority per se was not a contingent matter but a crucial issue that Report had to resolve. The argument for retaining parental permission to marry until the age of 21 ran as follows. Firstly, 'the very test of having to convince two intransigent parents of the worth of the person you want to marry can be a good index to your maturity: the young pair passing, as it were, an ordeal by argument before arriving at the altar'. (p.47). Secondly,

not all young people are ready, or mature enough to marry at the same age. Parent permission allows some flexibility, some discretion (i.e. parental) in the face of the law's inability to take into account all relevant personal factors (p. 48). On these arguments, parental permission is construed as protective; wise old heads providing sane restraint during the headlong rush of young love.

Such an argument was easily disposed of; demography indicated more parents anyway were happily agreeing to minors marrying; minors were taking things into their own hands, either by starting babies, fleeing to Gretna Green or applying to the Courts. Moreover, the Report went on to argue (p. 48) (using evidence from the Letters and Advice section of the <u>News of the World</u>!) parents always acting in the best interests of their children was 'an idealised view' (see Leonard 1980; 99-102). There were such things as intransigent parents.[15] Furthermore, factors such as social mobility, and the British practice of minors leaving home to pursue higher education meant that parents were often no longer directly in charge of their children (Latey;48).

In these deliberations, it is difficult to discern the real object; was it the interests of minors or rights of parents to withold consent in order to control the marriage of minors. It is illuminating of the nature of intergenerational relations in the extent to which it reveals marriage as a rite de passage to adulthood and the way in which marriage <u>still</u> operated as a point of conflict between generations. Gretna Green, pre-marital sex and pre-marital pregnancy materially reject the rights of parents to control marriage and conversely celebrate the minors' capacity to take their life chances in their own hands, to act and be autonomous individuals. They represent symbolically private and public affronts. On the one hand, they evoke the personal response; 'How could you do this to "us"', on the other, they represent the worst conservative fears - loosening of the moral bonds of the family. And this in turn runs against the grain of legal

and ecclesiastical tradition, two of the institutional bulwarks of patriarchal authority over the young. Private shame and public concern meet on the grounds of power relations within the family.

One of the effects of discourse is to create new norms and new forms of social control which play upon the normalities and abberations the discourse itself produces. In this report, elaborating the grounds on which 'free' marriage at 18 ought to be accepted and institutionalised, Latey reduces one potential source of inter-generational conflict, without seriously disrupting the power relationships between parents and children. Dependence continues by other means. Parents remained free to determine at what age children would inherit familial goods. Or, in more routine matters, 'children' (even those over 18) are absolutely reliant upon parents signing educational grant forms in order to receive anything over the minimum subsistence allowance. In all sorts of small ways, young couples are and were reliant upon parental goodwill for setting up house (see Leonard 1980; 233-34). On these points, 'new adults' have no absolute rights; parents assume different modalities of social control. Whereas Latey sanctifies early marriage (by making it formally possible), local and customary strategies to prevent it occurring could still prevail. As Lawrence Stone's social history of the family in England reveals, the weight of parental economic power is a difficult obstacle for children to overcome, be it 1667 or 1967.

In sum, it is interesting to see how the Latey Report hammers home our earlier arguments (in respect of the 1660 legislation) about the extent to which being adult is a status deriving from rights to marry freely and the right to set up home. Minority in contrast implies the ineligibility to contract valid marriage, or, to marry only at the behest of parents. Changing structural spaces (minor to adult) is as much concerned with the legal right to change places, construed in terms of personal

rights to flee the parental nest and having the contractual and possessory capacity to do so.

More complex is the problem concerning the wider ideological effect of elaborating structural spaces, of discerning the extent to which the positioning of a boundary evokes behavioural expectations. If being adult formally corresponds with the right to marry, are there social and cultural implications that all adults should marry, that the 'normal' adult does marry? There is considerable evidence that diverse sources, from Jackie to sermons from the pulpit prepare for this expectation. State social policies, ranging from the distribution of benefits to the allocation of public housing certainly assume the connection (see Land; 1978). There is a sense, however tacit, that unmarried mothers, gays, bachelors and spinsters (all bearing derogatory connotations) are not normal, and/or unfulfilled. Conversely, the adult with child-like attributes, may well be regarded, generously, as innocent or naive, or just plain mad. Minors too well acquainted with 'adult' social practices soon find themselves embraced by the protective network of the caring state and defined as being in need of care and control because they are delinquents or in moral danger. The act of 'leaving home', for example, is strictly an 'adult' practice. In the USA, it is a major status offence (Garbarino and Gilliam 1980; 198-202), rendering the runaway liable to automatic 'treatment'. In the U.K., running away is not an offence per se, but it certainly leaves minors under 16 dangerously exposed to a care order.[16] While this is not directly an effect of the age of majority, construing adult and minor, (separate legislation accounts for the welfare of children), nevertheless such categories materially contribute to a moral universe which requires that the young have to be protected against themselves.

c) 'Young people nowadays are more mature' (Latey; 47)
A conclusion born of two lines of construction. The first, familiar to us, is the acknowledgement that the 1967 age of majority ('designed mainly to protect children of the well-to-do'), is hardly appropriate 'for the majority of young people ... earning their living at 15 or 16' (Latey; 47). They are mature because they earn a living and are on the way (if not already) to being economically independent. But as a group, minors of the '60s were different, economically, from minors in the past. They had 'real earnings' not dissimilar from adults (p. 45) and, there is a 'decline in the proportion of young people employed as messengers, roundsmen and bus conductors'(i.e. they are doing adult jobs) ergo, 'they have economically come much closer to being adults ... '(p.44).

Moreover, one prominent witness noted (she runs a larger secretarial agency) 'there is a new type of employee now emerging, who shows signs of having a greater capacity than young people have previously had, and is being assigned to increasingly important and responsible secretarial and office positions' (p. 44). The Report here is silent about gender, but given the nature of 'temp' agencies, the 'new employee' with 'greater capacity' and 'responsible' silently acknowledges the increased opportunities for young women and their location in service occupations. The point here, however, is that allied to a rise in real disposable income, there is an assertion that minors are more responsible than in the past; the young are now responsible and important producers as well as consumers. Minors are now clearly responsible enough to accept the mantles of responsibilities that goes with the age of majority.

The second line of arguing for the increased maturity of the young, is carried through explanations of earlier marriage. One possible reason for younger marriages, the Report records, 'is earlier <u>physical</u> maturity, for which there seems to be considerable, if debated evidence' (p. 45). Evidence from the B.M.A. indicates that boys and girls have been maturing at a progressively earlier age . ('The average at which girls now reach menarche is a little

of 13 years ' ; p. 45). Quite how this causes earlier marriage, or indeed relates to it, is not made clear.

The B.M.A. do not pronounce on the relationship between physical maturity and judgemental capacity or moral development, but it is the medical profession's evidence which is a key element in arguing for earlier maturity (albeit only physical).

It is a Professor Tanner, author of 'Growth at Adolescence' (1962) who provides the link.

> "It is a good deal more difficult to measure earlier psychological maturity but Prof. Tanner claims that children who are physically advanced for their age do score higher in mental tests than their less mature contemporaries, so that there would appear to be a link between the two". (Latey; p. 45).

Quite how biology determined psychological development is never made explicit. More interestingly, however, is the kinds of psychology that this line of biological determinism precludes. The Report does not call on Piaget; there is no deployment of his elaborate theories which map out the systematic relationship between cognitive structures and age. Nor indeed is there any systematic link made between the work of Piaget and his follower Kohlberg and their work on cognitive structures and stages of moral development. While this tradition is by no means unproblematic, it is a coherent approach, in psychology, which does investigate precisely the problem the Report addresses - namely the relationship between age and maturity.

The relevant 'science' seems to be medicine, not psychology; the proper authorities legitimating a shift in the age of maturity are doctors even though the B.M.A. eschews any necessary link between biological and psychological maturity. What is

evident in and through the deployment of biological maturity (in relationship to 'responsibility') is the circularity of the whole argument. Earlier physical maturation appears to be a cause of earlier marriage, <u>and</u> a justification for it - or at least for earlier 'free' marriage. 'Readiness' in terms of moral development, judgemental capacity, emotional stability or whatever - the psycho-social justification for earlier free marriage - remains unargued and untheorised. The approach might properly be presented as 'Well, they already do it, so let us pass on the <u>formal</u> right to do so unhindered'.

CONCLUSION

To bring together disparate strands, let us consider the major themes in the Latey Report.

1. As social policy, it does not reconstitute the ensemble of social relationships which comprise the social categories adult and minor. Rather, the Report reaffirms the character of each category, and the relationships between them. Adulthood remains a legal status comprising the right to own and dispose of property, to sign and be held to valid contracts and the right to marry without consent. Minority is to be excluded from the possession of these rights.

2. However, and this is of signal importance, there is in the Report, a recognition that economic agency is more than simply owning property. Latey explicitly recognises that minors are producers and consumers (signified by the rise in real disposable incomes, changes in the labour market and changes in the occupational location of the young, and the question of credit-worthiness), and as such the Report argues, ought to be given formal recognition by lowering the age of majority.

3. This implicitly means a considerable shift in the modality of distributing subjects to either side of an age line. Responsibility is not to be judged solely on whether the young are fit and proper owners and managers of estates, but is evaluated in terms of (a) their location in the labour market, (b) whether or not they earn a living wage - and therefore (potentially) economically independent, (c) whether or not they are sufficiently capable of exercising responsibly new forms of credit.

4. It is tempting to conclude that feudal definitions of majority finally collapse in the face of capitalist definitions of economic agency (labourers 'freed' to enter both the sphere of production are now free to enter the sphere of circulation and exchange). Or, that Latey facilitates the expansion of potential markets and provides new forms of exploitation (where collecting interest is added to the collection of surplus value as a means of accruing capital) by providing the legal means to make full use of the spending capacity of youth. The problem is why (if one accepts the base-superstructure metaphor - however relatively autonomous the latter may be) should changing the age of majority be so long out of synchronisation with capitalist interests?

5. The age of majority has never been determined in a unilateral fashion by economic requirements: the age of majority has been in law a line which formally celebrates parental rights over children. The status of the formally free labourer never necessarily entailed the formal freedom to leave the patriarch. While Latey deploys the arguments for earlier free marriage and the evidence that the young are more economically independent than in past times, in a mutually supportive manner (because they are independent, they ought to be able to marry; because they are marrying young they ought to have rights to economic independance), we should not forget the weight of tradition (or inertia) - legal, customary and ecclesiastical - that Latey had to dispose of, in the matter of earlier free marriage. It is not a contingent issue in the

Report but an equally formidable obstacle that had to be argued against before the 18 to 20 year old could achieve full legal subjectivity. The issue concerned parental authority not capitalist interests. Quite simply, it is quite possible for capitalist economies to develop and change without any necessary developments of changes taking place in the formal structures of family law and without necessarily disturbing the customary practices of family life. It is quite possible therefore for 'feudal' chronological lines to continue into the present, where these entail major changes in power relations of family forms.

6. This not to argue that capitalist interests do not benefit from changing the age of free marriage; clearly young couples by taking on hire purchase agreements, home loans, setting up house and bearing children, in no way harm the process of capitalist accummulation. New households are new units of consumption.

7. We find in Latey no profound philosophical arguments on the rights or capacities of minors and scant regard for developmental psychology. Neither is it legalistic, quoting at length the judgements of the ancients. Its appeal to reason lies in its deployment of demographic statistics and descriptions of economic changes taking place in the U.K. in the late '60s. Herein lies the 'science' of its discourse, mapping out social trends which had already rendered 21 as an obsolete age line, and as an obstacle to changes already underway in the social structure.

8. Minority was historically, and post-Latey, an excluded status; where substantial areas of public and private life remain out-of-bounds. The existence of the boundary provides the means of regulating youthful social practices; precocious youth prematurely adopting adult life styles may well find that agencies which seek to protect them, also have regulative

powers. Latey reproduces the strong association between minority and the need for protection. Because minors 'lack' capacity, and judgement, the need to protect, grounds not only their exclusion from economic life and political participation but validates the need for moral regulation.

However, the need to protect the young becomes an organising principle for all manner of interventions, not only into the social practices of minors, but with the lives of adults. 'Protecting the young' is used to validate the claims of pressure groups moving against the free circulation of 'video nasties' and 'video naughties' for example, or to attack the medical profession's freedom to prescribe the contraceptive pill to school-age girls. This not to argue that minors don't need protection for clearly they can become subjects of exploitation, but we raise the point to highlight how age lines can be used to extend the range of moral regulation and social control over aspects of adult life. How the existence of minority status can be taken up and used to justify the right of the state to intervene into the private sphere of family is a theme we shall explore in Part 3.

CHAPTER FOUR

COMPETENCE AND CONSENT

> "The concept of justice carries with it not only notions of fairness and impartiality, but also the idea of individual legal autonomy, the right of a person to be heard on any issue which affects him or her and on which he or she feels aggrieved. A person who is forced to remain silent while others make decisions is denied justice."
> (King M., 1981; 113).

What are the grounds for denying minors justice, denying them 'legal autonomy' and 'the right to be heard'. Here we shall explore the basis of the excluded status of minors, seeking to understand some of the arguments deployed by philosophers and lawyers.

For analytical purposes, we may identify two contrasting approaches; paternalistic arguments broadly concerning the exclusion of minors from the democratic political process and from the legal process, because they are incapable of looking after their own best interests, and, the more libertarian arguments, broadly associated with 'kids-lib', which suggest that children should be given all the rights and privileges enjoyed by adults. Within each approach there are shades of difference so that some paternalist arguments accept that some of the prohibitions applied to children are perhaps arbitrary and questionable. Likewise, some advocates of kids-lib would want to raise the age of exclusion, rather than do away with prohibitions and protections applied to children altogether. The paternalist and libertarian arguments will be considered in the context of recent philosophising about the status and competence of children in liberal democracies.

In order to explore how competence and questions about it have a material presence in current legal issues, we shall look at the notion of consent as it applies to minors, and the kinds of social issues it generates. We look particularly at the Gillick case. We shall explore the way consent has been reformulated over time and the tensions it generates between claims for minors individual autonomy and the claims made for parents to oversee the moral welfare of their children. Consent usefully illustrates some of the politics of the intergenerational relationship between parents and their children, and between parents and other professions concerned with the physical and moral well being of minors. We shall begin with some grounding-clearing considerations of capacity, the way it is theorised and the implications it has for philosophers and lawyers.

a) Capacity

Capacity presents us with a problem of terminology, so here we have to make a distinction between 'legal capacity' and 'capacity' used in juridico-political theorising. By legal capacity is generally meant the legal right to pursue a certain course of action through the courts (on this basis, minors lack legal capacity), the right to enter agreements and to commit acts as an autonomous person and to be held responsible in courts of law, for these actions (e.g. contractual capacity, criminal capacity - both of which minors lack, but to differing degrees). One simple message we argue throughout is that legal capacity is not a homogenous entity; it descends on individuals at different ages in different legal circumstances. Thus, contractual capacity with regard to property descends at 18, the capacity to marry at 16 or 18 (depending on parental consent), and criminal capacity at any age over 10 years, to some degree. Why this is so is one of the foremost objects of this research. Possessing legal capacity therefore means the right to be a party to some legal suit, the right to be heard in a legal dispute,

the right to request a trial by jury, and in other circumstances being in the possession of the right to vote in or at local or national elections. Whether or not that right is exercised does not deny an individual's capacity to do so. And it is right that we acknowledge that legal capacity permits an individual's autonomy to choose a course of action; the assumption of legal capacity is oblivious to a person's exercise of it.

Capacity used in the politico-juridical sense is closer to the common-sense use of the word as descriptive of volume, size and content, and the relationship between them. In respect of children, the question turns, practically, on the amount or degree of competence they do or do not possess. To illustrate, Schrag's discussion of the child's status in a democratic state contains the following:

> "The reason for according children marginal membership (of the polity) is this: children lack not merely wisdom which would be insufficient grounds for excluding them, but capacity to be participate fully; 'something necessary for the completion of personality - reasonable maturity or rationality' - is just missing."
> (Schrag 1975, quoting Cohen; 343).

So children do not have a 'full tank' - either of competence, maturity or rationality. On this basis, children are excluded because of lack or incompleteness. And it is on these grounds that kid-libbers come into conflict with paternalist theoreticians. The political and personal stakes are these. If it can be demonstrated that children only partially possess the attributes of competence, maturity or rationality ascribed to adults (who, by definition, have a 'full tank'), then there is good reason
a) to exclude them from the legal process and participation in polity, b) to act towards them in a paternalistic manner, by

directing their social and personal lives so as to protect them for their own best interests. On the other hand, if it can be demonstrated that children possess these attributes to the same degree as most adults, the grounds for exclusion are extremely flimsy and overtly arbitrary . Politico-juridical 'capacity' then works upon the differential possession of '<u>cognitive goods</u>' possessed by adults on the one hand and children on the other. Their problem resides in measuring how full each tank is, and what instruments are available to measure the qualities of competence, rationality, maturity or judgement, and the extent to which these are acquired with age. It is precisely these problems that Latey avoided, preferring to remain on the ground of legal capacity - except in one issue - consent (see below).

Legal capacity differs in one further respect; it is a status ascription. Minors, by definition, are legal subjects denied rights to do certain things: other illustrations are blacks in South Africa being denied the right of residence in white suburbs; a married woman finding it impossible to bring a case of rape against the husband. These are simple illustrations of status ascription in relationship to legal capacity. Legal capacity determines the ascription of status, and speaks the social consequences for those who lack it.

However, particularly in the case of minors, the absence of 'legal capacity' and hence their excluded status, rests upon the putative and often questionable grounds of their lack of 'capacity'.

What we have tried to spell out in the foregoing chapters is the sociological aspects of the relationship between 'capacity' and 'legal capacity'. The distinctive move we have made, away from the idealist theorising of politico-juridical writers is to

underline the class and patriarchal interests concerned with and written into the legal definitions of 'incapacity' of minors. To reiterate, the legal capacity of infants, then minors, is defined along two axes; a concern with the protection of the person, and, probably more emphatically with the property that <u>some</u> minors possessed or were about to become possessors of. We are constantly made aware of the extent to which the law is invoked to protect minors as a <u>person</u> within a family, but also as a <u>member</u> of a family capable of owning and controlling familial goods. The minor's lack of legal capacity enabled family elders to control not only the person but also the infants' possessions. We would argue then that 'legal capacity' and politico-juridical 'capacity' have to be held as conceptually different and that philosophers in general have thus far had only minimal impact on the judicial imagination. Nowhere is this more evident than in the redefinitions of the age of majority where the material concerns have been with property, contract and marriage, with only scant respect being paid to philosophical issues about the 'capacity' of minors, and even a superficial reading of Latey confirms this.

b) <u>Competence</u>

Rationality, maturity, judgement - these are the constitutive elements of competence and the means by which 'capacity' is understood and measured. By legal ascription, the adult, the legal subject of 'full' age (again the terminology of the tank) is said to be possessed of these cognitive goods, unless by ascription, they are deemed to be mad.

Here we must distinguish between <u>lack</u> of 'capacity' because of age (which locates the minor) and <u>loss</u> of 'capacity' through legal ascription (e.g. historically, the married woman, the black in South Africa). By the doctrine of <u>couverture</u>, whereby a wife passed into the care and protection of her husband, and because

she did so, by common law, did not need to retain the legal means to treat with the world outside the marriage, married women were reduced to a status homologous with that of infants (no possessory or contractual capacity in law). Homologous with, but not reducible to; for single adult women (femme sole) retained these capacities as adults. Therefore a widow assumed the capacities originally denied her by marriage, not by age. We must retain this distinction between infants and married women, even though the social and economic consequences arising from the loss of legal subjectivity were broadly similar, consequences which reduced both to dependants. Likewise, a distinction must be made between minors and the mad (who may be 'adult' in age but not in competence) while holding on to similarity of their positions in law. In other respects, all adults may have the capacity (in terms of competence and right) to vote but this is not all-embracing; we may be electors in the constituency of Hampstead, but not in Birmingham Ladywood - an effect of legal ascription. This distinguishes between individual adults, but also distinguishes between all 'free' adults (who can vote) and all minors, who cannot. That difference in all liberal democracies rests upon age, and by extension some notion of competence. Here we shall consider some of the philosophers' arguments about competence, its acquisition and relationship to age.

1. '<u>The philosophy of exclusion</u>'

In a very perceptive review essay on children's rights, Bob Franklin (1983) remarks:

> "By seeking to answer the question 'what is man?' and attempting to define those characteristics essential to securing full citizen rights, philosophers have persistently excluded certain groups in society from effective political participation". (p. 16).

In effect he argues 'political philosophy can be viewed as a philosophy of exclusion' (p. 16). From Locke, through Mill, to present day writers on children's rights (Schrag,1975,1977; Cohen, 1980;Scarre, 1980) he argues that 'this philosophy draws much of its inspiration from the prevailing Liberal philosophy with its over-emphasis on reason and rationality as the hallmarks of the complete human being' (p. 21). Those presumed to lack these characteristics are therefore precluded from consideration as full human beings, and, consequently, 'women and blacks have been excluded by this philosophy but children are its most persistent and long suffering victims' (p. 21). On this account, the polity is to comprise those possessing rationality and reason, therefore according to Mill for example, children are 'incapable of government' (quoted in Franklin op. cit.; 21).

Now, while Franklin is justified in pointing out the victims of exclusion in prevailing Liberal political philosophizing, we should acknowledge that at least it does provide some basis for mass participation in the polity, and was written <u>against</u> Classical philosophies of government by the 'aristoi' (the best) and against the political claims contained within the doctrine of the divine rights of Kings. To be adult and sane were sufficient conditions for inclusion in the polity, according to the Liberal view, and, perhaps Franklin is being unkind to Mill in claiming that this philosophy is responsible for 'excluding' women. Children, however, pose a more difficult problem, for this tradition explicitly excludes them precisely because they lack competence which is circularly secured by reference to age; because of their youth they lack maturity, they lack rationality because of their chronological age and so minors should not be participatory members of the polity.

Franklin's riposte is to the point:

> "Why not leave age entirely out of the picture since it is irrelevant and more importantly obscures the argument. No-one really believes that children should be excluded from voting because they are children; this is not an argument but mere assertion .... The adult concern is that children may lack rationality and sufficient knowledge. Once the grounds of the argument have shifted to this terrain, they are easier to refute. It is then clear that those to be excluded from participation are those who, without regard to age, lack the relevant competence" (p. 18) my emphasis).

Two comments. Firstly, we cannot leave age out of it. Chronological age defines the organisation of numerous institutions and and the ascription of legal status. Secondly, precisely who, and on what basis shall determine, 'without regard to age', which individuals lack the relevant competence, and therefore be denied political/legal participation? A committee of mandarins allocating points on the basis of occupation, educational credentials and moral virtue, or what? Or shall it be participation on the basis of some criterion referenced test (like a driving licence). The latter suggestions entail the disqualification of some children but also some adults (not only the prisoners, the mad, but also presumably the illiterates?). On the grounds that the latter course reduces the claimable rights that adults already enjoy, more narrowly defines the social democracy we now participate in, and allows political litmus tests to be inserted into questions of adult competence (one can imagine the ease with which anyone espousing revolutionary politics could be deemed as 'incompetent'). The last course of action derogates further, civil and political rights already under threat and therefore can hardly be taken seriously. If this is the price

of including minors, then the cost may be too high, for its effects may well include an increased surveillance of, and intervention into, the social relations of adults - a state of affairs already endured by children, which theorists such as Franklin are seeking to ameliorate!

Franklin's identification of a liberal tradition of philosophy producing 'victims'; where an over-emphasis on rationality provides the grounds for excluding certain individuals on the basis of a 'lack' (of rationality, competence) broadly describes the legal process of classifying legal subjectivities. What he doesn't stress are the positive attributes of the liberal tradition, as a bastion against arguments supporting monarchical, dictatorial or oligarchic political forms. What he further identifies are the kinds of 'cognitive goods' which matter, both to legal theorists and liberal democratic philosophers. The reservation we have about exchanging the chronological age as an index of competence for some other kind of selection of competence may well reduce the size of the population allowed to participate in the polity, not merely change its character in terms of age profile.

We must acknowledge that Franklin's essay brings home the salience of competence, putting it centre-stage, as it were, and spelling the basis on which children are 'excluded' as legal subjects and political actors. But the process entails competence being mediated through age; because minors are below the age of majority, they are all 'incompetent'. Herein lies the rub ; chronological age, used as an index is arbitrary, is all-embracing and may well be unjust in the assumptions it makes.

2. <u>Age and competence</u>
The cognitive goods (reason, rationality, judgement, discretion) which collectively constitute the field of competence are tacitly acquired and (as generally agreed by all those cited above) only gradually so . How we recognise or quantify tacitly acquired qualities, such as 'maturity' is incredibly contested and necessarily imprecise. Moreover, because the acquisition of these qualities does not map with biological development, and because the process of acquisition is differentially distributed amongst individuals, not everyone reaches the same stage of 'maturity', 'reasoning', and so on, at the same age. Age lines, however, make the assumption that all those on one side of it are similarly endowed with 'competence'; those on the other, are similarly homogeneously grouped by their 'lack' of it. Age lines then are blind to the individual distribution of competence: in this sense, they are arbitrary insofar as no 16 year old is held to be as competent as any 'adult'.

So in seeking to ameliorate the lot of minors, in exploring a new basis for participation in the polity, what are philosophers such as Schrag (op.cit.), Cohen (1975), Scarre (op.cit.), Franklin (op.cit.) and Schoeman (1983) looking at, and looking for? What counts as competence in their diverse accounts. The secret is to look beneath their sophisticated arguments about the relationship between the possession of rationality and the right to participate as 'full' subjects, to referents common to them all.

The claims that maturity, rationality, reason or competence are gradually acquired, differentially distributed amongst individuals and acquired at different ages (therefore it is impossible to distinguish between some minors and some adults - ergo age lines are unjust) are based on the works of Piaget and/or Kohlberg (e.g. Scarre op.cit; 122, Schoeman op.cit; 270, Schrag op.cit. 475).

In all these accounts (even Franklin, who is actually quite critical of the 'liberal' tradition - see inter alia p. 17-18) what is sought is some evidence of the ability to think abstractly; the ability to consider issues beyond the level of analysing them only in terms of an individual's self-interest. To illustrate, take the following passage from Cohen (1975).

> "... I reach a conclusion similar in structure, though not in detail, to Schrag's: that rationality, in a broad and powerful sense of that term, is a presupposition of any democratic community, and that that rationality is to be understood as the capacity of the members to do certain fundamental kinds of thinking. The absence of such rationality is the reason it makes little sense to talk of democracy among brutes, or infants. It is not just that they cannot operate a democracy well; they cannot operate one at all."
> (Cohen op.cit; 460).

One further illustration, this time from Franklin.

> "If the argument for excluding children is really based on their assumed capacity for rational thought and a knowledge of the relevant issues, then it is not children as such who should be excluded but those incapable of rational thought and sufficient knowledge of the issues".
> (Franklin, op. cit.: 17).

"Fundamental kinds of thinking', 'sufficient knowledge of the issues', to be fair are first approximations, preliminary statements in the explorations of what children are assumed to lack. Schrag is more focussed.

> "Unlike the concrete-operational child, whose thought is tied to the concrete, the adolescent can transcend the immediate here and now."
> (Schrag op.cit: 172)

Schrag's principles here are derived from Piaget (see his footnotes 171-172). Kohlberg pops up two paragraphs later (ibid).

We suspect that with reference to Kohlberg's scheme of things, (detailed and tabulated for easy reference by Weinreich-Haste, 1983; 8), 'fundamental kinds of thinking', 'sufficient knowledge of the issues' and the transcendence of the here and now equates with Kohlberg's Level II, Stage 4 .

The problem is that there is general agreement that adolescents may well move to this stage at 15 or 16. On the other hand, many adults are still not operating at this level of moral development.

On the evidence, the philosophers' notion of competence seems to equate with the ability to assess issues, make judgements in abstraction; to assess how their decisions will affect the lives and liberty of others. The philosophers' referents are Piaget and Kohlberg, who suggest that this kind of cognitive attribute is acquired during adolescence. Not all philosophers however (e.g. Scarre) go the next step to advocate the inclusion of adolescents in the polity.

There is a fundamental problem with an over-reliance on Piagetian-Kohlbergian 'stages' of moral development approach, are not readily acknowledged by the philosophers but are recognised by fellow developmental psychologists such as Weinrich-Haste (op.cit.). Indeed, it is a problem which resides in philosophers like R. S. Peters (1959) and it is this. The stages of moral development approach is usefully descriptive, fundamentally analytic; both descriptive and explanatory of observable phenomena. But it too easily becomes <u>programmatic</u>; because children cannot do certain kinds of thinking at specific ages, certain kinds of knowledge should not be made available to them. One obvious example which comes to mind is political education. Far from being a necessarily <u>emancipatory</u> project for minors, the stages of moral development referent, has also its counter-tendencies. One can conceive of Kohlberg's work being used to limit the kinds of knowledge allowed to be transmitted in schools, because children aren't 'ready' for it. It can be just as prescriptive about what constitutes childhood and the subjectivity of children, about what children are competent to do, receive or perform, as the operation of the legal system.

The philosophers' debates about capacity, competence, rationality and stages of development signal just how far our way of thinking about intellect and reason is saturated with categories of chronological age. We constitute the social with generational categories as much as we think and analyse it in terms of gender, class and race. Perhaps with one exceptional difference; for most there is a potential of release, a near certain promise of emancipation. To be able to vote, serve on a jury, get married without parental consent, get a telly on H.P., all we have to do is attain the magical age of majority. This may well be the best defence of all for using chronological age alone as the only necessary condition for becoming a 'full' subject, wherever it is drawn, at least in conditions of universal suffrage.

3. Legal Subjectivity and Competence

By comparison, the philosophers' competence is pitched at a higher level than the law's practical concerns. 'Sufficient knowledge of the issues', 'fundamental kinds of thinking' in law, to borrow Piaget's phrase is actually 'concrete-operational'. Latey's concerns focussed on the gullibility of the young; were they smart enough to discriminate between contracts which would be in their interest or fulfil their need, against those which were exploitative. Criminal law requires a knowledge of right or wrong, firstly of the actus reus. Secondly, did they understand the implications of the oath? The significant equation of the age line and the acquisition of competence in law tells us much about the history of what the law valued, protected and what it was prepared to punish. The law makes no claim to the universality of competence or reason, insofar as it was prepared to place the age of criminal responsibility at the age of 7, and the age of marriage at 12, 14 and 16 and the age of majority at 21.

The law's diversity of competencies precisely opposed the notion of the philosophers' competence. It does not seek evidence of thinking in abstraction across a variety of moral issues, only a practical understanding of one situation at a time. We argued in the foregoing chapters moreover that the stage-easing of minors into the legal process does not refer to the complexity of the issues at hand as the principle determining when minors are thought to be competent, but to the material goods and possessions at stake. We have yet to be convinced that the competence required to be a party in a criminal case necessarily requires less 'cognitive goods' than to be a party to a contract. In effect, this is what the law determines the position to be.

In practice, we have two kinds of logic in operation. The philosophers seek the means to differentiate children from adults by looking for a point at which 'certain kinds of fundamental thinking' differentiate between age cohorts. The problem they openly acknowledge, is that individual differences mitigate against anything other than arbitrary age lines unless or until we are willing to discriminate between individual competencies. We have already acknowledged the negative social consequences of the latter course. Lawyers have been less concerned with a notion of generally applicable competence. For them, age lines have the merit of certainty when confronting individual cases. Justice equates with equality of treatment across similar cases, so at least the law they would argue treats all minors equally, firstly by exclusion, either from certain kinds of responsibility, or from some kinds of legal capacity which may work to their detriment. Yet the age lines the law draws are value-laden. They refer not to the complexity of the issue so much as to the value the law places on the object or relationship brought to its attention.

While certainty may well be of some merit and a prime reason for the legal ascription of minors as wholly or partly 'incompetent', nevertheless, the legal process also confronts the problem of individual differences. One aspect of this problem can be illustrated by reference to the legal conception of a minor's capacity to consent.

For reasons that we shall make clear, the issue of the consenting capacity of minors, has been and is, constructed primarily around girl minors. That this is so is itself a significant message about gender and sexuality. For clarity, therefore, we shall be discussing consent primarily as it applied to girls. We then discuss this capacity as it affects boy minors.

CONSENT AND AGE

The first thing to grasp about the age of consent is that it has been transformed over historical time and refers to quite different things. Schematically, there are three different ages of consent, none of which closely map one with the other.

1. In its earliest usage, the age of consent was a stage in the process of becoming married. By common law a boy under 14 and a girl under 12 could be married, but at those ages 'they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This was founded in civil law.' (Blackstone I; 436). It was an age at which verbal agreements became hard contract. At 14 and 12 respectively, boys and girls were given the legal capacity to confirm or remit earlier agreements about marriage. They had acquired sufficient discretion in law to be capable of entering a contract of marriage.

2. The age of consent also refers to sexual relations. The second usage, which makes it illegal for males to have sexual intercourse with girls under the age of 16, was legislated into existence through the Criminal Law Amendment Act 1885, subsequently confirmed by the Sexual Offences Act 1956 (see Bevan 1973; 220-227). This is the most commonly used meaning of the 'age of consent', understood in terms of the protection it offers to girls under 16.

The law has offered its protection to young girls since 1275. The Statute of Westminster I of that year made it an offence punishable by two years imprisonment and fine, to ravish 'any maiden without age', regardless of her consent. In 1285, the Statute of Westminster II made it a felony, punishable by death (Bevan, op.cit.: 222). The term 'without age' is somewhat imprecisely known; it seems to have referred to girls under 12, that being the age of discretion. Gradually, it became established that if the girl was between 10 and 12, it was not a

felony of rape to have intercourse with her if she consented (Bevan; ibid). A Statute of 1828 (9 Geo.4, C.31) both repealed and clarified the earlier principles; it distinguished between the felony of carnal knowledge of a girl under 10, and the misdemeanour of carnal knowledge of a girl over 10 but under 12. W. J. Stead's 'purchase' of a 13 year old girl as part of his campaign to expose the exploitation of child prostitutes, which led to the 1885 Criminal Law Amendment Act (for an excellent account of the context, see Goreham 1978) raised the age of consent to 16 years (whilst retaining the degrees of offence by allowing a mitigating plea that a girl over 13 but under 16 could 'consent' to sexual intercourse). In practice, a consenting girl over 13 but under 16 'saves' her male partner from a charge of rape and battery, but not from the statutory offence of unlawful intercourse (see R. V. Howard (1965) 3 All E.R. (CCA) and Skegg 1973;373). Moreover, case law takes account of the age of the male committing unlawful sexual intercourse . Statute and case has consistently constructed girl minors with a capacity of consent, with implications on the next kind of consent discussed below.

3. It may seem curious to refer to the capacity of minors to consent to medical treatment as a separate form of consent but its recent topicality suggests it raises some issues worth serious consideration.

Latey (op.cit.) recommended 'that without prejudice to any consent that may otherwise be lawful, the consent of young persons aged 16 and over to medical or dental treatment shall be as valid as the consent of a person of full age', (Latey;118). This recommendation was written into the Family Law Reform Act 1969, Sect. 8. Materially, this means that minors over 16 can sign the consent forms required, say, before a surgical operation is performed, and no further consent is required from parents or guardians. Prior to 1967, Latey admitted, the position was

somewhat obscure; in principle, parental consent was required before medical treatment was allowed to be performed on minors, but in practice, hospitals and the medical profession had accepted the consent of 16 year olds as being valid (though no direct judicial authority had in fact established that such consent was valid) (Latey;117). Latey grounded 16 as the age of consent to medical procedures on four points; a person of 16 or over could choose their own doctor (N.H.S. Regulations 1962); a person of 16 or over could voluntarily place themselves in a mental hospital (Mental Health Act 1959); 16 is the age of sexual intercourse; widespread practice of accepting 16 year old minors' consent as valid (Latey; 117-8).

Unlike the age of consent in relationship to sexual activity which was statutorily regulated, consent to medical procedure derives from common law definitions of capacity and consent. For example, doctors performing operations on 16 year old minors (prior to 1969) without parental consent, risked (in theory) a charge of 'trespass of the person' (Skegg op.cit.; 371, Latey; 117), and an action for damages.

However, in common law a separate principle concerning consent and capacity emerged from the criminal law and the tort of battery. Simply put, if a minor by <u>age alone</u> was incapable of consenting, then a charge of battery could not be brought against someone assaulting a minor, because a minor could neither consent to or resist battery or other touchings. How could it be shown that a minor had consented or not to an assault if they had not the legal capacity to give their consent anyway? How could it be shown that an offender had acted against the consent of a minor, when a minor had neither consent to give or withold? (see Skegg;372). Clearly, the common law was obliged to grant minors some capacity of consent, that could reasonably be witheld, simply for the protection of minors at law. In principle, the common law adopted the line that no minor is incapable of

reason by age alone, but that everything depends on their capacity to understand and come to a decision about battery or other touchings[17]. By extension, if minors were thought to be aware of the implications and effect of medical treatment, and that practitioners took reasonable care to explain procedures and outcomes of treatment and took reasonable measures to ascertain that a minor understood what was to happen, then a minor, autonomously could consent to treatment, without parents being involved.

For minors over the age of 16, after the passing of the 1969 Act, their position was secure. Not only could they seek medical treatment as if they were an adult, they could seek treatment which their parents or guardians may not approve of, and moreover, their parents could not force medical treatment on them against their expressed wishes.

Providing minors with the capacity of consent is important in two respects:

a) Consent allows for the assertion of an autonomy of self, it accepts that minors are capable of thinking about, reflecting upon and being able to understand and make decisions about important areas of their social being.

b) Allowing minors a consenting capacity places limitations of the rights of parents (natural or surrogate) to control and intervene in, important aspects of the lives of their children.

In this respect, capacity of consent sets up a considerable tension within intergenerational relations, potentially shifting the balance slightly in favour of minors legally being able to control small but important aspects of their

being and existence. But these tensions are not limited simply to relationships broadly in the domain of the family. For a consenting minor has the capacity to establish a direct relationship with medical practitioners and other para-medical organisations, most notably family planning clinics. In this instance, the tension lies between parents and members of the medical profession and members of personal caring services as to whether parents should be or need to be consulted about treatment being offered to girl minors. And it is broadly at this point that the politics of intergenerational relations opens out into conflicts in public domain, between competing groups of adults. All the competing interests, rhetoric and ideologies, about consent, medical treatment, the rights of minors as opposed to parents, and the competing claims of parents against the professions seeking (they would claim) to act in the best interests of minors, has most recently been highlighted over the issue of providing girls below the age of consent (under 16) with contraception and termination of pregnancy. It is to this situation we now turn.

MORALS AND MRS GILLICK

The Gillick Case (Gillick vs West Norfolk and Wisbech Area Health Authority, TLR 2 July 1983) temporarily settled some legal questions known to exist by the D.H.S.S., the medical profession, family planning associations and the legal profession for about 20 years. This case finally tested before the High Court:

a) the quality of consent of girl minors under 16.

b) the right, and discretion of the medical and para-medical profession to dispense advice and treatment in the area of family planning.

c) the claims of parents to be consulted about, and to give their consent to treatment for their daughters below the age of consent.

d) the legal status of guidelines issued by the Department of Health and Social Security in 1974 and 1980, in matters concerning reasonable practice in dispensing contraception to young girls.

More difficult is the description of the field of forces which required a social and moral problem to have a legal resolution. For in effect, the way of 'managing' the relationship between sexually active young girls, the profession and parents, for the last 20 years anyway, had been to give all parties some discretion, some latitude in their dealings with each other. 'Management', at heart, meant not making legally binding relationships between the parties but allowing all kinds of accommodations, compromises, discretion and common sense to prevail. So it was until Mrs. Gillick forced the issue. We must add that her motives, character and biography play only a small part[18]. In short, had it not been Mrs. Gillick, someone else would have put the issue before the courts. Such an outcome was always implicit because the area of practice was so fraught with uncertainty and conflict. Going to court had always been the last resort; it was a matter of time before some party played that hand.

What follows is a brief account only of the social forces dynamically constituting the pre-history, as it were, of the Gillick case.

Firstly, we have to register the demographic presence of school girl pregnancy; the fact that girls under 16 were and are sexually active.

According to the National Council of One Parent Families:

> "In 1977, 3,625 girls under 16, or 1 in every 500 girls of 11-15 years of age, were known to have become pregnant. This represents 2.4% of known conceptions to single women of all ages. Of these 3,625 pregnancies, 63% (2,300) resulted in legal terminatio-s, 36% (1,299) in live births, and 1% (26) in still-births."
> (NCOP, Pregnant at School; 1979; 57).

The NCOP further note an increase in known pregnancies for girls 11-15 from 1971 to 1975 of 32% (1971; 2,846, 1975; 3,736, and a small decline thereafter to 3,625 in 1977) (NCOP; ibid). Legal termination of known pregnancies for girls 11-15 has increased from 53% in 1971 to 63% in 1977 (NCOP; op.cit.: 58). This data drawn from OPCS sources makes no claims about being indexical of the sexual activity of girls under 16 (i.e. those sexually active but not becoming pregnant), nor does it claim to include any illegal terminations, nor cases (if any) where the pregnancy runs full term and the baby is simply given away and brought up by someone else. The number of pregnancies is tiny in the context of all known pregnancies. The percentage of terminations (63% compared with 41% for all single women) is sufficient to alert us to the unique predicament faced by under-aged girls, their parents and the professions counselling them[19].

Secondly, we have to comprehend known demographic statistics, in terms of the legal aspects of such practices. To repeat, it is unlawful to have sexual intercourse with girls under 16. We also have to be mindful of the 1956 Sexual Offences Act, which makes it criminal for any other person to aid, abet, incite to commit, any girl under 16 to participate in unlawful

sexual intercourse (see Bevan 1973; 223, 226). Like the age of consent, the provisions about aiding and abetting are principally protective clauses, seeking to prevent the exploitation of young girls. To this we must add the legal condition of medical consent. While girls 16 and over may consent to medical treatment, without parents or guardians being consulted or being required to give permission, for girls under 16, matters are not quite so clear, either for them or for those providing treatment. Where consent is obtained from parents, either for termination, or the provision of contraceptives for under-age girls, such practices are legally defendable. The 'grey' area lies in providing these services without parental knowledge or consent (see Skegg 1973).

Schoolgirl pregnancy on the one hand and research reported by the NCOP (studies by Farrell (1978) and Schofield (1965), the former reporting that 12% of her sample had had sexual intercourse before the age of 16, the latter reported only 2%) indicates that though under-age sexual intercourse may be illegal, it nevertheless goes on. Its extent, and the degree of sexual activity (no reference is made here to fondlings, petting or touchings which also constitute sexual activity, but do not constitute sexual intercourse) though a field of social relations, which, like any other needs to be explored by researchers, will not concern us here. It is sufficient for our purposes to register the tensions between legality and practice and the social consequences arising from it.

A third aspect is the network of professionals associated with the dissemination of sex education, advice and counselling, and provision of services, which together constitute the field of family planning. The organisations involved include the

National Health Service, which provides contraception and termination services, the Health Education Council disseminating information in 'educational' packages, and a variety of charity-funded clinics (Marie Stopes, Brook Advisory Centre, Family Planning Association etc.) providing services , but also acting as data-collecting and lobby organisations. Originally, the latter organisations functioned in opposition to state policy, to meet a popular demand from women for family planning advice and medically supervised family planning. To an extent, the service they provide allows women to go outside the sphere of the 'family doctor' for private and anonymous counselling and 'treatment'. Though professions working in the National Health Service and the clinics outside have long been permitted to provide both contraception and abortions, the practical problem of providing a 15 year old girl with the Pill, without her parents' consent placed all those involved in a legally disputatious position. The provision of the Pill, which can only be obtained on prescription from a medical practitioner, confers on it the status of 'medical treatment'. Likewise, inter-uterine devices, diaphragm (though not condoms or contraceptive gels) .

Fourthly, in these matters, what are the rights of parents? Do they have to give their consent to medical treatment for children under 16? It has been argued that (a) there is, in fact, no <u>law</u> requiring parental consent, and (b) parental rights and wishes in these matters are <u>not</u> inviolate (Children's Legal Centre, 1983;6). In the first case, obtaining written consent has been held to be good and reasonable practice (Children's Legal Centre ibid. DHSS 1974,1980). In the second instance, courts have overruled parental consent, most notably in Re D a minor 1976 1 All ER 326, where a child suffering De Sotos syndrome was about to be sterilised in accordance with her mother's wishes.

The practice of obtaining written consent from parents prior to medical treatment assumes of course that minors are incapable of fully understanding medical procedures and the likely outcomes. It also assumes that parents always act in the best interests of their children, and indeed are the final judges of what those best interests actually are. Both assumptions are, to say the least, questionable.

Those, like Mrs. Gillick, 'the pro-life' organisations and the political elements of the 'new right' who want to assert the primacy of parental authority, confront in opposition (a) any claim that under-age minors have any capacity for competence and consent, (b) the discretionary power of professions to assess and ascertain the competence and consent of minors and act on the basis of that assessment. Both were allowed for in the DHSS Guidelines 1974 and 1980 (DHSS Family Planning Service - Memorandum of Guidance May 1974; Health Notice HN (80) 44, 1980). In 1974, the DHSS advised:

> "It is for the doctor to decide whether to provide contraceptive advice and treatment, and the Department is advised that if he does so for a girl under 16, he is not acting unlawfully provided he acts in good faith in protecting the girl against the potentially harmful effects of intercourse. The Department is also advised that other professional workers who refer, advise or persuade a girl under 16 years of age to go to a doctor in his surgery or at a clinic or elsewhere for purposes of obtaining contraception and treatment would not, by such act alone, be acting unlawfully."
> (DHSS 1974 Guidelines, quoted in NCOP 1979;48 my emphasis)

Similarly, the Medical Defence Union's view stated that it was advisable for doctors to see a (young) patient's consent to inform parents about contraceptive advice. Where such consent was not forthcoming, her wishes should be respected (ibid). Given the DHSS's Guidelines outline, which constituted on the one hand good and reasonable medical practice, on the other, some legitimacy for widely accepted and adopted medical and para-medical practice, it was not surprising then that these Guidelines should be overtly challenged in the Gillick case .

Finally, the constitutive elements of the case's pre-history would be incomplete without some acknowledgement of the politicisation of the family in general and parent-child relationships in particular by the Thatcher government, most notably represented in the leaked report of the Family Policy Group's deliberations. In that, other Prime Ministerial statements and structurally embedded in social policy, we find the familiar litany of the elements of the well ordered family (male breadwinner, non-waged wife, dependant children whose character and well-being are crucially shaped by parental values and authority). The political climate in the early 1980's was appropriate for 'those who wished to see moral certainties embodied in law' (Naughton, Observer Sunday 4 March 1984), particularly with respect to the rights of parents to supervise their children's moral welfare.

THE GILLICK CASE

Heard before Mr. Justice Woolf, in the Queen's Bench Division of the High Court, Mrs. Victoria Gillick, mother of 10 children, including 5 girls under 16, asked the Court:

a) to declare the DHSS Health Notice HN (80) 44 and the advice contained therein to be unlawful.

b) request the Area Health Authority that no doctor or other professional person employed by them might give any advice or treatment on contraception or abortion to any of Mrs. Gillick's children below the age of 16 (TLR 27 July 1983).

Mr. Justice Woolf in his judgement, said there were two limbs to the argument on behalf of the Plaintiff. First, that DHSS Guidelines 'advised doctors to commit offences as principals of causing or encouraging unlawful sexual intercourse with girls under 16 ..., or of being an accessory to unlawful sexual intercourse ...'.Secondly, the guidance 'authorised doctors to give advice and treatment to children under 16 without their parents' consent which, if it was not an offence under the above provisions, was inconsistent with the rights of parents and their ability to discharge their duties of supervising the physical and moral welfare of their children'. In both instances, he rejected Mrs. Gillick's claims.

Summarily, his judgement ran as follows:

1. For a doctor to prescribe contraceptives with the intention of encouraging sexual intercourse to take place, then the practitioner is guilty of an offence, but, this is not usually the doctor's

motive for prescribing. Rather, the motive is to prevent either unwanted pregnancies or sexually transmitted disease, so without the necessary intent, they cannot be accused of aiding or abetting. Moreover, the offence of unlawful sexual intercourse could take place, either without the doctor prescribing contraceptives, or even where he prescribed them with parental consent. Finally, the doctor prescribes contraceptives, knowing only that there is 'a risk of intercourse taking place at an unidentified place and time with an unidentified man'. Not knowing the specific 'material circumstances' does not therefore render the doctor an 'accessory before the fact'.

The judgement here assumes that doctors are motivated by the desire to protect, to act for the best interests of their patients, to seek to prevent the 'harmful' effects of unlawful sexual intercourse.

2. In the matter of parental consent, the guidelines, the judge argued, that patients wanting advice and treatment without parental consent, would be the 'exceptional cases'. He acknowledged, "There was not previous authority of the English Courts as to whether a child under 16 could consent to medical treatment". However, because a minor was under 16, it did not "automatically mean that she could not give any consent to any treatment". Rather, the quality of the consent was critical; did the patient understand the nature of the consent required, was she mature enough to appreciate the nature of the treatment?

Mr. Justice Woolf's decisions certainly were positive declarations to the medical and allied professions, and for minors under 16. Parental authority in matters of moral welfare were held not to be paramount. The established practice of counselling girls to

go to their parents first but respecting their wishes if they felt they could not, or didn't want to, and acting on the girl's consent alone was found to be not unlawful. It also upholds the practice of family planning clinics to send girls to medical practitioners other than the family doctor (at her request) for the sake of privacy. Also, it allows under-age girls to request a termination of pregnancy, and her wishes to be met, even if her parents oppose it (Childright Oct. 1983). Moreover, it places in case law the right of all minors under 16 to consent to medical treatment of any kind always providing they show they have the capacity to understand the nature of the consent they give and the implications of the treatment. It also retains a space for parental consent, albeit somewhat unspecified. In sum, the old, practical and working concensus was found not to be unlawful. Yet a cautionary note is appropriate for several reasons. Firstly, there is no statute to make the under 16's right to give consent to medical treatment even more secure than at present. Secondly, Mrs. Gillick has been granted legal aid to take the judgement to the Court of Appeal (Observer 4 March 1984, Childright Oct. 1983). Thirdly, 'pro-life' and 'new right' groups have organised a petition, which it is claimed, has 'over a million' signatures appended to it. The petition has received 'an enthusiastic reception' from the Tory benches at the House of Commons. Consequently, Mrs. Thatcher and Dr. Gerald Vaughan have begun talking about 'revising' the DHSS Guidelines (Observer, op.cit.) thereby effectively outflanking the courts.

In the meantime, one group of children especially vulnerable to the exercise of 'parental authority' in medical matters, the children in care of local authorities should receive respite. The Children's Legal Centre has collected considerable evidence to show that 'problem' children have been forcibly drugged to make them more manageable (Childright Oct. 1983).

At present, local authority officers and parents who have customarily viewed children as 'legal chattels' in matters medical (Naughton, Observer 4 March 1983), now find they have no automatic right to ordain medical treatment for their charges because if they are mature and capable of giving consent, that consent can also be witheld by the under 16's themselves. If Mrs. Gillick's case is dismissed, in the Court of Appeal, and if the Tories do not interfere with existing DHSS Guidelines, the autonomy of self, grudging granted through the notion of 'consent' to under 16's will have taken a positive step forward. A small but important step towards recognising their competence, albeit in a limited area of the complex of social relationships they sometimes encounter.

'BOYS WILL BE (MASCULINE) BOYS'

Questions about consent effectively subsume questions about capacity and competence. If minors may consent, or withold consent, effectively they are granted capacity and competence. Questions about consent, and the age at which consent is effective, i.e. the age of consent is discursively ordered around girls under 16. For clarity we have left boys out of the frame of reference. But so does the law, in matters relating to heterosexual intercourse. For boy minors, there is no age of consent, only capacity. Effectively, boys have a fornicating capacity only after the age of 14 years (boys under 14 cannot be charged with rape, though could be charged with assault). In the case of homosexual relations, however, boy minors have no consenting capacity; 'consent' here is postponed until the age of 21 years. These ages are revealing of the assumptions, values and prejudices inscribed in law.

If we relate age to the protection of bodies, and what is protected longest is most valued, then the law's assumptions about what is 'normal' and 'natural' sexuality (choosing the most apt phrase) stands naked, revealed in a series of striking paradoxes. These are best understood in terms of the law's ascription of <u>masculinity</u> to boys and <u>femininity</u> to girls.

At the simplest level, girls consent (acquiesce, accept, agree). Boys do not have a consenting capacity in law in heterosexual relations (boys initiate sexual relationships). Girls require statutory protections (e.g. the age of consent) from predatory males, boys do not require the same protection from older girls or women, nor do they get pregnant. Where unlawful sexual intercourse occurs, certain protections exist, for men under 24 not previously charged with that offence and if they believed in good faith that the girl was 16 or over (Bevan op.cit.;223). Again, the assumptions are masculine/feminine in form; men make advances on the basis of physical appearance and the girl's willingness to participate.

Boys don't have a capacity to consent, but they do have a capacity for fornication (or, if under 14, a 'lack of it'). Boys under 14 therefore presumably do not have erections, and legally cannot commit rape. Boys over 14 are capable of achieving both (Halsbury, Laws Vol II;33). The age line for boys celebrates the age of sexual activity; the age of consent speaks of the age of acquiescence.

Girls are offered protection from male advances until the age of 16, boys are offered protection from older males until the age of 21. The punishment for the offence of unlawful sexual intercourse is two years, the maximum penalty for gross indecency (when one of the consenting males is under 21) is five years. Clearly, boys require more protection against 'unnatural' sexual practices than girls require from 'normal' and 'natural' male advances! Boys and girls however are equally

protected by statute (Indecency with Children Act) from men and women, inviting children to touch parts of their body (Bevan; 233-34). Finally, we should add that because women can't commit rape, adult women having a sexual relationship with boys under 14, can be charged only with indecent assault. The charge here, however, is discretionary, not a statutory offence.

The masculine/feminine assumptions underlying the legal regulation of sexual activity gives rise to a diversity of arguments about the utility and necessity of protective age lines in the sphere of sexual relations. Why males can become adult in every other respect apart from becoming a 'consenting male in private' in a homosexual relationship has no other grounding other than blind prejudice against what are legally and popularly construed as 'unnatural' sexual practices. There is no real argument against reducing the age to 18, for example, when in every other respect males are endowed with full legal capacities. Even at 16 the law allows minors sufficient competence to negotiate with medical practitioners.

On the age of consent, opinions are quite contradictory. Groups such as the National Council for One Parent Families have advocated reducing the age of 14 years, on the grounds that this would enable family planning associations, doctors and other professionals to alleviate the problems of schoolgirl pregnancy. Another approach suggests 14 as an age which would put girls in parity with boys, and in line with the Indecency with Children Act 1960. Yet a further approach suggests that because the age of consent is applicable to girls and not to boys, girls are subject to controls and interventions that boys are not, and as such, this age line discriminates against girls. Some groups, such as the Paedophile Information Exchange, have advocated doing away with the age of consent altogether, for both sexes.

The approaches are critical of various aspects of the current legislation, and at least have the merit of asking what purpose such legislation serves; do we privilege its protection provisions or its potentially coercive effects. Is it just another means by which adults require minors to fit in with the adult world-view of good conduct?

Broadly, we share the view that the age of consent in sexual matters, is predominantly protective, both in its history and operation. Unless it could be demonstrated conclusively that the repeal of the age of consent would benefit girls under 16, by reducing their anxieties about sexual intercourse if and when it occurs, encouraging them to seek advice, be partly responsible for taking precautions in contraceptive matters, we are not convinced there is a case for the repeal of a consenting age.

The age of consent does offer protection to young girls, in a social formation with a legal system that has a somewhat curious view of what a woman's consent is, let alone a girl under 16. Women are located in a cultural frame where it is hard to convince lovers, husbands, casual male acquaintances, and sometimes judges that 'no' means 'no', not 'yes, I want sex but you'll have to try harder'. At least the age of consent deflects the form of resistance from an inter-personal rejection to a more formal plane, where it is legitimate to say 'I'm under 16, what you ask is illegal!'. It actually gives young girls the right to say no, and adds the force of law to make the rejection authoritative. She can always say yes, enjoy the experience,but her male partners are left in no doubt where they stand vis a vis the commital of an offence. Moreover, they have no real purchase on girls to automatically return for more of the same. In the case of P.I.E., one could argue that their real interest lies in expanding the available pool of partners for adult males.

Perhaps those who want to see some liberalisation of the age of consent forget the context in which these regulations work. Sometimes, to be too concerned with individual liberties at the expense of recognising coherent structures, such as the way in which sexual encounters actually take place, the assumptions underpinning statute and case law (too often assuming that women victims of sexual offences, had been asking for it!), that old males and young girls do not meet face to face on equal terms.

For the time being, at least, case law now provides a more secure basis for the medical and allied professionals to provide care, treatment and advice. Should this be overturned with the Gillick appeal case in the Court of Appeal, the lowering of the age of consent is one strategy which will then have some merit.

CONCLUSIONS

It is not our intention here to bring strands together, rather to let the diversity of views of competence, capacity and consent lie, as divergent approaches to a complex, unresolved issue. Comparing the philosophers' views with the way the law constitutes consent allows us to view the bounded nature of the legal constructions.

Where philosophers and lawyers sharply differ lies in the fact that the law has never successfully integrated into its procedures the research and findings of developmental psychology. Psychologists such as Sutton (1981, 1983) and Michael King, who is also a practising lawyer, and academic lawyer (1981), are able to demonstrate in the context of the juvenile court, the hotch potch of theories, notions and practices which constitute developmental assessments. At a grander level, even Latey took little or no notice of the elaborate theories concerning moral development. While it cannot be claimed that Kohlberg and Piaget

are uncontested normative systems,they do at least provide a coherent and rational means of looking at competence and capacity which philosophers have at least recognised. The law's approach is rather more ad hoc and this quality is materially observable when we turn to a practical and working legal capacity such as consent.

Consent derives from several diverging species of law; common law rulings which allow (in the old voir dire tradition) officials to determine on an individual basis degrees of understanding, from statutory definitions which provide certain and precise but arbitrary lines (the age of consent) and from recent case law which took civil service guidelines of practice as a legitimate statement about consent in limited practical situations (i.e. administrative rules rather than 'law' per se). Moreover, consent or the capacity to give or withold it, is for minors, gender-specific. The socio-cultural assumptions of 'masculine' and 'feminine' sexuality create the necessity for gender-specific forms of consent, which on the one hand seem to create socially divisive lines between boys and girls, seemingly disparaging the civil liberties of girls. This is not wholly the case,though, as we have earlier argued. At the present moment, the protection the age of consent offers outweighs the arguments about the abridgement of girls' civil liberties. Changing the age of consent will not enhance girls as social actors, only increase their vulnerability. The danger is more victims not more pleasure, or less anxiety.

That being said, there is also no necessary reason for tying the age of (sexual) consent for girl minors, to the same age line operative for minors consenting to medical procedures. Firstly, these are unlike social negotiations; consenting to sex involves a quite different set of emotions, considerations and practices, from consenting to surgical procedures or the administration of drugs. The ethical procedures and guidelines

(which admittedly can be abused) set down for the medical profession, the intent and purposive end-point, all are quite different from the pleasures and consequences of a sexual encounter. Secondly, the sexual age of consent, and the medical age of consent have quite different historical trajectories; the former founded in statutory protection against exploitation, the second arising from common law rulings (and later, statutory initiatives) which allowed some measure of competence and capacity to minors, based on the premise that the degree of competence be ascertained before consent was accepted. The two kinds of consent are not only discursively different, constructed around quite different social encounters, but as they stand, offer some defence against parental authority. Indeed the tactic of Mrs. Gillick and her supporters is to conflate two discrete kinds of consent, in an attempt to reduce the already limited powers of discretion that the law attributes to minors. We fail to see how the moral and physical well-being of minors is actually enhanced extending the realm of parental authority. For this logic assumes that <u>all</u> parents know what is, and <u>always</u> act, in the best interests of their children.

The ultra-libertarian stance unfortunately forgets the historical conditions which brought about the age of consent and the offence of unlawful sexual intercourse. It has to remember it was a legal construct to prevent old males buying the sexual services of young girls in prostitution, to prevent masters preying upon young serving girls and so on. The fundamental conditions of class and patriarchy, the relations of power and authority which inhabit them, still pattern our social relations. We have yet to be convinced that the cause of individual pleasures and liberties of girl minors would be enhanced one jot by the removal of the protections afforded by the age of consent. The cause of civil liberties is not served by forgetting the enduring inequalities and social divisions of class, patriarchy and generation and their diverse effects in creating potential victims.

At present, local authority officers and parents who have customarily viewed children as 'legal chattels' in matters medical (Naughton, Observer 4 March 1983), now find they have no automatic right to ordain medical treatment for their charges because if they are mature and capable of giving consent, that consent can also be witheld by the under 16's themselves. If Mrs. Gillick's case is dismissed, in the Court of Appeal, and if the Tories do not interfere with existing DHSS Guidelines, the autonomy of self, grudging granted through the notion of 'consent' to under 16's will have taken a positive step forward. A small but important step towards recognising their competence.

NOTES

1. Slomnicka (1982; 84-85).

2. A useful compendium of relevant ages (at which infants can buy tobacco, guns, enter public houses, drive on public highways etc.) can be found in Latey (1969). See also a more technical list in Halsbury (1979; Vol. 24, 4th edition; 165).

3. Infancy and majority are not elective categories. The age of majority actually descends on the anniversary of the date of birth; in law, this is the day before the 18th (or formerly 21st) birthday - for the law cannot partition a day. The one striking ambiguity is the Sovereign, who though under 'the age', is never an infant (even though a regent is usually appointed). See Halsbury (op.cit.; 166).

4. The most authoratative modern compendium of case law and state, Halsbury's Laws of England, refers us back to Coke; Bacon's Abridgements on Age and Infancy, Roll's Abridgements on Infants, and to the relevant adjudications in common law courts.

5. The feudal incidents collectable on tenures in chivalry included aids, relief, primer seisin, wardship, marriage fines for alienation and escheat (see Blackstone II; 63 ff; Topham, 22-23).

6. 'By marriage, the husband and the wife are one person in law, that is the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated in that of the husband; under whose wing, protection and cover, she performs everything;' (Blackstone I, 441). The statements Blackstone derives from Coke (Co. Litt 112). For the technical details on the husband's assumption of property, see footnotes at p. 445, also Bromley, 1976; 429-30).

7. Sommerville (1982), Postman (1983).

8. See Hatcher (1981), Hyams and Brand (1983), Searle (1979) and Faith (1983).

9. Samuel (1980), Hill and Dell (1969).

10. Holdsworth cites negotiable instruments (cheques, promissory notes etc.) as an example. The first reported case upon negotiable instrument in common law courts come from 1603 (CRO. JAC. 6). In commercial courts, however, negotiable instruments had been recognised from the 13th century. (Holdsworth I; 543-44).

11. See Holdsworth Vol. I (p. 454-459). Chancery 'interfered in a class of cases where owing to the rigidity of the law, the enforcement of the strict legal right was clearly contrary to equity. Fraud, forgery and duress were some of the chief grounds of (its) interference', (Holdsworth I; 457). Partnership, the administration of estates of deceased persons and suretyships also fell under equitable jurisdiction.

12. Schochet (1975) writing of family relations in Stuart times records;

> "The family was represented to the larger community by its head - its patriarch as it were - and those whom he commanded were 'subsumed' in his social life. Thus, the father-master of each family was both its link with society as a whole and its authority, and his status was universally recognised." (Schochet op. cit.; 66-67).

13. A note on contracts and infancy. The technical issue which had to be resolved in law concerned whether contracts entered into by infants were void, (i.e. because of their initial incapacity, contracts entered into by an infant were void ab initio - that is, they had never taken place), or merely voidable (i.e. contracts stood, but if enforced, could be avoided by an infant pleading incapacity). For the technical writings on infancy and contract, see Blackstone (Vol. I; 460-466), Bingham (1816; 4-98), Macpherson (1842; 447-473), Simpson (1875; Chapter 1), Stephens (1914, Vol. II; 107-110), Anson (1937; 119-32), Halsbury's Laws (Vol. 24; 168-176).

14. Cases of fathers suing for the loss of a daughter's services are cited by Holdsworth; Terry vs Hutchinson (1868) LR 3QB and Hedges vs Jagg (1872), LR 7 Ex 283.

15. Setting down the role of the Official Solicitor, Latey noted; 'In cases where wardship proceedings are started by parents to break up an association which their child has formed with a man or woman, who in their view, is undesirable, the objectives of the Official Solicitor are broadly the same. These cases have become increasingly common during the past 15 years or so, the ward being a girl'. (p. 61) (my emphasis).

16. Grounds for such action exist within the Children and Young Persons Act (1969) 5 1. (2); (c) being exposed to moral danger or (d) being beyond the control over his/her parent or guardian.

17. Tattooing of minors (other than by qualified medical practitioners) falls into the category of 'other touchings'.

18. Mrs. Victoria Gillick has been involved with Right-wing politics other than the 'pro-life' campaigns, for which she is best known. John Naughton, writing in The Observer, reports:

'Years ago, for example, she was much exercised over the problem of coloured immigration, joined in a group called 'Powellight' and complained in her local paper about how 'immoral and unjust' it was 'to crowd our once beautiful and fruitful cities with peoples whose cultures and pattern of life is so different from our own'.

The Observer, Sunday 4 March 1984.

19. Anne Murcott (1980) takes up another aspect of teenage pregnancy; its construction as a 'social problem'. Discussing ideologies of childhood, she highlights the very bounded character the differences between 'adulthood' and 'childhood', where the latter is generally construed as the negative of the former. She continues:

> " ... teenage pregnancy constitutes a problem precisely because it expresses an ambiguity not catered for in the sharp conceptual contrast. It is a contradiction in terms and carries overtones of a 19th century horror of precosity. Child and adult are mutually exclusively conceptualised. It is impossible simultaneously to be adult and child. What is more, it is adults who bear and beget children. Yet that is what a pregnant teenager is about to do. Teenage pregnancy offends a morality which can identify children only by separating them from adults".
> (p. 7).

PART TWO

MINORITY; TRANSMISSION AND INHERITANCE.

"Nature gives man no power over his
earthly goods beyond the term of his
life. What power he possesses to prolong
his will after death - the right of the
dead hand to dispose of his property - is
a pure creation of the law - and the State
has a right to prescribe the conditions
and limitations under which that power shall
be exercised."
(Harcourt 1894; quoted in Pond 1983).

INTRODUCTION

The following chapters address an area of social practice curiously neglected by British sociologists - the system of succession and inheritance. The transmission of property over time, from one generation to the next, has been the ambit of economists, social and legal historians and anthropologists (the latter broadly focusing on societies other than their own).

Earlier, we saw how the law makes the initial separation betwen adults and minors. We argued that the crucial divisions between adult and minor articulates to the law of property. The purpose of the following chapters is to give that initial, synchronic analysis a diachronic dimension by pursuing the legal rules of inheritance in order to demonstrate how the statuses of adults and minors are sustained, reworked and reproduced over time. We shall argue that the rules of inheritance not only provide a framework for the secure and predictable transmission of property over time by providing a regulating framework of relationships of ownership and possession, but that these relationships are themselves crucial repeaters of hierarchies and statuses which are allocated simultaneously when the destiny of property is fixed and determined.

As excluded subjects, in the law of property, minors can only ever be recipients in the process of inheritance and this has considerable implications for any analysis of the personal relations between adults and minors especially within 'the family'. To this extent, the following chapters will try to ground the personal relations of parents and children inscribed in family law, in the economic framework of family property, goods and resources. Necessarily then 'the family' will be at centre-stage through this discussion, though not in its guise as a necessary institution for re-creation of populations, nor as the haven of personal, nurturant, loving and affective relations, but primarily as an economic system,

entailing material differences in power and authority inhabiting a system of statuses and positions of economic significance. But this no more than mirrors the discourse of the legal texts on the laws of succession and the rules of inheritance. They are simply obsessed with 'the family', determining in minute detail who, and who is not of the family - the parentaletic scheme or the legal 'family tree' is but a summa of this obsession. The legal obsession with 'blood' only has meaning if we understand that the destiny of land and personal property in English law is indissolubly linked with the possession of the right genes and chromosomes and nowhere is this more clear than at the death of a property owner.

Even where the familial property is of no great substance, perhaps the odd household chattel and/or small amounts of cash, lives are inflected by the laws of succession and the rules of inheritance. One prime and topical instance is the whole notion of legitimacy. Broadly it can be claimed that the legitimate offspring (as opposed to the bastard) had a necessary function, the feudal transmission of land, securing for the lord a certain social destiny for his lands from which aids, fines, reliefs, recoveries and services could be raised with a measure of predictability, in a system where land had only one destiny - the legitimate 'line'. However, these old common law rules materially shaped the character of social relations which have nothing to do with feudal tenancies; for example, the rights and claims to maintenance of mothers in one-parent families.

To return to our original claim about the sociological neglect of inheritance, there are several problems arising from it, that the following chapters fall well short of resolving in any adequate manner. The principal issue, simply stated, is that while we know a great deal about the formal system of inheritance (inscribed in the laws of succession), a great deal about the changes in the rules of inheritance over time - all of which have been made quite explicit by social and legal historians, we are still in the dark ages when it comes to inheritance practices, especially contemporary practices.

This is true for both ends of the wealth scale: the rich bury property in a welter of tax-avoidance schemes, trusts and transfers inter-vivos; the least wealthy either have nothing to pass on, or, chattels are routinely distributed amongst family and kin by principles we can only guess at. Because we are in the dark about customary, informal and tacit forms of distribution of property which take place at death, we have been obliged to stay firmly within the realm of the legal rules.

Similarly, we are somewhat inadequately provided for in the realm of theory. The sociology of education has advanced ambitions and rigorous theories of social and cultural transmission via the writings of Bernstein (1975), Bourdieu (1977) and by Althusser (1971) and his neo-Marxist followers which we may draw on. The tradition of 'reproduction' expressed in a rich variety of concepts, such as the code, habitus, cultural capital, ISAs, generally considers the transmission of values - symbolic goods, attitudes, dispositions, mental structures, competencies (linguistic, cultural, educational) and subjectivities. Quite unlike the laws of succession and legal rules of inheritance, which are promised on death, social and cultural 'reproduction' is promised upon transfers inter vivos (between the living). Furthermore, 'inheritance' narrowly conceived, refers primarily to the transmission of property;'reproduction' constantly refers us to the symbolic, ideational elements of the ideological 'superstructure'. Given these analytical distinctions, there are considerable homologies between 'inheritance' and 'reproduction'. Both are appropriate to the analysis of the creation, maintenance, cartenuance and durability of structured patterns of inequality in capitalist societies. Both focus on 'the family' as the site through which 'objective structures' and 'individual strategies' met to produce discernible patterns of unequal possessors of property and cultural capital. Both are profoundly 'economic' in function and consequence.

Within the 'reproduction' framework we are constantly referred to the school which acts as the crucial mediator - by distributing universal values in the form of educational credentials - between 'the family' and the reproduction of a class divided society. The school system has 'a logic of its own', containing feudal sedimentations, while existing within a capitalist mode of production (Bourdieu and Boltanski 1981). Its 'autonomy' from the express interests of any one class - for it awards and distributes universal credentials exchangeable at the labour market - precisely serves those classes whose academic culture pervades, permeates and imbues the school ethos, because those particularistic values are reworked by the school's anonomity into 'universal' credentials. In other words, 'reproduction' theorists assert the family-school couple as a crucial repeater of class divisions in capitalist societies, the main beneficiaries being the 'new middle classes'. We recognise the brevity and simplification here of the complex and rigorous theories of 'reproduction', but our purpose is a limited one; to highlight the centrality of 'the family' (in articulation with state apparatuses) as a means of identifying and explaining the durability of class divisions without any simple, unmediated reference to change(s) in modes of production.

'Inheritance' reproduces class divisions in a more direct unmediated way. Simply put, the laws of succession propel property 'down' the family. The legal rules facilitate the <u>concentration</u> of wealth (and the means of production) which may change in form over time in the 'families' that have managed to accumulate it by 'primitive' or 'capitalist' means of accumulation. There are no imperatives for the dispersal of property held by any one person at death to the realms of common ownership; its dispersal is limited to 'family' members. Economists have long recognised that the uneven distribution of wealth could be radically interrupted by the forced dispersal (by various taxation devices) of large accumulations of wealth

at death. So long as this is inimical to capitalist interests, states in capitalist societies are severely limited in the strategies available. To this extent, capitalist classes draw upon the inheritance system, largely written by feudal landholders, to ensure to maintenance of uneven distributions of wealth and property, which simultaneously ensures unequal divisions of political power and authority.

But this form of analysis leaves us primarily on the ground of 'reproduction' theories, with the stress being placed on the family's contribution to the maintenance of class-divided societies. Of equal importance, 'inheritance' reproduces 'the family' as an economic system, designating who is to own familial property, who has the right and under what conditions it may (but need not) be disposed of and to whom and for what purpose. The family conceived as an economic system, is quite undemocratic as will be argued at length in these chapters. For what the rules of inheritance determine is the patriarchal ownership of familial property; married women and minors have limited claims to the ownership and control of family property.

This remains the case even when we consider the transition from the feudal mode of production to capitalism. For the family as an economic system draws its character not directly from the means by which surplus value is extracted, but from the tenets and ideologies of family law. To misrecognise this, generally has the consequence of searching, in vain, for 'correspondences' between modes of production and family forms. In practice, the search for 'correspondence' wanders away from 'the family' into the jousting field of 'household' size, structure and composition - on to the terrain of historical demographers and Marxists still concerned to show that Karl was right (see Seccombe 1983). These points will be addressed in greater detail in Chapter 3 below.

In some, (but only some!) respects, family law is the analogue of the school in reproduction theory: the regulating institution was first the Church, succeeded by the state, and like the school Christian principles provide the moral and hierarchical framework and ethos even after 'secularisation'. Family law promotes universal values - coupledom, heterosexuality, patriarchy, romantic love, sexual fidelity and legitimate children, and 'universal' forms of social relations - dependence, filial subordination - which take place within a contract which historically privileged the husband; values which the state has deployed in a variety of fiscal and social policy measures. The extent to which family law expresses a class interest - though in truth there is nothing in family law inimical to the economically dominant groups under Feudalism or Capitalism - is less important than the way male interests are secured. While working class and peasant families enjoyed conjugal relations without the blessing of the Church, and forged their own system of divorce (Meneffee 1981), there is little evidence that customary relations in common law marriages for us to suppose that these were any different from those propounded by formal marriage. The codification of marriage by the Hardwicke Act 1753 certainly protected the interests of the propertied classes by protecting heiresses from abduction and seduction into unsuitable marriages. But equally, in the scheme of things, the Marriage Act also secured the rights of patriarchal owners of family property, to control the marriages of minors. Finally, like the school, family law has a logic of its own, and even in capitalist societies, can retain elements of feudalism (e.g. the Pauline doctrines of marriage) which do not 'reflect' directly the needs or interests of any one class.

'Inheritance' then can tell us a great deal about the family as an economic system and the minor's status within it. Because 'inheritance' celebrates the primacy of the family as a transmitter of material goods, and because the legal rules lay out what constitutes the relations of family members to

each other and to familial property, we shall use inheritance in an enlarged sense to encompass both the transmission of property and symbolic values across generations. Inheritance covers both the formal and tacit (customary) transmissions of goods and values across generations, but more importantly, specifies the location of minors in the family conceived as an economic system, thus allowing us to understand the continuing economic dependence of minors over time. We shall discuss in the following chapters the divergence of the minor's status away from the other 'dependent' - the married woman - pointing up the points of departure across time.

Addressing the legal rules of inheritance in English law is complicated in two ways. Firstly, the English law of property broadly recognises two forms of property, personal and real. At death, each form of property passes by two different sets of principles (thus the intestate rules of succession attaching to personal property and real property). To this end, Chapter 1 outlines the broad distinction between personal and real property. The significance of the real-personal property distinction for us, lies not so much in the form of goods transmitted, but the social relations of ownership and possession which law determines to be appropriate to each form of property. These social relations will be described in Chapters 3 and 4. We shall demonstrate the durability of the legal classifications of property and the durability of the two systems of transmission which were established as early as the 12th and 13th centuries, but continued to operate more or less intact until 1926. These legal classifications survived the shift from land to industrial and finance capital as the major forms of producing wealth. this analysis allows us some purchase on the family as an economic system which has temporal rhythms and determinations which cannot be 'read off' in any mechanical fashion from changes in mode of production.

The second complicating factor lies in the fact that English law celebrates the right of testamentary power; the power of an individual to designate, by will or testament, the destiny of property held by him, after death. So the 'templates' or 'plans' of family ownership laid out in the rules of intestacy are in some tension with the existence of testamentary power. One theme therefore is how these conflicts and tensions are resolved, hedged and worked out in practice. However, it is at this point that the lack of empirical research limits what can be said about the relationship between testate and intestate succession. Currently, less than a third of the estates passing at death are secured by a proved 'will'. The major thrust of research on wills has been focussed on the inheritance practices of the very wealthy. Little attention has been paid either to the small estates or on intestate transmissions. Again, we can state with some clarity what the _principles_ of intestate and testate succession are, but we can only speculate what the _practices_ might be. The focus of our concern remains with what the legal rules facilitate and coerce and what family forms are enshrined within these rules.

Clearly though, the tension between testate and intestate succession, necessitates some conception of agency. The rules of inheritance are no empty, self-reproducing principles, unproblematically engaged in reproducing structural inequalities of property, wealth, status, and power. There is a constant interaction between the rules and practices of transmission; on the one hand testate succession necessitates agency, a concrete decision to devise property one way and not another. But also, simply to let the rules of intestacy run their course, can also imply an active decision. In order to engage with some of the issues arising out of a 'formal' and 'customary' division of transmission, we shall now turn to some writings which are concerned with these theoretical problems.

Inheritance systems have a dual character. Firstly, inheritance systems provide rules for the orderly transmission of goods - material and symbolic - from one generation to the next. Secondly, inheritance systems provide a structured form of statuses and positions, defining who is permitted to transmit goods, and who shall inherit, take or receive goods to be transmitted, and who shall not. Inheritance is a diachronic social process, intimating the passage of goods, and the system of positions and statuses moving, over time.

Our concern here is not to write a general theory of inheritance, but to indicate how the legal rules of inheritance function to sustain and reproduce considerable distinctions between adults and minors over time. In the previous chapter we discussed the synchronic form of that separation in law, based on notions of property and ownership. We shall return to these questions below. The peculiar character of English legal rules of inheritance discursively position infants/minors in relationship to parents and familial property in a manner uniquely different from infants and minors, say, taking goods under Continental systems of inheritance.

Were we to pursue it, any general theory of inheritance would have to be adequate in theorising the following complex relationships:

a) the form and function of property and goods - material or symbolic - to be transmitted.

b) describe and explain who has the power to determine the passage of goods, and the moments of their transmission.

c) describe and explain who shall take goods, and who shall not.

d) the system of transmission itself; whether formal (guaranteed by enforceable rules) or customary in practice.

e) the range of strategies or tactics available to defeat both the formal and customary practices.

f) the structuring effects on inter-personal relations which are an inherent part of inheritance systems.

g) in whose interest do inheritance systems operate.

Because this chapter is concerned primarily with legal systems and because it is concerned to illustrate the structural nature of adult/minor relations, we shall limit our investigations to the legal rules of transmission of goods at death. This reservation must be stated because we are sensitive to the network of tacit, informal processes of transmission i.e. customary practices, which undoubtedly play a large part in the circulation and transmission of familial property (see, for example, Thompson 1976, and Bourdieu 1976). We are also sensitive that the transmission of goods does occur at points other than death (e.g. gifts <u>inter vivos</u>, marriage settlements, the provision of unequally distributed forms of private education, occupational preferment, the on-going differential distribution of cultural and symbolic capital), all of which must be considered to be constitutive of 'inheritance' in the widest sense. At this point it would appear necessary to outline some of the theoretical implications of consciously privileging the legal rules over customary practices.

INHERITANCE PRACTICES: FORMAL AND CUSTOMARY

We are confronted here with the old theoretical problem of structure and agency, manifest in the difference between the legal rules of inheritance and the customary, informal, tacit practices of transmission. On the one hand, we have an institutional complex comprising the courts of law, legislation and a tax system which operate through a set of legal rules and statutory requirements, to regulate the process of transmission of forms of property from one generation to the next. On the other hand, we have a 'dense bundle of social practices' of transmission, of which very little is written or codified and yet whose pervasiveness we are (like all 'lay members' of the social formation) aware. Legal texts state with clarity what the legal rules are. However, there is no guarantee that these actually correspond with what individuals or groups actually do. Yet we cannot render legal rules/ customary practices as a simple dichotomy. The existence of legal rules may evoke certain transmission practices because the existence of the rules guarantees a desired outcome; on the other hand some practices may be a reaction to rules in order to defeat outcomes nominally secured by the rules. Making a will or marriage settlement, for example, assumes that institutional means are available to secure the conditions of that will or settlement. Dying intestate, or making gifts _inter vivos_ defeats the rules of testate succession but evokes _either_ a different set of rules (rules of intestate succession at a court of law) _or_ informal, tacit principles of distributing property amongst successors. It follows then that we must be sensitive to what Bourdieu (op. cit.;120) calls 'anthropological legalism' which

> "regard(s) practices as the execution of an order or a plan, as if practices could be directly deduced from expressly constituted or legally sanctioned rules or from customary prescriptions coupled with moral or religious sanctions ..." (op.cit;117).

He further argues that 'historians of law'

> "... when they base their work on the study of notarial documents, which provide them with no more than actual or potential failures of the system, are still very far from showing how these practices really worked." (op.cit.;119)

We must be cautious in accepting Bourdieu's critique of legalistic determinism however[1]. Bourdieu renders inheritance practices as a series of 'strategies' designed to keep intact the familial patrimony. Practices, in Bourdieu's scheme, result from 'a whole system of "predispositions" ', 'consciously or unconsciously reinvented' which structure decisions 'without ever becoming completely and systematically explicit', and is the end result of 'strongly interiorised principles of a particular tradition' (op.cit. p. 118-120). For Bourdieu, the Bearn peasant's (the context of Bourdieu's particular study) recourse to law arises from some aberration in the habitus (i.e. the legal historians' study of notarial documents are no more than investigations of systems failure).

The problem which Bourdieu fails to resolve is the relationship between habitus and strategy. The habitus in Bourdieu's theoretical scheme affirms and reproduces structures. The peasant's recourse to law, which invokes the regulatory and arbitrational powers of the court, could well be one 'strategy' in the repertoire, not a necessarily pathological or aberrant practice. The end point as 'strategy' may well be to secure the survival of the patrimony; the outcome as practice is to reproduce the structure, by reaffirming the hierarchy of courts over customary practices, and reaffirming the position and status of Monsieur Notaire, in the circulation of inherited property. Bourdieu's

structuring of legal rules and customary practices as mutually exclusive, either one or the other system, but not both, misses the inter-relationship of the rules and practices and thereby denies the concept of strategy some of its potency. For practices are only designated as 'strategy' if the generative mechanism is the habitus; therefore practices which refer to something outside the habitus (i.e. the legal system) do not have the status of strategy, but of systems failure. Thus the space for familial agency is reduced to customary practices only, whereas the legal rules also provide space for 'strategy' and agency.

In the English context, of a class-divided society, in which families transmit differentiated forms and quantities of property, the two systems, the legal rules and customary practices exist side by side, but it is sometimes difficult to determine which system is being invoked. For example, if we agree with the legal historians, by following the legal rules, the landed aristocracy do no more than follow their customary practices which are inscribed in the legal rules themselves. For working class families, who historically transmit little but customary rights, the privilege of selling waged-labour, perhaps a council house, and personal goods of inestimable sentimental but of little exchangeable value, the legal rules are of little consequence. But, it may well be that families transmitting but little property, distribute the total patrimony, however tacitly and unconsciously, by the same principles and assumptions which are embedded in the legal rules. How exactly the distribution of the patrimony is played out, however, must depend on a number of factors; the size of the patrimony (if any), the form of the inheritance (land, personal possessions, tools of trade, assumption of a 'family business'), the personal and affective relations between family members between and within generations. The formal boundaries between the legal rules of inheritance and the customary processes of transmission therefore should not hide the shared assumptions, principles and ideologies which couple one system to the other.

When we turn to the history of English land law we do have to take the power of custom seriously. As much is evident from John Hatcher's (1981) reassessment of English serfdom and villeinage. The thrust of his argument suggests that while common law rules gave lords and superior tenants considerable rights over the property and personal lives of villeins and serfs, in practice, village and manorial customary practices in respect of tenure and service severely limited lordly depradations and controls, reducing the 'scope of arbitrary seigneurial action' (p.23). He argues that oral, customary bargains often become claimable rights to the extent that as the 13th century progressed, estate officials carefully recorded with every increasing precision the obligations and rights of customary tenure, thereby enhancing the stability and status of customary bargains .

It may well be that one of the principles of peasantry, evident in Bourdieu's work on the Bearn peasants practices at the beginning of this century, and in Hatcher's work on 13th century serfdom and villeinage, is the regulation of social and property relations (rights in land, marriage and inheritance practices which disperse or concentrate land, etc.) by customary practice rather than legal rules. But there are significant differences between the above peasantries. Firstly, English custom did not have to deal with the complexities of adot or any other birthright claims to land, such as is found in Bearn. Secondly, and more importantly, customary practices were closely supervised in England in customary courts (the seigneurial tribunal, the manorial court etc.). That villeinage fell under the customary court system, rather than the perspective of common law, at once signifies a status, but at the same time, villeins had an institutional framework in which rights and guarantees could be pursued and adjudicated (Hatcher op.cit.;8). From Pollock and Maitland we learn:

> "The rolls of manorial courts bear witness to a great deal of litigation concerning villein tenements; it seems to be conducted with great regularity; the procedure does not err on the side of formlessness; it is rigid, it is captious, the court is no court of equity which can overlook the pleader's blunder and do natural justic; it administers custom". (BK II;361).

What is conceived as 'custom' has legal dimensions, separate and different from Bourdieu's perspective of inherited predispositions. In one respect, however, both systems are joined by the practice of allowing past practices to determine what happened in the future.

Thompson's essay on the grid of inheritance, part of his larger concern with the diffuse and neglected history of local and customary social practices, catches the tensions between the common law regulation of land and the customary legal regulation of it, in the 18th and 19th centuries. To a remarkable extent he has caught the process of the demise of peasantry through the transformation of their customary tenures and use rights in and over the land. He argues:

> "By the early eighteenth century, we have the sense that there was a deepening (albeit submerged and confused) conflict as to the very nature of landed property, a widening gap between the definitions at law and in local custom - and by custom I do not mean only what the custumal may say but the denser reality of social practice."
> (Thompson 1976; 337).

The customary tenant, he notes, inherited not only a proprietary interest in land, but use rights both on and extending beyond it to the common, the forest and the pond, and also, a customary grid (tacit, informal, psychology of ownership) which validates the exercise of customary rights. But law's action in the matter of customary practice is contradictory; on the one hand confirming the customary rights of copyholders (thereby reifying copyhold as alienable property with a cashable equivalent), on the other, either demolishing the fringe benefits of gleaning, grazing, timbering or turbage, or transforming them into cashable equivalents. The very process of capitalising land through commodification - reducing customary claims to capitalist definitions of ownership - extinguishes the communal grid of inheritance.

Thompson's subtle and complex analysis of a historical moment, the process of transformation of notions of tenure, and of inheritance, signal the intertwining of the institutional framework of inheritance of and 'the social or communal psychology of ownership' (337). Like Bourdieu's habitus, the social psychology of ownership is something of a black box - we can't exactly specify what goes on inside it - both are attempts to signal the necessity of appropriating human agency to theory of social process as a balance to self-reproducing 'structures'. Thompson's essay however does accomplish the articulation of power and authority to the processes of transmitting real and symbolic goods, by situating customary practices in the wider framework of legal institutions.

Perhaps this is the most serious problem arising from Bourdieu's critique of legal historians and his consequent theoretical privileging of the customary processes of transmission; that the legal system and customary practices are equally valorised. Doing this, Bourdieu discounts the coercive power and hegemonic effects of the legal system, which in turns blinds us to the

articulation of class interests and state power. Questions such as, why the needs and interests of specific groups becomes the law of the nation, why the laws of inheritance serve a landed elite both in form and content, why some forms of property are counted as more important than other forms, are not really open to analysis. Further, though the durability and importance of customary practices is beyond dispute, Thompson and others have demonstrated that when the legal system is invoked against customary practices, historically, the law has smashed customary practices. Finally, what each generation acquires is not simply deeply interiorised sets of predispositions which unconsciously and tacitly structure decisions, but also a complex set of legal and administrative institutions with powers to define the possible and allowable forms of social intercourse, including a formal system of inheritance.

These observations suggest that the systems of inheritance are not merely mutually exclusive, but are in fact structured in degres of importance. Customary practices in England are always subject to and qualified by the legal rules. A dissenting family member can override the customary practices by appeal to the law. Where customary practices are invoked to get around principles embedded in the legal rules, this simply affirms the overarching principles with the rules which customary practices hope to defeat. As Bourdieu argues, the existence of 'strategies' merely confirms that there are rules of the game, even though these rules may not be made explicit.

Whereas Bourdieu's analysis of familial transmission points up the importance of civil society (which may be initially conceived as the 'commonsense', routine habits of thought, customs, morals, standards and practices), Thompson directs our attention to the changing interface between the state and civil society. Concepts of the order of state and civil society usefully sharpen our perception of what has so far been called 'formal' and 'customary' practices. Because (the unstable and contested)

theories of the state have been dealt with earlier, we shall direct our attention primarily to the concept of civil society, and its relationship with the state.

What we term 'formal' practices and processes of transmission are those which have their point of origin, and are regulated by various apparatuses of the state (these include legislation arising out of struggles between Parliament and the crown, and between different factions represented in Parliament, and case law handed down by the judiciary). More problematic are the conveyancing devices used by lawyers to secure the direct interest of individuals or families. We shall return to this point below. 'Formal practices' have these properties; a) being universally applicable even though in practice, they may well secure the interests of a few dominant groups, and in practice regulate the transmission of certain types of goods, which larger sections of the community may not possess; b) claims, rights and interests are pursued and enforced using the coercive power of the state; c) the effects are both economic and ideological: in the first case, definite distributions of property are carried out, in the second, formal systems constitute statuses positions and subjectivities which by the claims of universality announced in 'the force of law' extend beyond the interests of those practices directly regulated by formal systems, and may well at the same time conceal the interests upon which the system is founded; d) the 'formal' system is maintained and reproduced only so long as the system of power, institutional framework, bureaucratic and policing functions of the state remain - as these change, so will what counts as 'formal' e) change can occur by a changing balance of forces, between the crown and Parliament (e.g. 1660 Abolition of Tenure Act), between Parliamentary factions (Whigs and Tories), and by groups within civil society subverting the formal system (e.g. family lawyers undercutting the common law rules pertaining to married women owning property). So it is against the state (whose form is determined by the set of publically funded institutions of which it is constituted and whose power to act is determined by the balance of forces, struggling for dominance within it and through it).

that we must consider the practices of civil society, for if 'customary' means anything it must refer to practices arising outside the ambiance of state regulation, though symbiotically related to it, with the consequence that neither is wholly independent of the other, though it may have effects which are similar to 'legal' directives.

Civil society embraces a wide range of sites, social relations and social practices; its heterogenity stands in marked contrast to the state, formally limited and unified to the extent of its institutions and power that can be exercised . The practices of civil society arise outside the ambit of the state, on a variety of sites, sometimes though not necessarily in response to state action. Though the neo-Marxists over the last decade or so consigned civil society to a residual category (all that was left over after elucidating the properties of the Capitalist Mode of Production and theorising the State e.g. Althusser (1971) Poulantzas (1968), more often than not subsuming large parts of civil society as state apparatuses), the neo-gramscian critique of Marxist functionalism, the Women's Movement, black studies, to name but a few schools of thought , have steadily forced its theoretical reinstatement.

The 'noisy sphere' of 'Freedom, Property and Bantham' (Marx) of personal and 'private' relations seems to have been reinstated (with the neo-Marxist tradition) for the following reasons: a) the character of the state could not be adequately described, let alone analysed by reference to one variable - namely its function as sustaining class relations, b) the changing nature of capitalist states could not be adequately accounted for without reference to the balance of forces outside it i.e. within relations of production <u>and</u> within civil society, c) individuals are constituted as subjects within sites other than the state and other than as economic agents within the CMP; sites constituting civil society (geographical locality,

within the family, religious affiliations, ethnic affiliations, as members of trade unions and professional associations, and as generations) are equally effective in constituting subjectivities (URRY op.cit:70), d) these affiliations account for the diversity of politics, points of mobilisation and sources of resistance, which cannot be reduced to nor subsumed by an individual's class location. C) and d) together constitute the foundations of critique of 'functionalist' theory, ideology and the critique of 'economistic' politics. The above alerts us to the fact that the sites and practices of civil society must be taken seriously and to an extent separate from overarching theories of the CMP and the State.

To develop the concept of civil society further, we shall now address the constitutive elements of it; sites and practices. Site has the useful connotation of 'particular social space' (locality, building) (Johnson 1981;18). But it is also 'a cohesive area of social life characterised by a specified set of characteristic social relations or structures', (Bowles and Gintis 1981; 49). This may equally apply to the state, the school,the family etc. Sites are complexly connected and interdependent, each has a character multiply determined. Within civil society, sites do not correspond to the institutional framework of the state, but neither are they totally free from its influence or regulation: the family does not arise purely from personal and affective relations of love and devotion with desires directing the dynamics of relations within it, for those relations have positions and statuses set out in law.

Practices develop within sites but the character of the site does not determine each and every aspect of the social relations within it; at best it may set limits to the variety of social intercourse within it; at best it may set limits to the variety of social intercourse possible. Customary practices are, par excellence, practices arising within sites constituting civil society; popular (in the broadest sense), heterogenous,

perverse, contradictory and material. Customary practices may well arise as activities confirming the structure of sites (in defence against intrusions from other sites inside and outside civil society, or in mere celebration of the structure, they may well continue to exist in spite of changes of social policy arising with the state, or, changes in the CMP) in order to meet the perceived needs or interests of some or all of its members.

Not all of this inertia should be read as romantic 'resistance'; the resistance to change can equally promote relations of inequality, oppression and exploitation. Customary practices are necessarily local in effect (geographically and in terms of individuals influenced by them), though diverse sites may share common principles.

But we must stress the constant interplay between sites within civil society, the institutions of the state and the relations of production. Men become citizens and husbands and workers or capitalists at one and the same time, as women become (later) citizens, women wives, domestic labourers/wage workers/ capitalists simultaneously, through the interplay of practices within <u>diverse</u> sites. Some customary practices are written into the legal system, attaining 'the force of law', others are not (compare anulment of marriage with the selling of wives). Formal and customary practices exist side by side, with multiple points of cross-over so that it can be impossible to decide which is what.

The limits to the effectiveness of customary practices can only be known, when those practices are adjudicated in a site other than its own. Thus a dissenting family member in order to overturn the customary system of inheritance within a particular family may well draw upon the superior coercive power of the state to reclaim a particular part of the estate; workers appeal to a trade union, or move to arbitration to

upset exploitative relationships on the shop floor; battered women remove themselves (and children) from the family to prevent further abuse. Equally, customary practices are most powerful when there is no other site of adjudication; or where the formal system acknowledges, however tacitly, the veracity and propriety of customary practice: the notable instance here being (historically) the relationship between personal relationships within the family, and family law enunciated in statute and case law.

Thinking through concepts such as 'formal' and 'customary' inheritance then, necessitates appropriating theoretically a complex relationship between the state (where formal systems are secured, regulated and provide the means for enforcement) and civil society (where customary practices, strategies and grids of inheritance are seen to be effective). The site of the connection between the two,the terrain on which rules and practices are played out in the family. But the social relationships imbricated in the meeting of 'objective structure' (formally, economic divisions, family law and legal rules of inheritance promulgated by legislation and the courts) and tacit, informal social processes (implied in concepts such as 'the habitus' and 'the grid') are concrete relations between husbands and wives, parents and children, and possibly a wider range of kin and dependents, such as domestic servants. In this respect the family system plays a considerable part in durability of the 'lumpy' quality (economically speaking) of the British social structure, in which few individuals possess large concentrations of wealth). Processes which at first sight seem internal to family relations produce and reproduce concentration of property and wealth. But these 'lumps' are not simply 'classes', but are significantly engendered and generational in quality, and this characteristic is fundamentally derived from the material existence of family law.

In this analysis, the family simply cannot be consigned to 'the superstructure'; the relations between husband and wife, parents and children are not simply inter-personal relations,

because as inheritance rules and practices point out, at crucial times in the life cycle, inter-personal relations are also profoundly economic relations (in terms of ownership and possession), which are of significant importance to any understanding of class divisions. The wealth or property held by families does not imply all family members being equal and 'free' stockholders. As we shall demonstrate below, the laws of inheritance work quite to the contrary, impelling an unequal distribution within families, unless otherwise disturbed by a will, or by a family members, or members, overturning the rules by going to court.

How the meeting between the rules and the practices is actually played out will depend upon a number of factors, which we shall try to indicate in the following chapters. However, some consideration will have to be given to the kind of property being transmitted, to individual judgements about the needs and abilities of successors to hold and manage property, and to the effects of death duties. Moreover, what the rules-practice couple mitigates against is any simple reduction of inheritance laws to the needs-interests of <u>one</u> class, though inheritance laws were clearly written by a land-owning elite. To reiterate, there is nothing inimical to the interests of economically dominant groups in the inheritance laws, but in operation inheritance secures both the interests of a class <u>and</u> families within it. We shall see that where conflicts occur, between what the legal system designates as the appropriate form of transmission, and family interests, time and again lawyers are called in to secure the family-property nexus. This will be apparent when we discuss the use of the trust, and the married women's separate estate. The fact that inheritance rules secure 'family' interests and reproduces the family system of ownership of property accounts for the resilience the rules show towards major changes of shifts in property forms comprising the prime means of production, and, to significant changes in the mode of production itself, that is the changes from feudalism to capitalism,and for the resilience of the family.

Our purpose now is to provide some description and analysis of what the rules of the generational game of inheritance are, and this entails outlining the diverse but connected elements constituting the legal discourse of inheritance. We shall consider the specific designation of forms of property which can be transmitted at death and their historical context, then consider at some length, the legal rules which designate a particular structure of statuses and positions which define the social relationships of the family and of the relative position of family members.

CHAPTER ONE

PROPERTY, REAL AND PERSONAL

As a preliminary we must register some of the elements of a discursive order, the law of property. This is necessary because of the determinant position of the law of property in the English legal system. We are not concerned here to write anything like definitive statements on the law of property, but we limit our remarks to the classification of categories which operate in the legal rules of inheritance.

In order to establish the general field of inquiry, we have to make some formal distinctions, between wealth and property, real and personal property, testacy and intestacy, precisely because these classifications are important to the form and process of the familial circulation of goods.

Wealth, conceived here, as the quantity of alienable, exchange-able goods, is a deceptive category, in so far as it can hide important qualitative distinctions. Marxists carefully dis-tinguish between productive and non-productive wealth, between use-value and exchange value, between wealth and capital . In practice, there is considerable difference, say, between £25,000 cash in the bank and £25,000 worth of stocks and shares; between an owner-occupied mortgaged house and a house used purely for rental income, where each house is of equal exchange-able value. Wealth in English law is crucially mediated by the concept of 'property', where a basic division between real and personal property is elaborated. This basic division is important to our theorising about, not only of inheritance practices, but to any institutional analysis of the English legal system. Thus, the state for example, raises taxes not simply on wealth per se, but on quantitites of particular forms of property, and does so through separate and different institutions (personal property was declared at Probate, real

property through Inland Revenue). The form of property determines what taxes will be raised, creates the possibility for tax avoidance and, the means by which property will be transmitted down through the family. What the law means by 'property' has undergone considerable historical flux. We shall only sketch the barest outlines here. One legal primer reports:

> "... the word 'ownership' is not found in use before the year 1583, and the word 'property' is uncommon in English before the nineteenth century; people got on quite well by talking about 'possessions' and 'estate'."
> (Hood Phillips and Hudson 1977; 288-89)

Aylmer (1980) agrees that the earliest English law books 'contain no definition at all of property' (p. 87), but the word certainly appears in 16th century texts (p. 88). The first explicit definition appears in John Cowell's dictionary of 1607(p. 88). Cowell's definition,

> "Propertie signifieth the highest right that a man hath or can have to anything; which is in no way depending upon any other man's courtesie. And this none in our kingdom can be said to have in any lands, or tenements, but onely the king in the right of his Crowne."
> (quoted by Aylmer op.cit; 89).

was controversial at the time (James 1 demanded its revision) because it signalled real divisions between the Crown and aristocratic landowners - all land was held of the king as Ultimate Owner - and because it foreshadows the seventeenth century debates on individual liberty and political rights, which were to be grounded in the notion of property. There is little support for Hood Phillips and Hudson's assertion that the word property was uncommon before the nineteenth century.

Property was of crucial concern to Locke, Filmer and other juridico-political theorists for it was precisely through the conception of property that they tried to establish who were to be participants, as bearers or political rights, in the polity. (Richards, Mulligan and Graham 1981, Knieper 1980, Beitz 1980). Furthermore, Neale (1975;96) argues that the concept of property was part of the popular culture as early as 1700.

The discursive order of the law of property is structured on the basis of a relationship between an 'owner' (individual or corporate) and a 'thing'. Property in modern law signifies both the thing capable of being the object of interest (Jackson 1967;10) and the relationship between the thing and the subject. For example, the statement ,"This pen is my property", expresses both meanings (i.e. the pen, and my relationship to it). More strictly, modern lawyers refer to the relationship thus:

> "The word property when strictly used, does not refer directly to things, but to certain kinds of rights in respect of things. ... A person's property is best described as his proprietory rights in rem."
> (Hood Phillips and Hudson op.cit.;287)

Historically, the law has divided 'things' into particular categories; real property (land) and personal property (chattels, moveables, incorporeal things such as leases, financial instruments) broadly arising through the forms of action available from mediaeval times to recover their possession (Topham 1947; 9:, Blackstone, op.cit. Bk. II, Chap. II). As Blackstone elaborates:

> "Things real are such as are permanent, fixed and unmoveable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other moveables, which may attend the owner's person wherever he thinks proper to go." (Blackstone op.cit.;16)

Pollock and Maitland note,

> "We have every reason to believe that in very remote times our law saw differences between these two classes of things (lands and tenements, goods and chattels); but the gulf between them has been deepened and widened both by feudalism and by the evolution of the ecclesiastic jurisdiction" (Vol II;2).

The division of things into classes, real and personal, is long-standing, but the nexus of possessor and the possessed has been subject to considerable historical flux. The modern notion of proprietary right (use, enjoyment, disposal), coupled with the notions of enforcement and protection - where owners are given 'remedies for dispossession' - arises from a 600 year process of allocating 'things' to persons and the struggles - legal, parliamentary and customary - to determine the conditions of ownership. The law of real property, viewed broadly, can be seen as a range of strategies for tenants involved in a struggle to obtain the right of disposal - either by sale or inheritance - over land. And conversely, the legal process - at court and parliamentary level, illustrates the devices used by superior tenants to protect the fruits of tenancy by delaying, hedging, blocking and contesting any moves to make land like any other commodity, so that it became freely disposable and devisable. That all land was held of the Monarch - the Ultimate Owner - by forms of tenure, gives English property law its peculiar characteristics and much of its complexity.

Changes in the concept of property cannot be dealt with in any adequate manner here. Macpherson (1975) provides a usefully succinct account of the major changes observable over time and it is worthwhile to record his observations here. He notes three broad changes which arise with the emergence of capitalism.

a) Whereas in pre-capitalist society property was understood to comprise common as well as private property, with the rise of capitalism the idea of common property drops virtually out of sight and property is equated with private property - the right of natural or artificial persons to exclude others from some use or benefit of something.

b) Whereas in pre-capitalist society a man's property had generally been seen as a right to a revenue, with capitalism property comes to be seen as a right in or to material things, or even as the things themselves.

c) There is a change in the rationale or justification of private property: before capitalism, various ethical and theological grounds had been offered; with the rise of capitalism, the rationale came to be mainly that property was a necessary incentive to the labour required by the society.

(Macpherson; 105-106)

Macpherson notes in passing the demise of the concept of property, held by Cowell, Filmer, Locke et al, the broad meaning of property ('one's property including a right in one's life, liberty and honour, conjugal affections, etc.') and its narrow definition to'one's right in material things and revenues' (Macpherson;106).

Macpherson usefully couples the changes in the concept of property to changes in the mode of production. If much of English property law is concerned with the redefinition of land as a disposable alienable commodity, then we need to reassess the role of the aristocracy in the emergence of modern capitalism. For what we have in English property law is the heavily documented account of the manoeuvres of a landed aristocracy, in conflict with

Crown(and in turn, their inferior tenants contesting the great fief) gradually dissolving the power and privileges of the Ultimate Owner. In the process, productive wealth in the form of land, was dispersed to individual private owners, free of feudal dues and obligations. In this respect, the new bourgeoisies - the industrialists and bankocracy - had very little to do with the formation of modern notions of property (Neale op.cit; 95). Furthermore, as Neale argues, it was the aristocratic land-owning class that 'provided a good deal of the legal and institutional framework which alone made possible the development of industrial capitalism in England', (Neale ibid). While Neale certainly overstates his case here (where are the technological forces of production?), he does identify the significance of necessary legal pre-conditions of capitalism, which are of aristocratic origin. We shall develop this below.

We have to consider here, albeit briefly, categories of ownership and possession and their relationship to notions of property. The complementary categories of 'ownership' and 'possession' are similar but not completely mappable. Various commentaries on Marx's theory of law (Cain and Hunt 1979, Phillips 1980) draw attention to the theorising of property. For example, when Marx theorises property, he argues

> " society itself - the fact that man lives in society and not as an independent, self-supporting individual - is the root of property, of the laws based on it and of the inevitable slavery."
> (Theories of Surplus Value 1; 346 quoted in Cain and Hunt op.cit.;98).

The 'independent, self-supporting individual' is not the basis of property, nor ownership; they are at best possessors, which entails a physical relationship between the individual and that which is possessed. Ownership entails the powers to use, enjoy and dispose (proprietary rights); these powers are regulated and protected by the state, the legal system or customary practices; that is a social not physical relationship.

These general remarks on the distinction between ownership and possession are thrown into some disarray by one of the basic categories of English land law; the notion of seisin. For while Roman law accepted the ownership - possession distinction, the English law of real property effectively conflates them. One book of authority puts it

> "seisin .... is an enjoyment of property based upon title and is not essentially distinguishable from right. In other words the sharp distinction between property and possession made in Roman Law did not obtain in English law; seisin is not the Roman possession and right is not the Roman ownership. Both of these conceptions are represented in English law, only by seisin, and it was the essence of the conception of seisin that some seisins might do better than others."
> (Plunknett: A Concise History of Common Law; 358 quoted in Cheshire 1962; 28).

Cheshire continues:

> "Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned, there is in England no law of ownership, but only a law of possession."
> (op.cit;28)

For example, property per se was not sufficient for individuals to participate in the polity, nor participate in the judicial process as jurors. 'Men of property' narrowly encompassed land-holders and owners only, not necessarily men who held large amounts of cash or financial stock, so parliamentary representation for example, historically, was through and for land-owners. While the 17th century juridico-political theorists contested the Divine Right of Kings and celebrated the equality of all men, the practical political consequences were in fact limited to land owners and holders.

In other respects, proprietary interests in land, as set out in English law, determined proprietary rights in all that lay below it (minerals) and all that rested on its surface (not only buildings, but also the trees and feral animals). In the first case, the dispersal of land away from the sovereign necessarily implies the dispersal of the materials which were to become the basis of the industrial revolution in England, mineral deposits. The ownership of land supplied some land holders and owners with the means for further accumulations of wealth in the face of the declining importance of agriculture as a productive source of great wealth. In the second case, as proprietary rights in land included the ownership of trees, turves and animals, it is here we find the sharpest conflicts between the sense of individual ownership. And it is at this point where we find the clearest expression of a class deploying the criminal law against interlopers on landed estate. Thompson, Hay and Linebaugh (1976) give us a practical demonstration of the measures (the game laws and the Black Act) brought in to ensure that the privileges of land ownership went undisturbed. Most of the offences against a landowner's privileged usufruct of his property were deemed to be capital. The rights that kings formerly enjoyed were simply redistributed to 'lesser' landowners but the principle of privileged access and use remained largely undisturbed and indeed more severely protected.

On the other hand, forms of property, which concretely existed as notarial documents proclaiming rights to present or future incomes, and indeed the very important species of property - the lease - enjoy less certainty within the common law, and was afforded less protection by the criminal law. Until the 19th century for example, many notarial documents were deemed to be worth only as much as the paper on which they were written. These differences were not inconsequential; real property enjoyed the protection of common law courts, while in the absence of the common 'laws' protection, the equity courts had to develop elaborate means to secure the interests of property owners whose proprietary interests lay in 'things' other than land. Indeed, part of our narrative will point out how patriarchs were to play upon tensions between common laws rules and equity, to ensure the continuance of the family-property nexus.

Much of the complexity of the history of land law derives from the struggles in case law and conveyancing about turning possession into ownership, turning conditional occupancy of a physical space into absolute rights over its use, alienation and its destiny on death. We shall develop this argument further when we consider the notion of the estate.

Generally speaking, the law privileges ownership over possession; the first bearing the weight of absolute rights over things as opposed to conditional rights in them. The distinction is of considerable importance historically.

Thompson (1976) demonstrates for example that the extension of proprietary rights held by large landowners, meant effective 'dispossession' of customary rights which had been held from time immemorial, by a large number of smallholders in the capitalist agricultural grid. Rights of commoning domestic livestock, turbage, and taking timber, fell away through land holders using the courts to announce their ownership of, and proprietary rights - thus exclusive use - in land.

These observations on property have attempted to signal that it is not a free-floating abstract category, but a concept whose material existence and effectivity is bounded by the institutional framework of the legal system. Nor is it a unitary category. The division of things into real and personal, land and goods and chattels, corporeal and incorporeal, illuminates the material basis of the feudal order in England. Land was the basis of wealth, authority and political power. The legal struggles to defend the concentration of land and the obligations that went with it are significantly about the distribution of wealth and power and it is for this reason that English property law so profoundly affects the legal subjects with interests in property.

The divisions between real and personal property, constituting as they do, material distinctions _between_ the owners of property, requires further elaboration. Moreover, the distinction is central to our field of investigation here, because in the process of transmission by inheritance, of real and personal property, each diverges along dissimilar paths.

REAL PROPERTY: A TIME IN THE LAND

> "In law, real property refers to the proprietary interest in land with the definition of land bearing a wide meaning; land includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings whether the division is horizontal, vertical or made in any other way, and any other corporeal hereditaments; also a manor, an advowson, and a rent or incorporeal hereditaments; and an easement, a right of privilege or benefit in, or over or derived from land.
> (Law of Property Act 1925 S 205(1))

The description of 'land' differs very little from Blackstone's 'things real' - things 'such as permanent, fixed and unmoveable which cannot be carried out of their place; as lands and tenements', (Commentaries II;16). 'Land hath also', he says, 'in its legal signification an indefinite extent upwards as well as downwards', (Commentaries II; 17), so including the buildings above it and the mineral deposits below it. Blackstone's sources of his definition of 'land' refer us to Littleton's 15th century writings by way of Coke's commentaries. We can infer the ancient origin of this definition, unchanging for some 500 years. What is distinctly 'modern' about the above definition of real property is the relationship between the owner and 'the thing', expressed in terms of 'proprietary interests', (conceived here as use, enjoyment and disposal). The law of medieval and early modern England conceive the relationship somewhat differently expressing the relationship in terms of the complementary notions of 'fee' and 'estate' (Pollock and Maitland Vol I and II, Blackstone, Commentaries II op. cit., Topham op.cit.).

The fee expresses a complex of personal and real rights. For Pollock and Maitland, the English fee :

> "is one of the words which came in with the Conqueror, and perhaps for a short while it carried with it a sense of military or noble tenure; but very soon it was so widely used as to imply no more than heritability. This is its settled sense in the thirteenth century. To say of a tenant that he holds in fee ... means no more than that this rights are inheritable. He does not hold for life, he does not hold for a term of years, he does not hold as guardian of an heir, or as one to whom the land has been guaged as security for money; he holds heritability and for his own behoof." (Bk II 234).

The expression of fee includes that of tenancy, 'holding of' somebody, but as Pollock and Maitland are careful to point out, the ancient 'tenancy' is more secure than we commonly suppose, carrying as it does, heritable rights in the object of tenure. However, tenancy is conditional both in the ancient and modern usage of the word. Pollock and Maitland again:

> "... when regarded from the standpoint of modern jurisprudence, ... perhaps the most remarkable characteristic of feudalism (is); several different persons, in somewhat different sense, may be said to have and to hold the same piece of land. We have further to conceive of the service due from the tenant to his lord as being a burden on the tenement. It is service owed by the tenement."
> (Bk II, 237).

While considerable latitude was allowed between person and person, as to whether dues, obligations and services should be met, and indeed, how they should be met (by service or cash equivalent), 'all the same the land itself is burdened with duty and the lord's overlord may have his remedy against the land', (237; my emphasis).

If the usage of fee expresses the conditional side of land holding, (even though there is considerable security afforded by holding land in fee - heritability), the complementary idea of 'estate' expresses the person-thing relationship in terms of time. For the doctrine of estate 'comprises an analysis of the quantum of interest of the landholder in terms of time', (Simpson 1979). One of the clearest expressions of the doctrine is found in Walsingham's Case (Plowden, Commentaries 555;1578).

"The land itself is one thing and the estate in land is another thing; for an estate in the land is a time in the land, or land for a time: and there are diversities of estates which are no more than diversities of time; for he who hath a fee simply in the land has a time in the land without end, or land for a time without end; and he who has land in tail has a time in land, or the land for a time, as long as he has issue of the body; and he who has an estate in land for life has no time in it longer than his own life; and so of one who has an estate in land for the life of another, or for years.
(quoted in Simpson, ibid. my emphasis).

Estates - tenure structured, divided and hierarchically arranged by 'time in the land' - bears upon the social structure through its articulation to status. Legalistically, estates posits 'rights in land', but because rights in and over land vary (between say free or villein tenure, between land held by tenants in knights service, and socage tenancy), the tenures of land thrust on us the statuses of persons, arranged and shaped according to their relationship (by tenure) to land (Pollock and Maitland I 10ff, II 408: Topham op.cit.;5)[2]. The feudal conception of estate binds up rights in land with personal status (villein and free man for example). Modern conceptions of estate speak only of the interest in land (and later other goods including intangibles), without its determination, in law, of status and the services, obligations and exclusions it originally entailed.

For brevity, and by way of summary and without dwelling on the complex history of the land law, we can note that until 1660, the larger part of the land was not 'owned' as we generally understand it (in the sense of freehold land), but held for use, by more or less complex forms of tenure and it

was only conditionally devisable either by gift *inter vivos* or testamentary disposition. Rights of occupation, use and limited disposal (by creating sub-tenancies) of small parcels of the globe entailed the recognition of the superior status and authority of the Sovereign, made material and manifest through the payment of fees or provision of services. Military tenures involved the supply of armed men for military duty (or a cash equivalent), agricultural tenures (socage) meant the provision of labour or goods in kind. The passage of land from one generation to the next therefore demanded the conservation of the *material* and *symbolic* basis of kingly authority and power; not only was land to be transmitted but also the status and all the obligations that it entailed.

The terms 'fee' and 'estate' each bear economic and political import. Economic, because they entail relations of ownership and occupancy as basic conditions under which production for subsistence and production of a surplus take place (in peasant economies under feudalism this means primary production). Political, because each term specifies the rights of superior tenants to claim - either by outright violence or by judicial means - a fixed proportion of goods (or the equivalent in labour or cash), and the obligations the direct producers have, to provide a transfer of the surplus. Note, it is 'the land itself' which is burdened with rights and duties irrespective of occupants. But who ever occupies it (by ownership, tenancy, possession) is encumbered with obligations (military service, agricultural labour, payment of rent, fines, aids, reliefs, escheats etc.) to transfer something upwards. We should add immediately that land holders actually took some care to limit the range of potential occupants (this is the function of primogeniture in a feudal economy based on land) in order to ensure that the obligations attaching to the land, were met efficiently and with a degree of predictability and certainty.

In the same context, the familial event had economic consequences for the superior lord. Death meant entering a new tenant to the land with the advantage to the superior lord of claiming his heriot and raising cash by demanding payment of 'the relief' which fell due when a tenant was entered as a new land holder. Births can be construed as a means by which the obligated family would produce more efficiently the necessary surplus. Marriage signalled both advantage and danger. Advantage, in that it could be the means of recruiting labour power; danger in so far as labour power, and perhaps the land itself could be diverted away from the superior lord. We should not wonder then that the commonplace familial events were regulated with some precision by common law rules and by manorial courts (see Middleton 1981, Searle 1981, Faith 1983).

So as 'the land itself' passes down, in medieval times and for much of the land in the early modern period, the occupancy of it (a necessity for the majority of individuals in order to subsist) was premised upon a tenancy which speaks the individual's status; designated by the 'term in years' and, through the notion of the fee, to whom was owed service, surplus and deference. the form of tenancy and system of vassalage determined to which courts subjects could remove themselves in pursuit of claims or arbitration. The 'fee' and the 'estate' condense meanings of 'the land itself', the conditions of its occupancy and the personal relations of authority, obedience and deference. In this sense we can appropriate the intertwining of the familial event, births, deaths, marriages, succession etc. into reproduction of the relations between lords and peasants, though not in terms of the familial being subservient to 'reproduction' but an integral part of it.

Through 'fee' and 'estate' we catch some sense of the continuum of the sovereign exacting his silver by much the same means as the lesser gentry extracted their pence from the free and servile peasant. The exactions of surplus, though secured in law,

were never merely routine, as studies of the marriage rolls show. They were contested by peasants using the available legal machinery allowed to their status, and by outright resistance, for example, in the rebellions of 1381 (Hilton 1973). The problem for the peasantry and lesser landlords alike was that those who sat in judgement on their claims were those who benefitted from the upward transfer of the surplus product.

What we might call the other side of the law of real property, which extends its complexity, and deriving from the character of land, held not as 'property', but as 'estates' formally tied by feudal dues and obligations, is the multitudinous legal devices, used by aristocratic and lesser landed families to break down the doctrine of estate. Unbinding of the personal relations of tenure, from the proprietary rights in land - the process of transforming land into a commodity - thereby creating an unfettered relationship between subject and object is part of the larger process of the transition from feudalism to capitalism. A signficant part of that process is recorded in the case law, in conveyancing devices, and in parliamentary manoeuvres. The capitalising of land - turning it into a commodity, free for the market not only transformed the doctrine of estate but rewrote the relations of personal dependency that existed between superior and inferior tenures.

The complexity of this transformation has been detailed by lawyers such as Blackstone (op.cit.), Holdsworth (1903), Maine (1917), Pollock and Maitland (op.cit.), but we shall only register the barest outlines here. The means of effecting the transformation were manifold and simultaneous. There was the statutory path; where statutes such as de Donis (1285), Quai Emptores (1290), Statute of Wills (1540) and perhaps, most significant, Abolition of Tenures (1660) allowed landowners freedom to devise the land as they saw fit. The second strand involved the re-interpretation of tenures; of the great feudal tenures (for example, socage, sergeantry and knights fee, or military), by far the most

burdensome was the military tenure. Considerable efforts were made to have tenures converted to those which allowed some lands to be devised (i.e. socage and fee simple). The effect of 1660 was the dissolution of military tenures and their transformation into socage tenures. The third device was the use of legal fictions (fines and recoveries, barring entails) which provided limited means of alienating land. The latter involved the conversion of dues and obligations from service (by labour or donation of game, livestock etc.) to cash equivalents. This went hand in hand with the transformation of sub-infeudination to sub-tenurial relations. In this sense, the great fiefs were caught in a two way stretch, for on the one hand they were engaged in unbinding themselves from Crown perogatives (escheat, wardships, military service, relief etc.) while on the other re-writing the form of tenure through which sub-tenants were bound to and by the great fief. Lastly, the long term process of converting feudal dues and obligations from service to cash equivalents undermined the practice of sub-infeudination, creating sub-tenants and allowing 'substitution' providing a more flexible lord-tenant bond (see Hatcher 1982)[9].

What was contained in the doctrine of 'estate' and a characteristic that was never entirely broken, was that land was held of a superior lord, and on the failure to meet the obligations which went with the land, the land would revert (by escheat) to the superior tenant. The original grants of land went to holders and the heirs of the body; the failure of the lineage equally meant the reversion of the land to the superior tenant. In this sense then the feudal tenure necessarily involves the destiny of the land and the destiny of the line (the production of heirs). The destiny of the land has two paths; down the line, or, by reversion, back to the superior tenant. Here we have the beginnings of the possessory family, for the destiny of the land was secured in and through the family. What was to constitute 'the family' was elaborated in conflicts between the Church and the Crown, the common law courts and the ecclesiastical courts,

and in common law cases involving several branches of one family claiming the inheritance. Broadly, the constitution of 'the family' was fought out on the terrain of bastardy. While canon law took a sanguine view on bastardy, at least to the time of the Reformation, maintaining that the bastard had rights to maintenance and support from putative parents, and retaining the doctrine of legitimation by marriage, the common law took a different course, defining the family more rigidly by technically denying not only the bastards claim to patrimony, but also any rights to maintenance (Pinchbeck 1954;314-316). In effect, the common law defined the family in terms of those who could inherit land; those born in wedlock.

Precisely because land had limited destinies under feudal tenure (much of it could not be freely sold or devised by will), crucial familial events - births, deaths and marriages are key points in the dispersal of landed property. Points when superior tenants took care to preserve their interests by ensuring that the family events of their sub-tenants did not remove property from seigneurial ownership and control. Furthermore, because land moved over time through the family system, especially by the rules of inheritance, it is hardly surprising that ecclesiastic and common lawyers took considerable trouble to determine who was 'of the family' (determined by reference to the marital relation and the blood line). For family membership itself presented a potential claim to an estate (though for the younger male, and most female descendants, this was a claim never entered). In one sense, the rules of inheritance in combination with doctrines such as 'estate', serve seigneurial and sub-tenurial interests equally. In the former case, the fruits of superior tenancy (aids, reliefs, fines, rents, labour services) can with some certainty continue to be appropriated from the sub-tenant family whose conditions of tenancy and the tenancy itself passes down the line in a guaranteed fashion under a known and specified set of rules, which require only that the family line continues in order to retain the family property nexus.

If the transformation of land from 'estate' to 'property' registers the breaking of feudal ties between the crown and the great fiefs, and between the great fiefs and its sub-tenants, it is equally the case that not all persons were qualified as potential owners of real property. The infant, the mad, and married women were radically disqualified from holding land, as outlined in the previous chapter. The laws of real property, though, did not construct 'the family' as an entity capable of owning property (in other words the family is not the equivalent of corporate entity such as the trust or a joint stock company) through its historical exclusion of the infant and the married woman. The law construes the family-property nexus in openly patriarchal lines. In the feudal mode where the destiny of property is intertwined with the preservation of the line, the law of real property posits two potential owners - the husband or the superior lord, who hold the land instead of or on behalf of the married woman and the infant.

Where land was granted to the original tenant and his heirs of the body, the law of real property independently functions to arrange familial relations by privileging the adult male as the owner/holder of real property; therefore, the family in possession has its internal relationships fundamentally ordered by reference to property, where de facto ownership (i.e. in the case of the infant or married woman possessing real property in their own right) is overturned by de jure property relations. The limitations on who can own real property in the family is reinforced by the laws of inheritance which in turn limit those who can transmit property by will or testament.

Real property then has meanings beyond the proprietary rights in land. For the term real property exists in a matrix of other related terms of ownership and possession, particularly notions of feudal 'estate' and 'fee' which had to be dissolved in law and in practice to enable real property to circulate as if it

were any other commodity. The fee and the estate specify the time and conditions under which the prime form of productive property were to be held. But more, the fee and the estate speak of the limitations on dispersal of the land away from the superior tenant. With a limited amount of land 'freely' disposable at the market (medieval historians acknowledge the existence of a market in land, though its size and the volume of land moving through it is disputed e.g. Macfarlane 1978, 1981), fees and estates moved through the mechanism of the family. Key points in the family cycle of events, births, marriages and deaths, became key points for the limited shifts of productive property from one family member to another. Family membership established a potential claim to property, a claim to some portion of the product derived from land (usually determined by the patriarch) and significantly, usually entailed recruitment into a family-based system of production.

Though 'estates' and 'fees' remain with us as commonplaces within customary and legal usage, the post-1660 commodification of land, where landholders were granted extensive rights of sale and devising by will or testament, the family-property nexus - that the destiny of property is 'the family', remains with us, within circuits of capitalist relations of production, distribution and consumption. The rules of inheritance through which real property moved through the family did not change abruptly at 1660, the rules retaining an inertia of their own, well beyond the Civil War settlement and beyond the change in the forms of property which yielded greater wealth and income.

Legal rules and classifications have a history not easily reducible to macro shifts in to modes of production. The laws of motion of the legal terms real property, fee and estate refer us to something other than shifts in means which surplus value is extracted. Firstly, they are relevant categories for a land-owning class, whether the land is used for agricultural purposes or not (e.g. where wealth is derived from minerals).

Secondly, the fee and estate to provide the means for the secure transmission of property down the line, retaining both the legal and common sense of property belonging to the family. Thirdly, where rights in the polity are attached to particular categories of property (e.g. real property as the basis of rights to political representation) there are considerable class interests at stake working to preserve what appear to be formal distinctions between forms of property. Lastly, the category real property, has proved adaptable to both feudal landowners and capitalist entrepreneurs (economic groups not easily distinguishable, nor mappable one on the other) as a means of securing the accumulation of wealth and capital. Real property qualitatively distinguishes between the land and any other 'thing' which of itself may be of little import. Where its cutting edge lies resides is that proprietary rights in land entailed social relations beyond mere ownership of it, for extrapolated from this subject-thing nexus, came rights over nature's abundance on its surface and below and, the network of statuses, and relations of authority, unequal participation in the polity.

PERSONAL PROPERTY

The definition of personal property is in effect defined by the definition of real property; property not in the form of proprietary rights in land may be considered as personal property. Personal property is sub-divided between personal chattels in possession or chattels personal in action.

Personal chattels cover (but not exhaustively listed here):

> "Carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plated articles, linen, china, books, pictures, prints, furniture, jewellery, articles of household or personal use or

> "ornament, musical and scientific instruments and apparatus, wines ..., but they do not include chattels used at death of the intestate for business purposes, nor money or securities for money.
> (Bromley 1976;616-617) my emphasis.

Chattels used for business purposes are included in a separate sub-category of personal property collectively called chattels personal in action. These include'debts, negotiable instruments, stocks, shares and debentures, patents and copyright, trade marks, trade names and business goodwill, and sums payable under policies of insurance', (Hood Phillips and Hudson op.cit.;296), much of which objectively falls under the rubric of productive assets and forms of capital.

Blackstone's text is a concrete example of the difference of degree of importance of real as opposed to personal property in English law. Volume II of his Commentaries (Of the Rights of Things) devotes three hundred and seventy odd pages to real property and the complexities thereof; personal property receives less than one hundred and fifty pages. By his own account

> "Our ancient law books, which are founded upon the feudal provisions, do not therefore often condescend to regulate this species of property ..."

But he continues

> "... of later years, since the introduction and extension of trade and commerce, which are entirely occupied with this species of (personal) property and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it".
> (p. 385).

Blackstone has considerable difficulty with what he terms 'chattels real' (leases, rents, etc.) which he said were 'a kind of property being of mongrel amphibious nature'; he dealt with them under the general head of real property though then and now leases and rents are strictly personalty and descend by the rules of personal inheritance.

The legal distinction between real and personal property has been of some substance and cannot be simply construed as the mystificatory classification of a profession preserving the material base of its own existence. For example, leaseholders prior to 1832 were not enfranchised because they did not possess the necessary (real) property qualifications (Hood Phillips and Hudson op.cit. 296). In marriage and at death, real property was subject to the rulings of common law, and later equity courts; personal property, from the Conquest until 1857 was subject to ecclesiastical court administration (Stone 1977;8). Real property was not subjected to any state taxation on the death of the owner until 1853 ,3 whilst personal goods had to be declared at the Court of Probate from 1694 (p.p. 1861 xvi-xviii). Furthermore, Hill (1978) records, 'a statute of 1665 (which) said that jurors should possess freehold land worth at least £20 per annum - ten times the Parliamentary franchise; and so ... the independence of juries worked to the advantage of the men of property rather than the poor'. (p. 56). What was at stake for the industrial and commercial classes when they acquired landed property was not simply aristocracy - aping in the purely cultural sense, buying a piece of the rural idyll, but also access to parliamentary participation, access to the machinery of justice as justices of the peace and access to the system, of state and political patronage and marriage alliances which had been the traditional milieu of the aristocracy. The Old Corruption owed some of its durability to the sedimentations in English law, particularly the classification of real and personal property which survived the shift in productive wealth, from the land to industry and commerce. Indeed, the durability of medieval sedimentations is probably more visible in the legal rules of

inheritance (which we shall now consider in some detail) than anything else, for what was at stake was not simply the secure transmission of property but also the transmission of political power.

It has become something of an economic and sociological orthodoxy to describe the 'decline' of the British economy by reference to the long-term absorption of the new industrial and banking bourgeoisies into the leisure, culture and style of the land-owning aristocracy (e.g. Dahrendorf's journalistic view of Class on ITV 5.1.82) [4]. There is considerable evidence of industrial and financial entrepreneurs investing considerable sums in estates for their own use, and buying substantial estates for their heirs (Rubenstein 1974), and certainly a long term process of integration between the old landed aristocracy and industrial financial entrepreneurs, using the same education service (the public schools), the same clubs, and sharing the same electoral allegiance (the Whig and Tory Parties), and forming economic and personal alliances through strategies such as cross-investment, the distribution of company directorships, and by marriage (Scott 1982). While this is no way accounts for the late 20th century crisis in the British economy, it does signal the importance of property forms, especially where these forms are unequally valorized in terms of access to political power and social and cultural status. The culture of the 'gentleman' is inhabited by notions of the right connections, the right pursuits of leisure, the right schools and clubs, but is materially based on the ownership of real property. But in acquiring real property, bourgeoisie also acquired more than a physical property for real property was embedded in a network of legal and social relations which still owed much to the doctrine of 'the estate', wedding the family to the land and the land to the family.

The categories of real and personal property address something more than the differential qualities of 'things' possessed by property-owning subjects. The categories themselves are invested by qualitative differences in the relations of possession. Real property exists in a matrix of other referents, such as 'fee' and 'estate' which, until 1660, denied any notions of absolute,

unfettered possession. Occupancy of real property as we have noted, entailed certain conditions being fulfilled, and holding of land for specified quantities of time (the exception being 'freehold').

Unlike real property, personal property can be conceived as always-already 'loose' for the market. The 'objects' could be alienated, by sale for profit, given away, or devised by will and testament, within or outside family relations. Even 'chattels real' (especially 'the lease') though expressed in terms of time could be sold to another person or corporate body for the remaining time the lease had to run.

We can conceive the distinction between real and personal property as a feudal expression of the difference between productive and non-productive property, but the categories retained their effectiveness until well into the 20th century. In legal terms, the whole edifice of finance capital, stocks, shares, different forms of credit etc., which are premised on some rights to income as well as proprietary interest in a unit of capital of exchangeable value, fell strictly under the rubric of personal property. As a property form, it was amenable to new forms of capitalist organisation of the economy - the organisational units of joint stock companies, unincorporated and incorporated mercantile, mining and railway companies. In other words, there is nothing about 'personal' property, paradoxically, requiring a relationship between 'the thing' and human individual as possessor. Corporate bodies could operate with the category as well as named individual economic subjects.

In this respect, much of the early operation of real property implies a particular human subject, from whom dues and obligations could be collected with certainty. In fact, the *parentelic* scheme, the legal 'family tree', itself demanded such a subject-object relationship. What else could primogeniture be but the process transmitting property to a human subject, in occupancy of a place or status?

What the real-personal property categories suggest then is not universal subject-object relationship, but a diversity; a diversity which posits not only different kinds of 'things' but originally a diversity in the relationship itself. The division of real and personal property ultimately broke down under the impact of new legal devices, which effectively dissolved the real and personal categories as differences between proprietal interests, so that although 'things' continued to be classified as 'real' and 'personal', the proprietal relations which were appropriate to each, where necessary, could be legally diminished. It is to this process we now turn.

For inheritance purposes, the distinction between real and personal property, survived until the implementation of the Administration of Estates Act 1925 (Topham 1947; 129), from 1 January 1926. The statutory dissolution of the real/personal property distinction, long after land ceased to be the major form of productive property could be explained by the old property - political power alliance retaining sufficient parliamentary support to block (even in the negative sense of simply not introducing a Bill) the statutory path to reform. More compelling is the argument advanced by Neale (1975) that the substantial distinctions between real and personal property, writ large and secured by the common law, were largely a dead letter after 1660, for the aristocracy, and after them the financial and industrial bourgeoisies. By converting old feudal tenancies to trusts, and through the use of settlements, providing limited rights to alienate to heirs of the body, regulated through the equity courts (Chancery), land effectively became a financial commodity. While the Statute of Uses (1535) represents the last throw by parliamentary factions to retain the old feudal dues and obligations attaching to feudal tenancies, the Act of 1660 and elaborate conveyancing devices turned landed estates into something not unlike the joint stock company (Neale op.cit.; 100). Where land was held in trust or settlement, each occupant becomes a tenant for life, with limited rights of alienation, but able to benefit from rents etc... However, the law also now 'recognised the divisibility of property titles and recognised legal titles to present

and future income as property ...' (Neale; 98). From the 18th century, these paper titles, like mortgages and bills of exchange were all regarded as property. And moreover, like bills of exchange, mortgages - forms of credit - paper titles provided necessary capital for projects such as industrial enterprises. Importantly,

> "through the creation of life tenancies, ownership was distinguished from management and use, the claims of investors (mortgages) were given preferences, while the claims of all beneficiaries put pressures on the salaried estate managers and agents to maximise income ...".
> (Neale; 100).

The trust then became the means by which claimants, other than direct (familial) beneficiaries, could claim against the landed estate. Once this was established, loans could be secured by titles to land, and land became a useful source for raising capital to invest in home and overseas projects.

The trust however did more than transform real property into that 'mongrel and amphibious species' of property which gave a champion of the common law like Blackstone so much trouble. Note, for example, this passage from a standard legal text on real property:

> "TRUST FOR SALE:- So far we have concentrated attention upon the strict settlement of land, but an entirely different way of applying the principle of the settlement to land was by means of a trust for sale, a method that has been common in wills for some 500 years and in deeds since the early nineteenth century. This transaction, which is extensively employed at the present day falls into two parts ..." (we delete the technical details here).

> "of the execution of this deed is that in the eyes of equity the land is immediately converted into money, for that doctrine based on the principle that equity looks on that as done which ought to be done, insists that an imperative direction to turn land into money shall impress the land with the quality of money no matter how long the sale may be postponed. The important point to note, therefore, is that a trust for sale relating to the fee simple and containing a succession of beneficial limitations is a settlement of personalty, and not realty. (Cheshire 9th ed. 1962; 78-79, my emphasis). *

The magical transubstantiation of 'land into money' by the device of the trust is significant in itself but has several interesting consequences. Firstly, the property passes inter-generationally by the rules of personal succession, not as realty. This avoids the rules of primogeniture; it allows surviving spouses a claim on the estate. Secondly, it was a useful device for fathers settling property on daughters at marriage; husbands assume a life interest only, they could not alienate the property without the consent of the trustees, nor could they easily disinherit any offspring of the marriage. The so-called 'traders settlement' (counterposing the trust for sale and personal settlement against the strict settlement - see Note 30.) was not limited to estates in, or settlements of land, but could be applied to financial instruments as well.

* TRUST FOR SALE: a deed of trust allowing two or more parties to own jointly, say a house and land, as 'tenants in common' (a useful device employed in contemporary joint mortgages); each party has rights to proportions of the income from rents or, a fixed proportion of the sum raised by sale of the property. (For technical details see Cheshire op.cit.; 78ff, 148ff).

The trust has proved to be a serviceable and adaptable legal device, such that property in the form of land or finance (stocks, shares etc.) may be settled under its protection, serving the owners of the means of production, to maintain their exclusive possession of property, in a variety of guises, for several centuries past. By limiting the claims of beneficiaries, whether the substantive basis of the trust be in the form of land or financial stock, the equity courts at once provided a flexible means for the realisation of capital, and, the means by which concentrations of wealth and capital could be sustained and reproduced.

The rise of the corporation (from the mid 19th century) signified in Capital primarily, but not exclusively, by the joint stock company, as the predominant means of the organisation of capital, did not sweep away the old categories of property law, nor did it disrupt the traditional means by which landed and commercial classes secured their own interests and those of their families. While some manufacturers and mercantile enterprises, family owned and controlled, did convert themselves to limited liability companies by the (controlled) release of shares through City institutions (Francis 1980), not all of them did, nor did they find it necessary. Numbers of enterprises, especially mining companies raised capital by other means (Hirst 1979), no doubt including using existing assets as guarantees for loans, and the network of kin and marriage alliances as sources of new money.

As Hirst notes, that while the Companies Act posits a notion of the Corporation as a 'republic of shareholders governed by their elected representatives', in practice, 'most large companies are run by a self-replacing professional management and directorate whose policies and nominations receive formal assent at shareholders meetings (op.cit.;133). Unfortunately, he does not pursue the system and mode of 'self-replacement', nor its effects. However, what is clearly being alluded to is that significant feature of the British social structure - the concentrations of wealth and privileged access to key positions

in capitalist corporate organisations which correspond with clusters of family and kin. In other words, while lambasting Marxists for not paying due attention to the corporation as means of effective 'exclusive possession', continuing the pursuit of profit by other means, and directly effecting the range of goods and services which are to be produced, Hirst himself is forced to admit the existence of older forms of 'exclusive possession' inhabiting the legal-organisational system of capitalist enterprises. Family trusts can 'own' large portions of corporations; benefits accrue through the sale of shares, through dividends which shares (variably) yield, and through salaries (as Chief Executives, consultants, directors, etc.) which mere family membership may confer.

If the corporation signals the increasing importance of an 'owner' which cannot be reduced to the identity of a human subject, marking a decisive shift away from the property-owning subject posited by real property law under feudalism, there is also nothing essentially 'collectivist' or 'socialist' about the modern corporation, as Hirst correctly argues. Given the shifts we have identified in the nature of real property, it is a commonplace to find, in the realm of 'agri-business' (the vertical organisation of modern agricultural production and food processing), corporate bodies owning estates of land - perhaps a sign of the <u>ultimate</u> dissolution of the <u>practical</u> distinctions between real and personal property, in the face of continuing <u>de jure</u> definitions. Buying a house, a commonplace in the U.K., for example, takes place within a legal language that would probably be familiar to medieval lawyers. We still use the notion of 'seisin', though in practice most lay people would not distinguish between it and ownership.

The long duree of the legal classification of property into things real and personal emphasises the importance of conceiving legal relations, processes, forms of action and legal discourses as irreducible to modes of production, having instead multiple determinations which requires an analysis of struggles over legislation, case law and the ingenious devices of common

and equity lawyers dreamt up to secure the interests of their clients. One of the long term practical effects of the classification, and no doubt one of the prime means by which the legal classification of property itself was maintained and reproduced, was the systemic separation of transmitting real and personal property by inheritance. We shall refer directly to these consequences in the following chapters.

CHAPTER TWO

INHERITANCE AND THE FAMILY: TESTATE SUCCESSION

Much as the concept of property can only be understood by reference to the legal categories which it inhabits, the social relations of property ownership are riven by legal rules setting out the means of its devising and alienation across generations. We should state directly that classes do not reproduce themselves willy-nilly, but do so within the limits of definite economic institutional and cultural frameworks. It is worth noting that the familial unit is a significant element of class reproduction. Indeed the laws of inheritance, in the absence of wills or testaments devising property elsewhere, propels property down the familial line. Hedged only by claims against estates by creditors, and by the state (probate duty etc.), the legal system requires familial inheritance in instances of intestacy, as the 'normal' means of transmitting property at death. In its wider effect, the inheritance laws are crucial, economic, social and cultural repeaters.

We shall be concerned in this chapter with two fields of enquiry. Before we proceed further with our discussion of inheritance laws, it is necessary here to signal - albeit briefly - the conception of the family that we are working with. We shall defer any lengthy discussion of family law (the regulation of marriage, and the regulation of parent-child relationships) until the next Part (though we recognise that laws of succession are a part, but only a part, of the wider field of family law).

Secondly, we shall discuss the laws concerning testate succession; the system by which property is transmitted by will or testate. We do so to signal the importance of testacy as a system of transmitting goods, too often overlooked as an area of power, strategy, negotiation which has considerable effects on the relations of family members, especially minors.

THE FAMILY: SYSTEM, FORMS AND RELATIONS

Firstly, we should say directly that we are concerned with 'the family' constituted by the formal and customary relations of husband and wife, parents and children, and not with 'households'. By household, we mean the conception of persons - blood related kin, servants, labourers, lodgers - living together, generally under one roof (or in geographically immediate residences), usually subject to one structure of authority . The debate about the size, composition, and social relations of the household, and its (putative) changes over time, is the subject of intense academic discussion (see generally Laslett (ed) 1972, 1977, 1980; Anderson, 1971, 1972; Chayter 1980; Hacker 1982, Harris 1982; Hill, 1980 ; Stone 1977, 1981; Flandrin 1976; Forster and Ranum (eds) 1976; Macfarlane 1978) . What inheres the laws of succession is the radical disqualification of some co-residents kin, live-in servants, labours and lodgers to any claims in 'familial' property. This will be demonstrated at length below. Secondly, 'the family' as defined in the laws of inheritance, is by no means, now or historically, co-terminous with residence, nor therefore, are the power and authority structures inscribed within the laws. Thirdly, though the household is generally organised along the same principles of power and authority which inhere 'the family', those same principles are observable on a canvas much larger than the day to day processes and interaction of the household. For example, there are aspects of the capitalist state, which may be construed as profoundly 'familial' - in social policies privileging the distribution of fiscal benefits to male heads of households, for example. A similar principle applies to the labour market and places of work [5].

To advance this argument one stage further, we could take as an example the 19th century laws regulating the employment of domestic servants and apprentices (see Davidoff 1974). These laws conceived

the relationship between the master and his subordinates much in the same way as family law structures the relationship between a father and his children, or his wife. On entering employment in a household, (and in one sense 'constituting' that unit in broader meaning of term advanced by historical demographers), subordinates entered the patria potestas of the master, enjoying his protection but subject to his authority. While for most servants and apprentices this also implied 'living in', where this did not obtain (i.e. not being of 'the household'), the principles of familial power and authority still obtained during working hours, and often outside them. In other words, the 'formally free' labourer (in Marx's sense) enters an economic relationship which is overwritten by 'unfree' relations of personal dependence and familial subordination . Clearly, there is an overlap between conceptions of 'the family' and 'the household' - we might venture to say that individuals routinely lived and interacted in 'households' in a variety of class-specific ways, and may well have (and still do) experienced 'the family' directly through the household - however, 'the family' in the enlarged sense we use here, extends beyond and subsumes the household. The way forward then is to consider 'the family', 'a system of differentially distributed power and status relations' inscribed within formal institutions and customary practices, and observable in sites including, and other than, the household (the work place, the system of social policies promulgated by the state, for example). The boundaries between the positions of power and status, which determine the social relations of individuals within 'the family', constitute the family form.

Drawing on the work of Delphy and Leonard (1980, 1982, 1983), and on my earlier work with Hood-Williams, what follows is an attempt to sketch 'the family' in terms of its economic and social characteristics in order to demonstrate the centrality of familial relations in any understanding of the dependency

of minors. We shall proceed by advancing a series of theses about the family, each followed by discussion, in order to delineate a field of enquiry. Those taken directly from Fitz and Hood-Williams (1982) are acknowledged in quotes.

a) 'The family both historically and currently, constitutes a form or system of producing and consuming goods and services and transmitting property, in the broadest sense, according to a logic quite different from that of capital' (op.cit.: 68).

To elaborate; to argue for a familial system of producing goods and providing services (for the benefit of other family members) and a capitalist system of producing goods and providing services (as commodities to be exchanged at the market) is to argue that there are two 'economic' systems (both concern production, distribution and consumption), and not one 'economic' system and 'a family' system (i.e. 'un-economic'). The distinction is between capitalist circuits of production-distribution-consumption and familial circuits; the distinction between productive (capitalist) and non-productive (familial) labour, intensely debated within the 'housework' controversy, necessarily denies the family system any significance [7].

Some comments on the housework/domestic labour/household labour debate. One defence of the Marxist protagonists; unlike classical economists, they were at least prepared to conceive housework/domestic labour as 'labour'. While their attempts to theorise this specific form of labour has its problems (and we shall pass on to these below), there is considerable merit in the attempts to conceive the isolated labour carried on in the private sphere, in the context of capitalistic relations of production (e.g. Seccombe 1974, Gardiner 1977, Hummelweit and Mohun 1977, Folbre 1982). But the attempts to lift housework/domestic labour into a continuum of labour, from which capitalists benefit, on the other hand failed to address the problem of housework/domestic labour per se, its specific location within the household and its articulation to the family as an economic system.

The fundamental problem arises from Marxists analysing housework/ domestic labour in terms of the labour theory of value outlined in Capital Vol. I. The logic of the discourse traps them into a position of assessing domestic labour in terms of a) whether domestic labour is a commodity, b) whether it produces a surplus, c) whether or not it is subject to the law of value, d) whether or not domestic labour is socially-necessary labour time devoted to the reproduction of labour power, e) whether or not household labour is productive, and so on. These terse remarks give some flavour of the nature of the 'debate' but also clear the way for us to make some theoretical observations .

Now as we understand it, the labour theory of value in Capital Vol.I has the purpose of 'uncovering', 'laying bare', 'revealing' a) the laws of motion of capitalist economic systems, b) the necessarily exploitative nature of capitalist relations of production (the capital-labour relation) and the moral/political/ ethical consequences of exploitation. The theory posits through its concepts, two fields of enquiry; the first is considering relations of production not of the same order as familial relations of production; so there are problems of applicability. The second, the discussion of exploitation does have direct relevance to housework/domestic labour. So there is a case for deploying the labour theory of value in the analysis of housework/domestic labour, in so far as it might be regarded as exploited labour.

Given that the field of enquiry is exploitation, we are not yet out of the wood. The labour theory of value (Vol. I) is a mere analytical tool, appropriating in thought, a concrete economic/ political/moral-ethical relationship. Heresy! However, the epistemological frame set up here attends to the basic of the Marxist method. In terms of polemics, the labour theory of value achieved its ends i.e.'laying bare' etc..

However:

a) There are fundamental problems, internal to the discourse of Capital with the labour theory of value, arising from:
1. The abract formulations of Vol. I and the attempts to 'operationalize' it in Vol. III. This has been demonstrated at length by bourgeois economists such as Samuelson (1972, 1977) who can cite for his argument an impressive provenance amongst Marxist and socialist economists such as Sraffa; by Marxian economists, but most forcefully by Joan Robinson (1945, 1960, 1964, 1978); and by a collection of Marxian sociologists and economists, (Cutler, Hindness, Hirst and Hussain 1977 Vol. I).
2. The ambiguous term 'value', causing confusion more than acting as a searchlight on 'the laws of motion' and exploitation. Basically, 'value' in Vol. I cannot be made to correspond to 'prices' in the discourse of Vol. III (nor for that matter does 'value' address the price regime of the material world of capitalist societies).
3. The Vol. I. schema which allows only socially necessary (and living) labour to determine the 'value' of a commodity; the formulation traps the uncritical into assessing all labour only in terms of whether or not it produces 'value' (which itself is of uncertain status) (e.g. see the above domestic labour debate). Furthermore, the money-value of commodities is determined not only by labour, but also by scarcity, the laws of demand and supply, changes in technology and so on.
4. The language in which the theory is expressed. Joan Robinson writes:

> 'The awkwardness of reckoning in terms of value, while commodities and labour-power are constant by changing in value, accounts for much of the obscurity of Marx's exposition and none of the important ideas which he expresses in terms of the concept of value cannot be better expressed without it.' (Robinson 1967; 20).

5. The fact that little of the rest of the Marxian economic scheme derives from the labour theory of value. Joan Robinson again, 'no point of substance in Marx's argument depends on the labour theory of value (op.cit.; 22). The derivation of the relations to the means of production (possession/non-possession) is logically prior to any labour theory of value; it is therefore possible to devise a theory of class without recourse to 'value'. Rates of exploitation can be discussed outside the terminology of the labour theory of value, as can rates of profit.

b) It is therefore possible to demonstrate the exploitation of wage-labour by capital, without recourse to the labour theory of value; neo-classical economics have the concepts and algebraic formulations for quite another form of demonstration (see Samuelson op.cit.). That these tools were not widely deployed until post-1945 requires separate analysis. In other words (in Samuelson's term) 'erase and replace'; erase the labour theory of value and replace with the bourgois economics of wage bills and prices, but exploitation remains constant. To reiterate; the exploitation of wage-labour by capital exists outside the theoretical framework of the labour theory of value - independent of it - and moreover, the labour theory of value is an imperfect tool for describing and explaining the material and concrete process of exploitation taking place. We do not now need a labour theory of value to discover exploitation; though this does not deny its salience in the history of thought. Again, this statement in no way offends the precepts of materialist or realist social scientific epistemology.

What then is the significance of these comments in the context of the economic analysis of domestic/household labour and housework? Some observations:

a) One is led to wonder about the nature of the ideological heat generated by the domestic labour debate, and what it is that Marxist writers cited above are trying to discover or defend - the character and relations work carried on within the family, or the canon of the labour theory of value? It would seem a curious theoretical and political practice, a curious economic and sociological form of analysis to situate an analysis of non-waged labour in the context of canon which primarily addresses the problem of waged-labour (and the case of the Vol. I formulation), a framework which needs considerable revision before it can be operationalized. It can be said that whether domestic labour is commodity or not, whether or not it produces a 'surplus', whether it is or not socially-necessary etc. is irrelevant to the necessary proof of exploitation. Domestic labour does not necessarily have to fulfil all the precepts of the labour theory of value in order for it to be considered an exploited form of labour, productive labour, etc.. We shall consider the effects of sticking with the labour theory of value verbage below, but it is quite clear that its language acts as a block on a materialist account of the economics of the family.

b) A materialist economic analysis is not co-terminous with social relations and processes analysed in and through the Vol. I formulation of the labour theory of value. It is not even a necessary starting point for investigating the economic relations between husbands and wives, parents and children (those statuses and positions are given not only by relations of possession/non-possession of patrimony and relations of production - about which Marxism has a great deal to say which is of 'use' and 'value' - but also by formal legal institutions, customs, habits and predispositions; for example, ecclesiastical and state familylaw, peasant inheritance customs, attitudes

to the relative values of boy and girl babies etc.). 'Not a necessary starting point', however, does not mean that all Marxian economic formulations are redundant.

c) In one sense, 'we are all Marxist' (Robinson 1965); we cannot conceive what a materialist economic analysis might be like without say a concept like possession/non-possession and what flows from positing that relationship in economic and political terms. But it is a disservice to think through, say possession/ non-possession only in terms of capital-labour relations. Nor would we wish to disturb the formulation that without labour there would be no product (a formulation which holds equally good for both the gas cooker and the home-baked apple pie). Economists may differ as to how the value of a commodity is established (by the value of labour power embodied in it - Marx; by wage costs and scarcity of primary products and the law of demand - the more sophisticated bourgeois economists' account), few if any would disagree that commodities/products are unequally distributed in capitalistic economies. Both Marxist and bourgeois economists write into their formulations a form of 'simple reproduction'; that labour power must receive in wages, at the minimum a wage for subsistence, or, in reality a wage sufficient to ensure the reproduction of labour power/ labour force. While these formulations are generally made to apply to macro-economic theory, they can be transferred to the micro-economic sphere; there is no real need to re-invent the wheel, in order to explore the familial system of production and consumption. But it is also not necessary, to take up our earlier point, to attend to all the niceties of the labour theory of value, in order to discover the order of the relations of possession/non-possession, the relations of production, distribution and consumption within the family system. A formal deployment of its concepts does not itself constitute the boundaries of 'economic analysis'. A point all the more poignant when it is realised that Marx deliberately wrote out of the Vol. I formulation, the labour power of women and children (Folbre 1982;318).

d) In sum, Marx's economic system is not redundant to the analysis of the family system. Indeed it is a crucial link between the family system and the capitalistic economy in which it is an embedded part. Something of the character of the family system can be judged by highlighting the differences between capitalistic economies and the family system. But what we are positing here is that there is a tendency to _subsume, via the precepts of the labour theory of value, the family system as an extension of, or an appendage to the 'fundamental' relations of production_ (capital-labour).

One writer catches the tension nicely:

> "I would argue that the approach of Marxists to an analysis of class has _tacitly_ acknowledged the dependant relationship of men to women without addressing any of the problems this relationship poses either theoretically or politically. For example, women's class position has generally been equated with that of their husbands and the family _implicitly_ taken as the unit for analysis of the class struggle."
> (Gardiner 1977; 158, my emphasis)

Any attempt to describe and analyse the family system has to make the 'tacit' formal, and the 'implicit' explicit. The fact that Gardiner continues in this article to subsume women-wives as a sub-set of the class struggle makes the above all the more ironic.

In sum, we need somewhat different concepts and a different language to avoid the tendency to subsumption; to adopt this position does not necessarily entail dislocating the family as an economic system from capitalist relations. No-one will deny that unpaid domestic labour reduces the cost of the reproduction of labour power to a capitalist class; it is another matter, however to argue that capitalists are either the chief or the only beneficiaries.

In order to take familial production, distribution and consumption seriously, we need to examine it on its own terms. One way to delineate its character is to compare and contrast it with capitalistic circuits; to indicate the points of connectedness and difference. To this end, we shall use an extended quote from Delphy and Leonard as means of moving forward to a material analysis of the family as an economic system.

"In sum, in the model market system, the worker exchanges his or her labour power for a fixed wage which depends on the services which he or she performs. These services are also fixed, limited in quantity (hours of work) and in kind (qualification). The equivalents are determined according to a fixed scale (that is, a price determined globally on the labour market in the capitalist system) which is little influenced by the wishes of either party. The labour which is performed has a universal value and it is this value which the employer buys and which the worker can sell because it is possible for him to work elsewhere (for one of a large number of employers). The fact that he is selling certain pre-determined services enables the worker to increase his earnings by improving his services, either in quantity or in kind."

"In contrast, the work which family members provide is not fixed, in hours or in kind: it depends on the desires of the head of the family; and this work is not paid for according to a fixed scale. The maintenance provided for family members depends not on their work, but on the wealth and the goodwill of a particular individual: the head of the family. Since the benefits which they receive have no relationship to the work they do, it is impossible for them to improve their own standard of living by improving their work. The only solution, within the family system, is to be the dependent of a richer head. The logical consequence of the non-value of family labour for women is to hunt for a good marriage, but most of the time, there is no possibility of choosing whom to work for (none at all for sons or daughters), and very little for wives: compare the number of women who divorce and remarry with the number of workers who change jobs within a given year). While the paid worker sells his or her labour, the family member ...)."

"While the meeting and interaction of actors in the market depends on their having goods to exchange, patrimonial transmission is independent of the goods transmitted, and is on the contrary regulated by the status of persons. Exchange is based on reciprocity, patrimonial transmission does not involve counterpart and equivalence. The origin and forms of exchange find their raison d'etre in the satisfaction of particular needs, while patrimonial transmission is due to ascriptive criteria based on family roles. Finally, exchnage depends on individual volition while the transmission of patrimony is a (legal) obligation. (Delphy and Leonard 1980;9-10)."

We summarise and develop the above argument below. The differences are signalled by the <u>beneficiaries</u> of each system, and, in the social relationships of producing-consuming. The capitalist mode posits wage-labourers 'freely' contracting to produce commodities for the owners of the means of production (who benefits at the 'unfree' labour market, at the market when commodities are 'freely' exchanged, and from the surplus value appropriated in the very production of commodities). The phenomenal form of 'exchange of equivalents' (labour for wages, money for commodities etc.), rests upon legally 'free' subjects exchanging and contracting goods and services, formally 'free' to find new markets or different employers. As Marx suggests, (<u>Capital 1</u>;Part 1), the constraints of reality erode 'freedom' at every point. The contractual equivalence and equality between capitalist and producer, inscribed in the legal form, is undermined by the necessity of subsistence.

Quite unlike the contractual 'quality' of capitalist means of producing and exchanging, the familial contract (marriage) celebrates inequality. Goods and services produced (either for the market or for direct consumption by family members), by the operation of customary practices and family law, belonged to the husband. In exchange, the husband (who in law can only be male) owes to his spouse (who formally is female) obligations, which can only be enforced to a limited degree. The form of exchange then is unwaged, and is reinforced by relations of obligation, personal dependence and personal obedience (to be

enforced if necessary by violence). The familial system of producing is not based in any sense upon any contractual exchange of equivalence between husband-wife, husband children. The system of producing - be it goods of exchange, or goods or services of use value - is quite unlike the form of capitalist producing. Indeed, the significance of the status wife and minor arises from their legal exclusion from entering contracts in their own names.

The difference extends beyond the system of producing as described by the character of the labour relation. In matters of ownership and control, there are considerable differences between capitalist property relations and family property relations. Capitalist property assigns a relationship between a 'thing' and an individual or corporate body capable of exercising proprietary rights in it. A dog and a joint stock company may equally hold capital. Not so within the family system. For historically, married women and infants are excluded from owning and controlling 'family' property. Likewise, the married woman and the minor could not alienate or devise by will, 'family' goods (because they didn't own them!). Given these legal exclusions, it should be clear that familial property has only one owner, the husband-father.

b) "... there are two modes of recruitment to the family system. Firstly, the marital relationship which recruits women-wives and is of 'primary importance' in explaining the 'multiplex nature of women's oppression'. Secondly, the kinship and/or lineal relations."

On marriage, women-wives enter the couverture of their (male) husbands. Couverture offers both 'protection', and an obligation to maintain, but also, material and symbolic subordination for married women. The Pauline doctrine [6] of marriage, and the English ecclesiastical conception of 'one flesh', allots a husband rights in and over the body and the labour of his spouse.

Social policies further assign the subordinate status of the married woman, offering as it does the prime forms of fiscal benefits (tax benefits, health and social security benefits), to the male head of households.

Likewise, fathers have 'natural' rights over the children of his lines; rights to their labour, rights to determine a wide range of social practices (visible at particular points such as marriage, the age of majority - when the destiny of aristocratic landed property was resettled, entry to occupations, professions and family businesses), balanced by obligations (in exchange?) to provide food, clothing and shelter. Kinship affiliation is not simply a biological relationship (father and children 'owning' the same chromosomes), but is reinforced and sustained by social practices - the working of family law, and the laws of succession. To a limited extent, children can be conceived as the property of the patriarch. Principles which might constitute a concept of children as property are:

a) Adult power over familial offspring, stemming from an initial/prolonged physical dependence of children on adults (usually the male head of the family).

b) The notion of ownership and possession; parents having the exclusive rights in their child's labour; or rights of disposal (marriage alliances, apprenticing out, hiring out).

c) the exclusive authority to use (and abuse), raise, mould, develop according to parental ideologies, through the denial/ restriction of social practices, experiences and ideas.

d) The notion of transferability, whereby the exclusive authority outlined above, can be switched from the biological family to the State or other surrogate 'families' .

The characteristics of exclusive authority of use and disposal and transfer are legally guaranteed and customarily practiced. We recognise, however, that child protection legislation arising in the 19th century severely curtails patriarchal authority over, and rights in children.

c) 'The family is not a unit but a complex system of differentially distributed power and status position and relations'.

We have signalled the major divisions comprising the family by speaking of heads and subordinates. Typically, the family comprises the male head with subordinate women wives and minors. The family is patriarchal - but we use patriarchy in the sense commonly used by anthropologists and by the juridico-political theorists of the 16th and 17th century [7]. By patriarchy, we speak of power and status relations celebrating both maleness and seniority; women-wives are subordinate to male husbands, as minors are subordinate to adult parents. We would argue that the characteristics extend beyond the immediate social relationships of kin and household, and is observable in the labour market (differential job opportunities, rates of pay, career and promotional prospects), in a wide variety of social policies, and in institutions such as schools, colleges etc..

Family law celebrates both the positions and statuses and the power and authority relations between them as we shall indicate at length in the next chapter. As Delphy and Leonard suggest however, distributions of power and status arise significantly from the family system of producing, and from that, the distribution of benefits and rewards accorded to each status, are determined. We have already suggested one line of force; the patriarchal ownership and control of familial goods (the patrimony). The other line of analysis is to consider the distribution of tasks, and the control over them, the time

taken and the conditions under which they are carried out. The general principle that applies is that family subordinates do low status tasks, and, conversely, the work done by subordinates is low status. Anthropological studies (Delphy 1977; French peasants; Schildkrout's (1982) study of child labour in Kano, Nigeria) suggest the cross-cultural perspective of this principle. In the British context, child care is largely women's work (mothers, minders, playgroup leaders, women relatives), is predominantly unpaid or poorly paid (Coulter 1981) and residual to the main (male) business of working full-time for wages. In every sense it is low status, low paid, and residual work, affirming the residual and subordinate status of women in the system of producing (see Hood Williams and Fitz 1983). Like housework, cooking and running the kids to school, child care is relegated to realm of the 'non-essential', 'non-productive', therefore unimportant.

Though child labour was a key element in the economy of working class families, since the introduction of full time compulsory schooling, it is of decreased significance. However, research being carried out in London, Luton and rural Bedfordshire suggests that child labour is still with us, on a scale that is surprising. Though the jobs available for children vary with the regional and local context, within agricultural enterprises and smallholdings run by families, the significance of child labour should not be underestimated. Our interviews with the children living on smallholdings suggest that they spend considerable amounts of time, before and after school, doing tasks such as making up vegetable boxes, cutting and packing produce - all for minimal reward [8] . We should add that this form of <u>direct</u> appropriation of child labour by the family head, may not make up a significant proportion of the employment relations under investigation. What is evident (though impressionistic at this time) is the extent to which parents <u>actively participate in the recruitment</u> of their children to available jobs

on the market. The size and cultural significance of this recruitment pattern has yet to be explored. The character of jobs for which children receive payment however (part-time, low-pay, on the margins of production) confirms the principle sggested above.

To reiterate, what is presented above is a sketch, an outline requiring detail and elaboration and this will be part of the work undertaken particularly in this chapter and the next. In presenting the family as a complex system of positions and statuses imbued with relations of power and authority, we have attempted to move away from several theoretical positions evident within the social science. It contrasts, for example, with functionalist theories of the family where the family as a unit is conceived in terms of roles and imperative processes (especially 'biological imperatives') . There is a second variety of functionalism evident in Althusser (1971) where the family is regarded as one of the key mechanisms for the reproduction of the relations of production. Again, through Althusser, we find a second line of approach which consigns the family to the superstructure, resting upon the 'primary' mechanism of the mode of production. This approach admits very little space for the analysis of the family as an economic system, with its independent history and system of producing. Thirdly, we are unwilling to consign the family to the realm of social relations which are primarily constituted by personal and affective relations. It is of course imperative that we map the psycho-social relations of the interior of the family and the changes which occur in personal, affective and sexual relations, but we can only do so in the context of understanding that these relations are shot through with structures of power and subordination .

As it stands, the family as a system presented here is somewhat abstract, referring to principles and lines of analysis without detailing the ebb and flow of the relations between positions and statuses. It is certainly ahistorical, presenting as it does a 'de-historicised' system, blind changes in the mode of production and changes in the relationship between the state and civil society. What is offered below attempts to enlarge and elaborate on this schematic presentation, illustrating the necessity of locating the subordinate status of minors within the family. The laws of succession provide a useful instance of the family operating as a system.

TESTATE SUCCESSION

The law provides that on death, for the distribution of property held by a dead person to devolve through two separate systems; by testate succession (where the intention of the testator is made known through the legal instrument of the valid will or letters of administration [3], or, by intestate succession (legal rules invoked in the absence of legal instruments). We shall consider first testate succession of real and personal property; the rules concerning the intestate succession of real property and personal property are significant differences and will be dealt with in the following chapter.

The current position on testate succession put simply, is as follows:

> "By his will a testator may dispose of all his property as he wishes. Under English law a testator's spouse and children have no legal right to inherit a fixed portion of his estate. But whether the deceased dies testate or wholly or partially intestate, the court has power to order provision to be made for certain applicants out of the deceased's net estate." (Clarke 1977; 190).

For Blackstone, 'this power of bequeathing is co-eval with the first rudiments of law; for we have no traces or memorials when it did not exist (Vol. II; 491). The power of a testator to devise his personal property has been continuous from the Conquest to the present; the power to devise land was incident upon the particular form of tenure by which land was held. The Statute of Wills (1540) and The Abolition of Tenures (1660) extended testamentary capacity to include land holders.

These broad trends however must be elaborated further.

> "In case of personal property, in the 12th and 13th centuries, at death, a man's (personal) goods were to be divided into three equal parts of which one went to his lineal descendants, another to his wife, and the third only was at his own disposal."
> (Stephens, Commentaries Vol. II, 1914;306).

The rule of thirds, with wife and children having common law rights to pursue their claims seems to have held until the middle of the 14th century (Blackstone Bk. II, 491-493 : Pollock and Maitland II, 314-363). Blackstone and legal historians such as Stephens are unable to tell us when the rule of thirds disappeared, giving men absolute rights to dispose of all personal property by will; certainly local custom in York, Wales and London which retained the old rule of thirds were overturned by statute in the 17th and 18th centuries (Blackstone Bk. II; 430-33, Stephens Vol. II; 307). By common law, then for a considerable period of time, possibly from the 14th century, the claims of widows and children and other relations were totally barred. By custom, however, a testator was obliged to remember the Church and a superior lord by leaving them his two best chattels (the heriot and the mortuary) (Stephens;308) - one of the fruits of superior tenancy.

Testamentary power in the matter of real property is somewhat more complex. As Pollock and Maitland outline the situation, succinctly it is worthwhile noting their words:

> "In the twelfth century it became plain that the Englishman had no power to give free-hold land by his will, unless some local custom authorised him to do so. A statute of 1540 (Statute of Wills 32 Hen.VIII.C.l.), which was explained and extended by later statutes, enabled any person who should 'have' lands as tenant in fee simple to 'give , dispose, will and devise', the same 'by his last will and testament in writing'.
> (Bk. II; 315).

The Tenures Abolition Act of 1660, which effectively put an end to military tenures and the restrictions on their devising, effectively meant that all landed property except copyhold tenements, could be devised by will (Blackstone; Bk. II, 375). However, copyhold tenants did have considerable claims to pass on land to their successors. This was always conditional upon local custom, and the performance of certain rights and services due to the lord which had been fixed by the custom (e.g. fines payable on entry, etc.) (Hatcher, op.cit;9; Topham op.cit;242-245). The customary claim depended to a large degree firstly upon the antiquity of the line holding the copyhold, and secondly upon the superior tenant's willingness to enter copyholders' descendants without raising the entry fine above the means of the new tenant (c/f Thompson op.cit.). In matters of inheritance, then, there is nothing to suggest that customary tenures could not be devised by will and testament, always providing, the incoming tenant was able to pay the entry fine on taking the new tenancy ad was willing to observe the customary obligations and services.

A widow's customary, and later common law right to dower abridged the male testator's absolute right to dispose of land held by freehold. If she survived her husband the widow was entitled to one third of the income of the land of which he had held the fee (Stone 1977;159). This customary right to dower had become the rule of common law in the 13th century (Pollock and Maitland II, 420-26). The right to dower could not be defeated by the husband if he had once acquired freeholds of inheritance; this meant he could not sell the land or dispose of it except subject to his wife's right to dower. Her claims to dower had preference over the claims of his creditors (Topham op.cit. 176; 225-227).

In the earliest times, the widow had physical possession of one third of the estate, though this seems later to be commuted to rights to one third of the income; the land itself being 'owned' and administered by others (usually the male heir) (Stone ibid.).

But dower was always something of a contingent right; it could always be barred. Customary and local provisions provided for dower to be barred if the widow was unchaste (Pollock and Maitland II; 422). As early as the 13th century, there were conveyancing devices enabling dower to be barred (Pollock and Maitland II - 424). The Statute of Uses (1535) included devices for barring the widow's right to dower (Stone ibid.). The process of 'freeing' the land from obligations included freeing the land from rights of dower. It is significant therefore that it was during and after the civil war and the settlement of 1660 that we find Bridgeman's Conveyances, and 'a method invented by Mr. Fearne increasingly deployed as conveyancing devices to bar dower (Stone ibid; Topham; 226). Furthermore, the widow was dependant upon heirs, administrators of estates or the courts to make over a reasonable third of the estate.

The Dower Act of 1833 gave male testators the statutory right to bar his widow's right to dower. Dower and curtesy were both abolished in 1925 (Stone ibid.). As Stone concludes:

> "Total freedom - or irresponsibility - of testation as against dependants thus formally reigned for just over a hundred years in England and Wales, from the Dower Act 1833 until the Inheritance (Family Provision) Act 1938 came into operation."
> (Stone op.cit.; 159).

The 1938 Statute allowed a narrow class of dependants (surviving unmarried spouse, children under 21, unmarried daughters of any age, mentally and physically handicapped offspring) to apply to the courts for maintenance to be claimed from the net estate (Stone;159). But family provision here was limited to narrowly defined range of descendants (no mistresses nor illegitimate issue), and it was discretionary, at the behest of the Court.

Dependants were limited to marital partners of and offspring born in wedlock, of the deceased's last marriage. The purpose of the Act was to protect the lawful spouse and children from being 'disinherited' by mistresses and illegitimates (Stone op. cit. 162). The 1938 rules privilege the family, narrowly conceived in earlier custom and law where the family and its dependant members were described by the marriage contract and by blood-relations. But the rules also acknowledge <u>the dependancy</u> of family members on the deceased male head. So while abridging the patriarch's right to disinherit totally, the rules simultaneously confirm 'his' past power to do so, and, the subordination and dependence of surviving kin. Furthermore, family members have claimable rights only to maintenance and not to the whole of the estate, leaving the principle of testamentary power significantly undisturbed.

However, the concept of 'family provision' and the concept of dependency were rewritten by the 1975 Inheritance (Provision for the Family and Dependants) Act. The 1975 rules extend the notion of 'the family' to include any person 'who immediately before death, was being maintained wholly or partly, by the deceased. This will include the mistress or cohabitee, even of the same sex as the deceased.' Also included are illegitimate children, as well as former spouses and children of earlier marriage(s) (Stone op.cit;162). The concept of dependence spreads the net of 'family' more widely, moving away from the primacy of the marital relation and offspring born within it. So what the law now recognises as a legitimate claim against the estate, is not a claim advanced through the 'old' principles of marriage and legitimacy, but a claim advanced by persons because they were dependant on the deceased. The family is thus constituted, not so much by (the limited) contract of marriage, but by personal relations of dependance. On the one hand, the 1975 rules hark back to the customary rules of 'the obligation to maintain' pre 1834, on the other, they chime in with post 1945 social policies directing fiscal benefits to male heads of household, at the expense of direct claims against the state by women co-habitees and their children (see McGregor 1974).

The latter pieces of legislation we suggest, abridge only slightly the testator's 'power of bequeathing' while at the same time underscore the character of the patriarchal family relationship as one of personal dependancy. It will be useful at this point to consider some of the formal properties of what we shall call testamentary power. Testamentary power, where a testator is able to devise 'his' property as 'he' wishes (though the estate is subject to the claims of creditors pursuing debts, the state pursuing duties, and dependants pursuing maintenance) holds as a principle of transmission of property from medieval times through to the present day. It is perhaps the overarching principle of the legal rules of inheritance.

For only in the <u>absence</u> of the exercise of testamentary power, are the rules of intestate succession called into play. As we shall argue in the following chapters, the evidence suggests that in practice only a minority of estates pass by testate succession. However, this by no means alters the material existence of testamentary power, for it is perhaps most effective through the threat of its potential use. Those potentially most threatened by it are dependant descendants. There are, however, several other dimensions of testamentary power deserving comment.

Firstly, the patriarchal mode of expression ('his property', as 'he wishes', the claims of spouses and children) goes beyond the mere legal convention (where he and his encompasses both genders) to the common law reality of the exclusion of married women from exercising testamentary power. The married woman could not freely devise by will until the passing of the Married Woman's Property Act 1882, followed by the Married Women and Tortfeasor's Act 1935, when she gained 'full power to dispose of all her property as if she were feme sole ' (Bromley 1976;603). It was through the equity courts (dealing principally with those 'mongrel and amphibious' property forms, the lease, the trust ec.) against common law presumptions, that the testamentary powers were retrieved.

Secondly there were other classes of persons excluded from the exercise of testamentary power, persons 'absolutely obliged to die intestate'. These included boys under 14 and girls under 12, madmen and idiots, traitors and felons whose property was forfeit to the crown (Blackstone Vol. III; 496-498). Whether minors can at present transmit property is somewhat vague. There is an assumption that minors own little property of great value so the question is somewhat 'academic' (Bromley op.cit;572). Were a case to go to the courts, the validity of a will would probably turn on the question as to whether the minor possessed sufficient mental capacity to make a valid will.

Thirdly, when we consider testamentary power, legal assumptions and presumptions constantly refer us to the adult-male-father-husband exercise of that power. What the law construes as unreasonable exercise of that power gives us further purchase on the relationship between the family and property. The law considers that power to be unreasonably exercised if a testator totally disinherits his family, that is, there is an embedded assumption that wives and children will not be left penniless. Hence the court's power to make provision for wives and children out of the estate.

Lastly, this does not disturb the testator's power to disinherit, provided grounds exist for the 'reasonable' act of disinheritance. Alongside the assumption that families have claims on the testator's property (i.e. an implicit notion of family property), we also have (through the possibility of disinheritance) testamentary power which concedes to the patriarch the levers for the control of familial relations. Disobedient children, adulterous wives, unwanted marriages bear the threat of disinheritance. "This victory for unfettered testation and individual control of property", writes Cooper, "can be seen as the culmination of the process of asserting paternal power." (Cooper 1976;226). Testamentary power is power in a familial form, whose field of operation is local, interpersonal, engendered and intergenerational. Though testamentary power was forged historically by land owning classes in dispute with the Crown, while it is backed by statute and guaranteed by the courts, the practice of a deceased's 'last will', however informally communicated, being respected, extends beyond the formal institutional framework, into everyday social practice. It may be disputed; often it gives rise to familial ruptures and turmoil, but still bears substantial customary weight.

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The Dower Act of 1833 gave male testators the statutory right to bar his widow's right to dower. Dower and curtesy were both abolished in 1925 (Stone ibid.). As Stone concludes:

> "Total freedom - or irresponsibility - of testation as against dependants thus formally reigned for just over a hundred years in England and Wales, from the Dower Act 1833 until the Inheritance (Family Provision) Act 1938 came into operation."
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creation and recognition of testamentary power within the state, concedes within civil society the rights of elders (at the expense of any notion of birth-right) to disinherit their direct descendants. Dependants (spouses and blood-related children) have only limited claims on the estate of a deceased and not an absolute claim to a whole or any fixed proportion of the estate. Dependent descendants are powerless to determine the destiny of family property by formal processes. Testamentary power in this sense, continues by other means the historical character of family law which conceived the father as knowing best what was in the interest of his family and thus leaving him to rule his little kingdom as he will. It is of note here that testamentary power is patriarchal in character (in the broader sense of patriarchy used here): a power exercised predominantly by males and seniors.

CHAPTER THREE

INHERITANCE AND THE FAMILY; INTESTATE SUCCESSION

> "The law of succession is an attempt to express the family in terms of property." (J. Plucknett (1956) A Concise History of the Common Law, 5th ed.; 711)

Nowhere is this more evident that in the legal rules which apply to the transmission of property, in the absence of a valid will or testament. The destinies of personal and real property have had significantly different paths in English law so we shall deal with them separately. In this much, however, they are joined; at death the legal rules impel intestate property down the family line. The legal rules therefore extricably define 'the family' and the destiny of intestate property. The family is defined as those who have claims on intestate property (apart from creditors and the state). The rules of intestate succession provide a template of family membership; those who will secure an interest in a deceased's property in the absence of a will or testament.

The distribution of property amongst family members tells us a great deal about the legal relationships, between spouses, and, between parents and children, but, simultaneously, the legal rules themselves constitute particular relations amongst family members. Moreover, the legal rules may propel intestate property in directions which may not accord either with the individual or collection wish of a family members, or members. But firstly, a cautionary note. We cannot claim to know a great deal about the transmission of intestate property. Much as we have only a limited knowledge about the transmission of large amounts of wealth by individual estate, daily, small goods

and possessions are distributed, on the death of some relative, amongst family members. We do not know the rules by which these possessions are divided; we do not know the informal bargains and the tacit rules which define the passage of possessions not declared at probate or deemed not to be part of an estate, and therefore not regulated by courts or state officials . We are speaking here of goods and chattels, not estates in land or in stocks and shares where good title has to be proved. Historically and currently, perhaps for most working class families, their inheritance of any material goods, was and is probably in this form, as household possessions, tools of trade, small personal momentos, and cash assets.

This problem is by no means new. The Registrar of Births, Deaths and Marriages commenting on the Calendar of Wills and Administration for 1858 records that of the 210,972 deaths that year, only 30,823 left wills or letters of administration on personal property. In other words, on personal property, only 14% of owners devised it by testacy. He continued:

> "Sons and daughters, as well as many wives possess no property, but undoubtedly a large amount of property passes to successors in small portions untaxed."
> (p.p. 1861 XVI, XVIII;2-3).

This much may be argued about the unregulated transmission of property at death; that custom follows the legal rules in so far as property is transmitted within the family. We might argue that family descendants, historically having claims on intestate property could always remove themselves to the courts in pursuit of claims, were impelled to retain a customary mode not dissimilar from legal rules. We know little about the actual distribution within families; whether goods and chattels were distributed amongst nearest kin, amongst all relatives, or descended as one bundle to the eldest son remains an open question in the matter of intestate personal property.

The current position is extremely difficult to comprehend. Statistics from the Inland Revenue suggest that from the total of 660,000 deaths recorded in 1980-81, approximately 301,000 estates were declared for tax purposes (Inland Revenue Statistics 1982); Appendix D, 107 and at Table 4.5 p. 64-65). Can we infer then, that the other 359,000 dying left no property? The answer is no. They probably fall into three classes.

a) Those leaving no property or property of such little value that it is not registered for taxes at death.

b) Those leaving property in forms (e.g. National Savings Certificates) where transfer does not require taxation at death.

c) Those whose property lies in discretionary and beneficial trusts, or exists in the form of agricultural land or industrial plant for example, so that it too does not require the imposition of death duties.

It is impossible to say with any exactitude and without a great deal of specialised research, what the proportions are of each of these classes.

Neither can we determine with any precision what proportion of estates pass by wills, to descendants because not all wills are recorded in official statistics (estates of less than £1,500 in 1982, and less than £5,000 in 1984, did not require Probate registration; estates not involving money or financial instruments (sovereigns kept in a box under the bed!), lodged in an institution can be 'willed' without Probate certification). The number of estates moving by will, but not recorded by Probate registration remains a 'dark figure' unknown. Of the estates requiring Probate registration and therefore appear in official statistics, 279,127 in 1982 (Judicial Statistics, 1982;43), approximately two thirds were 'willed registrations' (testate estates) (pers. comm, The Record Keeper, Principal Probate Registry, Somerset House). This means that approximately 28% of those dying (660,000) left a will, proved by the Probate registeries.

Perhaps one 'customary practice' is to let the laws of intestacy run their course. What does this mean concretely? Under the Family Provision (Intestate Succession), Order, 1977 where a deceased is survived by spouse and children the distribution is:

a) to the spouse - all personal chattels, but not property used for business purposes, plus the first£25,000, plus income of half remainder for life.

b) to children, half the remainder held for deceased's children on the statutory trusts.

We shall not pursue all the other permutations (spouse but no children) except to say that property is destined for the family (parents, sisters, brothers).

In principle, we can say that 'customary' practices, if that word now really bears any great significance given the operation of the legal rules,are in accord with the older rules of intestacy.

The concept of 'family provision' severely hedges the rights of testators to direct property outside the family but does not destroy it absolutely. Only sufficient to maintain dependents can be claimed against the estate, not necessarily the whole of it. Perhaps the most radical change has been the widening of the concept of dependence. For under the provisions of the Inheritance (Provision for Family and Dependants) Act 1975, mistresses and illegitimate children are entitled to apply for provision (Stone op.cit.; 162). Certainly, for the rich, testamentary power still bears the weight it has enjoyed historically. But to reiterate, we are still relatively blind to the fine detail of transmissions at death.

INTESTATE SUCCESSION OF PERSONAL PROPERTY

The law of succession here generally falls into three chief (and overlapping periods, a) the old customary rules of division, b) the ecclesiastical administration of intestate personal property, c) present rules founded on the Statute of Distribution (1670) and the secular administration intestate personal property (1857 onwards) (see Holdsworth and Vickers 1899;129; and generally Blackstone op.cit.; Clarke 1977; Plucknett 1956; Mellows 1977; Stone 1977; Bromley 1976; Halsbury's Laws of England 1981, Vol. 35 at para 1164).

The old customary rules, probably settled in the 12th and 13th centuries (Holdsworth and Vickers op.cit.; 7) actually survived in a mediated form, through to the present day. The system of distribution was essentially a rule of thirds; one third of goods passing to a surviving spouse; one third devolving on children with the remaining third devisable either by will, or devolving on the Church or superior tenant, generally to settle outstanding debts (Pollock and Maitland II - 361ff). These rules are clear where a husband pre-deceases his wife but confused in the case of a wife pre-deceasing her husband (Pollock and Maitland II 428-431), though on balance the customary rules seem to have applied. The rule of thirds was so widespread that they had the de facto status of common law (Pollock and Maitland II:428). The ancient law then recognised the prior claims of spouses, children and (through the mediation of the clerics) creditors on personal property - a system quite unlike the destiny of real property. A surviving wife had absolute claims to her 'paraphenalia' (clothing and jewellery etc., suitable to her rank) (Blackstone II - 435).

From the 13th century, intestate property at death, devolved directly to the ecclesiastical courts; the relations of the deceased then claimed from the administrator the shares to which they were, by custom, entitled (Holdsworth and Vickers (op.cit.; 131-132). Debtors could claim against the estate

through common law courts. The characteristics of intestate succession here; the ecclesiastical administration of customary practices, remained until 1857 (Bromley op.cit.;615). The principle of the deceased's dependants being provided for out of the personal estate became somewhat chaotic but was put on a more rational footing by the statutory provisions of the Statute of Distributions (1670). On death, a husband took all his wife's personalty (earlier settled by common law rules concerning the destiny of leaseholds etc.). On the death of her husband, the wife took one third of the estate if issue of the marriage were alive; in other cases she was entitled to a half of the estate, with the remainder being distributed among the deceased's next of kin (Bromley;615). These were the provisions of the statutory rules concerning personal property, post 1670, and remain largely intact, at the present day, in so far as the chief claimants are the spouse, the children and creditors. The distinction between the claimable rights to intestate property, of husband and wife are considerable but follow the general principle of family law of 'one flesh'. The ecclesiastical rendering of this doctrine in terms of property meant effectively that a wife had no property - on marriage it became the husband's - therefore on death, the wife's property was not conceived as having any destiny other than her husband's possession. On the other hand, on the death of the husband, a wife became only one claimant amongst others to property which wasn't (legally) hers. We shall pursue these matters in more detail in the next chapter.

We should mention in passing the intervention of the state in the transmission of personal property at death. Firstly, the state has assumed the regulation of intestate property, succeeding the Church in these matters. Administering estates of personal property passed to the Chancery courts at the same time as the system family law devolved from Church to state. Secondly, the state, through the device of Probate (collecting taxes on personal property) became a claimant on estates; Chancery courts acted not only as administrators but also as tax collectors.

We have only schematically presented the process by which custom became fixed rules but the process is real enough. And the power of custom, mediated by the legal system is observable in the current transmission of intestate property.

The Administration of Estates Act 1925 radically changed the law of succession, in two respects. Firstly, personalty and realty has been put on the same footing (demolishing the ancient separation between real and personal property); in this sense we can properly speak of 'intestate property'. Secondly, the distribution of estate was transformed, giving the surviving widow a greater interest than she had prior to 1925 (Bromley op.cit.; 616-617; Stone op.cit.; 148-149).

Principally, the statute announces the following rules:

1. The surviving spouse (widow or widower) takes:

    a) all personal chattels
    b) £15,000* statutory legacy with interest at 4% per annum from date of death (*now £25,000)
    c) a life interest in half the residuary estate.

2. The children take:

    a) one half of the residuary estate on the statutory trusts, sons and daughters taking equally.
    b) interest on the remainder at the death of the surviving spouse.

3. Where there is no issue:

    a) the surviving spouse takes all personal chattels, £40,000 statutory legacy at 4% per annum and half the residuary.
    b) the deceased's parents (if alive), brothers and sisters have claims on the remainder.

(Stone; op.cit.; 148-151. See also Bromley op.cit.; 616-620).

We can note here the principles of distribution. Firstly, the equal claims of surviving husband and wife (unlike the customary privileging of the husband). Secondly, that all surviving children of either gender have equal claims. Thirdly, property may devolve 'up' the line (to surviving parents), sideways (to brothers and sisters of the deceased) as well as the customary 'downward' devising. We shall comment on other aspects of this radical reorientation at the end of this chapter.

Providing we recognise the existence of testamentary power, the succession laws applying to intestate personal property are the closest English law comes to accepting the rights of descendants. That it was administered firstly be ecclesiastical, then by Chancery courts, signifies its specific difference from real property (administered by the rules of common law). Its patriarchal aspects are visible in the differing claims on intestate property which attach historically to surviving husband or wife; the only absolute claim the widow had was to her paraphenalia. Furthermore, because of the existence of common law rules applicable to any interests in land (leaseholds, rents etc.) which strictly speaking was personalty, the rights of a husband to control personal relations (especially of his children) were considerably greater than those of a surviving wife, who could lose control of half such property (unless it was secured to her as her separate estate) directly to her offspring. Moreover, personal property, which passed on marriage, to the dominion of the husband, unless it was secured to a wife as her separate estate, could be devised quite freely, inter vivos, by the husband, to his privileged descendants, without the consent of, or without consulting, his wife, or children. The rules of succession also recognise the partibility of intestate personal property, which in practice signifies its difference in destiny from real property. Finally, we should acknowledge that minors do not take personal property directly; it is held and administered for them in the absence of a surviving parent, until such time as they reach the age of majority.

If we consider the temporal passage of the customary rules, we are struck by their resilience. Statutory interventions in 1670, and 1925, make the distributions more certain, perhaps fix the destiny of personalty in now-familiar paths. The significant transformations which occurred in 1670 and 1925 put into statutory form, case law and conveyances being fought out at Chancery: these principally involve the increasing rights of married women to assume possession of their deceased's husband 's personal property. The development of complex forms of conveyancing (by settlement, trust, and through the notion of separate estate) and judgements at Chancery were precursors to developments in the wife's rights over her deceased husband's personal property, and signal the long-term defeat of the common law rules, made concrete in provisions of the Administrations of Estates Act 1925, when both real and personal property were to devolve according to the rules of personal succession.

INTESTATE SUCCESSION: REAL PROPERTY

We begin with the rules of intestate succession because these rules, invoked independently of familial or individual choice, represent a class view, expressed through legal forms,of what the appropriate familial order was and should be. The legal rules on the intestate succession of real property are succinctly stated:

> The first class of persons called to the inheritance comprises the dead person's descendants; in other words if he leaves an 'heir of his body' no other person will inherit. Among his descendants precedence is settled by six rules.
> i) a living descendant excludes his own her own descendants
> ii) a dead descendant is represented by his or her own descendants

iii) males exclude females of equal degree
iv) among males of equal degree only the eldest inherits
v) females of equal degree inherit together as co-heiresses
vi) the rule that a dead descendant is represented by his or her own descendants overrides the preference for the male sex, so that a grand-daughter by a dead eldest son will exclude a younger son. (Pollock and Maitland, II, p. 260. See Blackstone II; Chap. 14).

Some preliminary comments. Firstly, these rules were settled by the early thirteenth century (ibid). They remained operative until 1926, when statute law (the Administration of Estates Act) effectively merged real and personal property. In the same year, by statute law, marriage could retroactively legitimate children born to a couple prior to wedlock. Secondly the rules were invoked at the death of a landowner who did not leave a will; at the death of those absolutely disqualified as testators (the infant, the married woman and the mad); and, significantly where the form of tenure precluded a land holder transmitting by will, a category including numbers of major land holders pre-1660. Our interest lies in the family form constituted by the rules because they concretise some of the arguments we advanced concerning the differences betwen capitalist and familial property relations. Fundamentally, the rules not only assign a destiny to property, but they are expressly concerned with who is 'of the family' and the hierarchy of status of those in the family.

ELEMENTS OF THE LINE

Lineal Consanguinity

Through the notion of lineal consanguinity (Blackstone II; 1976, p. 203) land was destined to proceed along one of two paths; either it *descended* to blood relations of the original grantee, or passed by reversion back to the superior lord. The legal rules thus provided definite limits to the dispersion of productive property. Familial practices required the production of an heir in order to retain the family-land nexus and in order to defeat the second destiny. The pivotal position of the heir in continuation of the land-line nexus was perfectly clear and much hung on it for the interests of the family and the superior lord. The family was required not only to produce children, but to produce *legitimate* issue, that is, an heir of the body of the married couple, for the bastard, the *nullius filius* (the child of nobody), which is no more than a legal construct, could not legally take the inheritance. The bastard *per se* represented no real threat to the family but did present a threat to the superior tenant. The changeling, or the sup-positious child was land-line nexus. When we look at common law cases concerning inheritance (Nicholas, 1836), they are obsessively concerned with problems of legitimacy.

HEIRS AND BASTARDS

The common law definition of the heir conceived the status in terms of an heir of the body of known parents, with known parentage conceived as a married couple, thus distinguishing the heir from the *nullius filius*. However, problems about known parentage stem from the wide interpretation given through ecclesiastical courts. For the Church, nuptials were *prima facie* evidence of legitimacy, for it regarded *all* children born

to a married couple, prior to or during wedlock as legitimate. The Church's attitude in effect denied the King's Courts of Common Law any say in the destiny of the land. Furthermore, it was the ecclesiastical courts which determined the validity of marriage, a criterion at the heart of common notions of legitimacy, so the common law was doubly distanced from the regulation of inheritance.

The tensions resulting from the possibility of land proceeding along two paths is evident in the struggles around the definition of the heir which proceeded throughout the thirteenth and fourteenth centuries. In effect, the issue was worked out in two ways, a clash between ecclesiastical notions of the family and common law notions, and, through cases involving adulterine bastardy. The fullest account of the tensions and the settlement is probably in Nicholas, Adulterine Bastardy (1836).

Strictly, the term heir is used only in relationship to real property and is a term used to designate the first claimant on property of a dead ancestor. Generally speaking, the feudal allocation was to the land holder and his heirs, with the destiny of the land indicated at the time of its allocation. What the law considered as heir was that they should be an heir of the body of known parentage, thus distinguishing the heir from the bastard - the nullius filius - the child of nobody. Problems about known parentage stem from the wide interpretation given through the ecclesiastical courts. For the Church, nuptials were prima facie evidence of legitimacy, for it regarded all children born prior to or during wedlock to be legitimate. A child born of the wife was considered as a child of the husband.

Bastardy presented no real problems to the Church, nor to the family per se. The bastard and the suppositious child (a child adopted by parents to secure the inheritance) were pawns in

the inheritance strategy of families against the claims of the superior lord and could be the means of preventing the land reverting back to the lord. There are cases, for example, where village children were smuggled into the lying in chamber to secure the inheritance.

The bastard did present a threat to the superior lord and did present a threat to other potential heirs, particularly children of second wives, for example, brothers and other cadet branches of the dead landholder, (Nicholas op.cit.;33-35). What ws at stake in bastard-heir dichotomy though is the destiny of the land, and on this point the ecclesiastical courts and the common law were at odds, as were lords and their subtenants, as well as other potential claimants within the family.

The Church's attitude in accepting all children born before and during in wedlock as legitimate and therefore at law, heirs of the body, in effect denied the King's courts of common law any say in the destiny of the land. Furthermore, on questions of legitimacy, it was the ecclesiastical courts which determined the validity of marriages, a criterion at the heart of common law notions of legitimacy, so the common law was doubly distanced from the regulation of inheritance. The tensions between the Church and the Crown is evident in the following exchange between the King and the Archbishop of Dublin in 1236.

> "... if a person born before marriage, against whom a question is raised, acknowledges that he was born out of wedlock, he neither can, according to the custom of England claim the inheritance, nor having claimed it, retain it; and if he alledges that he was born out of marriage, <u>the case was not to be referred to the Ecclesiastical Court, because the clergy would hold him legitimate</u>" (quoted in Nicholas op.cit.; 7).

The King's refusal to submit questions of legitimacy to the clergy seems a moment of resistance, for the law adopted the strong presumption which had been enunciated by the clergy, given in the pungent aphorism so beloved of early jurists, that 'whoso bulls the cow, the calf is your'. Bracton (1262) was quite categorical:

> "... if a husband and a wife have cohabited together and are both capable of procreation, and she becomes pregnant by another man, whether the husband acknowledges or repudiates the child, it is legitimate because he is born of the wife." (quoted in Nicholas op.cit.;13).

But Nicholas indicates that Bracton here is enunciating 'civil' not common law. In effect, the differences between the common law and the ecclesiastic courts turned on allowing marriages retro-active power, where marriage legitimated offspring produced prior to the nuptials. Pollock and Maitland see the common law and clergy differing in little but this single point but much turned on it.

The second but related issue is adulterine bastardy, or at least the formation of the <u>legal</u> notion of adulterine bastardy; for in the Church's view no such thing could be said to exist. Bastards in the ecclesiastical sense described children born by single women or born in invalid marriages; all children of validly married women were legitimate and therefore potential heirs.

We can say that common law shared this strong presumption but in a series of cases, beginning in the thirteenth century, elaborated rules by which this strong presumption could be challenged and rebutted, thereby establishing the notion of the adulterine bastard.

Customarily, a husband might challenge the paternity of his wife's children by repudiating the child at the moment of brith and, by removing it from his house immediately after its birth (Nicholas, op.cit.; 13). Matters of legitimacy were decided by juries in earlier times, but the challenge could be on two grounds only; a husband's impotence, or non-access to his wife - though this was narrowed to a plea of 'extra quator maria' - absence from the kingdom or dominions of the kingdom (Nicholas op.cit.; 29). Bastardising children was a male perogative; women could not go before the courts to bastardise children because this was considered as a perverse threat to the inheritance.

Those most susceptible to having their pregnancies examined in detail seemed to be widows. The writ of 'de ventre inscipiendo' allowed 'Everything connected with the pregnancy (to be) an object of investigation' (Nicholas op.cit.;15). If the period of gestation exceeded the time allowed by law for the birth of a posthumous child the excess rebutted the presumption of legitimacy (Nicholas ibid.). Thus, for example, Britton reports a case where a widow claiming to be pregnant by her dead husband, could be examined by a panel of matrons, confined to a castle, visited only by women of the plaintiff party; and if after ten months she had <u>not</u> given birth, then she could be fined and imprisoned for disinheriting heirs (or at least attempting to do so) (Nicholas op.cit.;19).

Common law cases, beginning with <u>Foxcroft</u> (10th Edw. 1) 1282, had by the early fifteenth century settled the grounds by which paternity could be challenged and rebutted. These were a) a husband under 14 years of age (who was considered incapable of procreation), b) non-access (extra quatuor maria was <u>prima facie</u> evidence of non-access), c) impotence, d) divorce (Nicholas; 52). Nevertheless, the common law presumption that children born in the couverture of the wife were legitimate and the proofs required so stringent that in two cases (Lady Parr 34

Hen VIII 1542, Lady Burgh 34 Hen VIII 1542), statute law was invoked as a means of bastardising the offspring of adulterous wives (Nicholas 59-63). These Acts failed in so far as the children of the women'notwithstanding they were notoriously begotten in adultery, they would nevertheless be inheritable' (Nicholas; 59). The House of Lords was presented with bills in 1543 to the effect that 'women lawfully proved guilty of adultery should lose their dower lands, goods and all other possessions'; the bills got no further and in fact were construed as attempts to secure female chastity by Acts of Parliament.

The bastard per se was not a threat to the family or to the inheritance. The child born outside the marriage of a husband, born to a single woman or a married woman other than a husband's wife, was a bastard and incapable on inheriting because of the prima facie evidence of the absence of nuptials.

The absence of nuptials in each case protected the husband against possible claims on the inheritance; he could in fact acknowledge paternity with the certainty that the law would not entertain any claim against the inheritance. In this sense, the philandering husband also presented no problems to the common law, for his only legitimate children are those born of his wife. This directly confirms the strong presumption that all issue of any marriage was legitimate. However, arising out of this strong presumption that all children of a wife in couverture of her husband were legitimate, there is one species of bastard which presented a threat to the husband, his representatives and cadet branches of the family; the adulterine bastard, the child whose paternity is other than its mother's husband. The sexually promiscuous wife was, in law, a danger to all parties in the inheritance system. The philandering husband could acknowledge the paternity of children fathered outside the marriage, for the absence of nuptials prima facie protected the inheritance against claims by bastard children of single or married women other than his wife. Adulterine bastards presented a threat in so far as they would be the means by which land would be removed from 'the family' and diverted

elsewhere. The adulterine bastard has further significance in our analysis. Its very existence as a category (formulated in case law from the thirteenth century) establishes that 'the family' is coterminous with the paternity of a particular male. The maternity of a child establishes no positive claim to be 'of the family', nor to the inheritance.

We have focussed on the issue of the heir and the bastard in English law of earlier times but this does not mean it is irrelevant today. We retain the strong presumption of legitimacy of children of a marriage, we retain the procedures (though they have been refined and expanded to include procedures such as blood tests) by which paternity can be contested, we retained until 1926 the principle that children born out of wedlock, could not be made legitimate by the marriage of their parents.

Legitimacy is an arbitrary category fixed in place and set in motion by the common law as a means of protecting the secure transmission of property along one of two paths. Simultaneously, it unequally valorises the sexual practices of husbands and wives. The philandering husband is protected by the nuptials to the extent that no offspring fathered outside the marriage can claim against the estate. However, the sexually active married woman presented threats to her husband, to the law and to the superior lord in so far as her adultery might divert property away from the allotted destiny of the land by the production of putative heirs (the adulterine bastards), and it is at this point of greatest danger that the common law establishes a) the possibility of challenging paternity, thereby b) disinheriting the adulterine bastard and c) the procedures for inspecting the sexual life of the married woman, in and through the legal system.

The assumption embedded in adulterine bastardy is, we have argued, that the property shall devolve only on the legitimate offspring of the husband, not simply the legitimate children of the marriage. In this sense, the law asserts the primacy of the husband as transmitter of real property, down the line, which is constituted by the laws of inheritance as his 'line'.

Of bastardy in general, the medieval nullius filius, though deprived of the right to inherit - they were after all the 'heir of no-one' - was a status without the social stigmas associated with the pejorative use of 'bastard'. Those seem to have arisen in the 16th century (Pinchbeck 1954, 314-315). The Poor Law Act of 1576 substituted the status filius populi (child of the community), in cases where poverty or the increasing ecclesiastical attack on extra-marital sexual intercourse, caused the illegitimate to be abandoned. The Parish, where parents could be identified was empowered to charge the cost of maintenance of the child to them, not for the benefit and the welfare of the child, but to punish the sexual miscreants. What has been subsequently transferred is the 'moral guilt' of the parental license to the status of the illegitimate (Pinchbeck; 315).

The social stigmas of bastardy were considerable and of long duration. Pinchbeck, in 1954, was able to list the following catalogue of disabilities:

> English law is still based on what has been described as the 'outrageous and unnatural fiction that the illegitimate child has only a mother'; legally he has no kinship with his father (except for a few specified purposes) or with any other child of his mother, or with relatives of either parents, and has no right of succession to, or claim against their estates. He is unable to inherit titles or certain estates which attach to titles, nor can he inherit from intestacy at all, except from his mother and then only if she leaves no legitimate descendants. The latter disability, but not the former, is removed by legitimation through subsequent marriage of his parents under the Legitimacy Act of 1926. An illegitimate child cannot inherit

> British nationality if born without the dominions of the Crown, since he has no father and consequently, he is an alien. He is entitled to no name at birth, though he usually acquires his mother's name by reputation. ... Again, while no obligation is laid on the father unless an Affiliation Order is in force, recent law has aimed at improving his lot by recognising a parental relationship under the later Workmen's Compensation Acts, to receive 'dependants' benefits in connection with military service, allowances and pensions, and other social service benefits. A relatively small proportion of illegitimate children are, however, benefitted by these concessions, and for the great majority the social and economic effects of defective birth are still disastrous.
> (Pinchbeck; 317).

Those disabilities remain largely in tact some thirty years later; moreover, the most recent legislation confirms the structuring principles that illegitimate must look primarily to the mother for aid, care and support. Illegitimates can enter claims on intestate estates of parents, along with legitimate children (under the principle that they are all dependants), but, illegitimates cannot claim on the intestate estates of grandparents or collateral kin (Bromley 1976;621). The British Nationality Act 1981 allows both parents to transmit British citizenship; however, a father transmits citizenship <u>only</u> to legitimate offspring. Illegitimates obtain citizenship by descent through the mother (Blake 1982; 192). Claims for maintenance still proceed through the medium of the Affiliation Proceedings in the magistrates courts, along with all the routine business of police prosecuting criminals.

Looked at historically, however, categories such as the heir, the bastard, legitimacy and illegitimacy and paternity can only be considered as categories which emerged in and through the law's concern to regulate the transmission of real property. These categories, however, have a much wider application. Thus, Finer and McGregor (1974) indicate that the Poor Laws, and local customary practices, presumed that even in the absence of nuptials, the putative father had obligations to maintain his offspring . The unacceptable face of paternity still resides in the procedures of the paternity suit where claim for maintenance still means the inspection (judicial in court, administrative in the case of benefits) of the sexual life of unmarried mothers, and in the concern over custody of children.

The outlines of the family form constituted by the legal rules of intestate succession of real property should now be clear. Real property moves down the line, not sideways to the wife or upwards to parents. It is propelled along the axis of blood relations. The claim is advanced by the possession of genes and chromosomes, not stocks, shares or capital interests, and thus the protracted struggles to exclude the bastard serve to define the family and secure the destiny of real property. However, the functioning of lineal consanguinity is never simply a mechanism for tying real property to the family; it is also a crucial reproducer of the blood related family itself. For what is inherited by descendants is not only the family property, but also the system by which it devolved on them, which in turn includes positions and statuses (the heir and the bastard) and which stands one descendant in relationship to another. That relationship is clearly elaborated in rules (iii) and (iv), where primacy is accorded the eldest male and the younger and the female descendants are allotted a destiny of subordination.

PRIMOGENITURE

Primogeniture and the allied notion of impartibility (i.e. that property should devolve as an unbroken bundle) is sometimes regarded as the English system of inheritance, in contrast to the continental system of morcellation (enshrined in the Code Napoleon) where all sons (of in the absence of sons, daughters) have an equal claim on familial property . Foreign observers have in past times commented on the pervasiveness of primogeniture and its malign effect of impoverishing younger sons (Thirsk 1976). Despite its privileged position in the legal rules, however, the significance of primogeniture needs to be reappraised.

Firstly, primogeniture is not the overarching principle of the legal system of inheritance. It is always subject to the principle of testamentary power (i.e. that land holders and owners won the right to dispose of real property by will or testament). Testamentary power signals an important difference between the English and continental systems in that heirs in English law have no birth right (property could be alienated without their consent) and that there is no legal notion of the family as a property-owning entity, even though the gentry conceived land as belonging to the line and took great care to preserve the nexus. The contradiction between the legal existence of testamentary power and practice of preserving the land-line nexus was settled by the device of strict settlement. Without pursuing all the technicalities, the strict settlement was a bargain struck between males of two generations and implicating a putative (and perhaps yet unborn) grandchild. The deal left the land in the hands of the father, with annuities to the son for the life of his father; on the death of the father the son

assumed control of the estate. But it exacted from the son a promise to resettle the land on the heirs of his body in the same manner (Robertshaw and Curtin, 1977, Lawrence, 1878). Taltrum's Case of 1472 and the difficulties encountered by this system of strict settlement in meeting extraordinary needs demanding cash (marriage portions, investment opportunities) led to a more flexible system of strict settlement (a portion of the estate, e.g. rent charges, was set aside to meet contingent liabilities).

It will be apparent that strict settlement granted only a limited economic existence to potential heirs until the death of the father. In the case of younger descendants their dependence is first on the father, and then the heir, for marriage portions and the other forms of economic provision. Strict settlement underscores the age of majority, marriage and the death of the patriarch as the crucial moments when familial property is propelled down the line, but these moments do not signal the end of parental control.

Secondly, Thirsk (op.cit.) argues that although primogeniture was to be found commonly in the seventeenth century as an inheritance practice among the yeomanry and lesser landholders, it was by no means the only one. Elsewhere we can find examples of primogeniture as an imposed practice, especially on the villein tenants of knights fees (Pollock and Maitland, op. cit. p278) where the superior tenant was probably more interested in the impartible nature of the tenancy: property was to be held by one person who was in turn liable for the dues and services. There were also considerable regional and local variations to primogeniture: Kent Gavelkind, Borough French and English systems provide for the youngest descendant to be entered as heir. Ultimogeniture benefits the parents to the extent that the youngest member was the one still left in the home; on taking the inheritance they were expected to provide free bench for any surviving parent.

Thirdly, studies indicate that although the legal rules suggest that the eldest was advanced as the heir, the inheritance was hedged so that provision was made for the younger descendants. Only the wealthiest could provide separate parcels of land for younger descendants, but in the case of lesser landholders, some provision was made in cash, goods or beasts (Cooper, 1976, Spufford, 1976, Thompson, 1976).

With these caveats in mind, why the persistent interest in primogeniture? Firstly, primogeniture plainly exists in the common law rules of intestate succession of real property. However we may conceive common law, it applied to great and small at times when land was the prime form of productive property. Great landowners defeated the rules through the equity courts, lesser landowners got round it by local customary practices, but in both cases the strategies merely confirm (Bourdieu,1976) that certain hard and fast rules did exist, and clearly embedded in them is the principle of primogeniture. Secondly, if we consider the manoeuvre of the landowning gentry, strict settlements were bargains between fathers and, where they existed, eldest sons, or eldest daughters. Land in the 'agrarian grid' was not equally distributed but was held in the hands of a few families, and their practices (strict settlement, marriage alliances etc.) privileged primogeniture. Thus, in 1848, two-thirds of all land in England was tied up by strict settlement (Robertshaw and Curtin, op.cit.p.298). The correspondence between the concentration of productive property and a particular form of inheritance is difficult to dismiss. That the process of accumulation of land <u>and</u> its maintenance in the hands of a few families involved a particular familial form (given in the legal rules <u>and</u> the system of strict settlement, the customary practice of the great landowners) suggests that the <u>familial</u> system of transmitting property should be central to our understanding and analysis of the reproduction of class, political power and state action. [9]

While the system of primogeniture is not inimical to capitalist accumulation and concentration of the means of production, there is no capitalist requirement that property should devolve only on eldest sons (as continental systems prove). That it did so is a function of particular notions of the family embedded in marriage laws, the common law rules of property ownership and the rules of intestate succession of real property, some of which we have tried to tease out here. Capitalist property relations, developing through the commodification of land, the classification of 'things' into real and personal property (subject to different inheritance systems) the apportioning of things to owners (the concept of private property), of themselves signal no necessity for individual, gender or age specific ownership. They are, of course, destructive of communal property and collective ownership. However, the significant fact that 'things' are allotted to, and owned by, male adults is a product of familial relations, structured by legal rules, customary practices and state action. This might be compared to the similar process of the exclusions of women and minors from the labour market in the nineteenth century. There was nothing in the changes in the labour process that necessarily precluded the employment of women and minors, as fractions of the bourgeoisie pointed out, rather, the expulsions were accomplished by legislation arising from agitation by male combinations for a family wage (cf. Hussain, 1976; Hartman, 1979).

In one sense, the legal rules of intestate succession announce the 'plan', or 'template', for the transmission of real property down the line. In the absence of a will, in the case of an invalid will, or where land is held by those absolutely excluded from testamentary power, then the rules take effect. The elements of the plan describe the valid inheritance of property, and also define the familial relations necessarily associated with its secure transmission. We have said that they are rules of social

order, elaborated for and by a land-owning class, which, by their presence in the common law, have a wider application. The principal concerns of the rules, as we have discussed them are:

i) The centrality of the marital relationship in defining who is considered to be the heir of the body and promoted as claimant to the inheritance. By the same process the marital relation is central in defining who is counted 'of the blood' for in the absence of nuptials the common law provided for the asbolute exclusion of some biological children: the bastards.

ii) The destiny of land is 'down' the line, to descendants, not sideways or upwards. Although this is taken to be obvious and unremarkable, descent is a historically and culturally specific inheritance practice. As we point out later, changes in the form of productive property entailed a system different from descent.

iii) By common law, the eldest was advanced as heir, though there were local and regional variations (ultimogeniture). The practice of primogeniture was partly in the interests of transmitting the inheritance as one unbroken parcel. But it was a system which not only entailed the unequal distribution of property to descendants, but also, the unequal distribution of political and social advantage.

iv) Women were, by the rules, merely 'postponed males'. They took the inheritance until such times as a male heir was produced (cf. Bourdieu, op.cit.).

v) The familial form announced by the rules (the male - adult head of house, the privileged eldest son, the subordinate position of the younger and female descendants and the equally distanced and subordinate position of the married woman) is actually transmitted and reproduced at the same moment as property is passed on down the line.

The relationship between the family and the land is a complex and subtle one. There is a constant intertwining of the economic and the familial event. Simpson catches it nicely:

> "To the wealthy landed classes, real property was the essential endowment not of individuals but of the family, a continuing but constantly changing entity forming and reforming around the basic family events - birth, the attainment of majority, marriage and death - and rendered continuous by the concepts of blood and inheritance (Simpson 1979, p.x., our emphasis).

But it is precisely at these 'basic family events' that land is not 'of the family', for the family does not democratically decide the destiny of the land, this is determined by the patriarch. In its devising the place of minors was often no more than as pawns in the matrix of alliances and settlements. Even in the case of strict settlements, where the patriarch's control over the inheritance was somewhat restricted, the settlement was a bargain struck between him and his father, between him and his eldest son. Moreover, the basic family events were occasions in familial life most strictly controlled by adults, often by the application of violence [10], or by threats of disinheritance. The crucial family events are, in fact, the points at which the minors' dependance and subordination are most naked.

PATRIARCHAL PROPERTY

We understand the significance of the Abolition of Tenures Act, 1660, in the light of the commodification of land as 'property' and, with it, the transformation of landholders into potential owners. This is an important moment in the capitalising of the property relations, and yet, the statute hardly disturbs familial property relations. The systematic exclusion of married women and minors from the ownership of property was continued in two

different ways. In the case of the minor, the Act of 1660 marks their extended separation from the ownership of real property. Prior to 1660 it was possible for minors to assume control of socage tenures at the age of fourteen, after 1660 the 'military' age of the majority of twenty-one was extended to all minors.

The exclusion of the married woman from property ownership was somewhat different. Women, <u>feme sole</u>, divorced or widowed, were never excluded from property ownership. However, in common law, the principle was that on marriage, a husband assumed proprietary interests (use, enjoyment and disposal) of any real property brought into the marriage. This has to be seen alongside marital rights to the body of the wife herself, and rights over minors, given through guardianship laws. In the case of land after 1660 the appropriation of real property by the husband presented a threat to the married woman's father, in so far as it meant the alienation of land from 'the line'. To prevent husbands assuming control and disposing of ancestral property, the landed classes through their lawyers developed the elaborate and complex legal instrument of the strict marriage settlement (Graveson and Crane, 1958, pp.14-15). Family lawyers used the Court of Chancery i.e. the system of equity. During the seventeenth and eigheenth centuries, equity developed the doctrine of a wife's separate estate, whereby property could be endowed on trustees for the wife's exclusive enjoyment. While this ensured a married woman's limited independence, her status was similar to that of a minor; she had no rights to the capital, only claims on the income. Furthermore, she could not devise any gift or will any of the property held in trust. In fact, the married woman could not devise real property at all, for such property was owned either by the trust or by her husband. It was not until the Married Women and Tortfeasers Act, 1935, that she acquired 'full power to dispose of property as if she were <u>feme sole</u> (Bromley 1976; p.603).

It is significant that the landed classes, drawing on private resources, protected their interests through the equity courts in the face of the state, which by merely allowing the common law rules to lie unaltered until the nineteenth century, severely disadvantaged the lot of _all_ married women, as with the power of their fathers to prevent ancestral land being alienated from 'the line' by common law rules (Dicey, 1914, pp. 371-98). And yet as we demonstrate in some detail below, the common law concerning the familial transmission of real estate was by no means immaterial to the needs and interests of landed classes, for the rules of intestate succession served to tie land to the family and the family to the land. The common law and statute law, post 1660, celebrates a patriarchal family form (adult male owner, the excluded and dependent wife and minor) which stands in some contradiction to the 'free' capitalist relations of property and labour of the period.

The historical specificity of this family form stands in relief when we consider the important changes it underwent during the nineteenth century. An earlier paper (Fitz op.cit.) indicated the manner in which the equity courts, through the doctrine of _parens patriae_, provided the state with the legal basis to intervene in the familial sphere in the interests of the 'welfare of the child'. It suggested that the doctrine of _parens patriae_ rewrote the relations between parents and children in so far as the state assumed the mantle of the supreme parentage of all children. We are concerned here with some other dimensions of the state regulation of family form.

What is striking about familial property relations in the mid and late nineteenth century is the resurrection of the married woman as a property-owning subject. Interestingly, it is the equity courts which provide a point of departure. Recognising a significant shift in the form of productive property from land to investment in stocks, shares and bonds they entertained a new form of marriage settlement, the _personal settlement_,

which grew in importance from the middle of the century (Crane 1957, p. 235). Strict settlements did not disappear, but the personal settlement took a place alongside them. The difference between the forms of settlement resides in the different forms of property held in trust (crudely, land in the first case, industrial and finance capital in the other). Crane generally argues that the wife's property was either held for her separate use (in trust, from which she had the income) or she took a joint interest in the trust alongside the husband. In terms of transmission, he argues; 'Hereby the parents could determine distribution of capital among the children or remoter issue as they saw fit, even to the total exclusion of some'. (Crane op.cit., our emphasis).

What he fails to say is: a) while the husband could not alienate the wife's capital, neither could the wife, for it is 'owned' and controlled by trustees appointed by the father; b) whereas he could devise or alienate his own property, the wife could not; c) the destiny of 'her' property was not of her devising but of her father's representatives. Therefore, the point that 'parents' determined the distribution is misleading. As in the case of strict marriage settlements the intention is to ensure that, in the absence of children, the wife's property goes back to her family (i.e. to her father), or if there is a son, the contract is between the grandfather and the grandson, to the exclusion of the feckless husband. At the same time, the settlement represents a contract, over time, reaffirming the continued existence of the patrilineal form.

Strict and personal settlements were, at best, class-specifically advantageous for a minority of married women. Those unable to use the equity courts, were by common law, still required to surrender any property or income to the male head of household. the Married Women's Property Act put into statutory form an already existing legal practice in which wives were able to

control and dispose of property which fell to them by inheritance. The feminist struggles of the period centred on something quite different. This was property, in the form of cash income, earned by married women through labour and talent (celebrated examples involved women authors and actresses whose income was spent or squandered by feckless husbands). The Acts gave married women something denied by common law and early property statutes, the right to dispose of property without the consent of the husband or her father (or his representatives). The Acts do not construct a formal legal parity between husband and wife in relationship to property until 1935. This point marks the end of the historic similarity between the married woman and the minor in property law.

With respect to property, married women and minors part company in 1935, but with respect to their abilities/inabilities to <u>contract</u>, their paths ran different courses.

Minors have, historically, had only limited ability to contract and this remains the case today. At the age of majority, the significance of the sexual division comes into play. While <u>adult</u> sons could contract, wives could not. <u>De facto</u>, therefore, many women were <u>never</u> able to contract. As we have suggested, the step from daughter to wife is short.

CHAPTER FOUR

CONCLUSIONS AND SPECULATIONS

> "It is clear, for example, that legislation addressing particular forms of patriarchal legal relations in the nineteenth century, governing property and inheritance, is a much determined by the structures of its own history prior to the shift into industrial capitalism, as it is by the specific historical developments in the period.' (Harrison and Mort 1980; 81).

This part has broadly argued that the transmissions of property over time is intimately bound up with the reproduction of positions and statuses within property owning families. This necessarily entails it is argued, the transmission of the structured dependency of minors, for what the inheritance laws systematically privilege is patriarchy; in the sense we defined earlier as maleness and seniority. We have indicated, albeit briefly, that categories developed within the law of real property, and the common law rules determining its transmission - categories such as the heir, the bastard, the blood related family, legitimacy, the line and primogeniture - have considerable effects outside the realm of landed families. They have become an embedded part of the system of family law, therefore, more generally applicable to non-propertied families. Moreover, legislation such as Poor Laws of 1834 contained policies about the obligation to maintain in which familial relations are conceived much in the same way as family form is constructed through common law rules of succession.

What is striking is the durability of the classifications of property (real and personal) and the separate rules (common law and ecclesiastic and equity) by which each species was transmitted, remembering that these classifications were forged as early as the 13th century and did not _formally_ expire until 1925. It was the landowning aristocracy and gentry, by the devices of conveyancing (trust, settlement, and entail) who used equity to defeat the rigidities of common law, and at the same time created forms of

ownership and transmission, which the bankocracy and the industrial bourgeoisie were able to use and adapt to their separate processes of capital accumulations.

This may well be a partial explanation for the persistence of what were essentially feudal classifications of property and transmission, long after land had ceased to be the prime form of productive property, and giving indeed the British capitalist economic structure some of its shape and form. The laws of succession were intensely patriarchal but contained little that presented any real problems to latter forms of capitalist accumulations; the contradictions between the common law doctrine of 'one flesh' where the husband assumed rights in and over his wife's property, as against the wishes of other 'lines' to retain property within them, had been fought out at least a hundred and fifty years prior to the massive accumulations of industrial wealth in the 19th century. Testamentary power anyway guaranteed the rights of property owners to devolve their wealth in paths where its continued accumulation could be best protected. As Harrison and Mort (1980; 92-93) point out, in a sensitive essay which covers some of the ground in this chapter, historically capital benefited from the legal relations of patriarchy in general, and the subordination of bourgeois women in particular.

> "Firstly under certain circumstances, the <u>appropriation</u> of a wife's property on marriage aided capital accumulation in that it augmented the husband's capital resources. Secondly, the transmission of property to male heirs facilitated the economic stabilization and political legitimization of the ownership of the means of production by individual named families."

Generally, the laws of succession contain a sufficient repertoire of categories of property, forms of ownership and legal instruments to guarantee secure transmission, that property owning families

could use the appropriate strategy best suited to their interests. What the laws best facilitate, is the transmission of property along 'the line'.

The extent to which the legislation of 1925 transformed the laws of succession, by breaking down the old distinction between realty and personalty, and by combining the separate rules of inheritance with one unified system, is indisputable. The destiny of intestate property (real and personal) was codified into a broadly similar set of rules, to that earlier applicable only to personal property. The division of property, devolving on surviving spouse and all surviving children of the marriage, signals a shift towards partible inheritance (away from the old system of primogeniture and notions of impartibility). For reasons we mentioned earlier (tax avoidance schemes on the one hand, the amount of property which is of so little value that it is not liable to duties, lack of research), the actual practices of transmission at death, of property, are very difficult to describe with any confidence. There are scattered clues which evidence some of the continuities and changes, without giving us anything like the whole picture.

Data collected by the Committee on the Law of Intestate Succession (Cmnd 8310 1951), showed that in wills executed from 1940

a) 73% of male testators leaving less than £2000 left the whole or most to their surviving spouse
b) 65% of those leaving between £2000 - £5000 did likewise
c) as did 43% of those leaving more than £5000 (Stone 1977; 148).

Male testators who left a life interest in the whole or major part of their estate to their widows indicates that on sums of less than £2000, 11% of male testators did so, on sums between £2000 - £5000, 21% did , and for estates over £5000, 45% did (Stone ibid). The first set of figures suggest that, the larger the estate, the less likely the surviving spouse will inherit the estate directly. This should not be interpreted either as a

process of wealthy men disinheriting widows, rather that transmission practices of the wealthy as opposed to the common people are somewhat different. For the very rich, the direct inheritor is the beneficial trust, set up to avoid the payment of death duties (see Thomas 1979, Blackburn 1973). Indeed, as one writer in the Economist put, 'It is clearly misleading to classify with the genuine poor the wives and children of millionaires merely because they have little property in their own right.' (quoted in Urry and Wakefield 1973; 57). In contrast a husband with an owner-occupied house generally wills it to his wife. For the rich anyway, death duties have become a 'voluntary tax' (Rubenstein 1981; 227-31). So much so that Titmuss noted:

> "The British fiscal system is almost unique in the western world in its generous treatment of wealth holders in allowing them to use family settlements, discretionary trusts, gifts, family covenants and other legal devices for redistributing and rearranging income and wealth." (quoted in Blackburn op.cit. 24).

Not only do the rich deploy devices such as the trust in passing on large quantities of wealth untaxed, moving away from the notion of the individually named heir, they also pass on qualitatively different forms of assets (dwellings, land, shares, company securities) as opposed to the ordinary forms of property transmitted (cash and bank deposits, national savings bonds, life assurance policies, and other cash assets), passing along to different destinies - the trust, and the surviving spouse. The increasing use of the trust as the means both of transmitting and holding large and valuable assets is prompted not so much by a will or desire to remove property from the direct control of descendants, as to avoid the estate duty payable on all estates passing at death, introduced in 1894. The net effect, however, means that (predominantly male) testators of large estates, still exercise considerable economic power over surviving widows and children. For it is their power to determine the conditions and provisions of the trust, by indicating what annuities are to be paid, for example, and at one point in the life cycle, minors are heritable.

Two more and related characteristics. Firstly, there is a variety of evidence now available, from economic historians and economists that few individuals become self-made millionaires or multi-millionaires in their own life time. The odd individual who climbs from rags to riches hides the more general process that the rich become so by inheritance (Wedgewood 1929, Thomas 1979, Harbury and McMahon 1974, Harbury 1962, Burghes 1979, Blackburn 1973, Rubenstein 1974, 1981, Scott 1982, Pond 1983) . Secondly, Rubenstein's work Men of Property is no sexist misnomer, but a fair reflection that major wealth-holders (and therefore chief inheritors) are men. 'Women', argues Rubenstein, 'were not often very wealthy in their own right', (Appendix; 250). Moreover, if few men actually accumulated great wealth in their own lifetime, almost no women do so (p. 250-251). And, 'It would seem that both commerce and landed society were more likely to grant women large fortunes absolutely than were beneficiaries of the Industrial Revolution.' (p. 251). These general points are confirmed by Rubenstein's tables on the top wealth-leavers (i.e. those leaving more than £3 million, 1940-69; £5 million or more, 1970-9); of the 39 names listed, only three are women (Rubenstein 228-229).

A cursory inspection of the Inland Revenue Statistics on estates passing at death, referenced by value and gender, confirms this general trend (Inland Revenue Statistics 1982; tables 4.13, 4.14). These figures suggest that the old rules still obtain; female claims are postponed in favour of male inheritors, when the estate passing at death is of considerable size and value and comprises in the broadest sense, productive property. In contrast, our earlier figures suggest that widows have benefitted directly when the property was either the matrimonial home or cash assets, where inheritance practices conform to the principles set out in the 1925 Act. Rubenstein's evidence suggests that full-blooded primogeniture, where the eldest son takes all, is not a universal principle amongst leading wealth-owners, at least from the opening decades of this century (Rubenstein 1974; 155-60).

One characteristic of British social science is its over-riding concern with poverty and lives of the poor. One of the few reversals of this trend is to be found in the above studies wealth and the processes of its transmission, though it is notable here that the substantive work has not been done by sociologists, even though these studies appear in works edited by sociologists, (e.g. Stanworth and Giddens - Urry and Wakefield). Contradictorily, we remain woefully uninformed about the processes of familial circulations of goods, cultural and material, amongst families whose main assets are chattels and small cash assets. For this reason, it is difficult to assess the importance of transfers inter vivos as opposed to transfers occuring (by will or intestacy) at death. There are hints in the studies of the wealthy that in order to defeat estate duty transfers inter vivos have taken on an increased significance (see Harbury 1962). In the case of the new middle classes picked out by Bernstein (1975) and Bourdieu (1977), the significant transfer may well be transmission of the appropriate codes, predispositions and educational creditation (though these rest on the possession of some material goods) and this transmission is wholly inter vivos - the dead may pass on assets, but are hardly in the position to transmit the sets of dispositions and codes which rely on personal communication and interaction. At best they may provide the wherewithal to provide a public school education which might do the job in a delegated way. The extent to which the eldest child is familially sponsored through the education system at the expense of younger siblings, and the extent to which girls are 'postponed' in favour of boys (measured for example, by length of schooling, the choice of boarding as opposed to day schooling, being sent to fee or maintained schools, or directed into 'high' or 'low' status, vocational or generalist education subjects, and being permitted to pursue higher education), is something we have yet to map.

Our lack of knowledge in the fine detail of the transmissions of cultural capital derives in no small part from the way of field of survey work has been traditionally defined in the sociology of education. Large scale surveys, from Douglas (1964, 1968), through to Halsey, Heath and Ridge (1980) are remarkably sex-blind; 'origins and destinations' have broadly been conceived in terms of relating educational achievement and occupational stratification tothe class backgrounds of male recipients of schooling. While the absence of women from the landscape in Douglas's study is fairly indexical of the whole field of sociology at the time, prior to the impact of feminism on social theory, no such half-apology can be sustained on behalf of Halsey et al. For in the interim, the women's movement has been concerned with the complex relationship between contents of educational knowledge (e.g. Anyon 1981), the boundaries between subjects celebrating gender difference (especially say, between home economics and craft skills, between rates of success in literature and language and the sciences amongst boys and girls, and, with the class-room processes which both create and sustain gender identity and difference[11]. Against this canvas, it is almost inconceivable that Halsey et al should pursue a study of the process of schooling in relationship to the origins and destinies of <u>one</u> sex only (on the basis that this allowed their research to be viewed comparatively with earlier studies).

Given these lacunae it will be appreciated that no general conclusions can be drawn about cultural capital transmissions in relationship to other inheritance practices. But it is clear that if we are to think through these different forms of transmissions comparatively, then we have to take categories such as gender and seniority seriously. For what the laws of succession detail is that it is precisely these axes along which family structures are defined and along which familial goods circulate, and, that these axes might well be the lines along which cultural capital flows.

With these problems in mind, is it possible to assert the emergence of a new family form within the rules of inheritance? The issue is complicated by the increased significance of transfers inter vivos (for the rich to escape death taxes, for the new middle classes, the significant transfers of cultural capital, concretely realised in educational creditation and occupational placement), as opposed to the transfer of family gods taking place primarily at death. However, this registers a change in the process of transmitting; we do not know about the interior privileging of spouses and minors (divided by age and sex), which would give us the clues to understanding whether the old principles of patriarchy and primogeniture (eldest male privilege) still persists, even after a qualitative change in 'the goods' being transmitted. Research here would need to embrace not only the network of transfers of cultural and social capital (i.e. contemporary customary practices of civil society), but also the transfers of cash, household goods etc., passed on to family members as loans, goods needed to set up new households and as gifts advanced at various points in the life cycle (e.g. the age of majority).

We are on more certain ground with the rules of succession. Does the one system of inheritance, post-1925, significantly change the family forms visible under the old rules of testacy? The implacability of testamentary power, though little invoked, stll remains with us, so the power to disinherit and the power to direct property in paths quite contradictory to the destinies set out in the rules of intestacy, also remains. Taken together with the considerable difference between the number of men passing on estates at death and the number of women doing so, and, the fact that men pass on larger estates than women at death, testamentary power is predominantly male in its exercise. To this extent, the old sense of 'patriarchal' property remains.

The post-1925 rules of intestacy certainly limit the claims of the male heir to succeed to (real) property as of right; those rules now privilege the surviving spouse. Male offspring take

equally with female descendants after the death of a surviving spouse. The intestacy rules therefore *formally* ends the system of primogeniture embedded in the old rules of the transmission of real property. The moiety system (half the property descending to the surviving spouse, half to surviving issue of the marriage) directly descends from the rules of personal intestate succession. The main beneficiaries here have been married women, to the extent that they have been accorded legal parity with surviving male spouses. Unlike minors, they now take the deceased husband's property directly; minors claims are postponed (though guaranteed by trust and executors) until the age of majority. The rights of minors to claims on the inheritance are guaranteed against surviving spouses (male or female) and to this extent, they cannot be 'disinherited' under the rules of intestacy. What the post-1925 intestate rules, that is, the Inheritance (Family Provision) Acts of 1938 and 1975, primarily defeat is the 'male to male' line of succession (though this may continue by custom or testacy). These statutes are good proofs for the argument that it is possible *de jure*, to re-write what constitutes family membership, without necessarily disturbing the power relations of the family system. Indeed, the 1975 rules *confirm* the principles of personal, non-contractual, relations of dependence, obligation and subordination, which separate family relations from capitalist relations. It is on this basis, precisely *because* 'family' members (in the widest sense) were *personally* dependent on the deceased, that courts entertain claims against the estate for maintenance, by persons inside and outside the last marital relation of the deceased. The principle of dependence therefore extends beyond the grave and does not necessarily end with the death of the patriarch, but with the change in status (remarriage, marriage or coming of age) of the descendants. For the majority of women, and girls, this implies merely changing one form of dependence for another.

In conclusion then:

> "An individual's inheritance cannot be measured solely by the financial benefits he receives. Numerous advantages are also conferred by education, life styles, contacts and all that these imply and which are virtually unquantifiable. Furthermore, the value of a father's estate at death is only a very inadequate proxy for the financial advantages a son receives from his father". (Harbury and McMahon, 1974; 123-124).

The 'grid of inheritance' thrown down the line at the same time as the familial assets are transferred (however great or small these might be) clearly extends beyond immediate financial benefits. Ceri Thomas' (op.cit.) brilliantly mischievous study of 'family and kinship in Eaton Square' beautifully maps the contours of the privileges and advantages conferred on the elite through a whole network of 'contacts and connectivity'. Whereas the studies of the wealthy elite generally are written to show the structured inequalities of wealth between economic groups and that these inequalitites are far from diminishing (for there is no effective legislative apparatus which forces the dispersion of wealth), we have tried to map, through a study of the inheritance laws and the categories through which it operates, the economic significance of the institution of the family, within the framework of a classed social structure. For part of our total inheritance, are the laws of succession, and with them the categories which are an integral part of their history, and the extent to which these categories operate to provide limits and possibilities of social intercourse, then our past presses upon our present.

Their significance for the study of minority status resides in the manner in which patriarchy (both maleness and seniority) operates within the framework of modes of production. To this extent, the laws of succession signify not only difference (between adult and minor, male and female) but actually sustain and perpetuate these differences in a structured way. Any social formation has symbolic systems which classify, differentiate and hierarchize individuals and social groups. In this context we have tried to indicate how property and wealth articulate to the exercise of power and authority. The laws of succession make visible the wider distribution of property, power and authority in a classed society, operating through the more local, private and personal relations within the institution of the family. Familial relations are at once economic and personal, intertwined and largely inseparable, where statuses are hierarchised by gender and generation. The laws of succession provide considerable leverage for parents to exercise both economic and personal control over their direct issue, and we are arguing that any understanding of familial relations in general, and inter-generational relations in particular, must take account of the presence of these laws of structured inequalities, for in the matter of familial goods, power flows one way; down the line.

NOTES

1. Bourdieu's 1976 essay was in fact a critique of a field of enquiry established in France which had a strong legalistic bias. As Lawrence Stone notes, "The strongly legalistic bias of much French scholarship on family history has also done a good deal to illuminate these questions, although few of these publications have probed very deeply beneath the surface of the law". (Stone 1981; 67). Strictly speaking, Bourdieu is writing about marriage strategies and not about inheritance at death. However, he is dealing with the destiny of land and the shaping of social relations involved in the redistribution of property so his concerns are very close to the field of investigation here. Moreover, Bourdieu does pose problems about customary practices and their relationship to legal rules which must be addressed.

2. Serfs and villeins are terms about which there is no general agreement. See Hilton (1973, 1976) and Hatcher (1981), for an extended discussion.

3. Brought in under the Succession Duty Act 1853, confirmed by the Finance Act 1894, (Topham 1947, chap. 35; Stephen's Commentaries II, 672-673).

4. The beginning of this orthodoxy probably lies in the attempts generated in the middle 1960's, to specify the 'peculiarities of the English', both in terms of dominant political ideologies and dominant cultural values e.g. Anderson (1965), Nairn, (1964), Thompson (1965). The impact of the aristocratic values, liberal education, the culture of the gentleman, the derogation of expertise and trade was mapped out by Raymond Williams (1961). More recently, the impact of the old order upon the British economy has been explored by Weiner (1981) and by Esland and Cathcart (1981). See generally, Field (1979), Urry and Wakeford (1973) and Stanworth and Giddens (1974).

5. Delphy's (1977) analysis of the family system of producing on French peasant farms has significance beyond the agricultural grid; it could well be applied to family systems of petty commodity production and to the early days of the factory system. For patterns of recruitment took place <u>through</u> the family (father employing children as factory workers) and tasks being assigned in the familial manner (subordinates allotted the unskilled occupations of cleaning and fetching). For this reason, we can argue that the family as a system extends beyond 'the household'.

6. St. Paul's Epistle to the Ephesians Chap. 5, 22- Chap. 6, 9. Just for flavour:

> "Wives submit yourselves unto your own husband as unto the Lord. For the husband is the head of the wife, even as Christ is the head of the Church".

7. See for example Meillasoux (1972), Rodgers and Standing eds. (1981) for anthropological versions of elders and subordinates. For juridico-political theorising of patriarchy, especially in the 17th century, see Schochet (op.cit.).

8. These were interviews carried out in mid-Bedfordshire in January 1983, by Roger Dale and myself, as part of a survey of the employment of school children. The case here involved a 14 year old girl living with her family on a Land Settlement smallholding. She routinely picked at packed vegetables before and after school and at weekends. Asked about wages, she replied she received none: however, Dad did pay her weekly judo fees (50p) and used petrol to run her to judo class. A weekly recompense of about 75p. The children from the Land Settlement small-holdings presented an image of family production and consumption not unlike Delphy's French peasants.

9. Two comments here. Firstly, as Rubenstein (1981; 195) notes, "the great landowners remained the richest group of men in Britain until the late 19th century". But their vast economic power was matched by the political leverage they exerted through various state apparatuses, occupying directly, or by delegation, key ministries and crucial positions within the civil service. Secondly, Bateman's publication, Return, the Great Landowners of Great Britain and Ireland, ran to a 4th edition in 1883, because it revealed with startling clarity, the concentration of large tracts of the British Isles, in the hands of very few wealthy families. Called at the time of the new Doomsday Book, it was based on an official Return to the Owners of Land. No similar compilation is available today. For a detailed discussion of landed wealth, see Rubenstein (op. cit. Chap. 7).

10. Stone, L. (1977; 130-136, 207-214). Note also Sir Edward Coke's kidnapping of his daughter in order to secure a marriage which would have placed him well with the Court (in Hill, 1965).

11. For example, Macdonald M. (1981) Class, Gender and Education, O. U. Course E353, Units 10 and 11; Deem, R. (1978) Women and Schooling, Deem, R. (1980) Schooling for Women's Work, Wolpe, A. (1976) The official ideology of education for girls, Acker, S. (1981) No-women's land; British sociology of education 1960-1979.

PART THREE

PARENS PATRIAE; THE STATE AS THE WISE AND SUPREME PARENT

'And the evidence of reason teacheth, that there is a stronger and higher bond of Duty between Children and the Father of their Countrey, than the Fathers of private families.'

Richard Mocket (1615) God and the King, quoted by Schochet (1975;89).

INTRODUCTION: PARENS PATRIAE

The legal doctrine of parens patriae simply stated acknowledged that:

> "The sovereign, as parens patriae had a kind of guardianship over various classes of person, who from their legal disability stand in need of protection, such as idiots, infants and mental patients." (Jowitt 1977: 131).

We have already established the nature of the infants' 'legal disability' so we shall concern ourselves here with two related notions; parens patriae and guardianship, which will put into play a complex relationship between the state, parents and children. It is impossible here to write a full account of the complex 'history' of guardianship, and the related categories of custody and wardship; guardianship remains a notoriously difficult construct, even for legal historians and commentators to trace through all its various paths and byways. Medieval law recognised ten different types of guardianship (Pollock and Maitland Vol. II, 444), while Coke lists four categories: his 19th century editor footnotes nine different types (Thomas 1818: 151). Legal commentaries on guardianship may be bracketed in two ways; those accounts which read its legal history as a series of successive blows against the absolute authority of a father over his children (see the various contributions to Graveson and Crane; 1957); and those accounts which privilege the growing concern of the courts to enact judgements - in custody,[1] wardship, divorce proceedings, etc., - which would be of benefit to the child (e.g. O. Stone, 1978). The first seeks to establish the grounds on which married women emerge as legal subjects in their own right;the second brings together the parents and

the state in constellation, through the doctrine of "the welfare of the child". The emergence of married women as full legal subjects, and, the doctrine of the welfare of the child were possible only after the partial demise of the figure in dominance in family law; the patriarch and his paternal power.

In the historical development of family law, the declining empire of the father is a key discursive element. Yet it is too easily overlooked that the principles on which his government of family members was based have not been entirely extinguished; rather, his position has been assumed by the state. Particularly, this is so in respect of minors. For what can be traced out, by reference to case and statute law is the transformation of the government of children in families, to the government of children through the family. At the level of narrative, it becomes important to understand how the near absolute rights of a father to the couverture of his wife and custody and control of his children were deconstructed, and how the state claimed a basis in law to intervene, supervise and if necessary, remove children from families. It is then possible, for example, to account why over 100,000 children are currently in the care and custody of local authorities, whose administrative power to direct and control the lives of those children, is super-ordinate to the rights of parents , and to account why it was possible in the past for a charity such as Dr. Barnardo's to resettle, between 1870 and 1914, nearly 25,000 children in overseas colonies and dominions (Pinchbeck and Hewitt Vol. II; 1973; 575).

Modern definitions of guardianship display firstly its field of operation in social relationships, and secondly, indicate its homology with the doctrine of parens patriae. Halsbury's Laws, for example, defines guardianship as follows:

> "Minors, both naturally and at law, are subject to incapacities which make it necessary for their interests to be safeguarded by persons of full age. In its widest sense, the relationship of guardian and ward may arise by nature, for nurture or by parental right. It may be created by appointment, whether by a court of competent jurisdiction or out of court, in which case the appointment may be by parent or by the minor himself".
> (Halsbury's Laws, Vol. 24; paras 527 and 223).

Note the similarities between the general superintending power of courts in parens patriae to provide protection for those with 'legal disabilities' (including infants) and, the more specific, individual-orientated provision of guardianship, to offer protection to minors who 'naturally' and 'legally' are subject to incapacities. The common assumption is that minors are incapacitated,need protection; responsibility best given by persons of full age, generally parents to whom minors are naturally related. But guardianship also entails powers; it may be over the minor's property, over the minor's person, or both (Halsbury, op.cit; para 527). Both guardianship and parens patriae entail the governance of minors, and specify who has claims, rights, duties and obligation, both to govern and protect them. And here lies a subtle and complex conflict between the general superintending power and the specific governance of individuals. For guardianship has evolved a normative set of rules and obligations applicable to guardians themselves, which, if not met, or if challenged, and cannot be adequately defended in the courts, the 'natural' claim to guardianship can be displaced and superseded by the more general superintending powers of a wiser 'parent'.

These intertwining themes are best understood in the context of the historical development of the doctrine of *parens patriae* and in the struggles to transform guardianship. The periodisation we suggest (as any periodisation must) is an implicit theorization of historical change. What will be paramount here, are changes in the guardian-minor relationship, always understanding that in law, who was to be the guardian of a particular child could always be a matter of legal contest. The general principles along which the law worked, however, have a considerable unity and longevity. Contesting the guardianship of children took place within those rules, and judicial outcomes of contested cases served either as practical re-affirmations of the rules, or in some more important cases, modified and transformed the general principles.

The periodisation we shall adopt is grounded in the 'decisive' shifts, generally statutory in form, from prior legal practice, where a crucial shift in discursive practice materialises in and through the guardianship rules. The historical development we suggest for analytical purposes is:

a) Pre-1660, where common law rules are pre-eminent; where guardianship is construed predominantly as a profitable right to superintend a minor's property, and where, in the general conspectus of family law, paternal power is the protected privilege and organising principle of it.

b) 1660-1839, which begins with the statutory affirmation of the supremacy of the father over *all* his children, but is also the crucial period where equity courts become the site of struggle against the near absolute rule of *paternal* power, where equity elaborates the doctrine of *parens patriae*.

c) 1839-1886, a signal period of time where successive statutory initiative recognise a mother's right to custody, often in response to cases where justice was clearly seen not to be done. Here also we begin to see the elaboration of the principle of the welfare of the child.

d) Post-1886 and the consolidation of the modern principles of guardianship, and the elaboration of the state's concern with children.

The historical transformations which take place in the governance of minors, take place within a turbulent, unceasing conflict between three main branches of English law; where common-law rules are the focus of challenges through the Chancery Courts; where ecclesiastical law is undermined by the appropriation of family law (of marriage and its dissolution, for example), by temporal officials on the basis of developing statutory law. Periodization is made more complex by the traditions of judge-made law operating as precedent, making observable continuities over analytically separate historical phases.

So, for example, we find modern definitions of different kinds of guardians, set out in Halsbury (op.cit.), citing cases from the 16th, 17th and 18th centuries (e.g. guardian by nature is founded on Ratcliffe's Case (1592), Thorp (1697); guardianship for nurture cites Hasfield (Parish) v. Furley (Parish) (1740) and so on; Halsbury's Laws; Vol. 24; footnotes para 527). The interaction of case law with statute, equity with common law and parliamentary initiative in opposition to ecclesiastical law, over the question of family law in general and guardianship in particular provides us with an interesting dynamic, elsewhere observed and noted, of the law transforming itself as it transforms the object of its operation. The question of which branch was to have legal jurisdiction over the family is as much of interest as to who was to exercise power, authority, custody and control over minors in families. In this respect, we may

apprehend the sense in which formal structures - the language, doctrines, procedures and fissures within the legal system, constantly interact with practices of families; where individuals located in structural spaces which the law sets out, constantly struggle to redefine the limits and boundaries the law sets to their individual capacities.

A final note on periodisation. The kind of historical transformations we focus on here, concerns temporalities in the development of patriarchal relations, the shifting balance of forces and social relationships entered into by men and women (as husband and wife), between adults and minors (as parents and children). We are looking at categories not necessarily governed, in Marxian terminology, by the ebb and flow of modes of production. As Connell (1983) argues, "A theory of patriarchy must gain its historical intelligibility from nowhere but itself, its own transformations", (p. 61). There are important implications here for the way in which we conceive, not only the historical developments in family form, but, the way in which we periodise the burgeoning institutions comprising the modern state. It makes little sense here to conceive the state in forms (bourgeois, liberal, corporate etc.), which describe and analyse it in terms of its relationship to capitalist accummulation, for example.

Of course, there are points, particular conjunctures which are of considerable significance, for economic relations and familial relations; the Abolition of Tenures Act 1660 is a case in point, where class and patriarchy inseparably intertwine in a seamless web. These moments cannot be ignored. But it would be wrong to insist that each and every shift in the balance of forces, between husband and wife, parent and child, takes place in response to changes in the balances of forces between classes (functionalism in extremis).

CHAPTER ONE: FAMILY STATUSES, PRE-1660

a. Husband and Wife

Before we consider more specifically the relationships between guardians and minors, an aside, a telling insight into the way the common law viewed the relationship between husband and wife. It explains much of the character of how law anciently regarded the marital relation. It also explains a great deal about the primacy of the father in relationship to other family members. From the notes and additions to Blackstone's Commentaries I, by Edward Christianson, added in 1809, we find the following: *

> "Husband and wife, in the language of the law, are stiled baron and feme: the word baron, or lord attributes to the husband not a very courteous superiority. But we might be inclined to think this is merely an untechnical phrase, if we did not recollect, that if a baron kills his feme, it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime; as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore the law denominates her crime as a species of treason, and condemns her to the same punishment as if she had killed the king. And for every species of treason, (though in petit treason the punishment of man was only to be drawn and hanged), till the (statute) of 30 Geo III C48, the sentence for women was to be drawn and burnt alive." (Blackstone, Commentaries Vol. I.; 445, f.n. 23, my emphasis).

* For the reference to petty treason, I am grateful to W. G. West of Ontario. One of his students, Sherry Gavigan, is doing further research into the legal history of this 'offence'.

Petty treason, beautifully condenses the marital relation as seen in the common law; the enormity of the punishment celebrates the king-like superiority of the husband over his subject wife. A wife killing her husband transcends all the laws of god and man, offends against the natural order of things.

Without apology for the Foucault-like introduction, and his reference to Damiens the regicide (Discipline and Punish 1977), petty treason usefully serves to introduce an 'ancien regime' in family law. 'Baron' and 'feme'; lord to serf. These were not 'untechnical phrases' but meaningful legal terms with concrete effects and consequences. Familial relations are connoted in feudal terms; couverture, in return for services and obligations; holding of the lord, but in return for aids, reliefs, fines and the other incidents of feudal obligation. A wife is subject to the personal authority of the husband; killing him 'condemns her to the same punishment as if she had killed the king'. It was Blackstone himself who was to state, 'our (common) law in general considers man and wife one person', (Commentaries I; 443) - that person being his. Likewise, children of the marriage entered the couverture of the patriarch, in much the same style of relationship and system of authority; subjects of his will and subject to it.

Petty treason speaks a relationship between husband and wife, and a relationship between the family and the state. Power is construed in terms of personal rights, duties and obligations; between the king, greater and lesser nobles; between the husband, his wife and children. Good and stable government rests upon each knowing his or her claims and dues. The family is but a microcosm of the wider network of individuals owing allegiance to a person of superior status in the hierarchy. The attitudes and values condensed in crime of petty treason

may be feudal in character but not in time-span; it was an offence, on the books, from 1352-1790 (Pollock and Maitland II; 504: Blackstone I; 445 f.n.). Personal subjection, vassal to lord, lord to king, wife to husband are founded in the doctrines of homage, fealty and liegeance (Pollock and Maitland I); 298-300). Vassalism demanded every man to owe faith to his lord of life or limb. To kill one's lord 'is compared to blasphemy against the Holy Ghost ; it is a crime to be punished by a death cruel enough to seem a fitting beginning for the torments of hell', (which originally meant flaying alive) (Pollock and Maitland I;300). Protecting the king against his lords, lords against vassals, husbands against wives by violent displays of judicial power tried to preserve notably the person of superior status but sought to protect the system itself and the system of power and authority imbricated within it. Individuals and the system were enveloped, held together by the same technique of control; verbal obligations backed by judicial terror. The same technique subjugated serf to lord, servant to master, wife to husband; the sublime revolt was petty treason.

Homage, fealty and liegance, the constitutionals of vassalism provide a first line of force; the second derives from the ecclesiastical control of marriage. 'When we ask', wrote R. Law, 'what the law of marriage was in England prior to the reformation, we shall find no answer in local constitutions, nor in the glosses of the English canonists, for the law was to be determined only by the Decretals, the codes of the lawyer-popes'(Law 1952;36). The rules of affinity and consanguinity (could you marry your first cousin, a deceased wife's sister?) derive from this source. And they in turn derived from an over-literal reading of Genesis 2.24, 'Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and the twain shall be one flesh ', (quoted in Law op.cit.; 38, my emphasis).

A third constituent of the family of the ancien regime, of signal importance to and ran in parallel with vassalism, was the material force of land-based wealth; the efforts to secure passage of estates 'down the line' provided the rules of legitimate issue as opposed to bastards, the degrees of consanguinity, the testament - any power of the patriarch and the honoured position of the eldest male child (for an extended discussion, see Part 2 below). The relationship between the family and the estate; the need to preserve both the line and its hold on the estate provides our first insights into the complex rules of guardianship and of the particularity of paternal power as an aspect of patriarchy.

b. The nature of guardianship

While feudal law recognised ten different kinds of guardians, 'It had been thinking almost exclusively of infant heirs, and had left other infants to shift for themselves' (Pollock and Maitland II; 444). Fathers had absolute custody over infant heirs, but not their other children. Of heirs apparent, to have their custody was a 'profitable right'; their marriage could be sold. On the death of the father, his superior tenant profited both from the sale of wardship and marriage; but was under the obligation to protect his ward during the ward's infancy. A transmutation of the relationship between adult lord and adult vassal, profit in exchange for protection, along lines of age. Paternal power was made material in the exercise of the father's protection and his ability to 'sell' his heir apparent in marriage. Feudal law sanctioned both his right of the heir's person (his claim to protect) and his 'profitable right' to sell it in marriage, and protected this right as it would protect any other 'thing', against interlopers.

The temporal law did not seek to provide guardians for children without property, or at least provide them with any permanent guardian (Pollock and Maitland II; 444). For those with property, the kind of property they were to inherit determined

the character of the guardianship, its length and who might stand as guardian. We can dispose immediately of illegitimate children; being illegitimate they passed to the custody of the mother. Thus, they were formally denied membership of the putative father's family, any claim on his estate, and claim to his protection, though the courts could force his obligation to maintain his children born outside marriage. A brutal reminder of the sanctity of legal relations between the family and the estate.

Classification of the types of guardianship provides considerable problems. We speak here only of the kinds of guardianship generally applicable in the period we focus on. In his commentaries of Littleton, for example, Coke notes:

> "It is to be observed that in the laws of England, there are three manners of guardianship; viz by common law, statute law and by custom. By common law, there are four manner of guardians; viz guardian in chivalry, guardian by nature, as the father of the eldest son, guardian in socage and guardian in per cause nurture".
> (quoted in Simpson 1875; 112).

We are chiefly concerned at this point with the common law definition, and the common law rules wherein lie the construction of paternal power, only later to be confirmed by statute law and equity. We refer here to definitions offered by Stephens (Commentaries Vol II 16th ed.; 1914;458-59) in matters relating to guardianship by nature, nurture and socage (who draws on cases and commentaries relating to the situation pre-1660). In the last case, where the king is guardian above all guardians, we refer to Pollock and Maitland II; 445):

"1. Guardianship by nature ; this is said to belong to the father in respect of the person of his heir apparent, or of his heiress presumptive; there being, properly speaking, no other kind of guardianship by nature than this. And the term

'natural guardian', as applied to the father or mother with reference to all their children, is rather a popular than a technical mode of expression. For when a father's right to the person of a child who is not his heir apparent is intended, his guardianship is properly that next to be noticed. It has been doubted whether, since the abolition of tenures in chivalry, guardianship by nature can exist at all, in the strict sense of the term.

2. Guardianship for nurture - this is a species of guardianship that applies to all the children, extending to the person only. It belongs to the father, and, at his decease, to the mother; and it lasts both with males and females only to the age of fourteen. The two species of guardianship above described, as distinguished from the parental right to the control and custody of an infant child, appear to have no practical importance at the present day.

3. Guardianship in socage - this is a species of guardianship which extends to the estate as well as to the person; and it occurs only where the legal estate in lands held in socage descends upon an infant, in which case the guardianship devolves upon his next of blood to whom the inheritance cannot descend. For though proximity of blood is a natural recommendation to the office of guardian, the law judges it improper to trust the person of an infant in his hands, who may by possibility become the heir. Guardianship in socage, like that for nurture, continues only until the minor is fourteen years of age; except in the case of lands held in gavelkind, where the office lasts a year longer." (Stephens; 458-459).

4. Pater patriae - a doctrine acknowledging that the king should protect all who have no other protector, that he should be the guardian above all guardians (Pollock and Maitland II;445). His protection materialised in institution through the Courts of Wards and Liveries (to the profit of the monarch and those who administered wardship) and through the king's courts.

c. Parents and Children

Paternal and parental power is founded in the rules on guardianship (Simpson op.cit; 3). Parents are guardians of their children by nature and nurture; it is the source of their rights, duties and obligations. But already we can see the subsumption of the mother, the construction of her lesser role as guardian. In law, the relationship between parents and children is founded in nature. In Blackstone we find it as the core principle; 'the establishment of marriage in all civilised states is built on the natural obligation of the _father to provide_ for his children' (_Commentaries I_; 447). It is a principle of law that there is an obligation on every _man_ to provide for those descended from his loins (p. 448). A mother's duties and obligations it seems end with birthing. And, paradoxically, children seem to spring from loins and were not heaved out of wombs!

Here we have the discursive distinction between the 'natural' guardianship of parents (or _de jure_, the patriarchy) and other kinds of guardianship. Guardianship in chivalry and socage announces the absent father; a situation where children of property pass to the care of others. Heirs to military tenures fell under the control of superior lords, while guardians in socage came from the heir's mother's family. In short, guardians were chosen from those who had no chance of inheriting; the law protected wards against those who might be persuaded to kill them for the inheritance. Guardianship in socage was no more than an early form of the 'trust'. We may safely assume that the king's general superintending power as guardian over all guardians was exercised only in cases, where there was profit in it for the crown; a protection only exercised over children with property (Blackstone I; 461). But what did the parent-child relationship entail?

'The power and reciprocal duty of guardian and ward are the same ... as those of a father and child', wrote Blackstone (Commentaries I; 462). For parents, these were the obligations to maintain, protect and educate their charges (Blackstone I;446), at a level suitable to their station in life. But note, these were obligations falling on the father not the mother. Case law and commentary, when his supreme power was tested, confirmed his common law right as the sole possessor of the right to determine the kinds of social relationships his children may enter, enjoy or participate (e.g. R v de Manneville (1804) 5 East 221; R v Greenhill (1836) 4 Ad and E 624; Re Agar-Ellis (1883) 24 Ch. D. 317). Because the father was the sole guardian of the children and the sole possessor of obligations, he therefore gave absolute rights to the custody of his children.

One later commentator sums up the position:

> "A court of common law can only have regard to the legal right of the father; it has no discretionary power to control the right of the father in the exercise of his rights (except in extreme cases).'
> (Simpson 1875;129).

And this applied even if the father acted outrageously towards his wife and children. His rights to the custody and control of his children could be enforced either by habeus corpus (a common law writ) or by application to Chancery (Simpson ibid.). A Mrs. East, for example, left her husband because of his extreme cruelty, taking with her the child of 8 months, whom she was still breast feeding. East broke into the house, kidnapped the baby and carried it away. The courts were powerless to intervene (see O. Stone 1977; 55 f.n.). Greenhill's (see above) adulterous behaviour and consorting with prostitutes was still not sufficient for the courts to refuse his application for custody (Stone ibid). By the same token, courts could and did, as late as the 19th century, return wives to the couverture of husbands after application to the courts (R v Leggatt (1852) 18 QBD 781).

d. Patriarchal authority and the state

The transformation of the obligations of guardianship into the rights to custody (of wives and children) illustrates the character and the security of the authority patriarchs wielded over family members, and which by extension could be exercised over other members of the household. His authority and his rights to custody, are founded in religious doctrine, his 'natural' right, and in common law rules, each working in a mutually supportive ideology, creating and maintaining that good government was consonant with the absolute exercise of paternal power. We cited here 19th century cases, but this amplifies how normal and natural, how commonsense and hegemonic the organising principles were; and their durability both in the law and in the family. Equity had yet not established its right to intervene and supersede paternal power.

Separately and together couverture and guardianship establish the patriarch's supremacy over the persons of other family members. But the same doctrines provide the foundation for his claim to the services of and the labour of his spouse and children. The non-personages of his wife and children deliver into his hands their property and wealth, for his use (if not ownership). Interconnecting authorities, which constitute his headship of the familial personal relations and his headships of economic relations into a single system. A legal form not inappropriate in an economy on the one hand dominated by land based wealth, on the other where production is predominantly organised along the lines of family enterprises (Sachs and Hoff Wilson 1978). A legal form which sets down the relations of domination between lord and serf, patriarchs and other family members in a co-mingling of personal and economic subjugation.

Fundamentally, the monarchical state was prepared to leave the family well-alone in routine and mundane matters. To an extent the monarchy laid claim to its own legitimacy in and through the family; king was to subjects as father to son -

superior all-powerful but with obligations to maintain, protect and if necessary chastise. But the state was not absent. How could it be when the king's judges actively supported the rules of the common law which subjected and subjectified husbands, wives, children and policed the powers of the father by allowing writs of habeus corpus, and offences like petty treason to stand as custodians of his status and will?

Statutory limitations on the father's exercise of his authority were few. He could award moderate chastisement to his wife and children (Blackstone I; 444), a dictum not formally overturned until 1891 (O. Stone op.cit; 55), but he could not be savage in the extreme by killing or maiming (unlike Roman law; see Blackstone I; 452). While the law makes no specific provision about the duties that children owed to parents, it did elaborate certain principles in common law. 'For to those who gave us existence we naturally owe, subjection, honour and reverence', wrote Stephens (Vol II; 448), echoing Blackstone. Moreover, the duty children owe to parents enables parents to more effectively fulfil their duties and obligations (Blackstone I; 452).

The paternal obligation to maintain however was primarily a moral obligation; the common law supplied no means of enforcing it (Stephens Vol II; 440). A deficiency, in legal parlance (see Stephens ibid) met in some measure by the Poor Relief Act 1601 (43 Eliz. C2). However, the conditions of existence of the Poor Relief Act cannot be understood by legalistic explanations, nor what was at stake in that particular statute. Whereas common law principles supply us with a father's obligation to maintain, it does not describe why the poor in general needed relief, and why at this particular time the statute was enacted and whom it was designed to police. Most of all, it fails to apprehend the extent to which the state

assumed the custody of children through the Poor Laws, at the expense of fathers. By statute, the general superintending power of the king was paralleled by an interventionist state - not replaced or transformed - through the Poor Laws of 1597 and 1601. In effect, the Poor Laws required church wardens and overseers of the poor to set to work wandering vagrant and delinquent children so by their labour they would provide for their own upkeep (Pinchbeck and Hewitt Vol I; 98). Children were apprenticed; training and work combined under some local master. The later statute (1601) provided that not only children, whose guardians could not be identified, but <u>also</u> children belonging to vagrants, the poor and the infirm who could not afford to support them, were to be taken into forced apprenticeship (ibid). Effective custody of the person, rights to the products of a child's labour, and the obligation to maintain and educate children of the poor were thus transferred to agents of the state, via local magistrate. A significant shift in the development of guardianship and a significant moment in the development of the state exercising power to intervene in families.

Pinchbeck and Hewitt conclude,'in principle the state accepted, the responsibility for securing the proper treatment and training of children into whose care the law entrusted them' (Vol I; 98). A liberal and generous reading. But it was also the means of managing a critical problem, a means of rounding up children who were dangerous; wandering, fending for themselves on the margins, dislocated from their allotted place in the system. These were children loosed from the familial setting, or children the family simply could not afford (see Dingwall, Eeklaar and Murray, 1983; Chap. 10). The state was as equally concerned with controlling as preserving the destitute child, to the extent that it was prepared to confront one of its own maxims, the sanctity of paternal power. Parish relief was to be a last resort; any relative was first obliged

to assume custody of a destitute child. After that, the local authorities were prepared to delegate a willing master to stand *in loco parentis*, as if he were the guardian. A critical extension of guardianship, along class lines. The security of children in propertied and wage-earning families (where those wages were sufficient for a modicum of existence) still lay with the family.

It is worth noting that this was not an extension of the general superintending powers of pater patriae; the sovereign did not stand as the parent; that mantle he was assumed by agents of the state, a responsibility given to them by parliament.

We have so far tried to set out the field of effects of paternal power, sought to locate wives and children as objects of its operation. Lastly, we have noted a significant moment of its dissipation. Fathers were the natural guardians of minors; in their absence, other individuals acted *in loco parentis* as if they were fathers with the obligation to protect, maintain and educate their ward. Guardianship entailed custody of the person and control of a minor's property; claims set out protected in common law and (when necessary) in Chancery. Only statutory intervention provided the means for paternal power to be curtailed in respect of children and then only in the case where obligations were visibly not being met. We now turn to our second period, where the absolute powers of the father were seriously challenged by and through the courts, wherein Chancery sought to activate and make effective a general superintending power of the sovereign in doctrine of *parens patriae*.

CHAPTER TWO: PARENS PATRIAE AND FAMILY PATRIARCHS, 1660-1839.

1. Statutory Guardianship

"The undoubted law of this country (is) that the father is entitled to the sole custody of his infant child"(Sir. G. Turner 1839). R C Halliday 17 Jur 56.

> That where any person hath or shall have any child or children under the age of one and twenty years, and not married at the time of his death, that it shall and may be lawful and the father of such child or children, whether born at the time of the decease of the father, or at the time in ventre sa mere, or whether such father may be in the age of one and twenty years, or of full age, by his deed executed in his life time, or by his last will and testament in writing ... to dispose of the custody of such child or children for such a time as he or they shall respectively remain under the age of one and twenty years ...
>
> Abolition of Tenures Act 1660
> 12 Car. II C. 24

The Abolition of Tenures Act manifestly expanded a father's custodial power over his children, beyond the powers he previously held in common law. In the absence of any reference to a mother's claim in the statute, not only was he statutorily granted sole custody, but the time-span in which his children remained 'his' was considerably expanded.

Firstly, with the abolition of feudal tenures and all the incidents and obligations pertaining to it, guardianship in chivalry and socage was subsumed by the father's status as sole

guardian. This was to extend until the age of 21, not as previously, where boys at 14 and girls of 16 could move out of wardship, and in limited circumstances appoint their own guardians .

Secondly, not only was the mother excluded from custody, but the father could 'dispose of the custody of such child or children' after his death, to testamentary guardians, whose custody was as absolute as his, to the exclusion of the mother. Even her common law right to act as 'guardian by nurture' was exterminated (Bromley 1976; 306). Testamentary guardians were therefore free to determine the kind of education, religious instruction and religious affiliation their charges were to receive, and had the power to remove children from their mother's household and control if they believed their charges were in some kind of moral danger.

So all-embracing was the statute in matters of a father's right to custody, that as late as 1883, a case report noted:

> 'A father has a legal right to control and direct the education and bringing up of his children until they reach the age of 21, even though they are wards of court, and the court will not interfere with him in the exercise of his paternal authority, except where, by his gross moral turpitude, he forfeits his rights, where he has by his conduct abdicated his paternal authority, where he seeks to remove his children being wards of court, out of the jurisdiction without the consent of the court.'
> (Re Agar-Ellis 24 Ch.D (1883); 317)

Agar-Ellis was only one in a long series of cases which challenged the absolute authority of the patriarch. But case law had a dual effect. On the one hand, case law nibbled at

the edges of paternal authority, on the other, considerably amplified the father's natural right to control all aspects of a child's upbringing at the expense of the mother. A curious paradox perhaps, but it was through case law that Chancery elaborated its own grounds for judicially interfering with paternal power, while at the same time, upholding a father's claims to custody over and above that of the mother, and privileging paternal authority at the expense of a doctrine of 'the welfare of the child'.

As an illustration of the material effects of installation of statutory guardianship, we can refer here to a Chancery case (Eyre vs Countess of Shaftesbury, ALL E.R. (1558-1774) REP;129) heard in 1722.

The Earl of Shaftesbury appointed three testamentary guardians, who on his death were jointly to oversee the upbringing of his heir. At the time the case was heard, the Earl had died, as had two of the appointed guardians. The infant Earl , then 12, was living with his mother, but having Mr. Justice Eyre as the sole remaining guardian. Eyre was concerned that the infant heir had no regular tutor and furthermore, was consorting with 'gentlemen ' attendants he thought unfit. Accordingly, he 'petitioned that he as sole guardian, might have the ordering as he thinks proper of such governor, gentleman and other servants to attend the infant heir and that the person of the infant earl might be delivered over to him (the petitioner)' (130). Lord Macclesfield (then Lord Chancellor) presiding, acknowledged that the father had the statutory right to dispose of the guardianship of his child until the age of 21, and his choice of guardian is binding until the guardian did something wrong. He concurred that the tutor, a Dr. Stubbs, 'Though (he) may be a good, learned, and pious man, yet he may not be so fit to attend the young Earl to all places, for instance to Court, places of exercise and diversion, etc., at which it may be proper for his lordship to appear (130) '. Eyre made it

plain he did not want the boy to go to public school, but to move into the guardian's household. In the event, Macclesfield L.C. ordered Stubbs to be dismissed, but the Earl was to continue to live at home with his mother, though Eyre was to remain as guardian, in spite of the mother having personal, physical custody. A point brought forcefully home at a later date.

In March 1724, the Earl's mother married him off to the daughter of the Countess of Gainsborough, without Eyre's (the guardian) consent. The young Earl was 14. Accordingly, the case was brought to court, the Earl's mother being charged with 'ravishment of an heir' and marriage of an infant ward without the consent of his legal guardian, charges which carried a maximum penalty of life imprisonment!

The court decided that the marriage was not of a 'disparaging kind' (the young Earl's wife after all was of the nobility), the financial settlement was adequate (though the court entertained the idea that his marriage portion might have been even better had he married later), and it recognised the marriage could not be rescinded (i.e. all legal formalitites were properly observed vis a vis the ceremony). This left the problem of the guardian's consent, which, Eyre being a testamentary guardian, ought to have been sought. They acknowledge the mother's guardianship by nature and for nurture, but it is inferior to the claims of a testamentary guardian, but because she is a 'guardian' (however tenuous that claim might be) a charge of ravishment could hardly be brought against the mother of an heir. The marriage was allowed to stand, <u>but</u>, Eyre was to remain as guardian until the infant Earl attained his majority.

Apart from the immediate and interesting details of the case, it usefully displays some of the legal rules constituting the discourse of guardianship and custody.

1. Notably, this case was heard in Chancery, signifying a considerable shift away from the common law rules which formerly provided the basis of familial legal relations. How it was that Chancery assumed the mantle of arbitration in guardianship and wardship will be dealt with extensively below.

2. Nevertheless, this case, as did other Chancery cases of the 18th and 19th centuries, affirmed paternal power, by recognising testamentary guardianship as a continuation of paternal authority .

3. In matters of custody, mothers even after the death of the husband were legally inferior to testamentary guardians. Consider the situation for example, where Eyre's claims to direct the education and general upbringing of the infant Earl merited the dismissal of a tutor chosen by the mother. Moreover, his claim to be regarded as the proper authority in the choice of marriage partner was not over-turned (although the dowager's strategy of a quick and early marriage, de facto defeated his rule, even though de jure his authority remained in tact).

4. More interestingly, the case asserted a new principle, that wardship was to continue for males anyway, until majority, regardless of whether he was married or not. Female wardship however terminated on marriage (Mendes v Mendes (1748) 1 Ves. Sen. 89).

5. Finally, the case is an early example of how the 'modern' law of custody worked its way through. 'Modern' in the sense that the accent is on the nature of personal and physical care, to be offered to children, be they children in the custody of natural parents, wards to testamentary guardians, or wards of court delegated the personal authority of guardians appointed

by the High Court. Therefore, unlike the earlier conception of custody given through wardship and guardianship, which primarily regarded the person of ward as a personification of an estate which had to be protected. 'Custody' writes Bevan (1973) 'is an ambiguous term'. In its primary sense it means the right to physical care and control; it is the correlative of the duty to protect. But in its wider meaning it represents "the whole bundle of rights and powers vested in a parent or guardian" (p. 265. See also Bromley 1976; 304-311). While Eyre asked the Courts to enforce his rights to control the education and the marriage of his ward, the _character_ of the custodial relation between parent and child, guardian and ward, was manifestly shaped through disputes as to whether a child was receiving a religious upbringing (Shelley vs Westbrook (1817) 2 Jac 226), whether a child might be corrupted by association with profligate and immoral parents or guardians (Wellesley v Duke of Beaufort (1827) 2 Russ 1, and Re Besant (1879) 11 Chan. D. 508 C.A.) and, disputes about which religious affiliation children should be raised to (Hawksworth v Hawksworth (1871) 6 Ch. App 539, Andrews v Salt (1873) 8 Ch. App. 622).

Custody, that bundle of powers and rights vested in parents or guardians, ties in adults and children into a particular form of social relationship, profoundly familial. But custody constitutes the similarity of the legal forms of parenthood, guardianship and wardship. The 'bundle of rights and powers' attributed to parent, guardian and the courts with wardship jurisdiction are broadly similar (involving obligations to maintain, educate and provide moral welfare to infants and minors). An effect of this is the _transferability_ of these powers and obligations (e.g. under the doctrine of _loco parentis_) This means that other persons can stand as parents, to children who are not their own. However, because parents and guardians (and latterly foster parents, local authority institutions)

are viewed as broadly similar in the powers and obligations they are expected to exercise, it also confers on them an element of comparability, to the extent that one kind of custody can be measured against another. The transferability and comparability of custody has important implications we shall develop below.

We mentioned earlier that the more recent law on custodial relations 'accented' personal and physical care. We must emphasise that it is an accent; the earlier notion of custody working along personal care and protection of property, never entirely disappeared. The extent to which families and courts sought to protect younger family members, and by extension, control them, (and familial goods) is displayed through the use of wardship proceedings. So while courts were settling cases concerning the personal and moral welfare of children, at the same time, Chancery asserted in a series of cases throughout the 18th and 19th centuries, that marriage of wards without the consent of the court is contempt (Halsbury, Laws Vol 24, para 600; 271). Cases such as Eyre v Countess of Shaftesbury (above), Long v Elways (1729) Mos 249, Brandon v Knight (1752) 1 Dick 160, Harford v Morris (1776) 2 Hag. Con. 423, Wade v Broughton (1814) 3 Ves and B 172, reflect and encourage the strategy of making recalcitrant children wards of court to prevent unwanted marriages (singularly necessary prior to Hardwicke's 1753 Act). By this procedure, the patriarch or his testamentary appointee, remained able to assert his authority, but simultaneously, it constitutes his power, however latent, to control the marriage destinies of his children. And here we return to the principles of the common laws, where the welfare of the minor is identical to the obedience owed to the patriarch, where the 'natural' love, affection and authority of the father is the best guarantee of the child's well being.

Taken together, the common law's view of the husband's primacy in the marital relation and his statutory attribute as sole custodian and solely able to appoint testamentary guardians fundamentally excludes mothers as legal personages within the family. It is against this background that we now consider the measures resorted to in and through the equity courts to overcome manifest absurdities and injustices that common law and statute put on married women with children.

2. Equity's jurisdiction over infants

Our narrative purpose here is straightforward; to establish the partial demise of a father's common law right to the asbolute custody of his children and the development of equity's jurisdiction to intervene between parent and child. Unfortunately, we are attempting to address a field of law judges and legal commentators are prepared to leave well alone! Chambers (1842) in his discussion of the jurisdiction of the high courts of Chancery over the property and persons of infants, admits that the origin of Chancery's jurisdiction is obscure, but undoubtedly now exists. Jurists ancient and modern speak of Chancery's 'perogative power', derived from the Crown 'to interfere to protect any person within the jurisdiction' (Bromley, op.cit; 298), or its 'inherent guardianship jurisdiction' (Halsbury, Laws ... Vol 24, para 527); while at an earlier date Macpherson (1842) notes that Chancery exercises a jurisdiction over infants though where its jurisdiction came from is difficult to state and not of ancient origin (Macpherson; 95-99).

The synthesis of the decline of a father's common law status and the increasing power of equity's jurisdiction over infants is writ large over numerous cases and commentaries. In tracing out the connections between these two themes there is, in-

herently a mapping of a intra-legal struggle between the common law's and equity's image of familial relations. A complicated exercise, but worthwhile because it is revealing of:

a) the ways in which judge-made law is a creative process in spite of 'declaratory theory' (see Roshier and Jeff 1980) which asserted that judges merely 'interpreted' or 'discovered' already existing legal rules and principles.

b) an aspect of how legal rules emerge through intra-legal struggles, which receives little attention, namely in the field of family law.

c) the state asserting its claim to be the wise and supreme parent of all children.

As a guide through the thicket of technical exposition below, let us counterpose common law views of the relationship between parent and child and equity's framework of reference.

Simply put, the common law recognised the natural duty of protecting, educating and maintaining one's legitimate infants. These duties could really only be performed if a parent had custody of the child's person, a duty it put upon fathers (see Bromley op.cit; 298). Bromley adds, it should not be surprising that the correlative of duty was a right to custody, absolute even against the mother except in very rare cases (ibid).

Equity gradually acquired through the 18th and 19th centuries the power to intervene between parent and child to the extent that Chancery, while leaving untouched the duties of parents (set down in common law), circumscribed

the near-unlimited rights granted to them in common law, (Bromley; 299). The limit position in Chancery was its right to remove a child from a natural father (e.g. Shelley v Westbrook 1817). So while equity shared something of the common law's elaboration of familial relations, in respect of the father's absolute authority, its views are antithetical . On what basis then did it deconstruct the common law rights of the father and elaborate its own authority in and over family matters?

a. Pater patriae

With good reason, legal commentators note that equity has a jurisdiction over infants, but they rarely trace out its emergence. One commentator was a little more precise.

> "In the year 1696, the year before Lord Somers took the seals, is the first instance to be found of a guardian appointed by the Chancellor on petition without bill; and since that time the power has been exercised unquestioned; though not quite without dispute (Chambers 1842; 2).

The case referred to is probably Bertie v Falkland (1696) 2 Vern 342 where Lord Somers argues that

> "... there were several things which belonged to the king as pater patriae and fell, therefore under the care of the court, as infants, idiots and lunatics; and though afterwards such of them as were of profit and advantage to the king were removed to the Court of Wards by statute (12 H.8 C.1), yet upon the dissolution of that Court they came back to Chancery". (Chambers;2).

Somers' judgement here can be used to illustrate the character and history of equity's jurisdiction; we can present these summarily:

1. It is a jurisdiction derived from the Crown; not from statute, not by custom. Quite how the Crown handed over care of infants to equity is not clear.

2. It is a protective jurisdiction, applicable to those who could not defend themselves (the legal non-persons, such as idiots, lunatics and infants) and by extension, who had no-one else to protect them. Note here this does not include married women (who were under the couverture of their husband, but who in law shared much with other non-persons). Children with fathers 'naturally' had guardians.

3. The Court in 1696 assumed the power to appoint guardians; a radical departure insofar as guardianship previously had been assumed under common law rules (by nature, for nurture etc.) and by statute (testamentary guardians), thereby writing into law guardianship by Appointment of the High Court, (Stephens Vol. 3;46). This alone is sufficient evidence already of the Court moving in the direction of assuming powers which were previously construed as familial.

4. Somers' reference to Chancery in relationship to and a successor to the Court of Wards (see above) interestingly displays the Court constituting its own 'history'. A history taken up by Blackstone (Commentaries Vol. 3; 426) as an explanation of the expansion of Chancery's jurisdiction, and running through various judicial statements (Lord Eldon in Wellesley v Beaumont (2 Russ 1) to modern texts such as Bromley (1976; 298), and Halsbury (Laws Vol. 24; para 527). But in Halsbury for example, the history is of no consequence; equity's jurisdiction in matters of guardianship, wardship,

custody, parental obligations and so on is rendered as 'inherent'.

5. But contained in its rendering of its own origins, Chancery acknowledges an inherent cleavage; between the protection it extends to children 'as were of profit and advantage' (infant tenants, whose estates had to be protected, by the king as superior tenant, and later by the Court of Wards) and, the persons of all infants who had no one else to protect them.

6. In its practice, Chancery, through to 1839, looked only to the interests of infants with property, but simultaneously it asserted its more general superintending power over all infants (but declaring it had not the means of actually doing so!). Thus we find Eldon arguing:

> "In answer to an observation that the (Chancery) Court never exercised that jurisdiction unless where there was property belonging to an infant, he remarks that the question had hardly been sufficiently attended to; but that the reason that the Court did not act in such a case as that, was not from the any want of jurisdiction, but from a means to exercise it ... because it cannot take upon itself the maintenance of all children of the kingdom.'
> (Wellesley vs Beaufort (1827) 2 Russ 1, my emphasis).

So while it presents itself as the direct successor to the Court of Wards, which explains its limited practice, the jurisdiction it claims as pater patriae, as if it acted as the Sovereign would act, remains unclear and unaddressed.

7. Through the use of pater patriae equity reveals one of its unspoken conditions of existence; the political doctrine of the divine right of kings, where subjects were looked upon as though they were children of the monarch. It is precisely this doctrine, enshrined within equity principles, which provided an almost unlimited jurisdiction over those who could not protect themselves and without protectors. But, entailed in that doctrine, is a profound patriarchalism and an inherent paternalism. For it constitutes the political relationship between monarch and commoners, as Sovereign and subjects, wherein subjects are always already fundamentally subordinate to kingly power. In simple terms, father always knows best. Pater patriae is at best 'a single basis of obligation', combining 'the law of nature, Paul's Epistle to the Romans, and the patriarchalism of the Fifth Commandment (Schochet; 1975;91).

8. By assuming the mantle of pater patriae, Chancery submits all subjects to its judicial gaze and authority, not only the child and the mad. While in practice it accepted only cases concerning infants with property, it held fast to its moral authority over all infants. And in this judicial guise it was prepared to appoint guardians, exercise its power to provide suitable custody for all children, if necessary at the expense of the claims of natural guardians.

b. Parens patriae; the Courts vs. paternal power

However tenuous it claims were to stand as pater patriae, successive cases in the 18th and 19th centuries served its cause in two ways. Only rarely did counsel ever question the nature of equity's jurisdiction in matters of guardianship and custody. Moreover, as in Bertie v. Falkland, Shaftesbury v Shaftesbury (2 P Wms 102), Butler v Freeman 1756 (Ambl. 303), judges in Chancery continually asserted their assumptions of crown perogative, reinforcing and amplifying their courts jurisdiction over all minors. Here

we point to the salience of case law in Chancery, both creating and maintaining the superior claims of courts over all children and all adults to whose care they were entrusted.

The elision of pater patriae into the more recent and common usage of Chancery taking its commission from the King as parens patriae is of uncertain date. The earliest case law we can find is Wellesley v Beaufort (1827) where Lord Eldon, ruminating in the origins of Chancery jurisdiction, mentions the phrase.

The substitution is of little moment, whether parens or pater patriae (father or parent), the effect of the jurisdiction remained the same.

It cannot be argued at this point that Chancery here was striking decisive blows against the absolute right to custody that the common law bestowed on the father, in favour of the mother. It was not. Chancery case law did not establish, nor did it argue for, a mother's right - natural, legal or otherwise - to the custody of children. The only claim it established was the right of Chancery against all other guardians, and, established the ground rules for removing minors from the custody of fathers. But this was not necessarily to the benefit of mothers.

In general, fathers had to display fairly spectacular behaviour to be deemed to be 'unfitness of character and conduct' so the Court would act. Cruelty, debt, immorality (drunkeness, dissipation, criminal assault on children), lack of religious principles, 'unfitness in external circumstances' (poverty plus bad character, robbing or spending an infant's benefit), or moving out of the country (out of the jurisdiction of Chancery) were considered sufficient conditions for the Courts to interfere with the custodial rights

of the father (Simpson 1875; 138-145). Where these conditions were met, Chancery could declare its interest (providing the infant had substantial means), and make the child a ward of court. It may allow a child to stay in the care and control of a mother, but it was not bound to do so and mothers had no necessary prior right over other guardians, albeit in the absence of either testamentary or court appointed guardians equity continued to regard her as 'guardian for nurture' until the infant reached the age of 14.

The problem for equity, and problems faced by married women seeking care and control of their children, and the limits of action equity courts and married women encountered, arose still from the actions that fathers had through the common law courts. He could apply for a writ of _habeas corpus_ for the return of his children to his custody, and in spite of drunkenness, criminal behaviour or adulterous behaviour, the common law courts (regarding children as a father's possession) would issue writs for the return of 'his' children as it would for any other 'thing' (see Pettit 1957; 60-64). And the common law's principle of the primacy of paternal right was reproduced to a significant extent in Chancery, thus the fairly outrageous conditions which had to be fulfilled before those courts would interfere with paternal custodial powers.

Yet the common law had, by the logic of its own rules concerning the discretion of infants, a seemingly more liberal side. Boys and girls over the age of discretion (fixed at 14 for boys, 16 for girls - these ages being absolute, and not being subject to tests of competence) were actually able to contest their father's writs of _habeas corpus_ (Pettit op.cit. 61). _Habeas corpus_ was a general writ against illegal restraint; variously it could be used by individuals against

the state, but equally it was a tool of familial power politics. Two illustrative examples of its operation are R. v Clarkson (1721) 1 Strange K.B. and R. v Delaval (1763) 3 Burr 14.

In R. v Clarkson, the King's Bench considered an application by one Dibley, that the guardians of a Mrs. Turberville (a woman of fortune) return Mrs. Turberville to him; he alleges a marriage between himself and the young woman (Mrs. Turberville apparently was still at school). The Court asked Mrs. Turberville did she want to go with Dibley, to which she replied no. The Court ruled that it would not order her to do so; their interest lay in whether she was being illegally restrained by her guardians. As a further measure, they ordered tipstaffs to guard her, but at the same time, informed the guardians that she may go where she pleases, as they have no right to restrain her beyond her will.

R. v Delaval concerned a young woman aged 18, brought to court on writ of habeas corpus by her father. At 15, the said young woman was indentured to a Mr. Bates, to learn music. By the age of 17, she had become quite successful earning some income for Bates. In that year she met and was seduced by Sir Francis Delaval, who later indentured her as an apprentice, again to learn music. The father alleged, and the court agreed, that the master-servant relationship hid the real nature of the association and that the young woman was probably Delaval's mistress. The court ruled however that in the case of habeas corpus each application had to be taken on its merits; the young woman had shown no wish to leave, she was not being illegally restrained and so the father's application for custody fell.

While there are numerous sub-texts in each of these cases, they stand in striking contrast to the nature of equity's jurisdiction. Whereas Chancery generally sustained the

claims of parents and guardians over the care and control of infants, up to the age of majority (its protective side of its jurisdiction), common law courts granted considerable autonomy, displayed above, to infants merely over the age of discretion. While equity generally considered the material aspects of the child's circumstances (did the infant have property) at common law, this was not a condition the courts had to countenance. However, in practice, for an infant autonomously to go before the law, we must assume that they have the material and symbolic means of doing so, and at the same time had a guardian ad litem to sue their cause. Not, we should add, conditions which would ensure wide applicability! More generally, beyond the age of discretion, the common law appears to build into the custodial relationship an element of consent; where infants withdrew it or where it was unreasonably suspended such that freedom of movement was impaired, then the courts would entertain a plea of illegal restraint. As far as we know, there is no evidence of a flood of writs by children charging parents with illegal restraint however, then or now!

Within the manifest tensions between common law and equity's views of the custodial relation, the married woman remained still a legal non-entity. Nothing accrued to her from the marital relation vis a vis her children. Her motherhood of itself only generated her status as guardian for nurture, a status lesser in standing than testamentary, paternally appointed or court appointed guardians. As against her husband, her separate claims to custody were non-existent in marriage and only on par with other guardians, when separated and less than paternally appointed guardians, as a widow.

The decisive shift towards establishing a married woman's right to the custody of her children (as opposed to merely elaborating Chancery's claim to curtail the custodial powers of fathers) came by way of legislative initiative.

3. Statute law and family relations

The Infants Custody Act 1839 (2 and 3 Vict. 54) broke with the traditional view of common law and equity courts, where any alteration to paternal power was tantamount to an attack on the institution of the family. On the altar of 'the family' the courts were time and again prepared to sacrifice the rights of mothers (Pinchbeck and Hewitt; II; 374).

It is unfashionable to view pieces of legislation as having particular 'authors', personalising history as it were, but the social history of the Infants Custody Act prominently features the activities of Mrs. Caroline Norton (see Holcombe 1983; 50-58: Pinchbeck and Hewitt II; 368-378) and her parliamentary ally Serjeant Thomas Noon Talfourd.

Mrs. Norton was the grand daughter of Richard Brinsley Sheridan, dramatist and Whig statesman. She and her two sisters were known as the 'three Graces' of London society in the mid and late 1820's, but her gifts as hostess and socialite apart, she established herself as poet, and dramatist and edited several fashionable women's journals and gift annuals. She married Norton in 1827, the heir of Lord Grantley. Norton had recently been elected to the House of Commons, and a lawyer by training.He had however little income though great expectations (Holcombe op.cit; 51), thus Mrs. Norton's continued literary productivity after their marriage. The marriage did not go well; her literary and salon circle standing in contrast to Norton and his associates.

In 1836 Norton abducted their three small sons and hid them away; he appropriated all her personal effects (jewellery etc.) which were legally hers, and initiated an action for 'criminal conversation' against Lord Melbourne (then Prime Minister), thus bringing an action against him for adultery with Mrs. Norton.

The case against Melbourne was ignominously thrown out of court, but it left Mrs. Norton in 'no-woman's land' (Holcombe; 53), separated with no recourse to divorce and without rights of access to her children.

Her riposte was a pamphlet 'The Natural Claim of a Mother to the Custody of Her Children as Affected by the Common Law Right of the Father', which she published in 1837. This pamphlet, the circumstances of the case itself (society hostess, abduction of children), other anonymously published pamphlets, and the support of two legal friends, Lord Lyndhurst (a former Lord Chancellor) and Talfourd (a common lawyer) made the Norton affair a cause celebre.

Talfourd was an unlikely ally on the face of it and an unlikely sponsor of two bills supporting a married woman's right to access and to custody of her children. Earlier in his career he had acted as counsel for Mr. Greenhill (see above) in a case which confirmed a father's claim to be sole custodian of children in marriage.

Reaction to Mrs. Norton's pamphlet and her letters to the newspapers, and the debates on the bills concerning infant custody were acrimonious. While the opposition invoked the possible dangers to the well-being of children likely to arise from contested custody, Pinchbeck and Hewitt perceptively note a sub-text to the argument. What the opposition most feared was the effect that proposed custody arrangements might have on the <u>stability of marriage</u> (p. 375). A tacit recognition that paternal custody was a means of exercising emotional and moral blackmail over married women; leave me and you will never see the children again. Talfourd's bills were thus represented as a subtle means of easing the process of husbands and wives separating, rather than a measure to ease the distress and legal plight of married women. For those advocating the passage of infant custody legislation

their strongest suit lay in the comparison between mothers of illegitimate children who were allowed to retain custody and married women who had <u>no</u> claim whatsoever.

The nature of the compromise between both positions is inherent in the provisions of the 1839 Act. Most notable of the provisions were:

a. Where children were in the care and control of a father, his delegated or testamentary guardian, the mother could apply through Chancery for some relief, if the child was under the age of seven, but the Court's judgement was to be discretionary.

b. Mothers could apply to the same Court for rights of access at specified times.

c. <u>But</u> no woman was to benefit from this legislation if she was guilty of adultery, proved either in the ecclesiastical courts or at common law (where the offence was 'criminal conversation').

In effect, the provisions offer only minimal custodial rights to mothers. Pinchbeck and Hewitt note: 'Under the Act the practice of the courts was to decide if possible in favour of paternal right rather than against it, and to exercise discretion against the mother even as to young children' (II;376). There had to be stout evidence against the father before the courts granted even the minimal privileges allowed for under the Act.

More interestingly, we find a particular construction of motherhood embedded within these provisions. Firstly a mother's nurturing role ends at seven. Mothers therefore have a useful role in the upbringing of babes and very young children, which ends somehow when the serious business of life begins, at the ecclesiastical age of reason. Mother's

place is construed here predominantly as child-minder, providing day care for nursing and developing children but with no real responsibilities when children encounter the world as rational beings. Secondly, the punitive provisions of the Act, manifest in the limitations it places on adulterous women, begin to forge the ideology of 'the fit mother' (Smart 1982;134). By statute, wives had not only to make a strong case against improvident or cruel husbands but themselves be beyond moral repute, simply to go before the courts, let alone have any guarantee of custody. What is beginning to emerge, through case law in Chancery setting limits to the kind of behaviour patriarchs could indulge in before the court intercedes and remove children from the governance of the father, and, through statute in the case of the adulterous married woman, is the moralisation and regulation by the courts of the custodial relationship between each spouse and their children. Effectively, case law and statute are elaborating a custodial relation between parent and child, which is somehow to be untainted and non-polluting. Though we are not at a point in time yet where either the courts or parliament begin to establish a coherent doctrine about 'the interests of the child', nevertheless we can see the glimmerings of such a doctrine exhibited through the court's concerns with the moral rectitude of a child's parents. Parenthood per se was no longer a simply natural duty, but a moral relationship as well, over which the state, through the courts had now the power to arbitrate.

It is difficult to say at this point how extensive the general superintending power of Chancery was after the 1839 Act. Provisionally, we can say that all married women had obtained some relief from the absolute rights that fathers had over their children. In practice, such cases had to go before Chancery, an extremely expensive form of proceeding. We know of no case where legal parties were not of substantial

financial means, as our previous citations indicate.
In effect, we are mapping the legal regulation of aristocratic and bourgeois families, rather than a straight forward imposition of the bourgeois norms on the social formation in general.

However, if we see the Infant Custody Act, in a continuum with the Poor Laws Act of 1834 (including the Bastardy clauses), the Factory Acts, and the Infant Felons Act of 1840 (providing Chancery with the powers to remove any infant out of the control of his parent and assign custody elsewhere - usually to a philanthropic organisation) then we begin to appreciate the extent to which the state, through the judiciary, poor law officers, magistrates, factory inspectors and philanthropic societies, was beginning to intervene in and regulate parent-child relations.

Of the 1839 Act we can make the following summary points:

1. The Act did not fundamentally disturb a father's prior claim to be the sole custodian of his children in marriage; the marital relation conferred on him that sole custody. To this extent the old common law rules pertained.

2. The statute granted Chancery discretionary powers to award custody to married women, under certain conditions (the age of the child, moral purity) which was a radical break from past practice, where a married woman had no formal claim at all, against the husband or his appointed guardians. Nevertheless, mothers had no superior rights over appointed guardians, they had to apply for relief and be subject to the morality test.

3. Chancery's jurisdiction over families in general and in matters of parent-child relationships was considerably extended, at the expense of common law's dogged deference to paternal rights in matters of custody.

4. The Act, however, extended Chancery's considerable power (established in case law, against fathers) to award custody on the basis of the moral rectitude of the parents bringing a case to court.

5. By extension, though children had no say in custody proceedings, and though the courts and legislature had not yet developed any coherent doctrine concerning 'the welfare' or 'best interests' of the child, clearly such a doctrine was implied in the qualification of a parent's 'natural' right to custody through the imposition of a test of moral behaviour. For, what case law (in the case of fathers) and statute (in the case of mothers) were beginning to establish was the notion of 'the fit parent'.

The last point is of significance, for other commentators have ignored the case law which preceded the Infant Custody Act and have somewhat overemphasised and misread its significance. Two illustrative examples. Pinchbeck and Hewitt note that 'the innovation; the absolute right of the father was now subject to the discretionary power of the judge' (II; 376). Well, the Act certainly extended Chancery judges' discretion, but at the same time from the middle of the 18th century, those judges had elaborated the conditions which were sufficient for them to deny a father his custodial rights (broadly, 'gross moral turpitude '). Secondly, they claim the Act was 'the first statutory intervention in the common law rights of the father' (ibid). Not quite; the Elizabethan vagrancy laws (mentioned previously) had precisely the same effect, but in cases where fathers could not afford to support

his children. Whereas Pinchbeck and Hewitt have tended to overemphasise the Act's significance, Carol Smart's illuminating essays on family law (1981, 1982, 1984) tend to interpret the Act in terms of the law's process of 'creating greater penalties for the so-called unfit mother' without acknowledging the legal process (through case law) setting (albeit less stringent) limits to a father's conduct towards his children. Indeed an element in the development of parens patriae concerned Chancery's claim to assert its authority over all parents, not just mothers. As we have suggested, Chancery asserted its own interest in all children, independently of all fathers and all mothers, not on behalf of one or the other, and this meant establishing some boundaries to any father's claim to custody. In the last analysis, the Infant Custody Act was probably more beneficial to the separate interests of Chancery judges, than it was to mothers involved in cases of contested custody. For the Act gave those judges considerably more formal discretionary powers; powers which could be used not only against mothers, but also against fathers. Whereas the doctrine of parens patriae has its roots in monarchical power, the statute added to Chancery's already considerable claim to be the moral entrepreneur of family law, but in this case its jurisdiction was derived from parliament. In the long term, the Act also constitutes a considerable shift away from the ecclesiastical jurisdiction over family matters and is part of the historical process of secularising the institution of the family (Leonard 1978).

So far we have set out the social process by which the courts establish a superintending relationship with the family, and the means by which the 'private sphere' of familial relations becomes a concern of the public sphere of the state, through the judicial apparatus. To what extent then were social relations within families modified or transformed by case law and statute circa 1839? Was family form significantly altered by the legal process?

We would have to say no. The legal doctrines of couverture the rights and obligations arising out of the marital relations, the difficulty of dissolving marriage, the father's continued place as prime custodian of children in the marriage and his new unlimited powers to appoint guardians whose claim to custody was equivalent and no less than that of natural mothers, and finally the non-existence (legally) of minors in matters affecting the family, broadly indicate how intact the 'ancien regime' remained.

Rather what case law and statute created was a relationship between the judiciary (specifically Chancery) and with different members of the family separately, not with the family as a unit. A seemingly paradoxical statement, but if we consider the family not as a unit, but as an ensemble of relationships, then it is possible to think through how the law might create and sustain role-models or idealised sets of attributes and characteristics for each family member, which together constitute the legal form of the family, and in particular what is to constitute the most adequate forms of bringing up baby.

Both common law and equity jurisdiction, and the 1839 statute begin with the 'natural' authority of the father and his 'natural' obligation to provide for his descendants, infants or wife. Apart from his breadwinning role, Chancery gradually erected conditions which, taken together, constitute fatherhood as a position of moral rectitude and leadership. Simultaneously, however, common law considered his dependents primarily as 'his' possessions which were 'his' in spite of any immorality on his part, and whose possession could be protected by habeas corpus. The guarantee of the welfare of wives and infants was tantamount to remaining under the

father's couverture and custody, these being obligations (though virtually non-enforceable) arising out of the marital relation. What equity and statute slowly established for married women was a status combining sexual purity as an index of 'the fit mother' and a definition of motherhood which is socially useful until a child reaches the age of seven. In matters of religious upbringing, choice of educational provision, marriage and the assumption of familial goods and property, however, within the marriage these were solely the domain of the father. In separation and after his death, either his or court appointed guardians had as much legal claim to decide on these matters as married women. The alloted destiny of children, at least in law, was always to be in custody, but with considerable common law rights, on reaching the age of discretion, to contest whose custody. Where such infants were in the care and control of their fathers, it was unlikely that even common law courts would overturn paternal custodial claims[2]. The ensemble of relationships constituting the family in law was fundamentally not a system of equals, but a system of hierarchically ordered spaces, against which individuals in specific situations and circumstances, and providing they had the material and symbolic means of doing so, might seek to transform or modify. However, the courts retained the means, through a variety of writs (at common law) and petitions (to Chancery), to ensure that everyone could be returned to, and restrained in, their proper place.

CHAPTER THREE: MOTHERS AND CHILDREN FIRST? 1839-1886

a. Families and Welfare

The fundamental principle in modern law, in cases concerning the custody, care and upbringing of children, demands that the courts regard the 'welfare of the child as the first and paramount consideration' (Guardianship of Infants Act 1925, Guardianship of Minors Act 1971, Bromley (1976); 301). In disputes, between parents, between parents and local authorities, and in cases brought before juvenile courts, this principle obtains .

No such overarching principle was visible in law prior to 1839, and between 1839 and the passing of the Guardianship of Minors Act in 1886, the special and separate needs of children (necessarily embodied in the principle 'the welfare of the child') was only gradually and partially established in family law. If we move away from the sphere of family law however, we find from the early 19th century onwards, substantial legislative provision directly affecting the welfare of children. The Factory Acts of 1802, and 1833 specifically limited the hours of work for children under 13. The Education Act of 1870 introduced a general system of public education for children (O. Stone 1977;15).

The public concern for the welfare of children, embodied in the public financing of the factory inspectorate, the requirement that employers provide some form of schooling for child labourers, the general provision of elementary schooling (with the later requirement that attendance was to be compulsory), together with the early attempts to provide (at local authority level) school meals, posit the subject of the child as a person with different needs and interests from that of the adult. The content of 'welfare' specifically provides for the protection of children (from exploitation in capitalist enterprises), the education of growing and developing persons, and, provides for the means of life (food, clothing and shelter) for the victims of poverty (either through the Poor Laws or through the school meals services). The obverse of the child,

is the adult, who has the obligation to provide for himself or herself, and for any familial dependants. The content of 'welfare' at the level of public provision is the mirror image of the obligations that parents, but especially fathers, have in family law. The punitive and humiliating conditions attached to the public and private relief of poverty (through the Poor Laws of 1834, for example, and the requirement of the workhouse test) indicate how the welfare of children was seen in terms of personal, individual and familial provision. Child care was predominantly and primarily an obligation placed upon individual family units, and within that unit, it was a father's natural duty to provide for his offspring. The other side of that parental relationship, again enshrined in family law, lay in the authority and control exercised by fathers over the life chances of their children.

There is no easy fit, however, between general and publically financed attempts to provide for the welfare of children and the legal conception of the 'welfare of the child', in family law. Whereas as the former conceives the child in terms of vulnerability, a subject in need of care and protection, a victim of circumstances not of their own making, the legal process was decidedly less concerned about the special qualities of children. The discursive order of the courts, and in the debates surrounding the 1839 Act, assume that the moral and physical welfare of children rested upon the natural duties, obligation and authority of the father [3]. So long as his rights and duties were sustained then the welfare of children was entirely unproblematic. The welfare of the child was therefore a secondary consideration, because it was founded entirely within the natural obligations and authority of the father. In law, *his* perceptions of his children's needs and interests, *his* direction of their education, *his* provision of familial goods, *his* standards of morality and *his* imposition of discipline and punishment were the important matters. As subjects of his authority, therefore, there was no real need for children to express their wishes on any of these matters. In family law, they were silent subjects, as

long as they remained part of their fathers' households.

Any attempt, therefore, to elaborate 'the welfare of the child' as the principle on which custody, care or control of children was to be determined, inherently involves the derogation of father-right and paternal power. For such a principle necessarily dissolves the identity of interest between the father's natural rights and duties and the welfare of his children, because it concedes that the moral and physical welfare of children is a greater importance than the father's rights and obligations. Furthermore, it means that persons and agencies, other than the father, (mothers, courts, welfare workers, teachers) are important to, and therefore have some claim to speak for, children, in the interests of the welfare of the child. Finally of course, 'the welfare of the child' shifts children to centre stage, as their interests, needs or benefits become the focus of attention, thereby creating children as the privileged subjects in custody proceedings.

From the time of the Custody of Infants Act 1839, through to the Guardianship of Infants Act, the principle of 'automatic father-right' (Brophy and Smart) was never entirely extinguished; indeed parental rights were still considered to be 'exclusively paternal rights' (Stone op.cit;13). There is no specific mention of the 'welfare of children' in family law legislation until the 1886 Act. When we turn to case law, however, we find a very different picture. In case law, we find Chancery (and after the Judicature Acts of 1873-75) High Judges, working with and managing the considerable tensions between paternal powers on the one hand, and the mutually exclusive principle of 'the interests of the child' on the other (see Re. Halliday (1841) 17 Jur 56, R v Gyngall (1883) 24 Ch. D. 317). We shall discuss these and other cases below, but firstly we need to consider the changing social context underpinning the observable

shifts in case law concerning the custody, care and upbringing of children. Why, in the mid to late 19th century did the custody of children become important? What were the conditions appropriate to the undermining of the empire of the father in family law?

a) Some aspects we have already discussed and need not elaborate further. For example, the doctrine of parens patriae appropriated by Chancery asserted that all infants fell within the jurisdiction of Chancery. Therefore, Chancery judges were able (though following common law, rarely did) to place definite limits to the rights of fatherhood. By statute (the 1839), mothers were given limited rights to the care and control of infants under the age of seven. By these means, fatherhood had become slightly more conditional than the status celebrated in and through common law. Nevertheless, statute and equity continued to buttress the father's position as the prime authority, moral arbiter and care-giver within indiviual families. Simultaneously though, Chancery effectively brought questions of custody and care infants into its jurisdiction and established its right to arbitrate in these matters, basing its disposition on the moral rectitude of parents, though not directly alluding to the welfare of the child.

b) Questions of custody directly connects with the development of the modern bureaucratic state, a line of reasoning usefully developed by Leonard (1978) and Smart (1982). From the 1830's (Poor Laws 1834, Registration of Births, Deaths and Marriages 1836), new state agencies were increasingly concerned precisely with the question, who belonged to what family?

The requirement that all births, marriages and deaths were to be registered, inherently involves a sharper distinction between 'official' marriages, legitimate children and other forms of cohabitation and other 'unofficial' family groupings. What was

to constitute 'the family' (the marital relationship and its legitimate children) is constituted through the process of bureaucratic recording, not by the simple fact of people living together raising children in households customarily identified as discrete family units. Whereas the aristocracy had always been concerned with questions of valid marriage and legitimate children because these were important issues in the whole system of inheritance, marriage, legitimacy (the general question of lineal consanguinity) and the question of 'the obligation to maintain', is brought sharply into focus, for the mass of the population and for state agencies in and through the operation of the Poor Laws (Smart op.cit; 131). Poor Law relief was available as a last resort; primary responsibility for welfare of family members was thrust upon any identifiable 'liable relative'.

What emerges is a complex interweaving of the legally designated obligations arising out of 'custody', the identification of children being the responsibility of definite parents, and, the obligation of parents to maintain their children if they wanted them to be kept away from the workhouse. The family relations of the common law, the registration of marriages, births and deaths, and the punitive provisions of the Poor Laws 1834 combined to produce what Finer and McGregor (1974) called 'the third system of family law'. On their view,

> "It comprised the imposition of support obligations upon relatives; the denial or subordination of parental rights of control, and custody of children and the determination of their education or occupational training; as well as the general regulation of familial relationships" (112).

Finer and McGregor continue:

> "Thus was established (by the Poor Laws) a national system by which the public supported those who were unable to support themselves but sought reimbursement by imposing a legal liability upon financially able relatives". (p. 113).

The 'liable relatives' were specified by statute but the required support was left to the discretion of magistrates. In the case of bastard children, the liability was the concern of both the mother and the putative father.

Finer and McGregor speak of family law having three jurisdictions; a) the High Court (dealt with extensively above), b) the magistrates courts (concerned principally with dispositions of maintenance) and c) the Poor Law as family law (loo-112). Case law reported here primarily concerned the well-to-do, able to afford the proceedings available in Chancery and High Court (post 1875). The magistrates courts were of considerable importance pre-1834, when mothers of bastard children could go before a magistrate to charge a putative father for the upkeep of his bastard child (Finer and McGregor; 116). Proceedings there were weighted in the mother's favour; only her sworn statement was sufficient for magistrates to levy a fine on the named father. Post-1834, actions for affiliation were transferred to the Quarter Sessions, heard before High Court judges, and were considerably less generous, procedurally, to mothers of bastard children, for putative fathers were able to contest her sworn statements (Anna Clarke, pers. com. 31/8/80, Finer and McGregor;116). Fathers, however, could now be failed for non-payment of maintenance, however, poor law guardians had difficulty in enforcing maintenance payments, leaving unmarried mothers as a charge on the parish. The magistrates' jurisdiction over family matters became of

real significance only after 1878, (when mothers were empowered to apply for the custody of children)[4] and after 1925, when maintenance charges arising out of divorce could be dealt with by those courts; where women could claim maintenance for each child under 16, up to the amount of 10 shillings (Finer and McGregor; 100-112). It is the coercive nature of the 'third system', the Poor Law as family law, which is more directly of concern here, for here we find a substantial rewriting of parent-child relations by the state.

In principle, the 1834 Poor Law abolished all forms of assistance for able-bodied paupers and their families in their own homes and required them to be given relief in a workhouse. It is difficult for us now to conceive one social site generating quite the fear and loathing that the workhouse achieved for some 100 years. It was a punitive institution in character and effect, and it is as well to remind ourselves of its principles of operation. Though practically it directly affected only its inmates, the fear of being sent to the workhouse had a hegemonic effect far beyond the population who had to endure its regime. The workhouse regime worked on the following principles:

1. On the 'less eligibility principle', it imposed severely deterrent conditions, ensuring for example, standards of living below those endured by the humblest working cottager and his family.

2. It involved the loss of civic rights.

3. It entailed the separation of spouses, and the separation of parents from children. Young children were allowed to stay with their mother in a wing away from fathers.

4. The stigma of pauperism was deliberately imposed; being in a workhouse was sufficient to be labelled 'pauper'.

5. A separate building would be assigned to each class of pauper so that (like the penitentiary) each would receive appropriate treatment.

6. The education and training of children was to be directed by the wardens and Poor Law guardians.

(See Finer and McGregor; 114-116, Pinchbeck and Hewitt II, op. cit.; Chapter XVII).

It was a regime as much geared to educating inmates and the population beyond its walls as to the causes of poverty (indolence, dissipation) as it was to dispensing the means of life to those unfortunate enough to be the object of its attentions.

The procedures of classification, separation and individuation precisely locate the causes of poverty and suffering at the level of the individual victim, rather than at the level of the labour market.

Once families were dependent upon national assistance, parental rights and duties arising out of the common law tradition, especially the right to custody, more or less entirely disappeared. Paupers were the limit case of the 'unfit parent'; care and control of their children, and the control and direction of their children's education and training passed into the hands of the Poor Law guardians. Once in the punitive domain of the workhouse system, the parent-child relationship, so sacred and 'natural' at common law and Chancery, was broken apart. In these circumstances, the welfare of the child followed not from the natural obligations owed to it by its parents, but precisely the opposite.

Their welfare was to be secured by the workhouse regime of discipline, education and forced apprenticeship, carried out by persons other than the 'immiserated', 'indolent', 'pauper' parents.

The orientation of the workhouse regime with regard to children, was to bring them up in a mode quite unlike the upbringing offered to them by their parents. Poor Law Boards were obsessively concerned with breaking the cycle of pauperism and the evils of delinquency said to be part and parcel of it. The 1861 Report of the Royal Commission on Education (1st Report Vol I) held,

> "that the evidence they had taken had established the following propositions.
>
> 1. That pauperism is hereditary, and that the children born and bred as members of that class furnish the great mass of the pauper and criminal population.
>
> 2. That the best prospect of a permanent diminution of pauperism and crime is to be found in the proper education of such children."
>
> (quoted in W. Chance (1897) Children Under the Poor Law; 21-22).

Education and moral training were the antidotes to the regeneration of pauperism, as prescribed by the Poor Law authorities. The Orders and Regulations issued by the Commissioners in 1835 for the management of workhouses called for the provision of schoolmasters and mistresses

> "who were to instruct the boys and girls for three of the working hours at least every day, in reading, writing and in the principles of Christian religion, and other such instruction ... as might train them to habits of usefulness, industry and virtue." (quoted in Chance (1897); 4).

Aside from the pathological view of working class and pauper family habits and practices, these reports present the imagery of the 'normal' bourgeois family routinely at work. Where education, moral training and the habits of industry were absent, then there could be no ordinary family life. In these circumstances, children were the objects of neglect and therefore it was fit and proper for state agents to provide for the welfare of children, to the extent that they became the custodians.

What is absent from the Poor Law view of children is any sentimentality or affection. Their 'welfare' was conceived not in personal terms, with children being regarded as affective <u>individuals</u> needing emotional support and comfort, but rather as a <u>population</u> in danger of moral pollution, and, dangerous because they were potentially 'the rising generation' of paupers and criminals. Indeed, the Royal Commission of Education in 1861 was not entirely happy about the workhouse precisely because 'the children contained in them learn from infancy to regard the workhouses as their homes, and associate with grown up paupers whose influence destroys their moral character and prevents the growth of a spirit of independence', (quoted in Chance op.cit; 21). The Poor Law's child, the potential pauper who has to be trained out of its 'hereditary' circumstance is something like a vessel whose contents have to be changed. There is a considerable homology between this view and that of the passive recipient of fatherly authority set out in the High Court case law.

c) The social process of secularising family law continued with the passing of the Matrimonial Causes Act 1857. This Act for the first time in English law, permitted divorce by judicial process in civil courts (limited in the first place to the newly established Court of Divorce and Matrimonial Causes). The Divorce Act empowered judges to make dispositions concerning custody of children, thus breaching further the common law's traditional defence of automatic father-right (see Graveson and Crane (1957), Graveson (1957), Stone (1977), Bromley (1976), Holcombe (1983) Chap. 5).

While the Divorce Act ended the ecclesiastical jurisdiction over the termination of marriage, the Act retained in structure much of the canon's law procedure and modes of disposition. Grounds for divorce were limited; to adultery (or in the case of a woman seeking to divorce her husband, proof of his 'aggravated' adultery, which proof of his adultery plus proof of some other offence such as bigamy, incest or physical cruelty), or if a husband was guilty of rape, sodomy or bestiality, and, desertion for two years without cause. The Act also retained a two-tier structure of termination; the old <u>a vinculo matrimonii</u> became absolute divorce, while the <u>divorce a mensa a thoro</u> became the new decree of judicial separation (Holcombe op.cit.; 98-99).

Under the 1857 Divorce Act, the judicial procedure was essentially punitive; it required a guilty party. Where guilt was proved, punishments followed, firstly in financial terms; the property of either spouse (if a wife had brought property into the marriage) could be appropriated for the benefit of the non-guilty partner. Secondly, the Divorce Court was empowered to remove children from the custody of either parent, or both (by placing children under the protection of Chancery). Like the provisions of the Poor Laws, the 'unfit' guilty parent was to be punished by the loss of custodial rights over children of the marriage.

While the Act made divorce more easily obtainable and probably somewhat cheaper than divorce by Act of Parliament (estimated to cost between £600-800 in the 1850's) because it was still the equivalent of a High Court action, the expense made it an impossible proposition for the majority of the population. As Dicey noted, 'The Divorce Act of 1857 was a triumph of individual liberalism. It did away with the iniquity of a law which theoretically prohibited divorce, but in reality conceded to the rich a right denied to the poor' (quoted in Graveson 1957;11). One reason why the cost of divorce was kept artificially high, by assigning the jurisdiction to the High Court, was the fear that cheap divorce would encourage immorality and the breakdown of marriage and family life.

Nor was the Act equitable in the way it provided for men and women who wanted to end a marriage. The married woman had to prove 'aggravated adultery' or her husband's sexual perversity before she could petition for absolute divorce. Adultery alone by the husband, was grounds only for judicial separation. Where this obtained, to all intents and purposes, the couple were regarded as still married so the husband's common law rights to property of the marriage still held. Only after absolute divorce was the woman treated as feme sole in matters of property rights and contract. A husband could petition for absolute divorce on the grounds of his wife's adultery alone.

It also made a considerable difference to the married woman and the maintenance she received as to whether the married couple were granted judicial separation or absolute divorce. In the first case, a wife received alimony, usually set at one third of the husband's income, but this could be varied from year to year according to changing need. The divorced wife, however, received maintenance, determined by the court

considering the amount (if any) of property the wife took into the marriage, the husband's ability to pay, and the conduct of partners during the marriage. Built in, of course, is the test of the good wife. In practice, the one third rule seems to have been applied, but, it was a sum fixed on a once and for all basis; the amount could not later be varied (Holcombe, op.cit.; 100-101). Following ecclesiastical practice, the adulterous wife received no alimony, and while alimony was a personal claim against the husband, maintenance was a claim against property set aside for the wife's use, over which judges could exercise some discretion in the amount and the frequency with which the income was disbursed. Finally, the Act retained the old principle of allowing the husband to sue his wife's lover, the damages collected being used to pay maintenance to the wife and contributing to the upkeep of children. Wives had no such action against adultresses.

Much as the operation of parens patriae in Chancery, and the punitive provisions of the Poor Laws, the wide discretion of judges in matters of alimony, maintenance and custody, in the Divorce courts, made the parent-child relation increasingly permeable to judicial and administrative direction and regulation. The private sphere of the family, 'the little commonwealth' of familial self-government set out in common law increasingly became the focus of judicial and administrative sanction. Basing the disposition of maintenance and custody on the behaviour of couples during marriage, at divorce, extends the principle of 'good' parenting as claim to retain the custody of children. It was no longer sufficient for parents merely to be natural parents but they had to be fit parents.

Separately and together, the High Court, Poor Law and Divorce Court jurisdictions are concerned primarily with the moral conduct of parents. The custodial relation of parent to child became part of what Smart calls the 'punitive' mode of family

law (Smart 1982;131). The loss, suspension or the supervision of custodial rights became part of a disciplinary technique which evolved as the state more sharply defined what was to constitute a family and delineated more clearly the attributes, rights and obligations of individual members within it. The tactical relief, offered on the one hand, to married women seeking to leave their husbands but wishing to retain the custody of their children, and the relief offered to paupers through the Poor Law system, were benefits obtained at the expense of wider judicial and adminstrative powers to inspect the internal relationships of such families and persons as sought relief. Retaining the custody of children shifted away from a natural right to a reward for good behaviour.

We seek in vain statements concerning the necessity of a stable home background, the special care that only mothers can provide, the necessity of a personally nurturent and emotionally warm family environment - the modern discourse of child care. The welfare of the child was assimilated within, and made identical with, the morally upright parent. The principle of the distribution of child custody was as a reward to the least guilty party, not as is now the case, a disposition based upon an assessment of the situation which will be of most benefit to the special needs and interests of the child.

Such was the situation in statute law until 1886. Case Law in Chancery, however, from the 1840's on, did begin to elaborate and work with a limited conception of 'the welfare of the child', and it is to this process we now turn.

b. Chancery and 'the Welfare of the Child'.

To illustrate the character and singularity of the discourse of case law in Chancery, let us begin with two cases, separated by some 40 years.

In Re Halliday, 17 Jur 56, Sir George Turner made the following plea before the Court.

> "When (the Custody of Infants Act) came into operation it was undoubtedly the law of this country that the father is entitled to the sole custody of his infant child, controllable only by this Court in cases of gross misconduct. With this right, the Act does not as I understand it, interfere, so far as to have destroyed the right, but it introduces new elements and considerations under which that right is to be exercised. The Act proceeds upon three grounds. First it assumes and proceeds upon the existence of paternal right. Secondly, it connects the paternal right with marital duty as the condition of recognising the paternal right. Thirdly, <u>the Act regards to the interest of the child</u>, for on no other grounds can I account for the distinction taken between cases of children above and under seven years of age, it being perfectly obvious that the comfort of the mother was as much affected whether the child were over or under seven years of age" (my emphasis).

In Re Agar-Ellis 24 Ch. D. 317 C.A. (1883) Cotton L.J. in his summing up recorded:

> "This Court holds this principle that when, by birth, a child is subject to a father, it is for the <u>general interest of families, and for the general interest of children, and really for the interest of the particular infant</u>, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child (p. 334). (my emphasis).

What is evident here is the extent to which the Courts still asserted the primacy of the father as the proper custodian of his children. But what is also becoming apparent, apart from making his custody conditional, is that the courts were beginning to consider the interests of children as a separate issue. Partly, this arose from the changing conception of parens patriae.

Lord Cottenham speaking to the Custody of Infants Bill (1839) held that the Court of Chancery has a general jurisdiction over the property of infants, and where the infant has property, it exercises jurisdiction over the infant (Macpherson 1842; 101). Chancery Courts thus continued a customary separation between the guardianship of property and the guardianship over the person. The child had a case to plead only as a bearer of property; those without property were outside parens patriae. This is reaffirmed by Cotton L.J. in Re Agar-Ellis (1883) 24 Ch. D. 317).

> "The Court does not exercise its jurisdiction except when either there is money paid into court under the Trustees Relief Act, and for this purpose £100 is held sufficient, or a suit instituted to administer trusts of money on the infant, not because the jurisdiction is not there but because the Court will not interfere as regards the Custody and tuition, where it has not the means of providing them".

But as the Chancery Court constituted parens patriae as applicable only to those with sufficient wherewithal to provide for their own subsistence, maintenance and tuition (i.e. child heirs), the discourse was simultaneously being decomposed. Cottenham (1847) in Re Spence 16 LJ (Ch (NS) 309 recants his earlier position (see above) declaring:

> "The cases in which the Court interferes on behalf of infants are not confined to those in which there is property. The Court interferes for the protection of infants qua infants by the virtue of the prerogative which belongs to the Crown as parens patriae"
> (my emphasis).

Thus Cottenham in redefining the Court's responsibilities effectively reconstructs the doctrine of parens patriae, and the court's supreme parentage over all infants. Cottenham's statements though must be seen in a much broader transformation of the Chancery's court relation with the family.

Chancery's equitable jurisdiction in the second half of the 19th century was seen to offer some advantages to the litigants concerned primarily with the protection and safety of infants; a refuge against common law dispositions less willing to interfere with paternal rights (Bevan 1973- 257). Re Fynn (1848) 2 De G and Sm. 457 emphasised this side of equity when a common law judge said that equitable jurisdiction could only be invoked if

> "The father has so conducted himself, or has shown himself to be a person of such description, or is placed in such a position as to render it not merely better for the children, but essential to their safety and welfare, in some serious and important respect, that his rights should be treated as lost or suspended - should be superseded or interfered with"(quoted in Bevan op.cit.; 257).

The intercession of Chancery between a father and his children has little to say about the position of a mother vis a vis her children. His loss of custody did not confer on a mother, either in common law or equity her positive right to seek it, save the rights given to her under the 1839 Act, to apply for custody of infants under seven (Bevan; 258). Married women continued to be the excluded subjects under both jurisdictions and case law did nothing to enhance her claims despite its increasing powers to protect infants against unreasonable physical or symbolic violence exerted by fathers. As late as 1883, in Agar-Ellis, Bowen L. J. (and his associates on the bench) disposed of a case solely in terms of the benefits accruing from 'the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can' (Agar-Ellis; 338).

Yet in particular instances, Chancery could act to award the custody of children to mothers, arising out of the jurisdictions given to it by the 1839 Act and by the 1873 Custody of Infants Act (which amended the earlier legislation). The 1873 legislation was important in two respects. Married women were now empowered to apply for custody of infants under the age of 16, and, were now not barred from doing so because of adultery proved against them. Legislation had forced on Chancery something which its own logic continued to ignore; the importance of mothers as providers of child care. Of equal importance was Section 2 of the 1873 Act which contains the first specific reference to the child's welfare as the basis of making a custodial disposition (Bevan, 258; Pinchbeck and Hewitt II; 377). Section 2 'permits a father by an agreement contained in a separation deed to give up the custody or control of his child to the mother, with the proviso that the agreement is unenforceable if the court considers that it will not be for the child's benefit to give effect to it' (Bevan, f.n.;, 258 and 263) (my emphasis).

As important as it is to record this new principle for determining custody, and the importance of the Act for the custodial powers it granted to married women, the Act also enhances the interventionist powers of Chancery. It could intercede and override any private agreement made between separate spouses about the care, custody and control of their children. The most celebrated case of this happening concerned Annie Besant (Re Besant 1879) 11 Ch. D. 508, where the court prevented her having the custody of her daughter (Bevan; f.n. 265), on the grounds of her atheistic opinions, her refusal to allow the child any religious instruction and because of her 'obscene' publications - on birth control! In the absence of any agreement between separated spouses about the custody of children and where custody had been awarded to the father, as in Agar-Ellis, some tribunals of Chancery judges were still inclined to disregard the 'child's benefit' and the child's wishes to see and freely correspond with the mother (Agar-Ellis op.cit.).

Each legislative initiative and each change of interpretation of parens patriae had the continuous effect of enlarging the discretionary powers of 'the family courts' (Chancery, Divorce Court). This perhaps is the unique character of these particular courts in relationships with families and family members. The courts placed considerable limitations over the primacy of the father without directly enlarging the legal claims of other family members. Even the private agreements on custody made by judicially separated spouses had to be ratified by Chancery, for example. We should recall however that it was at the behest of the father that private custody arrangements could be entered into; the Act did not acknowledge that mothers could initiate any such action (Bevan op.cit.; 263).

In sum, as the courts were required to consider the interests, benefit or welfare of the child, and were asked to consider the mother's claim to custody so its own discretionary powers increased, generally at the expense of the traditional, common law rights to custody of the father. By 1883, in Agar-Ellis, Chancery still held that father-right was the overriding principle in the distribution of custody. To many, it was a maverick decision and this judgement laid the basis for the introduction of the Guardianship of Infants Act 1886, which considerably expanded the custodial claims of the mother and wrote into the statutes the doctrine of 'the welfare of the child' (Bevan; 258, Pinchbeck and Hewitt II; 282, Brophy and Smart; 6).

c. Family law and custody in the 19th century; an overview.

To obtain some theoretical purchase on the diverse social process of legal change taking place in family law in the mid 19th century, it is useful to consider some of the recent writings specifically concerned with this problem.

Lee Holcombe's (1983) Wives and Property is primarily concerned with the social forces and political struggles bringing about the legislation reforming the status of married women as property holders (Chapters 6 - 10). But she also presents, with a model of clarity, the diverse legal categories constituting English family law (Chapter 1 covers common law, Chapter 2, equity). For her, the contradictions between common law, ecclesiastical and equity provide some of the dynamic of social and legal change.

She notes for example:

> "An account of the divorce law, like an account of the law relating to married women's property, reveals the confusion that characterised English jurisprudence in the mid-nineteenth century, a result of the survival of medieval institutions in an age when new ideas had won acceptance and other institutions had developed ... Thus, reform of the divorce law, like the reform of the married women's property law, was but a part of the wider movement of legal reform which had as its goals <u>to harmonise conflicting legal systems and to rationalise and modernize the country's judicial machinery</u>" (p.94) (my emphasis).

Central to Holcombe's account of the 'harmonisation' and 'rationalisation' of the legal system was the rise of feminism in the 1850's and its successful mobilisation as a political force throughout the 1860's and 1870's to bring about the recognition of married women as legal subjects entitled to own, use and dispose of property on their own account. Of the 1882 Married Women's Property Act, she writes:

> "The reform was not precisely what had been urged by feminists, who wanted not the extension of equity, but the enactment of equal property rights for men and women. Nevertheless the Married Women's Property Act of 1882 was a great measure of reform, and feminists rightly claimed much of the credit for having won its passage" (p. 207).

Feminists, she argues:

> "had struggled to end the 'virtual slavery of marriage' imposed upon women, particularly those of the lower classes, by the common law, and also to abolish the special, privileged status that wealthy women enjoyed under the provision of equity, 'the guardian of the weak and unprotected'. When they denounced the existence of these two rival legal systems, which meant in practice 'one law for the rich and another for the poor, the feminists won a wide and sympathetic hearing " (p. 206).

In her account of the beginnings of feminism as an organised movement, she carefully situates its appearance within the context of economic discontent; political unrest arising from such developments as the discrediting of the government in power or the emergence of a particular problem to be solved through the political process; the presence of leading personalities to voice economic and political discontents, to educate and arouse the conscience of the public about the reform desired,'and to present a policy of change, and some means of pushing reforms through' (p. 48).

Of particular note is her location of feminist disaffection with the law itself:

> "One can argue that this very real economic prosperity (of the 1850's) fuelled feminist discontent with the legal position of women. The common law affecting women had not changed, but the economic conditions of the society within which the law operated had been dramatically altered with the accelerating pace of industrialisation. In short, many more women than ever before felt the severe burden of disabilities placed upon women by the law" (pp. 48-49).

Moreover, Holcombe notes, that with ¾million women in the workforce in 1851, one quarter of whom were married, 'the common law, which clearly did not serve the interests of married women at work in a modern industrialised society, came under attack'. (p. 49).

From Holcombe comes a view of law as a materially oppressive structure for women; it is not consigned to the nether regions of the ideological superstructure, but is the means by which married women were dispossessed of property, and thus made economically and personally subordinate within the family. In this account, the law constitutes familial relations and relations between husband and wife, father and children as relations of domination and subordination. These relationships are fundamentally unequal; the husband owned the familial goods, deployed the labour of his familial subordinates and controlled the custody, care and upbringing of his children. What remains <u>unexplored</u> is the extent to which both class and familial relations were also fundamentally <u>exploitative</u>, through the two inter-connecting systems of capitalism and patriarchy. Women were in the unique position, as were children, of being exploited by both systems, which each entailed on the one hand relations of possession/non-possession, on the other, the extraction of surplus value, on which capitalist and familial accumulations were based.

In a work, the focus of which is one strand of family law and in a work which recognises from the outset the family as a key site in the multiple structures of women's oppression, these remarks may be consigned to the dust-bin of theoretical nit-picking. However, the rejection of capitalism and patriarchy as oppressive <u>and</u> exploitative systems has some material consequences for Holcombe's view of the social history of the 19th century. An over-reliance on the concept of 'industrialisation' simply omits the considerable fact that factories, sweat shops and other small capitalist and petty-capitalist enterprises were unequally distributed, by region, throughout

England and Wales. Sally Alexander (1976) notes that London, for example, 'offered no single staple employment for women comparable to that in the northern textile towns; secondly, in a city of skilled trades and small workshops, women, although long excluded from formal apprenticeship, often worked with their husband in his trade; thirdly, much women's work outside small workshop production was intermittent and casual, which meant that most women's lives were spent in a variety of partial occupations, most of which escaped the rigid classifications of the Census (p. 66). Moreover, though Holcombe is sensibly cautious about the census classifications of occupations (p. 7-8) and the way that working wives curiously 'disappeared' in 1881, it is difficult to ignore the large proportion of women in the mid 19th century working as domestic servants (18% of women over 20 in London; Alexander op.cit. 72).

Certainly, married women in the mid-19th century worked but often as not in family units of production. And, as Alexander suggests, where they worked away from the home, the character of the jobs they did 'mirrored' the kind of work undertaken in the home ('domestic' tasks such as washing, cooking, serving, mending etc.; child care; distribution of food) in enterprises while the division of labour was segmented and rewarded along lines which 'originated with, and paralleled that within the family' (Alexander; 73).

These detailed comments, which together suggest that the capitalist economy of the mid-19th century is not to be equated simply with 'industrialisation' however in no way invalidate Holcombe's fundamental claim that women as economically active agents were robbed of their claim to independent property and income by the common law, and this being the generative mechanism behind the rise of organised feminism. One of the effects of capitalism on the family, as Catherine Hall (1980) has argued is the separation of the domestic sphere from the world of production with the dual

effect of generating a considerable tension between the social relations of capitalism and the social relations constituting patriarchy. The harmonisation and rationalisation of the systems of common law and equity, and the re-positioning of married women as legal subjects, resulting from organised feminist struggles, suggests a very long term and complex reconciliation of capitalism and patriarchy (observable in fight to reform the law on married women's property), but without the crucial transformation of either system. Women benefitted to the extent that they achieved the status of 'formally free' economic subjects, but did not win the right to vote, did not receive equal pay for equal work, and in the sphere of family law did not (yet) achieve parity with husbands in matters of child custody. The married woman was not and is not a unitary subject in law. The value of Holcombe's work is to provide a detailed account of how the contradictions between common law and equity, the contradiction between the married woman in family law and her place in the economy provided the context for a political movement which sought to transform the sytems of oppression by playing on these contradictory situations.

Whereas Holcombe's focus is primarily on the legal status of married women, Carole Smart 'engages' with the law as an apparatus of the state (Brophy and Smart 1981, Smart 1982, Smart 1984). She is primarily concerned about the interplay between the law and the family, and conceives the historical development of that relationship in terms of different regulative modes that the state and the law operates 'to reproduce structures of dependency and inequality between husband and wife' (Brophy and Smart 1981;3, Smart 1982; 131 ff., Smart 1984; xi). Smart discerns a shift from a punitive 'negatively controlling orientation (Brophy and Smart;3) observable in family law of the mid-19th century (characterised by restricted access to divorce and financial security on the grounds of class and sex), (ibid), to a more 'liberal' mode of regulation, where the 'overt and negative controls over the entry into and the exit of marriage are far

less rigidly regulated' (Brophy and Smart;3). Notably, however, in its 'liberal' moment, the state has adopted 'considerable powers of intervention and surveillance over the family' (ibid), but also beyond, because welfare law 'is increasingly attempting to impose the duties and obligations of married (enshrined in family law) on the unmarried' (Brophy and Smart; 4). In a word, the categories of family law (obligations to maintain, rights to custody) have invaded welfare law to the extent that those adopting relations of cohabitation are increasingly obliged to act, be responsible and bear the responsibilities of married couples.

For Smart, the law is primarily a disciplinary apparatus of the state, which in operation defines 'normal' (legal) relationships (marriage, legitimate children) and punishes, intervenes and regulates coercively and overtly, the abnormal, the delinquent (the unmarried mother, the illegitimate child). Family and welfare law thus combine to create and sustain particular modes of behaviour, specific social relationships and specifies the rights and obligations of each family member which together constitute the family. Not only is the operation of the law disciplinary in the way it sets out 'normal' structures and subjectivities, but operates symbolically as a powerful message system by the way it 'punishes' those who either do not conform or choose alternative modes of existence. Smart argues that discipline and punishment operate strongly along class and gender lines; it is the unmarried mother, the illegitimate child and poor families who feel the interventionist state most (these being the households where fiscal benefits are obtained only if substantial conditions are met, and, households where the state is most likely to contest the parents' right to the care, custody and control of children) (Smart 1981; 132).

What is attractive about Smart's theorisation is the extent to which it problematises the boundaries between the state and civil society, the perimeters of the public and private spheres. Her suggestion of the constitutive power of the state to define what was to count as 'the family' breaks with the liberal conceptions of the family founded on the basis of individual volition and the power of personal, romantic and affective attachments in creating new families. She is able to generate the dynamic of the state's evolving concern with 'who is of the family' by referring to the requirements placed upon various apparatuses of the state, to provide welfare and support for families immiserated by the cycles of deprivation and poverty inherent in capitalistic societies. Equally, in times of changing economic circumstances in the direction of expansion (after the 2nd World War, for example), the state is forced to adopt different strategies, 'to stabilise the family and contain its members' (Smart 1981; 135). She asserts, as did Holcombe, the power of legal reforms to diminish patriarchal authority; that the law itself can be deployed against patriarchal ideologies and practices, 'protecting wives and mothers against the worst excesses of masculine abuse' (Smart op.cit.; 136).

While there is no simple read off possible from the development of the state (concerned on the one hand with securing the continued process of the accumulation of capital, managing and defending national boundaries, the care and exploitation of overseas colonies deploying resources to offset the generic problem of incipient 'legitimation crises' on the other) with say, the detailed evolution of custody proceedings as a strand of family law, nevertheless conceiving the law as an apparatus of the state does provide us with the opportunity to view family law being in a continuum with other institutions (such as the workhouses), constituting state agency. It is

therefore possible to conceive, as Smart does, how the legal categories of family law, have material effects in other branches of social policy. More importantly, it demands that we consider the historical development of state formation, not simply in terms of the support state institutions offer to the process of capitalism, but also in terms of the way it adopts and adapts patriarchal structures. Thus the Poor Laws regulated the poor, but equally they became a strand of family law in as much as this legislation rewrote the relations between the state and the family.

Finer and McGregor's (1974) thesis of 'three jurisdictions' of family law (Chancery/High Court; magistrates; Poor Law) broadly conceives a continuum between family and welfare law. Economic circumstances define the possibilities of litigants to go before the law, and, which jurisdiction will be the regulative administration of individual families. There were material differences between jurisdictions which had profound effects for the relations of family members. In equity, for example, married women and infants of substantial means had some legal claim against the jurisdiction of fathers. The magistrates historically arbitrated in matters concerning the support of bastard children, but became the prime means by which married women of modest means could seek custody orders (after 1878) and seek maintenance orders (after 1925). From Finer and McGregor we sense how class-divided the jurisdictions of the law were; each being appropriate to different classes of economic subjects. While individuals going before equity and magistrates courts pursued their legal claims, those caught up in the administration of the Poor Laws were in grave danger of having their legal and civic identity suspended.

> "The Poor Law was ... not only a law <u>about</u> the poor but a law of the poor. It dealt with a condition and it governed a class. The special legal provisions were designed not to solve the problems of destitution but to minimise the cost to the public of maintaining the destitute".
> (Jan Broek, quoted in Finer and McGregor; 113)

The legal ideology of individuals going as equals before a neutral system of arbitration here falls away to reveal a jurisdiction in which one class nakedly ruled another. The Poor Laws, through the workhouse, and through the conditions attached to the provision of outdoor relief, were, in Smart's word, wholly 'punitive'. They were premised on the ideology of the family embedded within the common law, with the exception that its punitive provisions broke apart the marital relation (by requiring husband, wife and children to be accommodated separately) and replaced the custodial powers of parents with the custodial powers exercised by agents of the state. The price exacted by the Poor Laws for the relief of poverty, was the right to control the education, vocational training and the labour of children who fell within its remit. The power of the Poor Laws resides in the visible exercise of its provisions on inmates of the workhouse and the way in which it visibly labelled beneficiaries as paupers, which collectively stood as a real threat to individuals and families living on the margins of subsistence by private endeavour. Gilbert (1973) notes the impact of these institutions on working class consciousness. In the early 20th century, for example, the fear of stigmatization nearly caused the demise of the early school meals programmes because fathers would not allow their children to benefit from charitable hand outs by Boards of Guardians (108-109).

The Poor Laws reserved its harshest measures for the unmarried mother and illegitimate children (Finer and McGregor; 116-121). It was urged for example that on no account should these women and children be given outdoor relief; the 1868 Poor Law Amendment Act restored to the parish the power to recover the cost of maintenance for bastard children, which went to the parish not the mother. The unmarried mother became part of the 'educative' element in the exercise of the Poor Laws as a means of disciplining and controlling the poor and the working class.

The continuity of the 'three jurisdictions' through to the present day (where the Supplementary Benefits Commission replaces the administrative inspection and regulation of the Guardians) underpins Finer and McGregor's thesis (p. 119). Their identification of the differential distribution of legal rights and claims <u>across</u> jurisdictions and the positioning of individuals as <u>either</u> litigants <u>or</u> claimants is indicative of how one class becomes embedded in, and seeks redress from courts drawing on the traditions of equity, while another becomes enmeshed in the procedures of administrative tribunals, without the 'voice' and representation guaranteed elsewhere in the legal system.

One further aspect of the litigant/claimant division concerns directly the custody and care of children. In the equity courts, custody remained essentially a private matter between competing parents or between mothers and paternally-appointed guardians, petitioning judges for custodial power. The courts interceded and exercised its generally superintending power simply by making custodial dispositions or occasionally by making the child a ward of court, but did so only when called upon to do so by one litigious party or another. Compare this with the surrender of custodial powers demanded by the operation of the Poor Laws. In equity, the welfare of the child was conceived

as coincidental with a parent whose claim was based on moral righteousness. Each case, judged on its merits, celebrates the assessment of the circumstances of individual parents and specific children. Expressed in the Poor Law provisions is a concern with a class of children, and children of a class; the rising generation of the 'indigent and criminally' poor. How else do we understand the installation of the disciplinary and educative regime directly addressed to the bastard child and the child of the pauper? What is common to the litigant and the claimant adult parent is the fact that the custodial relationship became a means of disciplining each; punishment equals the loss of custody, care and control of the child. By 1886, the power of the state, through Chancery or through the Poor Laws to contest the possession of children, was incontrovertable. The welfare of the child, however, had not yet become the paramount consideration in family and welfare law, but a concern with children, had become part and parcel of the disciplinary character of family law.

Brought together, Holcombe's study of the expressed concern over and struggles to improve the legal status of married women; Smart's theorization of family law as a disciplinary system of regulating, normalising and stabilising family relations; and Finer and McGregor's identification of three class-based jurisdictions of family law provides us with some theoretical pruchase on the diverse strands of family law. The formation and termination of the marital relation, the regulation of the custodial relationship; the ideology of the obligation to maintain increasingly became a central concern of a secular, bureaucratic state. The sharply etched distinctions of 'the public' and 'the private' found in the common law tradition, fell away to equity's claim to protect those (the married woman, infants, the mad) who could not protect themselves, which in turn buttressed by the Poor Law provisions, where agents of the state assumed the custodial powers of 'natural' parents, and had the right to break apart the conjugal conditions of the marital relation.

CONCLUSION

Several broad themes emerge from the study of family law in the mid-19th century; the merging of family law and welfare law through the common currency of legal categories of the family in both the family and the welfare sphere; the significant improvement in the legal status of married women; the consolidation of Chancery and the High Court as juridical site for resolving family disputes; the dynamic relationship between case law in Chancery and statute law; the class-specific jurisdictions of Chancery, the magistrates courts and the Poor Laws, finally the partial demise of the common law's construction of paternal power. Are these developments then, expressive of any new or different attitudes towards children, or about, childhood?

1. Leaving aside the custodial relation conceived in personal and affective terms, what the law continually protected throughout the mid-19th century, however much it was nibbled away in case and statute law, was paternal power. One aspect of the material importance of the law's protection of a father's right to custody, is the extent to which custodial powers gave fathers access to the property of infants and to the labour services of his children. Whereas equity functioned at times to protect an infant's property against fathers or their appointed guardians, and while the Factory Acts limited the extent to which children might be exploited by capitalists in capitalist enterprises, the common law tradition offered few such protections to children against their fathers. We have noted already the continuing importance of family-based enterprises and enterprises organised along lines of the familial division of labour, alongside factory-based industries. Custodial rights for many fathers, involved rather more than the right to determine the education, training and religion of their children; it also

involves the right to control and exploit their labour. Equity case law is entirely concerned with the former; where litigants were concerned about either an infant's property, or their upbringing, to the exclusion of facets of custody which were of considerable importance to many working class and petty bourgeois families. Nevertheless, it was the aspect of the custodial relation which the Poor Law authorities proceeded to exploit to the full in the instances where their authority displaced that of the father and mother. Therefore, while statute law was distinguishing between adults and children as economic agents (by limiting the enterprises the young might work in, and regulating the hours they worked and demanding some form of schooling at the place of work) the custodial element of family law made few such distinctions. In the familial and 'private' sphere, legally, no such distinctions were made; children could continue to labour for masters, whose claim to their services resided not only in the ownership of the means of production, but also in the very fabric of family law. Equity's conception of 'protecting' infants and infants simply does not cover the protection of infants as workers. Equity's concern was limited to protecting infants from physical and symbolic violence but not economic exploitation.

In equity and in the Poor Laws then, there is no conception of childhood as a period of grace, free from the rigours of labouring to live. Quite the contrary, in the Poor Laws anyway, where labour itself was a disciplinary technique deployed to snuff out the 'hereditary' tendency of paupered children to live a life of indolence and dissipation.

2. The absence of sentimentality. We find no expression in family law (case, statute or administrative) of children possessing a fundamentally different humanity from adults, similar to modern discourses on child care. While there were intellectual currents in the mid-19th century celebrating (in the Rousseauian/Romantic tradition) the child as inherently innocent, essentially a child of nature, progressively corrupted by the shackles of adult civilisation and industrial technology, the law's child derives from the Calvinist/Puritan tradition (see Gammage 1982; 17-24). The happiness of children coincides with the exercise of parental (primarily paternal) authority . So long as parents are morally upright then children would be trained and brought up with the correct set of moral and personal attitudes. While differing child-rearing practices were evident in the mid-19th century, drawing upon a variety of intellectual traditions, the child-orientated family is not 'the family' of family law.[5] The education, religion, moral attitudes, pace of learning and its context, fit for a child depends not upon what is best for the child but upon what parents believe it is fit to provide. However, equity, through the doctrine of parens patriae and later by the discretionary powers given to it by statute, was able to determine custodial dispositions by drawing upon a very narrow set of attributes which constituted the fit parent; and the most orthodox parent could then be rewarded with the custody of the child. Equity did not work with the conception of the quality of care (used in the modern sense to include the ability to provide full-time supervision of children; displays of love, tenderness, affection). Neither did the Poor Law provisions. Such a conception posits the child as a subject specificlly in need of these personal experiences to ensure healthy and stable development. The notion of 'development' being narrowly defined in terms of continuous moral enlightenment distances the child as the subject of family law from alternative conceptions of child-rearing practised by other bourgeois and professional families of the mid-19th century.

However, where equity's definition of child and its needs are most felt is not through equity's jurisdiction but in the workings of the Poor Law, which manifestly worked with precisely the same ideology of moral beseechment, and 'training-up' children, later to be found in the school-room practices of the emergent system of compulsory education. Yet there is a counter-tendency, which we touch on below and which involves the developing claim of married women to take control, care and custody of their children at the expense of fathers.

The invitation to slide from legal conceptions of custodial relations to a more general view of the law being an instrument of class social control is considerable. The extent to which the Poor Laws are saturated with the categories of family law derived from equity and common law is manifestly obvious, giving rise to a partially justifiable claim that the Poor Laws impose 'bourgeois' legal relations and 'bourgeois' familial attitudes on working class and paupered families. However, the work of social historians such as Lawrence Stone and Catherine Hall alludes to the problem of equating all family law with all the ideologies and practices of the landed gentry and of the bourgeoisie. Family law at best, specifically in matters concerning the parent-child relation, represents only one intellectual current, one ideological strand and one set of child-rearing practices amongst the many observable in the mid-19th century ruling classes. Indeed, family law 'policed' bourgeois dissidents such as Annie Besant as effectively as it enabled one class to determine the child-rearing practices of another. For embedded in family law are categories and subjectivities which at once may well be entirely consonant with the way that many or most ruling class families ordered their day to day existence but without fractions of it being responsible for the formation of the legal categories of the law which equally governs them and the pauper family.

Class-instrumentalist views of family law are deficient for two reasons. Firstly, family law concerns relations between men and women in marriage, and relations between parents and children; the legal relations focus primarily on relations of patriarchy, and this is constant across families situated in any and all classes. Secondly, class-instrumentalist interpretations inadequately handle the complex and dynamic relationship between the state and civil society. Class instrumentalism presumes state power to be unproblematically possessed or exercised by one or a combination of economic classes, rather than as a site of struggle between political forces only insecurely attached to definite economic class situations. Furthermore, class instrumentalist interpretations overlook the fact that state institutions and state agents (and these may vary from judges in Chancery to wardens of workhouses) have the statutory power to impose meanings, exercise discretion, execute decisionsand re-order social relations on citizens as subjects of, and subject to the state, irrespective of class belonging. Certainly across the three jurisdictions of family law, there is a broadly consistent view of what the family should comprise and what the obligations and duties of each family member is, but the mechanism for legitimately floating off specific ideologies of the family and disciplining the recalcitrants who don't quite fit rests upon the specific powers allocated to individual state apparatuses, and these are not unambiguously the instruments of any one class. The consequence in this line of reasoning posits the formation of an increasingly direct relationship between state apparatuses and children, but one which is not consistent across classes. The appropriation of children through the mechanism of the workhouse regime is quite dissimilar to the acquisition of children by Chancery, through wardship proceedings for example, but neither jurisdiction actually appropriates children from one class on behalf of another. What can be said however is that in the mid-19th century the state principally concerned itself with the 'welfare' of children of one class, through the operation of the Poor Laws,

adopting the technique of directly inserting itself between parents and their children to prevent the reproduction of the 'hereditary' poor. It was not yet concerned with the health and development of all children as citizens of the future who were important to the continued existence of the race and the nation state, and therefore were to be of paramount consideration.

3. Age-lines and motherhood. Smart noted that the recognition of the married woman's claim to the custody of her children can be taken as the growing recognition of the social usefulness of mothering and motherhood. At what ages was it thought beneficial for children to be left in the care and control of mothers? Throughout the mid-19th century, judicial opinion continued to see the proper place for children in terms of the father's custodial power; they should remain in the custody of the patriarch while they were infants (up to 21). The struggle for custodial parity between husband and wife focussed primarily on the elevation of the legal status of married women; more so than any sense of children needing or wanting the specialised child care that mothers could, or were thought to, provide. However, the ages of children for whom mothers could apply for custody gives us some indication of the ages of childhood at which mothering and motherhood were regarded as important and beneficial.

The 1839 Act set the age at 7 years, extended to 16 in 1873 (in the Act which also lifted the bar against custody applications from adulterous wives). Likewise, the Poor Law regulations generally provided for children under 7 to stay in the same wards as their mothers, or to be housed in a separate ward, with mothers being granted 'access at all reasonable times' (Pinchbeck and Hewitt II; 501). The Divorce Court was empowered to make custody orders on infants up to the age of 21, but magistrates were allowed to make discretionary custody orders in favour of married women on children under 10 (Bevan;253), suggesting that some married women were more entitled to custody

than others. The chronological ages above offer no precise definition of subjects with special emotional and affective needs, though clearly the mother's importance to the child occurs in its early years of growth and development. There is no coherent ideology in family law yet that the welfare of the child being equated with either the presence of the mother or the quality of child care she offers or she alone can provide. 'Maternal deprivation' had no place in 19th century family law.

CHAPTER FOUR: POST -1886, CHILDREN OF THE STATE?

INTRODUCTION

The modern 'child' is a heavily protected species; protected from themselves, from their natural parents, from the local environment and the local community. The sheer volume of legislation devoted to this purpose is perhaps one of the defining characteristics of childhood itself; to be a child entails being in someone's protection. It is not new; over 100 pieces of legislation protecting and privileging, and by extension creating and maintaining a singular notion of childhood received Queen Victoria's assent. Binding disparate pieces of legislation, administered through a variety of institutions and cutting across different spheres of law (family law, welfare law, employment and educational legislation) we find a common referent, 'the welfare of the child'.

Our purpose here is two-fold. Firstly, we shall indicate how judge-made definitions of 'the welfare of the child' interact with the legislative process of law-making. We do this to tease out the assumptions, about minors, about their families and about family arrangements embodied in judicial decisions and in an increasingly complex web of social administration directly concerned with the welfare of children. Secondly, it is our purpose to provide a narrative account of a continuously unfolding and increasingly complex relationship between the state and particularly statuses within the family. In this we shall be centrally concerned to demonstrate how the state forges a more direct relationship with 'its' children, for the sake of their physical and social welfare. We shall also question whether a public concern with the welfare of the child can be taken as a thermometer of the rise of a child-centred society or whether it functions as the ideological justification for the derogation of parental rights consequent by permitting the professionals in social adminstration to exercise more 'parental' powers.

While we are continuing to address the categories of family law, especially custody which specifies the legal and public parent-child relationship, it is significant that we have to add in, as soon as we speak of 'the welfare' or 'protection' of children, the state as an integral part of the formulation. The state is no longer something 'outside'; to which bourgeois parents surrendered themselves to resolve private disputes; or which appropriated children from the poor and immiserated. From 1886 onwards, it is the extent to which the state, across a variety of institutions 'borrows' the doctrine of parens patriae to assume the mantle of 'the wise and supreme parent' of all children of the nation state, at the expense of natural parents, which distinguishes the modern period of family and welfare law. In effect, children become subjects of and subject to the state as much as they were once the subordinate dependent subjects of their parents. Likewise, parents, while continuing to be the immediate adults in authority over children, who remain still as the key agents in the transmission of material, symbolic, social and cultural capital, but are so from a situation of delegated authority. By this, we mean that parents continue to have obligations to their children, but unlike the imagery of the common law family, no longer retain unassailable rights to determine the quality, pace or methods of bringing them up. Recent legal commentators have noted the 'waning' (Hall J. C., 1972) or the 'fragmentation' (Maidment, 1981) of parental rights. Parents who neglect, abuse, fail to exercise expected levels of care and control, fail or refuse to send their children to school, or in spite of considerable effort, raise up children who commit criminal offences, find that their parental rights are suspended and their children removed from the family setting and placed elsewhere. 'The welfare of the child' disciplines parents as effectively as it protects and controls children.

Let it be said immediately that we do not exist yet in some form of 'children's gulag' where the state willy-nilly exercises unlimited power to appropriate children; the law permits parental rights to be suspended but does not extinguish entirely the parents' existence as a legal entity capable of initiating legal or political action to resist the unreasonable exercise of state power.[6] However, not all parents are equally placed, by the nature of the unequal distribution of material and symbolic goods, to resist through the deployment of the law.

Because the welfare of the child has become embedded in many facets of the legal system and an important axis of social work practice, it is therefore important to sketch out its content, its material effects and the authoritative voice it gives to adults other than the child's natural parents. Let us refer them to the statute which sets out the welfare of the child as the principle on which custody, care and control of children was to be determined.

The Guardianship of Infants Act of 1925 in Section 1 states:

> 'Where in any proceedings before any Court ...
> a. the custody or the upbringing of an infant; or
> b. the administration of any property belonging to or held on trust for an infant, or the application of the income thereof,
> is in question, the court in deciding, shall regard the welfare of the infant as the first and paramount consideration and shall not take into consideration whether from any other point of view the claim of the father in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.'
> (my emphasis)

Erase 'infant', replace with 'minor' and we find the identical wording some 46 years later in the 1971 Guardianship of Minors Act [7].

What constitutes 'welfare' is less important than its deployment (with respect to children) to transform radically the position of infants and parents in 'any court' in matters of custody. The courts are required to discount the claims of the father and the mother (previously protected in statute, common law and equity) and instead to view custody cases from an entirely different perspective; what arrangements will be in the best interests of the child. More importantly, this statute (and its successors) allows for some arbitrational body (here, 'any court') to insert itself between the parents and the children, in the interests of determining how children's welfare is to be best secured. It severs the identity of interest between parental custody and child welfare. That principle now extends over all the branches of law exercising jurisdiction over children; from divorce law, wardship proceedings, social welfare law and to the jurisdiction of the juvenile court. It is a principle which creates a judicial and administrative space, into which judges, social workers, court welfare officers, officers of the juvenile bureaux, children's panels of the social service departments, educational psychologists and so on, may be inserted. Once the fissure between parents and their children was socially created, then the ensemble of family relations is open to inspection and regulation by a variety of state apparatuses [8].

The 1925 statute was not the first, the main or the only means by which the welfare of the child became a major element of family and welfare law. We shall find a similar privileging of children as an embedded part of equity's gradual development of parens patriae, in the rhetoric of the eugenicist movement, in the concern to provide school meals and a schools medical service and in the organisations

concerned with preventing cruelty to children and in the political struggles seeking to establish a family wage.

Whereas some commentators view the public and formal expression of a concern with the welfare of children as indicative of a shift in sentiment and moral attitudes to and about childhood (Pinchbeck and Hewitt II; 347), of equal importance is the extent to which the welfare of children provided an ideological justification for state agents from dispersed institutions to attach themselves to the family.

For what follows on from determining, as a general and guiding principle, that a child's welfare is of the first and paramount consideration, and is not necessarily identical with it being in parental custody, is a creation of techniques and criteria for assessing welfare and establishing some means to see that welfare is secured. Enter the personnel with expertise, certified professional competence, moral standing and requisite authority to 'speak' for children; the social worker, the NSPCC inspector, the medical profession, the health visitor and the environmental health officer. Legislation which saved children from neglect, abuse and exploitation simultaneously created the conditions for social and professional grouping of adults to bring to bear a complex web of ideologies and theories to describe, account, assess and execute social policies whose justification depends upon reference to the welfare of the child[9]. In sum, the material effect of legislation referring to the welfare of the child generated the rise of professional child savers whose separate and different practices are justified by their explicit concern to act in the interests of children. However, their ideologies and practices simultaneously constitute what is to count as a 'normal' childhood and 'ordinary' family life.

If one cuts through the stylistic opacity and the attendant neologisms of Jacques Donzelot's (1979) The Policing of Families (subtitled Welfare versus the State), there is to be found a very complex and elaborated argument broadly similar to that presented above. The family in Donzelot's work is a point of confluence between different ideologies, technologies and practices, articulated to different family members, but whose end is the preservation of children. For example, he argues that the particular concern with 'motherhood', providing mothers with the necessary techniques in baby-care, nutrition, hygiene and the provision of guides to help child-raising ensured on the one hand the rearing of healthy and properly socialized children; on the other, secured for mothers a privileged relationship in respect of children. Concern for the preservation of children, affected not only children within families but repositioned mothers insofar as they became singularly important in the strategy of raising up a healthy population. More interestingly, though is his broad argument that philanthropic and then state agencies (in sequence) become attached not to the family unit per se. Rather, the state enters and polices the family through a strategy of different agencies observing and regulating the practices of individual family members: being concerned with the employment prospects of, and directing fiscal support, to fathers; surrounding mothers with experts in hygiene, health and child development; providing education, separate juvenile courts, and educational psychologists to 'assist' children.

Donzelot's account of the state's interventionist strategy describes a process entailing a) The individuation of family members, where each member is allocated specific duties and obligations one to the other. In supporting, and encouraging individual family members to fulfill these duties and obligations simultaneously, each member's importance is confirmed and the general well-being of the unit is secured. b) A multiplicity

of ideologies and practices at play within the family separately and together confirming the correct relationship of each family member to the other. c) A process which at once shifts the balance of forces within the family, <u>without</u> destroying the unit as an entity recognisable as a 'family'. For example, it is quite possible to destroy the absolute rights fathers had to the custody of children by defining and sustaining the importance of motherhood without removing the dependence of mothers and children on the male breadwinner. d) 'Intervention' or 'policing' involves a dual process of 'observation' - collecting information, providing knowledges about families which then programmes finely graded patterns of 'regulation' (one extremity being 'assistantial', the provision of money, advice, help; the other extremity being 'appropriation', where children are taken away from their parents). It is a historical process which at once differentiates and valorizes the structural positions comprising the family but draws on the guiding principle of the paramount consideration being the welfare of children. Buy why this principle and no other? Why not preserve the singular authority of the family set out in common law, 'the little commonwealth'? (Schochet;95).

Entailed in the conception of the family as 'the little commonwealth' are two competing and contradictory tendencies. Firstly, it is the corollary of the nation state ruled by the divine right of the sovereign; a divinely-given order of personal ties and obligations, an autonomous sphere of 'charismatic' government. The nature of the state is encapsulated within the relationship of the patriarch and his dependent subordinates; the state is like the family, the family mirrors the state, each legitimating the other, by the similarity of images. Secondly, however, because the family is an autonomous sphere, how is it possible to regulate the production of children (in terms of quantity), regulate their cultural, political and economic socialization such that they do not become a danger to existing political, social and economic system? . In Donzelot's account, the family of the

ancien regime; the autonomous, self-regulating system of governing individuals ceased to be the cell-form of 'the social' and became 'the enemy of civilisation' precisely because it had the juridicial power to repel invasion, interrogation and regulation of a state whose mode of domination and control had shifted from the invocation of 'charismatic' (and kingly) authority to the impersonal application of abstract rules (the legal-rational mode of domination, in Weber's terms) . Too many children, wandering children, unregulated children cut loose from family ties, gathering in gangs, the depravity of children of different sexes sharing the same bed, spoke the fears of unregulated family life.

Transforming the family, undercutting its juridicial autonomy, while at the same time retaining its structure, Donzelot argues, involved two strategic lines of invasion:

> 'From being the plexus of a complex web of relations of dependence and allegeance, the family became the nexus of nerve endings of machinery that was exterior to it. Those new mechanisms acted on the family as the basis of a double game that eventually required its juridical conversion. On the one hand, they penetrated it directly, turning family members, with the help of the norm, against patriarchal authority, organising - in the name of the hygienic and educative protection of these members - the depletion of parental authority in general, and placing the family under an economic-moral tutelage. On the other hand, they induced the new norms as being so many advantages, favoring a more complete realization of the family's goal of increased autonomy. They relied on a liberalization of intrafamilial

> relationships to get the norms accepted.
> Only five years separated the law on divorce (1884) and the law on the destitution of parental authority (1889).'
> Donzelot (1979; 91).

A process combining 'public assistance' with moral regulation; in extremis, the civil rights of parents were suspended in order to save children from destitution and delinquency. While this was a strategy applicable to paupered and working class families, those families demonstrating ' a capacity for economic autonomy' escaped the attentions of public authorities as long as the new 'liberality of the contract between conjugal partners' continued to produce socially useful members (91-92). The simultaneous application of class-specific carrots and sticks enmeshed all families and household in some kind of exchange with the state through a series of 'bridges', coupling the family with the system of public assistance, the schools, the juvenile courts, medicine and psychiatry (p.89).

The temporalities of the exchange between the state and the family, the matrix of institutions comprising the state, the historical trajectory of family law in France necessarily means that The Policing of Families has only a limited applicability in the English context. Also, his presentation of women as the willing dupes of philanthropy, law and medicine, the absence of any account of the feminist struggles to rewrite the legal subjectivity of married women mitigates against the uncritical acceptance of all that Donzelot has to say. However, some aspects of his study (given the homology between 'the preservation' and 'the welfare' of children) are particularly useful. Most pertinent perhaps is his conception of the 'preservation of children' as having no particular or singular point of origin but emerging from a

multiplicity of social sites and joining together diverse institutions, agents, practices and ideologies. This view runs simultaneously with a complex view of the state-family nexus, which eschews any view of a monolithic state or an undifferentiated family 'unit'. Rather, it is the inter, and intra familial relations 'the differences between working class and bourgeois families'; the differences between family members that the various agencies of the state (and it delegated authorities in civil society) precisely play upon as means to install the mechanisms of investigation and regulation. By these means we can ease our way around two inviting but equally limiting notions of the family. Firstly, we can avoid the 'top-down' version offered by Stone and Aries, which argues for the downward transmission of transformations which took place in the bourgeois family, into the working class family. Significantly, these accounts provide no mechanism for 'the spread of the modern organization from the bourgeoisie to the classes populaire (... 'the lower classes')'. (Hussain and Hodges 1979; 88). Secondly, we can avoid the reductionisms inherent in the 'reproduction of labour power' thesis. Now this thesis is observable across Marxist-functionalist accounts of welfare provision and in socialist-feminist accounts of the family in relationship to capitalism[10]. The problem here resides in the difficulty of allocating the state, the institutions comprising it, social and welfare policies which these institutions initiate and execute, any autonomy from the needs, interests and politics of classes in struggle. This makes it difficult to consider or analyse the state as crucial reproducer of patriarchal relations on the one hand, while on the other, allows little theoretical space for us to consider the material effects of social policies, welfare and family law other than as direct expressions of classed interests. Clearly, the state exists within, and the law, legislation and social policies have effects upon, a class-divided social formation and consequently differentially felt and experienced by economic

groups. However, these laws and policies have the power to constitute subjectivities (along the lines of race, gender and age), producing social identities and social relationships which are not wholly identical with those arising from economic class situations; married women and illegitimate children, for example, are social categories present across all economic classes who have been distinctively disadvantaged (historically), whatever their class situation. When we turn to a specific principle such as the welfare of children, a principle upon which large areas of social life are organised, we are forced to accept the material effects of law, legislation and social policy. The crucial point to retain is that a theory of the family must look two ways; to capitalist division of labour and the state. Thereby we can avoid two compelling accounts of the changing nature of familial relations. Firstly, that the family-household expands, contracts, changes in form according to the changing process of capitalist accumulation. Secondly, and an extension of the above, that the spread of 'the modern family' is located in the mechanism of 'social control'; wherein one class forces or imposes cultural, social and economic social relations on another (which necessarily requires an instrumentalist state operating unproblematically for the ruling class). We can do this, without jettisoning the social categories of class, as we suggested earlier by acknowledging that the differences between class situations and class practices are deployed by the state in governing civil society.

One theoretical effect of this argument requires us to acknowledge the material effects of legislation, and the impact of ideologies generated by the child savers on family form and family relations. We are required to consider the effect of the state separate from the effects of a capitalistic economy. While the latter may adequately account for the general demise of petty commodity production in households

and the general separation of the sphere of production from the domestic sphere, we also need to account for the impact of social policies which shape and support specific and detailed family forms by describing the appropriate character of the relations between individual family members. Why fathers should be privileged as custodians historically, to be superseded later by the practice of placing children in the mother's care (as in divorce law) why maternal deprivation was thought to cause long-term psychological problems but not paternal deprivation, are examples of the material effects of the state, firstly developing images of what the internal relationships of the family should be and then directing resources, and making custody dispositions accordingly.

We need to concern ourselves with the multiple determinations at work which describe and account for the development of 'the welfare of the child' as the first and paramount consideration, not simply as an index of the rise of a child-oriented social formation, but as a meeting point where different (and sometimes conflicting) social forces, ideologies and practices join, and effectively transform the balance of relations between individual family members. We shall argue that through the 'welfare of the child', not only did the state ensure the welfare and survival of children but ended up transforming the relations obtaining between spouses and between parents and children. The elements of this transformation we now set out below.

1. Case Law and Custody

One aspect of the importance of case law is its interactive capacity with statute law. The two cases we discuss below are an interesting example of this process. In Agar-Ellis (1883) the court's findings prompted statutory measures to remove a visible injustice. In R. vs Gyngall (1893), the court's ruling set out principles later adopted as taken up in statute form and justified on the grounds that this represented the law as it then stood. The content of these cases however are crucial indicators of an important shift in how the High Courts treated questions of custody, and their dispositions represent a significant change in the legal relationship between the family and the state.

Agar-Ellis (1883) concerns a 16 year old girl, who in a lower court, by writ of habeas corpus had applied for the right to stay with her mother. The lower court had argued that in the absence of any suggested fault on the part of thefather, the court had no jurisdiction to interfere with the legal right of the father, to control the custody and education of his children (p. 319). The father had also prevented uncensored mail passing from mother to daughter and would not allow the daughter access to the mother. The lower court had stuck to the principles of common law (a father's sole right to custody; hearing a writ of habeas corpus), which then went to Appeal in 1883 as the above-cited case.

The Chancery Court at once established that the girl was over the age of discretion (16 years for girls, 14 for boys) and was therefore entitled to petition under a writ of habeas corpus. Chancery then establishes its own powers of jurisdiction.

> 'If the principles laid down by the Appellants (the girl and the mother) were to be adopted by the Court, they would produce a revolution in the relations of the father and the child. Most cases cited are decisions at Common Law on writ of Habeas Corpus (but) ... in all cases relating to infants the Rules of equity are to prevail.'
> (p. 323). (my emphasis)

The common law rights of the girl, to bring a writ of habeas corpus are quickly disregarded in a display of judicial support for the father's right to hold the sole custody of his children. The girl's writ suggests Brett M.R.

> '... seems to me to be directly contrary to the law of England which is, that the father has control over the person, the education and the conduct of his children until they are 21 years of age. That is the law.'
> (p. 325).

Later, he continues:

> 'The law does not interfere (with the rights of the father) because of the great faith, and trust it has in the natural affection of the father to perform his duties and therefore gives him corresponding rights.'
> (p. 328).

He ends with stating the general principles upon which equity acts.

> 'The Court must act upon the general rule, and say that on account of the general trust which the law reposes in the natural affection of a father, this case is not brought within any rules which authorizes the Court to interfere.'
> (p. 329).

So the Court's benign trust in the father to exercise his rights in a responsible manner is a far more important consideration than the abrogation of an infant's right to pursue her legal rights under a writ of habeas corpus. To change it, as Bowen earlier argued, would certainly revolutionise father-child relations!

Cotton L. J., in his judgement continues to place the Court in a position such that it cannot act on behalf of infants against blameless fathers, because,

> '... it is for the general interest of families, and for the general interest of the children, and really for the interests of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the father, but leave to him that power which nature has given him by the birth of the child.'
> (p. 334).

In all this, the mother and her rights, duties and obligations are absent. Regardless of claims to custody, she may have in statute (at divorce or on separation) the Equity rules, simply address the issue purely in terms of the father's rights and obligations.

Likewise the 1873 Custody of Infants Act gets short shrift. Bowen L. J., acknowledges that;

> '... we must regard the benefit of the infant; but then it must be remembered that if the words 'benefit of the infant' are used in any but the accurate sense, it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by the way of interference with the father'.
> (p. 337).

Ergo, we must also have regard 'to the natural law which points out that a father knows far better as a rule what is good for his children than a Court of Justice can' (ibid).

Thus, all the statutory intentions for courts having regard for the benefit of the child disappear under a welter of words which condense down into a simple statement, that the child is best served by remaining in the father's custody. It was a judgement at odds with statutory intentions set out in 1873, and with the new legal rights accorded to married women, in matters of property. By this judgement, married women exercised considerable rights to possess, control and alienate property, but had no corresponding rights in the matter of either physically possessing or having custody rights over children of the marriage. Unlike unwed mothers of illegitimate children, who in the same year (Reg vs Nash (1883) 10 Q.B.D. 454 C.A.) were held

to have a right to claim custody of those children (O. Stone op.cit. 72). We may appreciate now why Stone argues that this 'strong' decision provoked the 1886 Guardianship of Children Act.

In Agar-Ellis, the material circumstances of the girl disappear in the celebration of the very principle of legal patriarchy; the 'natural' right of the father qua father to dominate his children. Her writ represents a threat to the social body, 'the general interests of children and the general interests of families' which the court entrusts to the good management of the patriarch. The 'social' as constructed by the bench is a set of households, internally regulated by a set of natural laws, stemming from the father's natural affection for, and responsibilities to, those in his domain. The family is the cell form of the well ordered society with sacred duties to perform, and where the court intervenes at its peril. What is to be regarded as most beneficial to the infant therefore, is their continued subserviance and obedience to the father's wishes.

By contrast, if Agar-Ellis celebrates legal patriarchy, the case of Reg v Gyngall (1893) 2 Q.B. 232, celebrates its decomposition. Gyngall is of some importance for its new reading of <u>parens patriae</u>, the elaboration of the notion 'the welfare of the child', and finally for the space created for the interventionist state.

Lord Esher puts <u>parens patriae</u> in play in a revolutionary way:

> '... the Chancery Court was put to act on behalf of the Crown as being the guardian of all infants, in place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent'. (239).

Chancery becomes the guardian of all children, it functions as if it were a parent, and importantly, its jurisdiction supersedes the natural guardianship of parents. Further, as 'the supreme parent of the child':

> 'The Court has to consider what is for the welfare of the child and for her happiness, what are her prospects ...' (p. 243).

Thus the empire of the father and the natural rights of parents decompose in a judgement where Chancery 'acting as a wise and high minded parent' (p. 245), fabricates a direct relationship not only with child heirs but with all children. We can see the doctrine intact in the principles of the Guardianship of Minors Act 1971.

In Reg vs Gyngall, we find the statutory requirement that the welfare of the child should be placed above the wishes of either parent, not only made effective but in some ways extended. Firstly, the court begins to take account of the wishes of the infant. Lord Esher, for example, acknowledges earlier judgements that spoke of this matter and notes that other courts fear that to acknowledge that a child had the power to consent to custody 'would be entirely to subvert the whole law of the family' (p. 241). Though not citing Agar-Ellis, directly this argument is familiar to us, and is revealing of the extent to which courts had sought historically, to preserve the stability of the family by silencing the voices of infants. In Gyngall, Esher asserts that 'wishes' and 'consent' are not the same, and that the wishes of an infant, over the age of discretion, are important too in assessing 'what is for the welfare of the child and for her happiness' (241-243). Welfare begins to refer to the physical and moral

emotional and mental well-being of children, a definition taken up in later Acts directly affecting the custody of children.

In Agar-Ellis (1883) and Gyngall (1893), we find a contrast between the 'old' discursive formation bounded by Common Law principles and the 'modern' conception of family law; the sphere of private regulation, gradually displaced by the superintending power of the state. The silent infant of the common law's family is replaced by the infant in equity, accorded the status of being a speaking subject. Simultaneously though, the infant stands in relief as an object of intra-familial dispute. Against this, we have to recognise that the principle of 'the welfare of the child' as the criterion for custody dispositions, allowed equity considerable powers over and above the rights of natural parents. 'Welfare of the child' remained a vague enough concept for the courts to begin to inscribe the contents of 'welfare' in the application of a general principle.

2. Legislation on Guardianship and Custody; ' a history of a change of attitude'?

Taken together, the series of acts covering guardianship and custody (Custody of Infants Act 1839, Custody of Infants Act 1873, Guardianship of Infants Act 1886, Custody of Children Act 1891, Summary Jurisdiction (Married Women) Act 1895, Guardianship of Infants Act 1925, Guardianship of Minors Act 1971, Guardianship Act 1973), were the material means of effecting the shift of the balance of custodial powers between husband and wife. A 'history of change in attitude', Bromley calls them, which collectively 'whittle down the father's rights further and also give the mother positive rights to custody which even equity did not accord her' (Bromley op.cit; 306). Here we find who was to have

the physical possession of, and provide day-care for them, and who would determine a child's education (its nature and length) and its religious affilliation.

The Guardianship Act of 1886, like previous similar legislation indirectly concerned itself with the welfare of children. Primarily, it was legislation giving 'legal rights to the mother of legitimate children in the presence of her husband' (Stone op.cit; 71). High Courts were now allowed to grant mothers custody of infants up to the age of majority. Furthermore, it repealed a father's right to oust the authority of the mother after his death; for any testamentary guardians appointed by him were to act jointly with the mother. Note 'jointly'; a mother's right to custody of the children after the death of her husband was <u>not</u> superior, only equal to that of other testamentary guardians. Mothers and testamentary guardians, in any dispute, were litigants of equal standing before the courts. Courts were also required to regard 'the welfare of the child' as separate consideration. Once installed, this principle allowed mothers guilty of misconduct to be awarded custody if the courts thought it was in the child's interest to do so (Pinchbeck and Hewitt; 382-383).

'A history of a change of attitude'? Closer examination of the legal situation of husband and wife, parents and children in the late 19th century suggests an elaborate double game. The 1886 Act, the 1895 Summary Jurisdiction Act (and later still the 1925 Guardianship Act) seemingly extend the custodial powers of mothers while sustaining and preserving the position of the father as head of the household (Brophy 1982; 151). The formal and public acceptance of the custodial rights of mothers set out in case law and legislation was to be achieved at the cost of affirming the married woman's mothering role while affirming her dependence on her husband, and hardly disturbing his power to determine the life-chances of children in, or of the marriage. The key to understanding the dual process

of legislation seemingly loosening the ties between fathers and children is to consider the powers delegated to High Court judges and magistrates in the acts. There was a transfer of patriarchal power, not so much an erosion; custodial and guardianship rights were not granted unambiguously and independently, to married women, but it was left to the discretion of the courts to determine which parent would be granted custody (Grossberg 1983; 236). A judicial power considerably enhanced post-1886 when courts were required to 'have regard for the welfare of the child'.

As a brief illustration let us consider the Summary Jurisdiction (Married Women) Act 1895. It required married women to prove 'aggravated assault, desertion, persistent cruelty or wilful neglect to provide for her children', against her husband, such that she had to establish a separate residence. Both conditions assault etc. and separate residence had to be met before she could apply to the magistrates for custody of children (up to the age of 16) and maintenance for their up-keep (Brophy op.cit.; 167).

Like the legislation before it, the 1895 Act considered custody as an issue only when a) a father had failed (in the eyes of the court) his responsibility, b) a break up of the marriage (separation, divorce) occurred, c) marriage terminated by death. Within marriage, the father remained the sole custodian; he retained the power to create guardians after death whose authority was equal to that of his surviving spouse; his obligations to maintain his wife and children were unenforceable but formally and customarily they remained his subordinate dependents. On the break up of marriage, custody passed to a married woman only at the behest of courts; at death, testamentary guardians were empowered to challenge a mother's custodial authority, again before the courts.

Whenever marriages were in danger, or breaking apart therefore, married women assumed custodial powers only after their behaviour in marriage was assessed by jurists and it was to their power she had to defer, not that of her husband. The married woman's dependence shifts from the husband to the authority of the judiciary with its powers to award custody, and equally importantly, maintenance, to enable her to live in some kind of autonomous existence outside her husband's domain.

The 'expanded presence' (Grossberg op.cit; 237) of married women in the legal sphere should not blind us to the continued existence in the courts of an ideology which celebrated the family as an area governed by fathers and maintained by mothers. Nowhere is this more evident in the way that the historical development of the conception of 'custody' unfolded, superbly analysed by Brophy in her interpretation of the 1925 Guardianship of Infants Act (Brophy 1982).

What she detects is the splitting apart of the bundle of rights, duties and obligations pertaining between parents and children which collectively describe 'custody', such that day care and child-rearing were made the realm of mothers, formally separated from the custodial powers of fathers who still retained the power to determine the education, religion, vocational training and future occupation of children of the marriage. This remained so after marriages had broken up or terminated. So, even where married women were awarded the physical possession of children, the hierarchical arrangement of 'the common law family' could be perpetuated and sustained by and through the powers of the courts. By so doing, what was to be for the welfare of the child worked along two different axes. Firstly, child care was construed as women's work and of utmost benefit to children. However, child care is domestic work which makes it difficult for women to detach themselves from the home and become economically independent. In turn, this means an increased dependence on the good will of husbands and the discretionary power of courts. Secondly,

married men could at once be freed of an open-ended obligation to maintain (the courts delineated the amount of maintenance) whilst retaining considerable powers over spouses and children not living under his physical potestas. They remained 'his' without being his physical possessions.

The feminists struggles of the early 1920s forcing the issue of custody on to the political agenda provoked powerful opposition from parliamentarians and lawyers (see Brophy, 150-156). Opposition, which fundamentally grounded its arguments in saving and stabilising the family. Or at least saving 'the family' as founded in nature;

> 'Nature takes the thoroughly straight-forward and natural line that marriage is partnership. The father has his definite duties, and the mother has the more intimate domestic duties'.
> (H. C. Debates 1921, quoted in Brophy; 154).

The ideological 'spheres of men' and 'spheres of women' within families, slightling references to 'petticoat government' already existing in the nations households, and the impossibility of inserting legal jurisdiction into a relationship based on 'understanding and mutual forebearance', love and affection was the discourse deployed against the feminist appeals for relief from inequalities suffered by women in marriage. Unequal treatment before the law compared with husbands, compared with unmarried women, in matters of custody, the feminists argued, left the married woman as a second class citizen (Brophy; 151). Moreover, they argued that custody gave husbands leverage to force married women to stay in marriages which in many respects were intolerable, because husbands could threaten mothers with the loss of access to children if they left. Brophy correctly argues that this Act gave women some further rights to go before courts to acquire the custody of children,

but more importantly, the Act demonstrates the state's concern to preserve one version of familial relations namely 'the natural' order of things.

Feminists and defenders of the 'natural' family deployed 'the welfare of children'; the former arguing that they were powerless to intercede on behalf of children; the latter arguing that joint custody would undermine existing relations of authority, destabilize and therefore endanger the welfare of children (Brophy; 158).

Where did the 1925 Act leave custodial relations? Brophy concludes, 'Essentially, it did not intervene directly in the common law rights of fathers as sole legal guardians. Thus a mother could not exercise any parental right without her husband's consent. If he disagreed, she must apply to the courts to assert her wishes. In the absence of legal proceedings her opinion as to what might be in a child's best interest was still to remain secondary to that of the husband.' (Brophy; 163).

One further effect of installing the principle of the welfare of the child as the criterion for deciding custody dispositions was the expansion of the state's power to investigate the psycho-social interior of the family. The 'private domain' of the family, the sphere of the intimate and affective relations became a terrain legitimately open to inspection and regulation for the sake of the children, regardless of the claims that this was an impossible area to legislate.

In case law it is interesting to note how the judges deployed the Act to bolster the natural parents' right to remain as the prime custodians. In Re Thain, Thaine v Taylor (1926) 1 Ch. 676, where on re-marriage, a father

applied to the courts for the custody of a daughter of his first marriage (the first wife died), his daughter having been placed in the care of another couple in the interim, was awarded custody. He had, in judicial terms, 'improved his station' (i.e. re-formed a family) and thus the court declared 'it was well-settled practice that the claim of the father must prevail, unless the court was judicially satisfied that the welfare of the child required that the parental right should be suspended' (676). Moreover, the court held that while the welfare of the child should be the paramount, it was not the sole consideration. What other considerations were material are revealed in their citation of Re O'Hara (1900) 2 I.R. and reading this passage into their judgement:

> 'Where a parent is of blameless life, and is able and willing to provide for the child's material and moral necessities ... the court is ... judicially bound to act on what is equally a law of nature and society, and to hold ... the best place for the child is with its parents'.

What the judicial utterances confirm here is the extent to which the state continued to promote the rights of natural parents in respect of their children, while simultaneously making that parenthood increasingly conditional upon specific performance. Parents living 'blameless lives', 'unimpeachable parents' (Re Thain; 684) were safe, and by the laws of nature and society, children were best left with them. Though we have looked at a series of acts fundamentally concerned with children and their welfare, we look in vain for anything pertaining to the rights of children against their parents. These acts simply allow courts and parents (in existing marriages) unproblematically to determine what was in a child's best interest and what

was to constitute children's welfare. The primacy of parental authority which these acts assiduously confirmed, that strand of law which continually supported the location of children as the dependant subordinates of their natural parents, had one dire consequence. Their effect, until the middle of the 19th century, made it extremely difficult to protect children against wilfully neglectful, physically abusive or exploitative parents. Protecting children against their parents required a separate series of social interventions in order to free some of them from the nightmare existence of an abusive family.

3. The Protection of Children

> '... a few weeks later (in 1882), at a meeting organised by the Society for the Prevention of Cruelty to Animals, an appeal for a Dog's Home became extended into an appeal for the protection of children'.
> (Pinchbeck and Hewitt II; 622).

The strange beginnings of the National Society for the Prevention of Cruelty to Children is one of the curios of English social policy . Founded in the early 1880's, the rise of the federation of urban-based societies formed to protect children against cruelty and abuse, speaks the extent which the courts still supported the rights of parents and guardians to raise and rule their young charges as they wished. The courts' assumptions of parental rights, and, the effective working of *parens patriae*, materialized only after parents surrendered themselves to law. Staying out of its orbit meant that the familial governance of children remained intact. In the absence of

any administrative machinery, a philanthropic body, with the powers to go before the Courts, as an interested party acting altruistically on behalf of children, found it difficult in the extreme to 'save' children from the family. In common law, there were criminal sanctions against extreme physical abuse of children by their parents, certainly criminal sanctions against child-killing. However, the rules of criminal evidence applied, such that intent and actual evidence of undeniable physical injury had to be proved for parents to be found guilty. Where failure to protect led to death or injury, courts were ready to acquit, or at least convict on a lesser charge (e.g. manslaughter not murder) (Bevan op.cit.; 175-176). It was through statute law, legislation pressed for by a variety of philanthropic and church societies, that the apparatus was established to allow a third party to go before the courts to wrest control of children away from parents. The latter half of the 19th century is thus marked by the creation of corporate entities statutorily entitled to apply for the custody of children. Predominantly these were to be administrative branches of the state, but not completely so (the NSPCC, Dr. Barnado's, children's friendly societies were others empowered to contest parental custody).

The formation of the modern notion of protective custody for children draws upon a diverse set of legislative and administrative initiatives (Parton 1979, Geach 1980;1983). The process of de-constructing the common law and equity tradition of the prior right of parents was difficult. Whatever else the common law tradition represented or accomplished, it had historically been a buttress against the exercise of arbitrary state power over individual citizens. The National Society for Women's Suffrage for example attacked certain provisions of the (then proposed) Infant Life Protection legislation (provisions dealing with the licensing of day nurses) precisely on the grounds of state inter-ference. 'The responsibility, they argued, for the child in infancy as in later life lies with (parents), and we emphatically deny that the State has any right to dictate to them the way it shall be fulfilled' (quoted in Pinchbeck and Hewitt II; 618). Recall that equity assumed the wise and supreme mantle of parenthood of all infants by carefully asserting its long

historical precedence, deriving from the Crown, to act as the protector of all those who were unable to protect themselves. The courts were at all times sensitive to the charge that they were wantonly interfering with private rights. Not surprisingly then we find the State interceding between parents and children, for the protection of children, occurring in a class specific manner; removing children from the families of social groups least able to defend themselves at law, and most open to the charges of neglecting and abusing children. Note also the extent to which the powers of the state to remove children from natural parents into the protective custody of a 'fit person' (which describes the conspectus of the operation of all the Children's Acts, and Children and Young Person legislation since 1908 through to the Child Care Act 1982), derive substantially but not wholly from the Poor Law jurisdiction (Maidment 1983; Stone O. 1976).

There was, and is, strong tradition amongst liberal juridico-political theorists, that while the state should not interfere with the rights of citizens, conversely it had a duty to protect those who were politically incompetent, those who could not protect themselves and protect itself against the miscreants who mindfully ignored the social contract between citizen and the state (Eccleshall 1979). The kind of state paternalism which is inherently a part of child protection legislation legitimately drew on this political tradition. Little wonder also that child protection should be bound up with the older version of state paternalism found in the Poor Law system of relief, and shares its classed character.

One point of convergance between the two enterprises was the Poor Law Amendment Act 1868, (section 7) which made it an offence for a parent wilfully to neglect to provide adequate food, clothing, shelter, medical aid or lodging for children

under 14 years of age in the custody of an adult, such that their health might be seriously injured (Bevan, op.cit.; 177). This act intended to remedy a moribund common law rule protecting children from violent parents but significantly extended by writing in 'neglect' as a sufficient condition for an offence.

If we are to identify the initiatives which shifted the balance between parental and state protective custody, however, it is a group of acts passed in the late 19th century which are most important; Children's Act (Prevention of Cruelty to, and Protection of Children) 1889, amended, and replaced by the Prevention of Cruelty to Children Act 1894, the Custody of Children Act 1891, and the Poor Law Adoption Act 1889 (Bevan, op.cit; 177; Stone O. op.cit; 246-247; Bromley, 340-342; Maidment, 1983, 71-73). Olive Stone called the 1889 Act 'the first great Children Act' (p. 246). The Lord Chancellor at the time said of the 1891 Act, 'It gives the poorer child the same protection given by the Court of Chancery to wealthier children who have property bestowed upon them' (quoted in Pinchbeck and Hewitt II; 385). For Maidment, current powers for local authorities to assume parental rights, draw directly on the 1889 Acts. Let us then set out briefly the principles of child welfare established by these legislative initiatives.

a) The 1868 Poor Law Amendment Act, making neglect and physical cruelty to children an offence, was considerably extended and reinforced by the 1889 Prevention of Cruelty to, and Protection of Children Act. This remains a central feature of later Children and Young Persons Acts (but extended principally by the 1933 Children and Young Persons Act, sect. 1, which states that anyone over 16 in charge of, having care or custody of anyone under that age who wilfully neglects, assaults, ill-treats, exposes or causes unnecessary suffering or injury to health, is guilty of an offence) (see Bromley; 341). The federation of local NSPCC societies, Booth and the Salvation

Army were primarily responsible for the investigation and publicity bringing attention to the social problem of child neglect and injury. By 1894, ill-treatment, neglect and assault of children were all offences (Bevan; 177).

b) The 1894 Prevention of Cruelty to Children Act 'specifically provided that a parent would be neglecting his child (sic) if, being without the means to maintain him, he failed to provide for his maintenance under the Poor Law' (Bevan; 177) (i.e. apply for Poor Law relief, and contribute to upkeep).

c) The Acts of 1889 and 1891 command our attention for two reasons. Firstly, public authorities were permitted to retain the custody of children against the wishes of parents (1891). Secondly, the Poor Law Amendment Act 1889 provided for Boards of Guardians 'to resolve that parental rights should vest in them where the child was deserted, or the parent was imprisoned to penal servitude or for an offence against a child' (Maidment 1983; 71, my emphasis). This power for Guardians to assume parental rights (note, without judicial disposition) was extended in 1899 to include children of parents who were mentally deficient, of vicious habits or mode of life, or a parent unfit to have control of it (Maidment;71).

In contrast with common law and equity traditions, these provisions are quite astonishing and are landmark rebuttals of absolute parental rights over children. The 1891 provisions arose out of a celebrated series of cases where Barnado tried to resist attempts by parents to take back formerly deserted children, or children they could not maintain and placed in one of his homes, at about the time these children were about to enter the labour force (see Stone; 246-247; Bevan;289: Bromley; 311-312). Parents deployed the habeas corpus writ to obtain their children. Section 3 of the 1891 Statute required courts to have regard to the conduct of the parent, and,

> "if he has abandoned or deserted his child or allowed him to be brought up by and at the expense of another person, school; institution or public authority for such a length of time and under such circumstances that he must have been unmindful of his parental, an order giving him custody of the child cannot be made unless the court considers he is a fit person to have it".
> (Bevan; 289).

Later case law (Re O'Hara (1900) 2 I.R. 232) provided some relief for parents who temporarily, and because it was in the best interests of the child, had to hand over care of the child to another party. Case law required that loss of custody could be effected only if some degree of parental moral turpitude could be shown, such that a parent was an 'unfit person' (Bromley; 321).

The other aspect that a non-judicial authority, a Board of Guardians could pass a resolution, and vest itself of parental powers, constitutes an advance of the administrative (as opposed to judicial) power to confront parental authority. But it connects up with the 1891 Act insofar as it works with notions of 'fit' and 'unfit' persons.

d) The principle of 'the fit person' was a provision of the 1889 Act. The 'fit person order' allowed for the removal of children from the care of parents or other persons having charge of a child. As an ideological construct the notion of children being in care of a 'fit person' combines strands of common law (an obligation to maintain, sanctions against cruelty, neglect and assault) and equity (with its requirements that parents be morally righteous). As a principle of regulation and control, deploying 'the fit person' as a criterion of

custody rights allowed for outside intervention against a wide range of situations which might place children in physical and moral danger. By the end of the 19th century, this included children in the care and possession of persons who were criminals, mentally deficient, displaying moral turpitude (which could range across atheism, chronic drunkeness, blasphemous language, consorting with prostitutes, living with persons other than a spouse - grounds established by equity) or persons who were neglectful of and cruel towards children, and, persons who could not afford to maintain children in their charge. Vagrant, wandering or criminal children, those beyond the care and control of their parents, guardians or other custodians were taken care of under a separate set of procedures (see Part 4).

Collectively, these acts undercut the juridical autonomy of the family, in the name of protecting children. By offering a definition (through the construct of 'the fit person') of proper parenting, by extension this legislation simultaneously offers a substantial definition of the child's place in the social world; home-bound, off the streets, out of the work place, under the general superintendance of the wise and caring gaze of 'the fit' custodian. Where these general conditions could not be met by natural parents or their appointed guardians, then there was a formal and public duty to place children in a situation where these conditions could be fulfilled. Contemporary case law combined these new currents of thinking when Lindlay L. J. offered up a redefinition of the meaning of 'welfare' in relationship to the child.

> "The welfare of the child is not to be measured by money only or by physical comfort only. The word 'welfare' must be taken in the widest sense. The moral and religious welfare of the child must

> be considered as well as its physical well-being. Nor can the ties of affection be disregarded."
> (Re. McGrath (Infants) (1893) 1 Ch. 143).

Note the resounding silence about welfare and the release from poverty. As late as 1948, when annotating the Children Act of that year, one commentary records:

> "From this (judgement) it would appear that a local authority would not be justified in acting under the present section merely on the ground of poverty of the child's home. There must be present some other factor prejudicial to his (sic) bodily, mental or moral well-being."
> (Morrison, Wells, Eton and Barwell 1948; 34, my emphasis).

Relief was available of course, but at a high price because it required parents to surrender up children to the ministrations of the Poor Law system, with the consequent problems of bearing the stigma of pauperism, loss of care and control of children, and the danger of a permanent loss of custody. The other route was for children to be placed with Dr. Barnado or with the various waifs and strays or children's friendly societies. There is a parallel here with Donzelot's complex of measures which he calls a system of 'economic and moral tutelage' (p. 91). A system which embraces the complex of institutions and sites within the state and within civil society. A system which caught up children and their families in a web of exchanges; assistance in exchange for control, a relief from obligations in exchange for a loss of rights, a means by which the welfare of children could be guaranteed but with no control over the 'contents' of welfare provision. A system which embraced children without families (orphans, deserted children) and children of families simply too poor to maintain them.

Critically placed between the family and the state at this conjuncture were the philanthropic societies; the NSPCC, Charity Organisation Society, the waifs and strays and children's societies, who simultaneously fulfilled several roles; visitors providing comfort and assistance, as inspectors reporting on neglect and abuse, and as foundations providing housing and guardianship for children without families or children whose families found it impossible to support them. They were also politically effective pressure groups, campaigning on the basis of data and knowledge about living conditions in the great urban centres produced through the individual reports of home visitors, inspectors, and by larger scale social surveys. Thus, these bourgeois reformers were uniquely placed to inform and influence parliamentary opinion and to shape legislation . And they were ceaseless proselytizers which is why the campaigns look like moral crusades on behalf of children, as well as humanitarian programmes which relieved actual suffering. At the same time, as Donzelot notes, because they were private corporate bodies, because they were self-financing and not formally state institutions, they functioned as mediating sites between the public and the private; providing for individual needs without unnecessarily expanding state control over individual citizens. Moreover, they provided 'welfare' without incurring state expenditure. Officials contacting families,(the visiting C.O.S. officer, the NSPCC) were agents of private corporations not directly agents of the state; they functioned to retain a delicate balance between individual 'freedom' and state paternalism.

Because philanthropic societies and charities were 'private', when it came to interfering with the custodial powers of parents, they were regarded in law as 'strangers', against whom parents retained considerable civil rights. In Barnado vs. McHugh and Barnado vs. Ford, parents could and did challenge the rights of custody and kind of guardianship offered by a philanthropic organisation. Mrs. McHugh challenged Barnado's right to bring up her own son as a Protestant. Mrs. Ford (again

deploying habeas corpus) challenged his authority to ship her son off to Canada without her knowledge. Both mothers voluntarily surrendered their children into Barnado's custody; both still retained the civil right to request the return of their children, which the courts supported. It was this 'crisis', the ambiguous status of philanthropic bodies to retain the custody of children which provoked the 1891 Act, which formalised and secured the custodial powers of corporate bodies . State support for philanthropy was extended by the 1894 Act (confirmed in 1904), which empowered NSPCC inspectors to initiate prosecutions and to take out warrants permitting them to remove children to places of safety. These developments firmed up the extent to which philanthropic societies acted as delegated state authorities. By these means also, charitable bodies functioned as policing agencies; where 'policing' entails both the provision of welfare-assistance, and, the more coercive function of bring sanctions to bear against individuals.

These powers are now vested mainly, though not exclusively, in local authorities, by the provisions of the various 20th century Children Acts and Children and Young Persons Act. Their character and their discourse ('place of safety', 'fit person', welfare of the child - where 'welfare' is constructed in forms of physical and moral protection) derived substantially from the legislation of the 1880's and 1890's. Indeed, the age-definitions of adult and child have remained substantially the same. The 1889 Protection of Cruelty to Children sets out the age-lines thus:

> "Any person over sixteen years of age, who having the custody of a child, being a boy under the age of fourteen years or being a girl under the age of sixteen years, wilfully ill-treats" etc.

While 16 years indicates the lower limit of 'adulthood', the age differences between boys and girls inflect the moralization of age-categories. Girls require a longer period of protection because they are sexualise subjects (following on from the Criminal Law Amendment Act 1885) whose 'welfare' is taken to include freedom from sexual abuse and sexual exploitation.

CONCLUSION

Childhood, at the end of the 19th century, is a category of increasing social importance. Not, we would argue, because of any increasing sentimentality about children, or any increasing romanticization of childhood, rather it emerges out of two complexly-linked processes. Firstly, more numerous sanctions against parents/guardians/custodians who neglected, ill-treated or failed to maintain children, constitute the categories of the abusive (adults) and the abused (children). Secondly, 'neglect', 'ill-treat', and 'maintain' are all ideologically loaded terms but collectively led to a closer specification of good-parenting. 'Neglect', 'ill-treat' and 'maintain' were effectively 'moralised' by the application of the 'fit person'. So quite separate social behaviours and attitudes (physical cruelty, failure to exercise sufficient parental control, and sheer poverty) were all rendered as moral problems and moral failures. 'Fit' and 'unfit' persons therefore emerge as categories of moral classification. The specification of good-parenting thereby defines the necessary contents of childhood. Parents offering the rudiments of Christian teaching, surrendering children to the schoolroom, keeping their offspring out of the work place, off the streets, and staying out of poverty had no fears of their custodial powers being wrested from them. That so much of child welfare derived its categories from and worked through the Poor Law system indicates that it was the paupered and working classes who were most likely to have their custodial powers challenged and their civil rights suspended.

Measures to prevent physical cruelty to children unambiguously allowed the state and its delegated agencies to increase the regulation of family life. Adulterous parents, poor parents, cruel parents were all 'unfit' because they were morally inadequate to have and hold the custody of children. Removing children from their custody on these grounds threw a blanket of morality over an underlying fear expressed in all the campaigns of social reformers, expressed in the parliamentary reports on juvenile delinquency, expressed in the workings of the Poor Law system; namely that morally inadequate parents would corrupt, improperly socialise and improperly encultrate members of the succeeding generation. Removing the child from the morally inadequate parent, therefore, had a wider social purpose; it was a means of interrupting the reproduction of social disorder. The development of child-centered institutions, (the industrial and reformatory schools, compulsory state education, prohibitions on labour, protection against parental neglect and abuse), inserted between the child and the family, a set of institutions offering different (and sometimes contradictory) messages, requiring a different set of cultural and social practices and values from those presented by the family and its locality. By these means, state and state-delegated institutions and their agents were able to accomplish two things. Firstly, the creation of childhood, defined by chronological age, but equally characterised by setting apart, by distancing children from the adult world through a series of statutory 'protections'. Secondly, the social construction of childhood entailed the instrumental use of minors; they were to be the means of attaining a broadly based moral regeneration of the social order, something which could be accomplished only after curtailing the juridical autonomy of the family and installing the state as the wise and supreme parent.

Securing the physical and moral protection of children in the family took place in the context of a broader set of social policies concerned with their health, education and general well-being. We note these initiatives only briefly because judicial ideology contributes very little either to the character or the analyses of them.

A concern with the national population of children as opposed to individual children who were objects of court cases was embodied policies directed at reducing infant mortality (Lewis 1980, Davin 1978), providing education on a full-time and compulsory basis (Lawson and Silver 1973, Horn 1978), providing school meals and school medical inspections (Lowe 1979, Lawson and Silver op. cit.) and in measured designed to give economic assistance to families with children (Land 1976, 1980, Davin op. cit., Lewis 1980). Numerous commentators, including those cited here have noted that these policies were not entirely altruistic either in intent or execution. It is argued that many of these policies were a consequence of fears about the numbers, strength and efficiency of Imperial troops, industrial labourers and the future of 'the race'. These fears were formally expressed in the proceedings of an Interdepartmental Committee on Physical Deterioration which reported its findings in 1904 (Davin; 58).

Mass education, school meals and school based medical inspections (the Education Acts of 1876, 1906 and 1907 respectively) brought the majority of the nation's young into everyday contact with the state. Beyond this, the campaigns to educate the nation's mothers in matters of diet and 'domestic dirt' (Davin op. cit., Lewis op. cit.), the establishment of baby clinics, home visiting and the provision of domestic education for girls defined 'normal' and 'adequate' mothering practices.

Taken together, these policies expressed a concern with children as a resource; as the future bearers of the nation and race. The ideological character of the debate as to how 'the human capital' of nation was to be best preserved involved a long running clash between the eugenicists and environmentalists (Lowe, op.cit.). Within that debate, there was a shift in the ideology of motherhood. Once celebrated as a natural, nurturing status, the production of training manuals, the rise of home visitors and infant clinics, relocated motherhood as a semi-professional enterprise to be conducted in the national interest.

Nevertheless, it is possible to see the promotion of 'public health and domestic hygiene' by interlocking voluntary societies and local authorities connecting up with the initiatives to protect infants. The Infant Life Protection Act 1897 provided for the recruitment of home visitors to inspect households which might be 'unfit' for young children. The systems of 'protection' and 'welfare' thus intersect through the officials and agents of philanthropic and state-funded bureaucracies empowered to inspect, assist and advise families on the best, safest and most efficient means of bringing up baby (see Dingwall, et. al. 1984).

NOTES

1. We use custody here in the sense which combines 'care' and 'custody'. One legal commentator sets out the legal definition of custody as follows:

> As we have already seen, in earlier law only a person with de facto care and control of a child could exercise the other rights which were attached de jure to the guardianship of a parent or other person. As a result, there was a tendency to use the word "custody" sometimes to designate all these rights and sometimes to designate only care and control ... To avoid confusion ... the word "custody" will be used in its widest sense to the whole bundle of rights and powers vested in a parent or guardian. The narrow sense of the term will be denoted by the words 'care and control' or 'possession'. (Bromley 1976; 304-305).

For a full discussion on custody, see also Bevan (1973; Chap. 9), Maidment (1984).

2. Boys over 14 and girls over 16 could go before the courts on a writ of habeas corpus. Maidment's very full citation of custody case law from 1741-1857 refers to no case based on a minor's writ of habeas corpus, (Maidment 1984; 93 ff).

3. Some of the speeches in the debate on the Custody of Infants Bill are reported in Pinchbeck and Hewitt II; 362-378.

4. The Matrimonial Causes Act 1878 empowered magistrates to award custody of children under 10, to either parent (Bevan op.cit; 258).

5. See Laurence Stone, for example, who argues that by 1800 'there were six distinct modes of childrearing', (p. 254).

6. See The Observer 19 August 1984. 'The spectre of children's gulag haunts Sweden' (p.6.). A report which outlines the actions of Swedish social workers who seized a four year old girl and took her away from her parents, 'purely on the evidence given in an anonymous phone call', which alleged mis-treatment.

7. 'Where in any proceedings before any court ... (a) the custody or upbringing of a minor or (b) the administration of any property belonging to or held on trust for a minor ... is in question, the court in deciding the question, shall regard the welfare of the minor as the first and paramount consideration ...'. Guardianship of Minors Act 1971.

8. These agents range across Court Welfare Officers who report to courts in the matter of divorce custody cases, social workers placing social enquiry reports before juvenile courts, case conferences deciding on the kind of care and supervision to be afforded to children in local authority care, the Official Solicitor and medical experts called in to wardship cases, teachers' reports to juvenile courts, and reports from educational psychologists.

9. See Dingwall (1983), Philip (1978), Woodroffe (1962).

10. For a review of the reproduction of labour power thesis and a trenchant critique, see Jane Humphries (1977).

PART FOUR

MINORS, THE CRIMINAL LAW AND THE PENAL SYSTEM

"HELD, that the evidence that the defendant was a respectable child who had been properly brought up was sufficient to rebut the presumption of innocence which arose because of his age, and that the Justices and the quarter sessions were entitled to find that there was evidence of a guilty state of mind"

X vs X (1958) J. P. Jo 752

Appeal verdict on a 9 year old boy charged with stealing £2.00 and some chattels.

CHAPTER ONE

INTRODUCTION

In 1831, John Any Bird Bell, a boy aged 13 years, was tried, convicted and hanged for murdering, then robbing the corpse of a boy the same age as himself (Knell, 1965; 200). The Children and Young Persons Act 1969, with the exception of murder, effectively decriminalized all offences committed by any person under the age of 14 years (Bottoms, 1974). Capital punishment for anyone under the age of 16 years was legislated out of existence in 1908 (Knell op cit). This part then, is concerned with the transformation of the legal subjectivity of the child in English criminal law, the legislative history of which, we have just briefly outlined above. As an object of enquiry, we may pose the following question: how was it possible for courts to prosecute and order the execution of a minor in 1831 - that is, to make few distinctions between the adult and the child in criminal law, when a clear distinction existed in other legal discourses? The further question then suggests itself: what was the process of transformation of the criminal law and of its related penal practices that reconstituted the child as a legal subject which could be excluded from the procedures and processes of adult criminal law?

In this respect we shall be arguing that the changing subjectivity of the child in criminal law occurs at the point of dissolution of, and as a consequence of, one system of criminal law enforcement, which we shall nominally call the absolutist system, and the formation of the 'modern' system of criminal law enforcement. The 'modern' system entails a new set of institutions, concerns, practices and agents connected by a common purpose; to discipline, reform and rehabilitate criminals rather than seeking to punish them in order to revenge, expatiate or merely to uphold the law. In the shift from the

absolutist to the modern criminal justice systems, the place of the child is in fact quite ambiguous and complex, because as a category in law, 'the child' is, in one sense, passively changed by the larger scale transformations which have taken place, whilst on the other, the struggles to remove children from adult criminal judicial processes were an integral part of the process of the dissolution of the absolutist system. Because of this ambiguity and complexity we shall be limiting our argument to the period 1800-1860 in order to demonstrate these two facets of the child as a category in criminal law. Furthermore, the sharpest contrast between the old and the new systems of criminal law enforcement are evident during this period.

For our purposes, we conceive the absolutist system as a set of institutions, procedures and practices operating on the shared principle that a criminal offence is the physical manifestation of a morally evil mind. The criminal is therefore held to be absolutely responsible for his/her offence and therefore after conviction is to be punished according to the degree of transgression. At the centre of the system is the <u>virtual absence of the notion of extenuating circumstances</u>; for once such circumstances are acknowledged, the consequence is to recognise that there are social reasons for committing crime, and therefore the principle of <u>individual</u> responsibility, upon which the legal process and practices of punishment were based, puts in jeopardy the ideological basis of the absolutist system of trial and punishment.

And yet it is possible to demonstrate that from the very early years of criminal law, the absolutist system did harbour a form of 'extenuating circumstance'. The form it took was that of the specific privileges, granted with discretion, to children under seven years, and the mad. One of the grounds around which the social reformers of the 19th century focussed their attacks on the absolutist system was the central principle of <u>strict liability</u> and they were able to use the child and the mad, as

already existing categories within criminal law as instruments for the extension of the notion of extenuating circumstances. In other words, they played upon already existing contradictions within the criminal law.

Our procedure in this Part will be as follows:

1. By reference to the work of Michel Foucault we shall indicate the form and nature of the systemic change from the absolutist to the 'modern' system of criminal law enforcement, in the period 1800-1860.

2. Schematically, we shall outline the notions of rationality and responsibility traditionally operating in criminal law in order to indicate how these categories became instruments of social reformers intent upon re-writing the legal notion of 'the child'. This will necessarily entail a synoptic history of the criminal liability of children.

3. By reference to archive material indicate something of the dense reality of the lives and experience of criminal children in the early 19th century, and to argue that there is a radical disjuncture between the practices and experiences reported in the documents, and the ends to which the documents were put. By this we mean that the documents discussed below, whilst enunciating young criminals as 'victims', cannot escape from the singular fact that these 'victims' were resourceful, purposive, rational actors - the very characteristics which social reformers had to strip from them in order to remove the young from the barbarities of the 'Bloody Code'.

In addressing these specific issues, it will be evident that there is an inescapable theme which runs as a thread through them and intrudes its way constantly into the analysis. It is this. We shall be constantly examining the shifting boundary between the State and civil society and this is because the relocation of the young in the system of criminal law enforcement

is bound up with the emergence of new and differently organised apparatuses of the State, which articulate to the reality of civil society in radically new ways. To this extent, the changing subjectivity of the child in criminal law can be seen as a consequence of the changing structural relations between the State and civil society.

1. SYSTEMIC TRANSFORMATION: CHANGES IN SOCIAL GOVERNANCE

FOUCAULT AND THE BIRTH OF THE PRISON

Michel Foucault's (1977) Discipline and Punish, traces the transformation in penal theory and practice in France in the years 1780 - 1840. Such a description conveys nothing of the richness of the arguments, the complex set of concepts deployed and the multiple determinations Foucault brings into play in his account of the birth of the prison. We are not concerned here to reiterate the general epistemological claims nor for example, to repeat the radically different theory of the 'microphysics' of power announced in his work, nor shall we be concerned to assess their theoretical rigour or political importance. Our concern is with the general trajectory of change in the system of law enforcement which he traces out in the book.[1] For anyone concerned with changes in the systems of law enforcement will be immediately confronted by the research agenda set out by Foucault. However much we may despair at his somewhat elliptical 'history', his leaping about in time and space, and at the complexity of his dense theoretical determinations, his work is a highly suggestive map of a particular systemic transformation. What follows below is an exploration of the applicability of the general scheme of Discipline and Punish to a particular conjuncture in English criminal and penal history.

What Foucault traces out then, is the transformation of a system of punishment whose punitive domain was the physical violence exacted on the bodies of the judicially convicted (the limit case perhaps being his description of that meted

out to Damiens the regicide) (Foucault; 3-5) to the installation of a regime of discipline. The latter takes as a constant the body of the offender, and whilst the power to punish likewise remains in the hands of the state, the mode of the exercise changes from tyrannical violence to an ever-present regulation; metaphorically, a shift from the guillotine to the penitentiary; from torture to the gaol timetable. The judicial and punitive process becomes one of identification, individualisation, and regulation of subjects in time and space; the public spectacle of execution is replaced by the isolation of the prison cell; in the partition of the day into small periods of time spent on highly supervised and precisely defined activities (Foucault op. cit. 6-7). 'We are', Foucault argues, 'now far away from the country of tortures, dotted with wheels, gibbets, gallows, pillories' ....(p. 307). We reside contemporarily in a 'carceral archipelago' (p. 298) amidst a pyramid of institutions whose apex is the prison. Institutions such as the orphanage, the reformatories, the disciplinary battalions, the schools, charitable societies, the workshop, the almshouse are not directly modelled on the prison, but share its characteristics; the principle of classification of inmates/clients/daily attenders; the written rules and notices of formal procedures, whose infraction generates both delinquents to be normalised and the process of normalisation; the intense supervision of activities; the assessment of performance which produces knowledge about the individual, which in turn opens up that individual for more special surveillance and more precise correction. And it is the knowledge generated by and about individuals in such institutions which provides the ground of operation for new classes of state-employed officials, managers, advisers, agents, administrators, educators and repairers. When looked at as a connected system of shared principles, Foucault argues, what we see is no longer the disconnectedness of an exemplary system of punishment where torture and execution ritually celebrated a 'difference' between a sovereign and a social body, but a subtle gradation, from mere infractions of local rules treated as the correction of irregularities, to the punishment of a crime. The character of the carceral is

this minutiae of gradation from correction to punishment. In effect, Foucault continues, 'perhaps the most important effect of the carceral system and of its extension well beyond legal imprisonment is that it succeeds in making the power to punish natural and legitimate, in lowering at least the threshold of tolerance to penality' (301). By extension, we have the social body penetrated by rules and regulations, simultaneously carrying the possibility of their infraction and thereby continuing the process of normalisation. The rules and regulations though, must not be thought of in the negative, repressive, coercive sense, for though that effect is ever present, Foucault wants to argue that the rules, regulations etc. constantly produce knowledge about individuals and knowledge about the social body which is already regulated by them.

Such a short summary belies the richness and complexity of Foucault's project. Not only does he present us with a working description of the historical transformation of penal practices and attitudes, but manages to place on the agenda a radical re-thinking of power, of knowledge and its articulation to ideology, a very contested and diffuse political programme and finally, some original insights into the developments, character and the social location of the social sciences. What makes Foucault's discursive analyses so contested (without of course taking account of the more mundane charges of generating major theoretical insights from little empirical data, or, first being plainly un-historical - having scant regard for either chronological or geographical sequence) is his refusal to take, for example, the transformation of criminal and penal systems as an <u>index</u> of other (and generally, more fundamentally) social changes or transformations. The procedure of examining discursive transformations in the light of multivariate determinations and a refusal to assign causality to the over-arching principles either of 'the rise of capitalism' or changes in the mode of production, brings Foucault, contemporarily, into epistemological and political conflict with a wide variety of Marxists.

For Foucault, the factory and capitalist work discipline are assigned an important place in the carceral society, but, they are not accorded a primacy nor are they regarded as points of origin. Rather the factory and capitalist work discipline are important regulative mechanisms within the social body, but not necessarily more influential than the prison, school or the asylum. Likewise, Foucault's explanatory system, while giving due consideration to the organisation and mode of producing material consumable goods, is insistent on giving similar weight to the work of psychologists, criminologists, jurists, psychiatrists and penologists whose metier is a theoretico-political contest in the production of (competing) knowledge systems. In terms of material outcomes, the knowledge systems are the providers of the ideological underpinnings, organisations, rituals and practices of a variety of institutions whose effects are the regulation of the social life of groups and of individuals. The concept of knowledge production being a material process, is of course widely appreciated by Marxists, post-Althusser, but where Foucault diverges from this tradition is his refusal to link the production of ideas with either the needs of capital or the interests of <u>economically</u> dominant social groups. This is not to suggest that the economically dominant exert no authority, nor exercise no power, but that power can be exercised, for example, but by state agents or functionaries according to the principles and logic of knowledge systems whose basis is not to be found in the principles of capitalist relations of production. More concretely, the organization of prisons, the principles of their operation are not derived directly from capitalist units of production; the modes of organisation and operation of the prison and the factory are dialectically linked in a two-way exchange. Both probably owe much to methods originally deployed in a completely separate system - the military. By way of one last horrific example; the 20th century phenomena of gas ovens and death camps of Nazi Germany, cannot be simply explained by the logic of capitalist development nor by the needs of economically dominant classes.

We have here perhaps the clearest example of a knowledge system, embedded in a particular political and ideological belief system, defining particular <u>social categories</u> whose existence was said to be a threat to the social body, and who were therefore expendable. In these circumstances we would want to make the knowledges, ideologies, symbols, rituals and practices of a specific political authority, the Third Reich, an object of enquiry, in order to understand the tragic fate of 6,000,000 Jews. To do so would require an understanding of the institutional forms, and the use of force, comprising an historically specific form of the state.

It is now commonplace, in an attempt to accommodate the conceptual framework of 'economic determination in the last instance' to argue that 'the economic' (however broadly or narrowly defined) does not shape, say, the minutiae of the capitalist state, nor, the social relations of schooling, but rather 'sets limits' to the possible forms of institutional forms, social relations and social categories within a given mode of production . Broadly, such a theoretical approach avoids the excesses of mechanical Marxisms, avoids the relativism of total theoretical eclecticism, on the one hand, whilst granting an autonomy in the form of a limited independent development in political, ideological, symbolic and cultural relations on the other. However, such an accommodation, however sophisticated and/or mediated its deployment might be, does not itself generate, any necessary theoretical or procedural protocols as to how we should proceed with the analysis, say, of the emergence of new social categories within the social sciences. It is, we would argue, one thing to say that capitalism 'sets limits' to the possible forms of social relations, but it also does <u>not</u> specify the principles which generate the, albeit 'limited' range of social, cultural and political forms which may emerge.

We can acknowledge then that Foucault's scheme of change from punitive to disciplinary provides us with useful descriptive and theoretical procedures for mapping the manifold aspects of criminal and penal systems. In the light of Foucault's well known tendency to leap about in time and space however, we must be concerned as to whether the processes he describes are applicable and appropriate in the English context. We shall indicate in the section below that a similar transformation is observable in the historical development of the English criminal legal and penal system. But we should indicate clearly here that it is not our concern to provide anything like a complete picture of that transformation; our focus is much narrower. For we are centrally concerned with the question of a particular social category, identified in a diverse range of texts, parliamentary reports, legal texts, case reports and social, scientific inquiries - the child in criminal law - whose discursive positioning alters with the installation of the techniques of a disciplinary regime.

Necessarily, our inquiries will be limited to a particular historical period; in this case the decades 1800 - 1860 will be the main, though not exclusive point of focus. This is not to deny other periods any salience; the Children Act 1908 for example and the formation of the juvenile court, and, the considerable impact of the 1969 Children and Young Persons Act are particularly relevant to any study of the child and the criminal law. We would argue, however, that the juvenile courts generally carry on by other means, the separation of the adult and the child in the criminal and penal systems, established in the years 1800 - 1860, by other (institutional) means. Furthermore, it is the years 1800 - 1860 where we witness the most intensive, though by no means complete, transformation of the criminal and penal systems; the breaking apart of the absolutist notions of justice and retribution, the reduction of the symbolic importance of the gallows, and, the establishment of the prison, of notions of crimes having causes external to the mind of the criminal. Also, we can

trace the development in this period of those institutions deploying disciplinary techniques, especially applicable to the newly formulated category of 'juvenile offenders.'

PUNISHMENT TO DISCIPLINE?

It is interesting to note a change in the writing, in English anyway, of the social histories of crime and punishment. Our most influential histories have focussed on the history of capital punishment, its rise and demise (Radzinowicz , 1948, Hay 1976). Only recently has there been an interest in the 'birth of the prison' (Ignatieff 1978 , McConville 1981). The focus of interest in the historical studies of crime and punishment have largely been concerned with the social forces involved with the struggles over capital punishment. So the biographies of Beccaria, Bentham, Eden, Romilly and others whose writings and public activities were devoted to the opposition of the bloody system of criminal justice are known at a popular level. That prisons, the institutions popularly conceived as the normal means of punishing offenders, are in their present form and character, of recent date, does not register to anything like the same degree .

But does the declining use of the gallows and the rise of the English penitential prison system, whilst it is a useful metaphors, signal the sustained structural change elaborated by Foucault? There is now considerable evidence that the movement from 'punishment to discipline' did take place in England, evidence made available by a variety of social histories of the 19th century. Change did not come all of a piece; there are local regional variations, where for example prisons in their modern guise and other appurtenances of the disciplinary regime were slow in coming. The prison has to be regarded as the apex of a much wider range of institutions and practices whose combined effect is to produce a new and different form of social governance. Some of the institutions which fall into this category are as follows:

1. <u>The Poor Laws of 1834</u>

The wider restrictions on out-door relief meant effectively that relief could only be obtained by the very poor surrendering themselves to the principles of classification, and, to the rhythm of the workhouse, supervised by the overseers and the Poor Law Guardians . The system of classification entailed separate quarters for men and women, and, at the age of seven, the separation of children from their mothers. Relief was deliberately stigmatized through Chadwick's principle of 'less eligibility'. This meant that those on relief should suffer a standard of living deliberately lowered below that of the lowest paid labourer . The effects of the Poor Laws were not limited simply to those regimented in the workhouse but had wider effects, for example, in the network of social policies and family law which regulated familial relations. Of particular note here are the Bastardy clauses of the 1834 law which considerably rewrote the common law and customary practices of child maintenance by requiring unmarried mothers to seek relief through the Poor Laws rather than through the magistrates courts (U. Henriques, 1967). The effects were the stigmatisation and regulation of the sexual lives of 'fallen' women.

2. <u>The 'active and preventive' police</u>

It is only now becoming clear the profound effects that full-time, paid, uniformed policemen had on the social body in the mid 19th century.Peel's London force was to be the model for the rest of the nation. By 1856 it became compulsory for all Boroughs to have a police force, legislated for by the County and Borough Police Act of that year (Phillips D. 1980). The head notes of the 1829 Act make it quite clear that the police force's role was to be the defence of property (POLICE ACT 1829 10 GEO IV C44). But the 'property' here was of a different order from that defended by the county magistrates, and assizes and writ so large in Blackstone (Vol. II; 177). What was endangered in and near the metropolis was not game, timber, fish or turves, but retail merchandise, tills, and personal effects carried in pockets.

Reaction to the uniformed constabulary was differentiated by class. Whilst for sections of the bourgeoisie they were 'domestic missionaries', to the urban working class and to the poorest sections of the working class, the casual poor, they were the plague of 'Blue Locusts' (Storch 1976 , Gattrell, 1980, Gorer G, 1969).

The new police forces were 'active and preventive' and whilst their prime purpose was to defend property, the process necessarily included the identification of those social groups who preyed upon it. The net was thrown over not only those apprehended in the commission of crime but potential criminals. So section VII of the 1829 Police Act, defining the new powers of the police, delineates a class of possible miscreants;

> " .... it shall be lawful for any man belonging to the said police force, during his time on duty, to apprehend all loose, idle and disorderly persons, whom he shall find disturbing the public peace, (having) just cause to suspect of any evil designs, and all persons (found) between sunset and the hour of eight in the forenoon, lying in any Highway, yard or other place, or loitering there ...."

Simply being in specified places at certain times now constituted an offence, making those whose milieu was the street and public places, liable to arrest and punishment.

Certainly the most potent change in the form of the state in its relation with civil society was the establishment of local police forces on a national basis. To a very large extent the local police re-wrote the basis of the relationship between the state and civil society, in that more and more intimate details of the daily experience of a newly urbanised, capitalised and industrialised population were open to routine surveillance, and when necessary, regulation, by the uniformed constabulary. This applied even to the metropolitan no-go areas, the rookeries. For the law began to function in a different way. The reliance

on the symbolic and ritual properties of the theatre of blood; the procession to, and execution at, the public gallows declined, and with it the network of authority relations, so brilliantly described by Hay (op cit), maintained not so much by the direct act of retribution (increasing numbers of offences were made capital but fewer people were hanged), but by the appeals for mercy, the letters of contrition written by men of property on behalf of offenders, actions which celebrate their power and authority in society, and over the propertyless. In this sense the law worked, in the late 18th and early 19th century, by winning consent through ritual and symbol and universalistic appeals to justice. However, as Gattrell (op cit 260) argues, the law was now to work through 'the police (asserting) a good deal of their influence through <u>other than directly by punitive means</u> (through the regulation of vagrants, street traders, lodging houses etc.) and it was intended they should do so.' (my emphasis). Ritual and symbol were now to be found in the military bearing, height and distinctive uniform of the constables, who, unlike their continental counterparts, were to circulate constantly and frequently with and amongst the civil population; they were to live with and amongst the population they were policing, not, as elsewhere stay behind the barrack walls (Gorer op cit. Pasquino 1978). The state then is no longer a complex of institutions 'outside' and 'above' civil society, but now significant 'above' but deeply imbricated 'in' civil society.

To judge the effects of the new constabulary force we should turn to Gattrell. His comments on the police forces are part of a larger project where he assesses the validity of drawing definite conclusions about crime rates in Victorian England, from the wide range of judicial and criminal statistics now available for that period, and for the period up to 1914. He concludes that social historians of crime have been reluctant, unnecessarily in his view, to draw conclusions about long term crime rates. While remaining sensitive to the disparity between crimes committed (the 'dark figure' in his terms) and crimes actually tried, rates of conviction, etc., he argues that it is

possible to demonstrate the long term <u>decline</u> of offences against property and persons from the middle of the 19th century to 1914, and this is the face of a series of moral panics about rising crime rates [2]. Gattrell's assessment of the impact of police forces may be summarised as follows:

a) In respect of detection and prevention of some forms of crime, the police forces were spectacularly successful; firstly the high conviction rates evident in statistics up to the middle of the 19th century give some indication of their apprehension rate of those engaged in particular offences against property; secondly, the <u>deterrent</u> effect of the police can be justifiably argued by reference to the declining rate of offences against property from the mid 19th century onwards.

b) Against the new,disciplined organized force, the criminal element remained innocently unorganized, and this in part accounts for the success of the policing in Victorian and Edwardian England. In Gattrell's words: 'In the ensuing decades, while the machinery of control developed its techniques, the organization of crime seems to have adapted very little ... the contest between the law and the criminal was a wholly unequal one, a perfect paradigm indeed of the contest waged between a capitalist state and its as yet inadequately organized workforce.'

c) Those who were in the front line of this police's work in the civil population were the casual poor. 'We should note,' adds Gattrell, 'that the casual poor in the second half of the century were being ever better supervised' (p.315). Firstly, by overt means; the Vagrancy Acts permitted up to 20,000 individuals in the late 1850's to be prosecuted. Secondly, 'by a plethora of secondary regulations to which the urban population was to be progressively subjected - the regulation of street trading and of lodging houses, and the enforcement of by-laws etc.' (Gattrell op cit; 315).

Increasing state activity by and through the means of an organised and disciplined constabulary was of course welcomed by sections of civil society; the urban bourgeoisie and petty bourgeoisie could carry on their trades with better protection than that afforded by the local watch committees and this sense of security seems to have been shared by the skilled artisans. We have noted the effect on those whose rhythm of existence was unskilled labour - unemployment - petty thieving - poverty (Gattrell op cit; 265), i.e. the casual poor. What is striking though was the nature of offences which the existence of the police, made it possible to define and sanction. The Police Acts and the Vagrancy Acts gave powers to the police to act, not only on acts of commission - the intentional committal of an offence against a person or against property (a notion of crime embedded in common law), but also against persons merely being in public places at certain times. The subtle gradations, the shading off of the distinction between offence and existence were the marks of a societal organisation which Foucault calls 'the carceral'.

3. Penitential Institutions

Punishment under the Bloody Code did not begin and end with the gibbet. Before 1775, major crimes were punished with banishment, whipping or the pillory, as well as hanging; confinement was used for minor infractions, sentences being passed down by local magistrates (Ignatieff, op cit; 24-25). Banishment in the form of transportation to the colonies in Australia continued to be an important form of punishment until well into the 19th century. It is estimated that between 1787 and 1862 some 162,000 convicted felons were transported to the Australian colonies (Rude 1978 ; 1)[3].

Commuting the death penalty to transportation was one of the measures sought by Howard, Eden and Blackstone in the drafting of the Hard Labour Bill of 1778 (McConville op cit; 105-111). By 1800, through commutations, pardons and the like, only 10% of those actually sentenced to hang were ever executed (Ignatieff op cit; 90). Branding was abolished in 1779. Whipping as a practice declined from 17% to 11% of Old Bailey verdicts between

1775 and 1790: by 1805 whipping accounted for no more than 4.5% of sentences at assize and sessions. It certainly did not disappear as we shall indicate below, but tended to be used on convicts for infractions of the rules (Ignatieff ibid) . Imprisonment was reserved for misdemeanours; offences which could be dealt with summarily by magistrates. Those incarcerated in Houses of Correction or 'Bridewells' were those awaiting trial, runaway apprentices, non-capital felons (Ignatieff op cit; 11-12) (McConville op cit; 116-117). They were not prisons in the modern sense. 'They were rather loose and disorderly places' (Ignatieff; 11). There was an 'easy commerce' between the houses of correction, the jails and the streets outside for whilst local authorities were supposed to provide provisions for inmates, in practice they had to fend for themselves (Ignatieff 31-33). Jails housed the debtors, prisoners awaiting trial and convicted felons awaiting transportation or execution. In most bridewells and jails the categories of prisoners freely mixed with each other and with the outside world (Ignatieff Chap. Two; McConville Chapters 1-3)[4] .

The bridewells and jails were not in any sense the'total' penitential institutions which were to succeed them, and which by and large displaced the regime of physical punishment. Some of them exhibited some of the characteristics which were to become, in mediated ways, the normal regime of the modern prison.

The daily timetable of Pentonville, the first 'total' penitential institution, described by Ignatieff brilliantly catches the distance between the bridewells, and institutions built for and devoted to the reform of the mind of convicted offenders(Ignatieff p. 1-11). Pentonville represents a massive shift in the punitive system; away from a concern to restrain and mark the body, to a concern for the reform and rehabilitation of the prisoner by making the mind the object of a disciplinary regime. Between 1770 and 1840 a form of carceral discipline'directed at the mind' by putting prisoners in solitary cells, clothing them in distinctive uniforms, regimenting their days 'to the cadence of the clock', and trying to improve their minds with 'dosages of

scripture and hard labour' (Ignatieff; xiii), went hand in hand with the establishment of new institutions - penitential in character, including the 'new' prisons, but also, industrial schools, reform schools, houses of industry and the like. The institutions were 'total' in so far as their architecture, organisation, timetable and discipline were designed to close off the outside world so that habits of industry, orderliness and an appropriate moral universe might be installed in the consciousness of those incarcerated in them.

As recent studies have been quick to point out, such institutions are not simply premised upon the economics and effectivity of one form of punishment as opposed to another. They are also premised on the considerable fact that habitual offenders could be reformed, something taken as unquestioningly given now, but a radical departure from traditional conceptions of crime and punishment in the late 18th century and early nineteenth century. Secondly, penitential institutions also conceived the notion that it was worthwhile, or, for the general well-being, to attempt the process of rehabilitating offenders .

On the one hand, then, we have a considerable shift in the philosophies of the psyche or of the mind given in the concepts of reform and rehabilitation, and a reconsideration of the causes of crime, with on the other, a revamped moral economy. How the reform of offenders was to be achieved, and how prisons might act as a deterrent was never settled, certainly in the period covered by Ignatieff. The competing systems of 'silence' and 'separation' each had its advocates, and penitential institutions varied accordingly as to which system was employed [5] . But there were observable principles common to each system and which ran thread-like through the penitential system. These were elaborated by Beccaria [6] but most fully and influentially by Jeremy Bentham [7] . Their ideas have been elaborated at length by Foucault (op cit), Ignatieff (op cit), Heath (1963), McConville (op cit), and by National

Deviancy Conference contributors, Lea, Anette and Melossi (1979). What follows is the briefest of sketches; we shall return to the relevant items in more detail later in the chapter.

Beccaria's opposition to capital punishment entailed the elaboration of different stance on punishment. His general maxim that the certainty of detection followed by punishment (non-capital) would serve as a greater deterrent than the wheel, stocks or gibbet, in practice sounds more like the philosophical basis for the active and preventive police, than for the system of penitential prisons. Punishment as deterrent rather than as retributive justice provides the crucial links between Beccaria and Bentham.

> "General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be adding one evil to another.
>
> (Bentham, The Rationale of Punishment p. 20-1, quoted in McConville; 115)

In Bentham's scheme, the penal regime of solitary confinement combined with hard labour was primarily a system of deterrence; reformation was a subordinate end in the process (McConville;114). But the regime was to adhere to four important principles:

1. The rule of parsimony; the application of sufficient punishment, and, no more, for individuals, so that its deterrent qualities would be effective.
2. The rule of lenity; "The ordinary condition of a convict doomed to forced labour for a length of time ought not to be attended with bodily sufferance, or prejudicial or dangerous to health and"

3. The rule of severity: "the ordinary condition of a convict doomed to a punishment which few or none but individuals of the poorest class are apt to incur, ought not to be made more eligible than that of the poorest class of subjects in a state of innocence and liberty" (my emphasis). This is the probable origin of the 'less eligibility' principle which Chadwick had inserted as an integral part of the Poor Law provision of relief. In other words, workhouses should be considerably less attractive than the prevailing conditions experienced by the poorest labourers outside. For detailed analysis see Finer S.E. (1952)

4. The rule of economy: "No public expense ought to be incurred, or profit or saving rejected, for the sake either of punishment or of indulgence". (Bentham, quoted in McConville; 115).

For Bentham, punishment was not to be applied unwittingly on some idealised, universal but non-existent subject; the intensity of its application was to be mediated by 'circumstances affecting sensibility' which included sex, age, strength, mental state and moral stability, variables which will be of particular relevance to the rest of this chapter (McConville; 113). Taken together, Bentham's advocacy of 'circumstances affecting sensibility' and solitary confinement speak of penological theory based upon the process of individualisation, rather than the broader system of classification (identification and treatment of homogenous groups) which was the basis of separation under the poor laws. Bentham, of course, was to propose, in what was the logical outcome of his theories, the concept of Panopticism, a principle of institutional government extensible over not only penitential prisons, but workhouses, Poor Houses, manufactories, hospitals and schools.

Deterrence combined with reformation in the penitential system had probably their most rigorous exponent in Sir George Paul and is evident in the manner in which the Gloucestershire prison system was reformed in 1792 (Ignatieff: 98-109; McConville; op.cit.)

> "On entry, convicts at Gloucester were stripped naked, probed and examined by a doctor, and then bathed, shaved and uniformed. This purification rite cleansed them of vermin and filth, but it also stripped them of those marks of identity that defined them as persons." (Ignatieff; 101)

The 'medical rituals' extended beyond the signification of the ritual passing from one world to the next; baths, regular diets, medical attention and whitewashed walls, and glacial indifference on behalf of warders were to attend the prisoners. In order to reform, all links must be severed with the outside world. The separation of prisoners, one from another, was intense. At Gloucester, prisoners not only slept in solitary cells but worked in solitary day cells adjacent to their sleeping cell. Exercise was taken under the eye of officers whose job it was to prevent loitering and conversation. Habits of 'quiet resignation' and 'decent submission' were to be the normal demeanour of prisoners, exacted by a formal and highly ritualised regime;

> "... the governor standing at attention in a uniform symbolizing his authority and his subordination to the state, issuing terse commands; the prisoner in uniform symbolizing submission, locked in the pose of obedience tensely awaiting the word of command." (Ignatieff; 104).

A regime of solitude, sparse diet and unrewarded labour were intended to make the prisoner more malleable but it was religion which was to be the 'reformatory fixative' (McConville; 130). It was geared to win a change of heart and conversion (ibid).

We shall not deal in any detail here with the conflict as to which system, the <u>associated silent system</u> used at Auburn and Sing Sing in the U.S.A., or, the Philadelphian <u>solitary confinement system</u>, was to be implemented. Each had its own advocates and practitioners in English penology. We shall conclude by underlining the considerable differences between the 'loose and disorderly' 'bridewells' and gaols and the new penitential institutions. The differences are partly constituted by the purpose built model prisons (e.g. Pentonville, Gloucester), the timetables, the uniforms, and, the regimes of labour, religion and confinement. Some of the other changes which contributed to the considerable shift from the old gaol to the penitentiary, and which of themselves are noteworthy were:

1. The demise of the old gaoler, for whom the position was a profitable sinecure and the rise of <u>the prison governors</u>. The latter were appointed by bureaucratic methods, generally for their 'expertness', and they were directly responsible to the state rather than local political forces.

2. The key position occupied in the process of rescue and rehabilitation, by <u>the prison chaplain</u>. The very idea of solitude has a religious basis in so far as it was a system practiced by Quakers in Philadelphia (McGowen 1979; 123); silence and solitude were to give prisoners time to reflect on their evil ways. Whilst the regime of hard labour, isolation, and punishment of minor infractions, were to be no more than a softening-up process, it was the chaplain who was to carry the message of redemption (McGowen ibid). Converting the criminal was seen as an analogous process to that of religious conversion (McGowen; p. 136).

3. The deployment of the <u>discipline of labour</u>. There was a sharp conflict between prison reformers as to the place of labour in penitential regime, though all were agreed it was an essential part of rehabilitation i.e. learning the habits of industry. There were various forms of endeavour, okumpicking, the treadwheel, the crank, and shot drill designed to keep the body in toil, with little or no visible productive output. The utilitarians, however, conceived prison labour as being not only useful for rekindling the experience of honest work, but also a profitable enterprise which helped reduce the burden on taxes [8]. Either way, labour was an integral part of a system designed to end the mixing, milling crowds in the prison yard - a prominent feature of the old gaols and bridewells.

"Thus", writes Foucault, "discipline produces subjected and practised bodies, 'docile bodies' " (Foucault op cit; 136). The minute regulation of bodies in time and space speaks of new forms of power, exercised on the prisoner, in an extended attempt to re-arrange habits and attitudes. The penitential system constitutes a radically new subject in the discourse of penology. For at the core of the system of silence and solitude was the individual, no longer simply the bearer of a morally evil mind, but, also the bearer of some moral universe psycho-pathology or what you will, which was capable of being reformed, and, afterwards returned to society as a useful, productive and active member of it. Attended by the prison chaplain, 'as a doctor of the soul' (but whose effect was entirely dependent on the rigours of prison regimes - the beatings, the isolation and dress etc.), prisoners could be guided away from crime, to lives of honest endeavour. The penitential process admits, not a sharp distinction between good and evil, but a gradation between normality and deviance. The process of reform required measured steps along a set path; enclosure from the loose and idle world, loss of individual

identity (shaven heads, uniforms) regulated work at a measured pace and compulsory religious instruction which were to combine to reduce the differences between the normal and the deviant and to render the criminal similar to the rest of the civil population.

The circle was never fully closed however. One of the major targets of the penitential system was the prison sub-cultures embedded in the 'loose and idle' crowds which mixed and milled in the old gaol yards. It was never entirely suppressed; the old lag continued to pass on the arts of criminal practice, juveniles continued to learn and communicate the variety of ways in which one might eke out a living on the streets (see below). At Gloucester, even Paul's attempts at the total regulation of all prison behaviour were "frequently shattered by disturbances. Prisoners refused to work and called on others to put down their tools." (Ignatieff op cit: 103). In 1815 Paul faced a full-scale uprising, which he suppressed then dealt out 36 lashes to the culprits (Ignatieff ibid). For Paul, however, such ripples merely confirmed the need to employ the right staff, staff who could be relied upon to enforce every rule and regulation increasingly and to punish all infractions. Furthermore, although we can point to falling crime rates in certain categories of offence, from the mid-19th century (see section 2 on the police, above), it is difficult to say what effect the penitential prisons had; Gattrell argues forcefully that it was the new police forces which were primarily responsible for the measurable decrease in offences against property.

We have purposefully not detailed the regimes in other penitential institutions, specifically, the reform schools, industrial schools and the like because we shall be discussing these below. Our purpose, here, is to indicate some of the regulative principles of the penitential regime observable in prisons, firstly as an important historical development and secondly as a prelude to the analysis of the treatment received by juvenile offenders.

4. The birth of the school room, and 19th century popular education

The principle of the panopticon (or inspection house) Bentham claimed, was applicable to

> "any sort of establishment in which persons of any description are to be kept under inspection; and in particular to Penitentiary Houses, Prison, Houses of Industry, Work-Houses, Poor-Houses, Manufactories, Mad-houses, Lazarettes, Hospitals, and Schools"

Bentham (1830) The Rationale of Punishment, quoted in McConville (op cit; 118).

Monitorialism, claimed Bell, the principle of self-instruction under surveillance,

> "is the new intellectual organ which characterises the new system of education - such the mainspring which puts the whole scholastic machine in motion; such ... the principle on which every schoolroom factory, workhouse, poorhouse, prison house, and the administration of the poor laws, and every public or even private institution of any magnitude should be conducted."

Bell (1797) An Experiment in Education made at the Male Asylum at Madras quoted in Jones and Williamson (1979;73) (my emphasis).

The panoptic-monitorial school in its pure form probably never existed in the 19th century. Certainly, the organisation of education, especially popular education, was too fragmented, until at least the mid-19th century to accommodate a view that education before that date was a giant and effective engine of instruction inculcating particular values, knowledge systems or moral universes. Given the plethora of forms which education took, from the Dame schools, through to the bastions of Classical education, the great Public Schools, each delivering a variety of messages, it

is difficult to assert that education, particularly popular education was one giant exercise in social control (conceived here as economically dominant classes controlling the range of activities, cultural experiences and social practices made available to economically subordinate groups, through the mechanism of schools). Like the prisons, police forces and work houses, the provision of education was shaped by particular local conditions richly variegated, and susceptible to local and regional balances of political and authority relations.

There were suggestions as to what institutional and architectural form education should take (e.g. panopticism) and what its 'ideal' organizational and pedagogical mode should be (e.g. monitorialism). Our concern here is not to consider the reasons why panoptic-monitorialism was never achieved, rather we are concerned as to why at this particular time schools were throught to be homologous with prisons, factories and workhouses, and what regimes were to be installed, and in what senses might they be conceived as 'disciplinary'. We are concerned here with mass education in its pre-compulsory phase.

Social historians of education have pointed out an interesting paradox; that though early 19th Educational provision was the concern of private, religious, and local initiative the central government was far from a disinterested party to the means and ends of that provision (Johnson 1970, 1976, 1981; McCann (ed) 1977; Digby and Searby 1981). State intervention, supervision and inspection of the voluntary schools systems (the most important and widespread being the National Society and the British and Foreign Schools Society systems) may be largely explained by reference to the system of state funding provided by the means of grants, very small sums in 1833, but rapidly growing over the succeeding decades (Digby and Searby op cit; 6-8). The Education Committee of the Privy Council Office, established in 1839 (though generally known as the Education Department formed to oversee the dispensation of

grants, was in its day one of the largest apparatuses of central government; comprising by 1849 50 civil servants (Digby and Searby; ibid).

The Education Department post-1839 was not to remain aloof from the daily organization, rituals and pedagogies of schools funded (partly) with state money. Prominently under Kay Shuttleworth, the Departmental Secretary from 1839 to 1849, the state agency was to develop its own policies and initiatives in the general field of mass schooling. During this decade, we can see the state, in general accord with (though not without tensions and differences), the religious organisations, begin to advance the concept of education as a civilizing force and as a means of governance of specific sections of the social body, in this case the labouring and pauperized classes. The Swing Riots in agricultural areas and the Chartist disturbances gave some overt evidence to the likes of Shuttlewoth that something broader based than the yeomanry raised at Peterloo, was needed in the control of unruly urban and agricultural mobs. It is precisely at this point, <u>the target populations</u> of the social policies, programmes and institutions of diverse 'reformers' such as Eden, Bentham, Bell, Carpenter and Kay Shuttleworth that we <u>begin</u> to see the connections between the school, the prison and the workhouses, and which gives <u>some</u> warrant to those who have interpreted the historical development of mass schooling as a process of social control (Johnson op cit) or 'socialization' (McCann op cit).

The representation of working class (labouring and pauperised fractions) cultural forms and social practices in the texts of the social reformers above operate on the axiomatic principle that they are 'foreign' and 'alien' social groups, groups whose moral values are so distant from the class location of the authors as to be totally opaque. Johnson's illuminating analysis of Kay's 1846 <u>Minutes</u>, and of Thomas Wyse, a contemporary social

reformer argues that bourgeois investigation did not analyse the leisure of working people in terms of cultural analysis, but mapped them in the moral language of 'idleness', 'drunkeness', vice and improvidence (Johnson; op cit; 49). One particularly florid example quoted describes the 'weekend' of an industrial worker:

> "... after a stale and filthy debauch of two or three successive nights, with all that is degraded and sensual ... returning with sleepless eyes, on Monday Morning, to his work - the Sabbath profaned, his health gone, his week's earnings robbed from his pining family, and the seeds planted of crimes which perhaps ere long, may consign him to the transport vessell, or the scaffold"
>
> Thomas Wyse (1836) Education Reform, quoted in Johnson (1976; 49)

By and large, argues Johnson, the representation of the agricultural labourers are of individuals outwardly doltish but underneath sullen and resentful, whilst industrial workers are active, sensual, easily misled and volatile (ibid).

One education Inspector witnessed the following in Lancashire, near the town of Colne:

> "... I have seen in broad daylight, at 9 in the morning and at 4 in the afternoon, men, one in the prime of youth, the other past middle age, running races or rather matches against time, on the public highway, quite naked.
> ... Amongst them, and along the road on which this shameless race was run, were women of all ages - mothers, factory girls, young children ..."

And he concluded that these practices:

> "... are sufficient of the most striking instances, which came under my own observation, of the shamelessness and filthy habits, the want of chastity,

> the ignorance and carelessness with regard to religion, the neglect of worship, the brutality recklessness, and almost animal state in which some of the labouring classes, both manufacturing and agricultural, of the county of Lancaster live, and to which their children must be inured from their earliest years"
>
> Rev. F. Watkins, p.p. (1847) XLV p.p. 238-9.

Such representations of working class cultural forms and social practices are by no means atypical and neither is the vivid and certain analysis. But the analysis itself contains a programme of remedies; the installation of habits of moderation, industry, worship and protection for the children against the daily experiences in which they are inured; a programme not dis-similar from the penitential principles of the modern prison. Similarly the 'loose and disorderly' world from which prisoners were to be excluded, provides in the texts of the educational reformers the opposition which must be civilised by appropriate forms of schooling. Furthermore, the educational reformers considered as 'dangerous' the same sites policed (in the widest sense) by the vagrancy laws, the new metropolitan constables, sites which were considered as fundamental to the formation of vicious and sensual habits, namely the back-streets, the 'cellars, garretts and cabins' - the homes of the working classes (Watkins ibid).

The prisons and the schools, of course, were separated by the simple fact that the latter did not have a captive clientele (which was not achieved in any near-universal form until at least 1870). The penologists and educationalists shared a similar concern in so far as the institution per se was inadequate to tasks which had to be performed; the old gaol and the Dame school were regarded as inappropriate responses to criminal and to working class practices - indeed such places provided points for the circulation of filthy habits, licentious behaviour and dangerous knowledges. We find, therefore, as in

Bell's writings the regime to be experienced being regarded as the very essence of progress. The most visible regime, in the schools provided by the Anglicans and the non-conformists, was the monitorial regime (a system run on slightly different principles by Bell and Lancaster, but sharing more similarities than they celebrated differences).

Of the quality of monitorialism, two commentators write:

> "The guiding principles of this 'intellectual organ' were the division of labour, mutual instruction, classification of minute discipline, constant surveillance and ceaseless activity".
>
> (Jones and Williamson op cit; 73)

Johnson notes the finely calibrated system of commands, classification of pupils into 'drafts', the numbering labelling, grading, the coercive regulation of petty rules and the graded punishments for the degrees of infraction (Johnson 1976;47-48). The underlying principles of the educative process comprised:

a) notions of restraint; enforcing the observance of religious and moral principles.
b) inculcation of habits; 'steady habits of industry and integrity'.
c) the working of the school was compared with machines (a grand intellectual factory), the military; the firmness, promptness and decision attendant on military order.
d) education was likened to medicine; vaccinating the rising generation, a preventative against the poison of infection.
e) schooling was intended to shackle the mind; firstly by the 'sheer habitual weight of the order of the schoolroom; secondly, by inuring children with religious texts and by requiring church/chapel attendance and by the imposition of theologically derived punishments.'
(Johnson 1976; 47-48).

The child as a scholastic subject appeared to be no more than raw material on whom change had to be wrought, against the resistances they would inevitably bring from home and class background. Liberal reactions to the rigidity of the monitorial regime and its assumption about the nature of the child, were to gain ground circa 1835, when the notions of childhood being a period of flux, of change and development (Johnson ibid) were increasingly to supplant notions that children had wills to be broken.

The regime itself necessarily assumes that there are appropriate agents to administer it, and, like the prisons, schooling was to be increasingly premised on the 'expert' - the correctly trained teacher following the right programme of knowledge transmission. We note the growth of the pupil teacher system and the development of teacher training through the Queen's Scholarship [9]. What gives added impact to effect of educational systems though, is that those groups who formulate what is to count as appropriate schooling generally define what is to count as school-appropriate knowledge, even if it is at the level of how a multi-various matrix of empirical details about the material world are to be classified into 'subjects'. Social governance, in the view of one nineteenth century writer, did not stop at the mere instruction of duties and obligations 'enjoined by religion and morality,' but also depended upon the poor being'acquainted with those circumstances which principally determine their condition in life'.

> "They ought above all, to be instructed in the plain and elementary doctrines respecting population and wages; in the advantages derived from the institution of private property, and the introduction and improvement of machinery; and in the causes which give rise to that gradation of ranks, and inequality of fortunes, that are as natural to society as heat to fire, and cold to ice." (my emphasis).
> Causes and Cure of Disturbances and Pauperism, Edinburgh Review L111 (1831) 611-12, quoted in Digby and Searby op cit; 115).

The 'naturalising' or 'universalisation' of historically specific forms of economic organisation and political relations of course is generally conceived in critical social sciences as prime forms of ideology put into the service of dominant economic groups. However, it does point to the manner in which the knowledges to be transmitted through the appropriate forms of schooling were to be deployed in defence of property and the existing social order.

What we have been mapping here, albeit briefly, is how particular organisations in civil society, namely the competing religio-educational systems, consciously deployed education as a means of social government and pacification, as, in due course did the State. The <u>means</u> of governance was to be the regime of the schoolroom itself; the application of abstract, impersonal, careful calibrated rules under the monitorial system which were to imbue the necessary orderly behaviour. Secondly the regime was to transmit the appropriate knowledges, knowledges which legitimised the social order, in a manner which trained, rather than awakened or enlightened the scholar subjects. Thirdly, the appropriate knowledges and the means of their transmission were to be regulated by experts in its dispersion; this necessarily de-legitimised the common sense and useful knowledges of the home and the Dame School. The relations between the state and the educational organs of civil society were of course substantially reordered by the Revised Code of 1861 when salaries and grants were made dependant upon the successful transmission of the appropriate forms of literacy and numeracy [10].

SUMMARY: CIVIL SOCIETY AND THE 19th CENTURY STATE

Two brief disclaimers. Firstly, the process of tracing a historical shift from 'punishment to discipline' can in no way be read teleologically. The process is not one of unmitigated 'progress', recording a shift from a brutal dark age to a more enlightened and liberal modern history. Could we claim that locking up felons for months on end in solitary confinement,

commonly resulting in madness, was any more 'humane' than passing a death sentence on an individual than either pardoning the crime or commuting the sentence to transportation? Changes from the gibbet to penitentiary, from an armed militia to unarmed bobbies does not necessitate the complete disappearance of the former, but only that new modes of policing predominate.

Secondly, the changing relationship between State and civil society is a material process of initiative, resistance and compromise and in no way merely the irrepressible rise of an irresistible capitalist state. For example, whilst the "New Police' were legislated into existence in 1829, it had in fact taken 44 years to bring them into existence, after the idea was first put to parliament in 1785 (Phillips op cit; 171). In the case of prisons, the earliest proposals to use prisons as the chief means of punishing felons, and notions that prisons could function penitentially, were in circulation in the 1770's, but Pentonville was not built until the 1840's; in other words, a gestation period of some 70 years. Furthermore, 'the last vestiges of voluntary and local administration ... the transfer of all borough and county jails to a central prison commission administered from Whitehall' was not completed until 1877 (Ignatieff op cit; 205). In the case of education, if we date the State's large scale involvement in it from 1839 (the establishment of the Education Committee of the Privy Council Office - 'the Education Department'), the earliest date the Department exerts a decisive influence over the religio-educational systems is probably 1862 (through the 'Revised Code') - a gap of 23 years. State schools, provided through local boards were brought into being through the 1870 Act, came into being post-1870, 31 years after the foundation of the Education Department.

Describing the pre-1870 pattern of educational provision, and noting its decentralised pattern, Johnson notes that

education

> "was seen to be indigenous to civil society. The direct organizers of education remained the representitives of dominant class-fractions in their own communities: clergy, gentry, manufacturers, merchants and, marginally, tradesmen and farmers."
> (Johnson 1976; 47).

A pattern consonant with, we might add, the direct administration of the Poor Laws. Describing the currents of opposition to the New Police, Phillips delineates three different political forces in the decades 1780 - 1830 who firstly opposed the establishment of the Metropolitan Police, and consequently, similar constabularies being extended throughout England and Wales. Firstly, representatives of working classes, for whom the New Police were

> "another instrument of crowd repression to add to the constables, special constables, Yeomanry and troops already used against political demonstrations."
> (Phillips op cit; 172)

Secondly, there were the liberal whigs and the few parliamentary radicals for whom the New Police represented a threat to constitutional rights and to civil liberties, because the extended constabulary was seen as little more than the creeping edge of the centralised, bureaucratic state. Thirdly, and most importantly, the strongest and most potent opposition (because unlike the former, this group were an organised and powerful political grouping) came from 'many backbench country gentlemen'. Their opposition was two-fold. Their manifest argument appealed to the dangers to the liberties and rights of free-born Englishmen arising from the continental style, (especially 'French') over-centralisation of the New Police. Secondly, and perhaps more to the point, the New Police directly undermined one of the sources of their direct control over the shires, the powers to appoint the watch, the local constabulary and so on (Phillips. 172-3). Taken together with the first

appointments of stipendiary magistrates (1792) and the revamping of the prison service, the coming of the New Police threatened their unique position as the natural guardians and purveyors of 'law and order' in the counties.

What we are arguing here, then, is that in tracing the large scale and long term structural change notated in Foucault's terms as the general switch from punishment to discipline, one is simultaneously mapping constantly changing edges between the State and civil society. We have noted above the considerable resilience of civil society. This makes any one-to-one correspondence between the needs of a ruling class and the development of a capitalist state a difficult relationship to demonstrate. For, clearly, there are segments of the ruling classes, for example, the gentlemanly squirearchy, and whig constitutionalists, who were prepared to use parliamentary means, and no doubt, a network of informal channels, to oppose the establishment of new institutional forms of the state, which undermined their own local networks of power and authority, and which did not therefore advance the squirely interests. What was to replace the system of patronage, deference and authority which was the mode of domination in the county system of law enforcement (Hay; op cit)? Increasingly, it was to be the paid agents of the state whose authority was to derive from particular institutions and not class location and whose mode of domination was to be enforcing 'abstract rules' and bureaucratic rational procedures, and whose legitimacy more and more derived from their expertness. Alongside the distribution of power and authority in civil society structured by ownership and control of various forms of property we have noted the increasing power of the state to intervene and regulate social relationships, social practices and social sites which were once regarded as the domain of private, self-regulated existence. The competing systems of authority were not entirely class based; some of the tension between them was generated by their different

spatially located bases, town versus the shires, for example. At best, 1800 - 1860 is marked by an uneasy co-existence between the traditional forms and sources of domination and the newer state-located modes.

The balance was disturbed not only by the fact that the system of law enforcement was to be re-located away from the local sheriff, J.P.'s etc., but also by the state acquiring the characteristics of a huge information bank. Foucault, Donzelot (1979) and most recently Giddens (1981) note that some of the most important features of the modern state are to do with surveillance, information gathering and processing, where information becomes a major medium of power (Giddens op cit;174). In the early 19th century we have the beginnings of the industry of registering and enumerating and classifying the population of the British Isles. Registration of births, deaths and marriages commenced in 1837. Seemingly innocuous, the fact that registration now took place permitted and produced much sharper distinctions between legitimate and illegitimate children, for example. In the early part of the century, of course, the monopoly of demographic information was not entirely in the hands of the state; various statistical societies, social investigators and medical men were beginning to enumerate the population, and identify sites of ill health, poverty and social disturbance. However, it was to be the school teachers, prison governors, inspectors and prison chaplains, the New Police, the factory inspectorate and Poor Law commissioners who were to provide the substantial information about relationships, practices and sites within civil society, and who were to become simultaneously the agents of intervention and correction. We shall be providing more substantial evidence on this theme when we examine some of the work of Edwin Chadwick and W.A. Miles.

An integral part of the process of enumeration and identification, was the classification of populations into social groups. As we noted earlier, the activity of classification extended beyond

a means of encoding numbers to the practice of fixing individuals into particular categories and then keeping the categories apart. We have mentioned this in connection with the administration of prisons and the Poor Laws; monitorial schools operated on similar principles. One of the outcomes of the process of enumeration and classification in the first half of the 19th century was the identification of a set of relations, practices and sites associated with the phenomenon of youth, but more particularly with an emergent category - the juvenile delinquent. The identification of a problem category was to be one of the conditions for the institutionalisation, in criminal law, and in the penal system (i.e. the system of law enforcement) of a distinction between the adult and the child as legal and penal subjects.

CHAPTER TWO

MISCHIEVOUS DISCRETION: CHILDREN AND CRIMINAL LAW

> "a child knows right from wrong long before he knows how to make a prudent speculation or a wise will".
> (Kenny (1965) Outlines of Criminal Law, quoted in Smith and Hogan 1969; 110).

INTRODUCTION

How the legal system retained the apparent contradiction between infancy terminating at the age of 21 years whilst maintaining the criminal responsibility of children begins at 7 years, can largely be explained by the logic of the grammar of the English criminal law. The specific combination of fundamental elements of the criminal law (mens rea, actus reus, responsibility etc.), provided an almost insurmountable stumbling block to social reformers concerned with removing offenders of tender years from a legal process whose potential outcome was the gibbet.

This Chapter will be primarily concerned with the discourse of English criminal law in the 19th century, seeking to indicate how the principles around which its processes were organised, permitted the very young to stand trial as though they were 'full' legal subjects. This will entail looking in some detail at the concepts of criminal law, and how the criminal process, almost from time immemorial had accommodated offenders who were especially young. This is of particular importance because even under what we have termed the absolutist system, to be of tender years was regarded as being an extenuating circumstance, which though carrying no guarantees about the law not running its full course, did allow judges and magistrates to exercise judicial discretion. And it was in this particular 'space' within the discourse, that reforming magistrates, lawyers and 'child savers' sought the rescue, by separating the old from young offenders, of children and a new social category, 'the juvenile' from the rigours of the criminal law.

In trying to carch a particular moment in the transformation of the criminal law, and in the criminal subjectivity of the child, we must be sensitive to wider changes which took place in the English criminal legal system during this period. Attempts were being made to eliminate the contradictions which existed within case law (due in part to a poor system of court reporting and, a reliance on legal texts were themselves inaccurate), and contradictions which existed between case law elaborated under the procedures of common law, and, statute law. Diverse parties, such as Bentham, Adam Smith and lawyers serving on, and giving evidence to parliamentary commissions tried to put into statute, a criminal code (in the Continental manner) combining the complex forms of actions, definitions of crimes etc., into one coherent system. Reducing the number of petty offences which were punishable capitally, combining diverse definitions of forms of larceny, re-writing the definition of certain offences (forgery and fraud) and recognising new forms of property was part of the process of codification, which in the end was only partially achieved.

Children as Adults

That the criminal law did treat children as though they were 'full' legal subjects in the early years of the 19th century is indisputable. Taking the death penalty as an index, children were sentenced to death for the same offences as adults. John Any Bird Bell, however, is an extreme example of the system of law enforcement running its full course. We should lay to rest the popular conception that children were commonly executed. One study traces the disposition of 103 children who, after criminal trials, were sentenced to hang; the years 1801-1836; none were executed (Knell 1965). "Small boys and girls were not strung up on gibbets for petty theft" as some commentators have supposed (Knell op cit; 207). However,

like Knell, Radzinowicz (1948) and Kean (1937) demonstrate that capital sentences for child offenders was by no means uncommon. John Morris, aged 8, was convicted of breaking and entering, and stealing the sum of 8 shillings and was sentenced to death at the Old Bailey (Knell; ibid). Radzinowicz reports that after the Gordon Riots, Horace Walpole wrote "... of the several persons, male and female, executed on account of the late riots, seventeen of them have been under 18 years of age, <u>and three not quite 15</u>" (my emphasis: Radzinowicz; 14, footnote 40). It was possible then, until 1847, for children as young as seven to stand their trial in the same manner and under the same proceedings, as adults. No distinction, at the level of documents before the Courts, for example the Bills of Indictment (lodged in the P.R.O.), was made on account of age .

Evidence suggests that popular consciousness was affronted by offenders of tender years being sentenced capitally. The widely reported case of William York, aged 10 is instructive. (Knell op. cit., Smith and Hogan; 111, Radzinowicz; 12). In a trial at Bury assizes, in 1748, York was sentenced to death after he murdered a 5 year old girl and buried the body in a dung heap. York was condemned to death for the murder. The Lord Chief Justice, who was the presiding judge at the assizes postponed the execution "until he should have the opinion of other judges as to whether he (York) should be put to death or not" (Knell; 204). This was in consideration of York's tender years. York remained under sentence of death for another nine years, until in 1757 he was pardoned on condition he entered sea service. More than a hint perhaps of judicial indecision about executing young offenders. There is evidence from the 19th century which indicates popular opinion. Numerous parliamentary commissions report that traders and other victims of juvenile thieves preferred not to press charges, or, under-reported the value of stolen articles (e.g. P.P. Crim. Law Vol. I (1819) 13-15). The jury in the Bell case recommended mercy. In another case, in 1800, a ten year old boy sentenced

to death "for secreting notes at the Chelmsford Post Office" the judge noted

> "The scene was dreadful, on passing sentence, and to pacify the feelings of a most crowded court, who all expressed their horror of such a child being hanged by their looks and manners ... I hinted something of its still being in the Power of the Crown to interpose in every case that was open to clemency."(my emphasis: Hotham B., quoted in Radzinowicz; 13).

Whether children had sentences commuted principally because of their age is difficult to determine, for as we indicated earlier, the practice of retaining capital punishment and yet pardoning or commuting convicted adult criminals was systemic to the law enforcement process at the end of the 18th and at the beginning of the 19th century. What is demonstrable though was that other forms of punishment were meted out to adults and minors alike. Transportation, the hulks, whipping, and incarceration were punishments with few chronological age boundaries[11]. Nicholas White, aged 9, for example, was sentenced to death in May 1833 "for felonously breaking and entering the dwelling house of Thomas Batchelor ... and stealing therein, fifteen pieces of paint, value 2d", had his sentence "commuted" to a whipping and transportation for seven years (Knell;198). It was from this widely cast net of law enforcement that social reformers principally concerned with the "problem" of juvenile delinquency sought to free young offenders, largely though not exclusively, because of its brutality.

Paradoxically, from at least the 14th century, the criminal law had made special provision for child offenders. Once before the court, there was considerable judicial discretion

as to whether the subject before the court was an 'adult' or a 'child'. This judicial discretion derives from one of the axiomatic principles of criminal judicial discourse: the notion of 'responsibility'.

As we shall argue more fully below, central principles of the criminal legal discourse include a set of judicial concepts, responsibility, liability, intention, mens rea, doli incapax, capcacity, motive, guilt and the like, which though they are in constant flux open to interpretation and philosophical debate, address the problem of the mind of the offender. For in criminal proceedings, not only must the offence be proved, but also the intent to commit it. This inevitably involves questions of rationality and reason. Case and statute law has elaborated general defences which allow specific subjects to plead on the grounds of insufficient (infancy) or impaired (insanity) reason; (other general defences include diminished responsibility, mistake, drunkeness, necessity, duress (or compulsion) and coercion, and superior orders (Smith and Hogan 1969; chapter 9).

It was on the terrain of the mind as constituted in criminal and penal processes that child-saving reformers were able to find the means of re-writing the subjectivity of child offenders. However, central categories of the criminal law were challenged in a mediated manner, for what emerged in the struggles to remove children from the rigours of the criminal law was not simply calling into question the then-extant legal notions of responsibility, but more fundamentally the causes of crime itself. Furthermore, the power base of many arguing for a different system applicable to children, was not within the legal profession itself (though many magistrates testified to parliamentary commissions along these lines) but are familiar to us primarily as movers for penal reform, thereby attacking the criminal law, not only by arguing for separate procedures for adults and children, but also calling for separate institutions for adult

and child offenders. In fact, the separation of children from adults in penal institutions was accomplished a decade prior to the establishment of formal procedures allowing offenders under 16 to be tried summarily for many offences. The Convict Department in Van Diemen's Land for example set up a separate establishment for your male convicts as early as 1834, at Point Puer. Girls were not separated from convict women; initial placement throughout the period was in the Female Factory in Hobart (see Appendix).

To address the complex issues of responsibility and the notion of liability more adequately, firstly we shall describe how the criminal law conceives these notions. Secondly, we shall consider the particular case of children's reason and child knowledge as conceived in criminal law.

a. 'Sufficient reason': criminal responsibility

One of the foremost commentators on criminal law, Sir James Fitzgerald Stephen states that

> "in order that an act may by the law of England be criminal, the following conditions must be fulfilled:
> 1. The act must be done by a person of competent age.
> 2. The act must be voluntary, and the person who does it must also be free from certain forms of compulsion.
> 3. The act must be intentional.
> 4. Knowledge in various degrees according to the nature of the offence must accompany it.
> 5. In many cases either malice, fraud or negligence enters into the definition of offences.

6. Each of these general conditions
   (except the condition as to age)
   may be affected by the insanity
   of the offender"
(Stephen;1883:Vol. II; 97).

What is of note here is the centrality of notions such as 'voluntary', 'intentional', 'knowledge' and 'malice, fraud or negligence', to the legal conception of what constitutes a criminal act. We should note that (except in the case of insanity) the form of the legal definition of a crime is generally ahistorical. Texts such as Hawkins, Pleas of the Crown (1787) and, more recently for example, Smith and Hogan (1969) generally define crime in the context of offenders being responsible for their actions unless special conditions obtain(for example infancy or idiocy). Smith and Hogan's work describes the elements of a crime as follows:

> "Before a man can be convicted of a crime it is usually necessary for the prosecution to prove (a) that a certain event or state of affairs, which is forbidden by the criminal law, has been caused by his conduct and (b) that this conduct was accompanied by a prescribed state of mind. The event, or state of affairs, is usually called the actus reus and the state of mind the mens rea of crime".
> (Smith and Hogan, op. cit.; 27, my emphasis).

Analytically, we are confronted with two discursive principles constituting crime and criminal law. Firstly the actus reus - the 'event or state of affairs' forbidden by criminal law. Secondly the notion of mens rea which refers to knowledge, intention, etc.. Each element is susceptible to transformation but not in register, and according to different principles. There is a third element, that of the form of judicial procedure (ordeal, battle, trial by jury, trial by witness) [12].

The _actus reus_ is constituted along two principal lines; offences against the person (murder, assault, rape, sodomy, prostitution, etc.) and, offences against property. Offences against the person are further valorised by reference to the status of the victim, so that we have historically, brutal punishments inflicted on the putative regicides. In the case of offences against property, the criminal law works in visibly securing capitalist relations- the obsessive protection of private property, given through the capital punishments meted out for trifling offences of petty larceny for example. As the dominant forms of capitalist property change, the criminal law reconstitutes the offences deemed to be criminal. Thus, for example, we have the rapid passage of the Waltham Black Act (Geo 1 c 22 1723) which made 19 separate offences capital, and which aimed predominantly to secure _rural-agricultural_ property relations (namely the appropriation of traditionally 'common' lands to the exclusive use of the aristocratic landed gentry), (Thompson 1975). In the first half of the 19th century we find legislation obsessively concerned with urban crime. (The Police Acts 1829 , The consolidation of offences for petty larceny 1827) , and a new concern with stealing, forging and disposal of finance instruments. The 18th century law for example placed no value on documents other than the paper on which wills, deeds, etc. were written. At the beginning of the 19th century there were about 80 pieces of legislation covering forgery (Cornish and Hart; 1978;49). Capitalist industrial enterprises as a matter of course, sought and obtained capital punishment, by parliamentary means, for offences against its buildings, machinery, raw materials and finished goods (Hay et al; 1975;20-22).

Crudity, crisis and cruelty seemed to be the proper epithets for the criminal law specifically, and the common law in general. " Its absurdities", remarked one commentator

> "are enough to make a horse laugh; a drizzling maze of empirical inventions, circuitous procedure, and unintelligible fiction, calculated for no purpose but to fortify monopoly (of lawyers) and wrap justice in deceit and mystery."
> (Wade, 1835 Black Book; 327. Quoted by Manchester 1978;117).

In the early part of the 19th century it was difficult to discover what exactly the criminal law was; definitions such as murder, manslaughter, rape and larceny; defences such as insanity and self-defence, had to be extracted from the decisions of judges. It was difficult to appeal a decision because few records of cases were kept (and many that were, could only be found in private collections (Cornish et al; 51). The Criminal Law Commission 1834 (1st Report P.P. Vol. XXVl) was followed by a further four reports in an attempt to codify existing common law principles. A draft code was produced in 1849 but never put into statute form. It was Stephen's Digest of Criminal Law (1879) which became the most complete 'code' (subsequently forming the basis of the criminal codes in Canade, New Zealand, Queensland, Western Australia and Tasmania). (Cornish et al; 55). So much for the crudity. The cruelty we have dwelt on. The crisis is caught very precisely in the following passage.

> "At a moment when the pecuniary enterprises of the Kingdom were covering the whole world, when railways at home and the steam on the seas were creating everywhere new centres of industrial and commercial life, the Common Law courts seemed constantly occupied in the discussion of the merest legal conundrums which bore no relation to the merits of any controversies except those of pedants of a machinery that belonged already to the past".
> (Bowen C. 1907;509, quoted in Manchester 1978;119).

The law here, whilst its categories are sensitive to the relations of possession (feudal/capitalist, rural/urban, agricultural/financial) at the level of judicial procedure, it may well retain an archaic and antiquated life of its own. through nothing more than sheer inertia. Whilst we have argued that new offences legislated into existence in the 19th century are distinctly capitalist can we also argue that notions of *mens rea*, criminal responsibility and liability 'reflect', 'mirror' or 'correspond' to these distinctly capitalist forms of offence?

Two recent commentators writing of the absolutist system of criminal law enforcement certainly take this view. Clarke (1975) speaks of,

> "... *the classical view of crime*, law and punishment which (in typically uncodified manner) forms the bedrock of the English criminal law, most notably in the subordination of questions of motivation to the questions of guilty knowledge and responsibility. This orientation has its roots *in the image of bourgeois man* generated in the formulations of classical political economy and political philosophy, the atomised, egotistical, rationally self-seeking embodiment of individualism bounded only by the social contract." (p. 12; my emphasis).

Likewise, Garland (1981) writes:

> "One might say that the prison, penal law and the judicial process of the period effectively transferred the concepts of economic liberalism into the realm of punishment ... The twin doctrines of

> individual responsibility and presumed rationality formed the basis for the judicial findings of guilt - since in free-market society the criminal actor - like his economic counterpart - was deemed to be in absolute control of his destiny. Reason and responsibility were absolute and essential attributes and since freedom was guaranteed by market society, there could be neither excuse nor mitigation for crime . . ."
> (p. 31; my emphasis).

Two valuable insights into the nature of what we might nominally call the juridic subject in general. The notion of the individual subject, like 'the economic counterpart' being in control of his destiny is not, however, strictly a bourgeois construct, especially in the case of criminal law. The homology between the bourgeois legal subject and the economic agent of capitalism will not bear up under the weight of historical evidence.

Absolute responsibility, where the legal subject is held liable for his actions is not unknown in criminal law in feudal times. Legal historians tell us:

> "Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows."

And of the 13th century in particular,

> "If once granted that a man's death was caused by the act of another, then that other is liable no matter what may have

> been his intentions or motives. To
> this principle our evidence directs us,
> though for an unmitigated application
> of it we may have to look to a pre-
> historic time."
> (Pollock and Maitland; Vol. II:471).

Questions of mens rea, culpability, liability and responsibility and the difference between intention and misadventure were known to and were being contested by mediaeval lawyers (Pollock and Maitland op. cit.; 470), so hardly bourgeois in origin or distinctly capitalist in the social relations it secures. Individual liability subverted collective responsibility perhaps by denying the early law of blood-feud and familial rights to compensation.

A mens rea, (guilty mind), constituted without reference to environmental influences and therefore disallowing mitigating circumstances (brief description only of mens rea in the absolutist sense) clearly assumes a rational subject who has chosen to lead a life of crime and was therefore strictly liable for any punishment consequent upon conviction of an offence. The legalistic construction, as Clarke (op.cit) rightly points out, privileges liability and guilt without reference to motivation. This construction remained as a hard core in criminal law for something like 500 years. However, the actus reus was transformed to take account, say of changing forms of property and securing changes in the relations of possession. The constituted subjectivity of the offender; a rational subject choosing the pursuit of crime, remained durably indifferent to the processes of codification and reclassification of criminal offences. For the rational subject is a premise of a law enforcement system where retribution is the organising principle. The rewriting of the subject is therefore consequent upon a re-ordering of the organising principle, and historically this was to take the form of asserting the notion of rehabilitation wherein punishment was premised upon programmes of reform.

Where the law confronts the non-rational subject however is where we find the greatest clarity in legal enunciation of what is regarded as rational, and it appears as a very narrowly defined quality, purely cognitive and inherently biological in form. A pertinent example occurs in Hawkins' (1787) description of offenders who might enter general defences in criminal law:

> "As to the first point it is to be observed that those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots and lunaticks, are not punishable by any criminal prosecution whatsoever." (pp1-2).

The third figure, alongside the child and the madman, was the beast. The law granted them, from at least the 13th century, a general defence against prosecution - as Bracton argued in the 13th century, they were "protected by their innocence", (quoted in Jacobs 1971;25). What then was the principle of classification whereby specific subjects were granted the privilege of innocence, rather than assuming the legal capacity of mens rea? The lines are made clear to us in the judicial considerations of the M'Naghten Case (1843).

The circumstances of the M'Naghten case are well known. Under the 'delusion' that Sir Robert Peel had injured him and mistaking Mr. Drummond (Peel's Private Secretary) for Peel, M'Naghten shot him dead with a pistol (Stephen 1883;153: Hart, 1968;189-193: Jacobs 1971; 30-36). At the trial, the questions left to the jury were

> "whether at the time the act was committed, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong and wicked act, whether the

prisoner was sensible at the time
he committed the act, that he had
violated both the laws of God and
Man." (Stephen ; 153).

The jury acquitted M'Naghten, a verdict causing some public alarm, to the extent that the House of Lords asked the judges to respond to some very general questions about pleas of insanity. The judges' replies became in principle the M'Naghten Rules. Mental abnormality, post-M'Naghten, sufficient to constitute a defence, comprised three elements:

a) the accused at the time of the act must have suffered from a defect of reason.
b) this must have arisen from a disease of the mind.
c) the result of it must have been that the accused did not know the nature of the act or that it was illegal.

(Hart; 189: Jacobs; 30)

The defence then is framed purely with reference to cognitive principles; the offender did not <u>know</u> what he/she was doing, and did not <u>know</u> the act to be wrong. There is no reference to a lack of capacity to control action (i.e. cases where the offender knew the act to be wrong but could not prevent nor control the act being done because of a lack of capacity to do so). It was a peculiarly English version of the relationship between crime and madness, very unlike the defence of madness in the French Penal Code 1810 [13].

Rationality then is founded upon knowledge. But knowledge is furthered refined, as in Hawkins (op.cit.), as the ability or disability to distinguish between good and evil. The general defence of infancy or insanity therefore could be entered, but, it was the judge's discretion whether or not the plea was a good one, determined generally by a common-sense process given the

legal nicety 'voir dire', looking and talking! The legalistic conception of rationality, narrowly defined as knowing right from wrong makes no reference to habitat, environment or motivation, and was not disturbed by the M'Naghten Rules. The cause of crime was sited within the individual, its point of origin being the guilty mind. This being the case, changes in the classification of what constitutes an actus reus, the redefinition of offences, and changes in formal court procedures, therefore have no necessary effect upon the judicial construction of individual responsibility.

There were attempts to subvert the judicial discourse of rationality. The M'Naghten case is notable here as a point where medical men tried to insert their claims as arbiters of the boundary between madness and sanity. If, as the judiciary claimed, madness was the manifestation of a diseased mind, who and by what procedures, was to determine whether a mind was diseased? Medical men claimed this as their specific terrain (Stephen; 125).

Perhaps the most coherent critique of extant notions of legal rationality, and its location, within legal discourse came from Benthamite philosophy. Bentham and his followers were fundamentally concerned to construct an all-embracing system of criminal law enforcement. Bentham's own projects comprised not only the elaboration of the principles of codication of criminal law, but a sophisticated (and obsessive) plan for reorganising English prisons. Bentham's system of criminal law and punishment was premised as an 'economy of threats', enshrining the principle of deterrance, as an attempt to displace the organising principle of retribution. Punishment was structured by the minimal use of force, violence and coercion necessary to deter both the guilty and the innocent from pursuing criminal careers. While he embraced the legalistic notion of the rational subject, that subjectivity was put into play in a radically different way. For Bentham, the rational subject was both a target of the deterrent strategy and an instrument of it. An argument clearly demonstrated where

Bentham considers cases in which punishment must be 'inefficacious', cases where:

> "... the penal provision, though it were conveyed to a man's notice, could produce no effect on him, with respect to the preventing of him from engaging in any (criminal) act of the sort in question. Such is the case,
> 1. In extreme infancy, where a man has not yet attained that state or disposition of mind in which the prospect of evils so distant as those which are held forth by the law, has the effect of influencing his conduct.
> 2. In insanity; where the person, if he has attained to that disposition, has since been deprived of it through the influence of some permanent though unseen cause.
>
> (Bentham, 1970 ; 244).

The general defences in criminal law accorded the infant and the madman, argued Bentham were "either false in fact or confusedly expressed." In his view the legal arguments

> "... that the will of these persons concurs not with the act; that they have no vicious will, or, that they have not the free use of their will
> (p. 161)

are purely circular and without purpose. How can these subjects be instruments of deterrence, when punishment has no effect on their conduct, nor on that of society in general, for the target of punishment is a mentally abnormal subject? Punishment as a deterrent strategy only works through subjects

who are commonly supposed to be ordinary, rational members of society. It was, therefore, Bentham's view, a purposeless exercise to use the infants and the mad as instruments of any deterrent strategy, and this was to be the grounding of their extenuating circumstance, not merely their cognitive defects, which in Bentham's scheme, were little more than extention of bodily imperfections [14].

The classic theory of deterrence conceives punishment as the means to obtain more than retribution, it was the means deployed to instil the rule of law in the offender and on society at large. The offender is not merely punished for transgression but also becomes a reified instrument of terror in the service of the law. What is central to the theory of deterrence, and to Bentham's scheme of law enforcement, which gives shape to his particular conception of the rational subject, was radical conception of preventive justice. That the law should serve a larger purpose than retribution, that it should use offenders as active agents of prevention is comprehensively articulated in Bentham's theories of the panopticon. However, it was not the rationalist-utilitarian of preventive justice which became the dominant practice in courts and prisons in the first half of the 19th century. Crime prevention was not systematically articulated to theories of deterrence in law enforcement institutions, but to the evangelical notions of 'reform', 'rescue' and 'rehabilitation'. The Panopticon remained an idea, the practical reality was the prison chaplain. The significant difference between the theory of deterrence and the evangelical programme of rescue, reform and rehabilitation is the latter's decisive shift beyond the 'twin doctrines' of individual responsibility and presumed rationality, into the problematic areas of motivation, and, the possible effects of environment.

It was the logic of the criminal legal process in the first part of the 19th century which included young offenders as a category of criminal to be taken before the court and tried for alleged offences. The absolutist system recognised offenders only as persons freely making rational choices to commit crimes and therefore liable to any punishment the court might bestow. Where the criminal law differed markedly from previous legal discourses, we have noted earlier, was in the absence of any statutory protection of infants. Any protection extended to the young was purely by judicial discretion, not by any right statute only applied to their status. The privilege could be extended or witheld only within the very narrow doctrine of mens rea, as it was applied in the 19th century; namely a practical test of the judge deciding whether a young offender knew right from wrong. It was this very narrow interpretation of mens rea which allowed judges to try, and sentence, children of any age, treating them to all intents and purposes as though they were full legal subjects.

By dicta, precedent and customary practice, there were specific chronological ages which acted as markers in the exercise of judicial discretion. We shall outline these below, but emphasise here that these ages were no more than markers; judges could and did ignore them, applying more often their own rough and ready tests of mischievous discretion.

B. 'Of Sufficient Age': the criminal liability of children

We are innured to analysing and explaining social phenomena by reference to relationships between specific ages and definite aptitudes, characteristics and abilities, if only to indicate the normal from the abnormal, the odd from the conventional. Attaining a certain age (certainly up to the age of 18) constantly rewrites an individual's relationship to and within modern

institutions; at the age of 5 we go to school, at the age of 16 we may leave it, and so on. Modern usage of chronological age remains with us as a rarely questioned, wide embracing principle of classification. Age is used as a precise boundary marker; an efficeint way of excluding individuals from the polity, the economy and the full rigours of the legal system.

Nineteenth century criminal law displays few of the certainties we attach to the relationship between specific ages and definite aptitudes and abilities. One principal reason of course was the absence until 1837 or any national system of registering the birth of individuals. Part of the process of subjectivity, in the modern sense, is to be assigned a date of birth (registering one existence and in part supplying a means of identification). In the absence of any such reliable means of identification, the English judiciary accorded little weight to the ages of offenders; the principle of legal classification was not so much age as physique. Judges were more inclined to rely upon their own examination of the offender's physical appearance and mental competence when any general defence of infancy was deployed.

The weight of historical practice had, both by precedent and dicta, in common law, bequeathed the 19th century judiciary three categories of young offender, loosely bounded, one from the other by age. The ages are broadly related to the legal notion of mens rea - either its presence or absence, which in turn determined whether a young offender was deemed to be exempt from, or liable to criminal trial and punishment. The operative categories were as follows:

a) under 7 years; a child of this age, by common law was deemed doli incapax (possessing no guilty mind), and therefore could not legally commit a crime, nor could be punished.

b) 7 but under 14 years; the common law generally presumed against criminal intent on the part of the offender, but (unlike those under 7) this presumption could be rebutted, and if it were, an offender was liable for trial and punishment.

c) 14 years plus; an offender was treated as an adult, and if convicted, liable to any punishments, even capital.

The general divisions are not disputed by any writers on 19th century criminal law, or child law, (e.g. Hawkins 1787, MacPherson 1842, Stephen 1883, James 1957, Kean 1937, Knell 1965). We shall expand on the logic of these categories below. In passing, however, we should note that for offenders under the age of fourteen, the criminal law offered the possibility of a measure of protection against its full rigour. However, the criminal law constituted as 'adult' those offenders over the age of fourteen; unlike other branches of the law where infancy terminated at the age of 21. To all intents and purposes, the criminal law made no distinction between an offender over the age of 14, and an offender over the age of 21. Both were deemed 'responsible' and therefore liable to suffer any punishments handed down by the bench. Age itself, for those over the age of 7 was not a prima facie reason alone, for the mitigation of punishment (this is a contemporary usage) but merely sufficient reason for judges and magistrates to consider the possibility of mitigation, based on a subjective assessment of the offender. To reiterate, age was related, not to notions of capacity - an ability to understand, to control behaviour but to the much narrower legal notion of responsibility - the ability to distinguish between (legally defined) good and evil, right and wrong. Legal logic dictated that the age at which one could make "a wise will or prudent investment" was an attribute acquired at least seven years after the acquisition of a knowledge of right and wrong.

A notable absence in the common law was the notion of 'juvenile'. Juvenile, as a descriptive term, applied to young offenders (of unspecified age) seems not to be a product of legal discourse but category arising out of the reports of surveys carried out by 19th century social reformers and philanthropists. One of the earliest references to juvenile, in context of young offenders was the name of a committee (which neatly reflected its own object of inquiry) called the Society for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis (Pinchbech and Hewitt 1973; 433-434). Their first Report was issued in 1816. This was followed by the Society for the Improvement of Prison Discipline and the Reformation of Juvenile Offenders which disseminated further the existence of that special species of offender, the juvenile. We are not claiming here to establish a terminological point of origin, but merely to establish a distinction between age-related legal categories and the deployment of 'juvenile' as a product of social philanthropic reportage. The distinction, however, between legal and philanthropic categories was maintained less and less post 1836. Before we explore the legal / philanthropic classification however we shall return to the general problem of age and criminal responsibility.

1. The age of responsibility

One commentator outlines the position of young children accused of criminal offence as follows;

> "... within the age of seven years an infant cannot be punished for any capital offence, whatever circumstances of mischievous discretion may appear; for ex presumptis juris, he cannot have discretion; and against this presumption, no averment shall permit. Therefore if a child under this age steal the goods or fire the house of another, he cannot be punished for either larceny or arson. (Hawkins 1787;1-2 footnotes).

A child under seven was immune from conviction primarily on the ground that in law they were presumed not capable of having a guilty mind - therefore to be doli incapax. The defence was not therefore infancy, but the irrebuttable assumption that they did not have the necessary mens rea (Jacobs op.cit; 63). Without mens rea, in law no crime could be committed.

The attribute of absolute innocence for those below the age of seven was purely arbitrary. The age of seven was probably drawn from Roman and Canon Law (Christian doctrine for example did not admit a child to the sacraments of the Church until it had a mind of its own - customarily at the age of seven). The age of criminal responsibility has varied across time. Contemporarily it is set at 10 years, though recommendations prior to the 1969 Children and Young Persons Act set the age at 12 years . There is some doubt as to when seven became the age of criminal responsibility. Evidence suggests that such a boundary existed in the 13th century. Pollock and Maitland report however that in the case of homicide

> "it is with difficulty that even a child can escape the hard law. Reginald aged four, by misadventure, slew Robert aged two; the justices granted that he might have his life and members because of his tender age. (Y.B. 30-1 Edw. I;511). A little later we hear that a child under the age of seven shall not suffer judgement in a case of homicide"(p.484).

Certainly such was the ruling in the 14th century. The Year Book Hil 4 Edw. II (1310-11) states that "an infant under the age of seven years, though he be convicted of a felony, shall go free of judgement because he knoweth not of good or evil" (quoted in Knell op.cit;364). Whilst the common law determined

a period of absolute innocence, the chronological upper limit was not fixed in any precise manner. Knell finds evidence of the age being fixed at seven, and at twelve years (Knell; 366-367).

However, the evidence suggests that the age line of seven as the upper limit of a designated period of absolute innocence was settled by the end of the 14th century (Knell; 367). In a sense children below the age of seven were regarded as tabula rasa - completely without the attributes of guilt, intent, discretion and discrimination. These common law principles were operative in the 19th century.

2. The age of discretion

The doctrine of doli incapax operates where a defendant is seven years old but below the age of fourteen years. Unlike the previous category however, the law entertained a rebuttable assumption that a child is capable of committing a crime. There is little doubt that lawyers had a great deal of difficulty in settling, firstly the upper limit of this category in terms of chronological age. It is the upper limit which is generally designated as "the age of discretion". The age of fourteen was settled on by both Coke and Hale in the seventeenth century. (Knell;369). Later writers followed their age line. Again, 14 years seems to be somewhat an arbitrary boundary for in criminal matters we know that discretion could be acquired as early as twelve, and that children below that line were said to be 'within the age'. Fourteen years was certainly thought to be the age of discretion in matters concerning socage, land and property, as we have demonstrated earlier. None of the authorities make any distinction between the age of discretion, in criminal law, for boys and girls, though we have shown that such a distinction existed in family law in medieval times.

The second great difficulty for the judiciary and magistrates was to determine whether someone "within age" possessed "discretion", or whether the case being heard indicated that the offender had displayed "mischievous discretion". Much hung on the examination by the judge (which had to be carried out in court. Hawkins puts it this way:

> "And if it appear by the circumstances, that an infant under the age of discretion could distinguish between good and evil, as if one of the age of nine or ten years kill another and hide the body, or make excuses, or hide himself, <u>he may be convicted or condemned and forfeit etc. as much as if he were of full age</u>." (Hawkins; 3: my emphasis).

The mischievous discretion, the knowingness displayed (hiding the body, hiding himself or making excuses) was sufficient to place a young offender in jeopardy of being treated as an 'adult', liable to unmitigated punishment, regardless of the tenderness of years. "The capacity of contracting guilt is measured more by the apparent strength of the offender's understanding than by years or days", concludes Hawkins (op.cit.2).

How did the Courts assess this unspecified quality of 'discretion'? We can understand the process by reference to reports of cases where discretion was at issue. The initial presumption is that,

> "Every person of the age of discretion is presumed of sane memory until the <u>contrary appears</u>, which may be either by the inspection of the court, by evidence given to the jury, or being a collateral issue, the fact may be pleaded and replied. (Hawkins; 3, my emphasis).

So in 1313-14, 'an infant within the age killed his companion; and then concealed himself (though some reports say he concealed the body - in a cabbage patch) and thereupon he was hanged; for Spigurnel J. argued that '<u>by concealment, he could discern between good and evil</u>' (Kean; 367, my emphasis). In the York case (1748), noted earlier in the chapter, where York aged 10 killed a girl aged 5, the Lord Chief Justice in his summing up argues:

> "... supposing the boy to have been guilty of the fact, and there are so many circumstances stated in the report, which are undoubted tokens of what my Lord Chief Justice Hale somewhere calls a <u>mischievous discretion</u>, that he is certainly a proper subject for capital punishment."
> (quoted in Knell 1965;204, my emphasis).

<u>Mischievous discretion</u>, the knowledge of right and wrong was given through the concealment of the victim's body in a dung heap. Though the boy was ten, the act of concealment therefore made him 'a proper subject for capital punishment.'

One further case is worth considering in a little more detail because it gives us some insight into court practices. The case of R v. Owen (1830) (E.R. 172; 685-686) involves a charge against Elizabeth Owen, aged 10, for stealing coals and was seen to put a few knobs into a basket. In answer to the prosecution, she admitted taking coals from the heap. The head note reads:

> "If a child more then seven and under 14 years of age is indicted for a felony, it will be left for the jury to say whether the offence was committed by the prisoner, and if so, whether at the time of the offence, the prisoner had guilty knowledge that he or she was doing wrong. The presumption of the law is, that a child of that age has no

> guilty knowledge, unless the contrary
> be proved by the evidence."

Two points of some note; firstly a crime comprised <u>actus reus</u> and <u>mens rea</u> and both had to be proved; secondly, and more importantly, it was the <u>jury</u> who was to decide whether or not the child displayed guilty knowledge. This point is underlined in the judge's (Littleton J.) summing up.

> "... such a person might not be convicted,
> unless there be evidence to <u>satisfy the jury</u>
> that the party at the time of the offence,
> had a guilty knowledge that he or she was
> doing wrong."

Indeed, Littleton himself stated he was of the opinion that he

> "... cannot hold that a child of ten years
> is incapable of committing a felony. Many
> have been convicted under that age."

The defence solicitor agreed, but invoked the York case to show that conviction there was premised upon a strong evidence of guilty knowledge. Littleton left the decision to the jury, who acquitted Elizabeth Owen and the foreman declared the grounds of the decision by stating, "We do not think that the prisoner had any guilty knowledge". It will be remembered that the jury in the York case found him guilty but also put in a strong plea for mercy.

The Owen case seems to signal two things. Firstly, a shift in the procedure of who was to determine the possession or absence of guilty knowledge - in the 18th century the judge was generally the arbiter whilst the Owen case indicates that this had become the responsibility of the jury. Secondly, there was a strong divergence between judicial and popular opinion as to the criminal responsibility of children, where

the latter are unwilling to convict, whilst the judge made his feelings quite clear that children of ten could be possessed of such responsibility.

But if mischievous discretion was manifest in particular actions; lying, deceit, concealment etc. and thus according to the criminal law children between seven and fourteen were liable to punishment, there was also a second yardstick commonly applied as a test of childish cognition. The axis here was a knowledge of good and evil as measured by the process of oath-taking. Children appeared in criminal cases not only as offenders but also as witnesses and the judicial concern here was with the reliability of evidence.

The general principle in common law was:

> "... the evidence of all children had to be given on oath in both civil and criminal cases; this followed from the general fundamental rule of procedure that no testimony whatsoever can be legally received except upon oath."
> (James 1957; 187).

Coke, for example, argued that the age of discretion included an ability to understand the nature of the oath. He stated that this age was fourteen years (Coke Just. 1; 247b quoted in James op.cit. 187). This was by no means settled in judicial practice. In R. v. Brazier (1779 1 Leach 199) involving an attempt to commit rape on a girl under seven, the testimony was given by the girl's mother and a woman lodger. The girl was not sworn or produced as a witness. This was raised as a point of law, on the grounds that evidence had to be produced by sworn witnesses bearing the responsibility of cross-examination. Because it raised the

general problem of child witnesses, the judges (12 in chambers) made a general statement on the relationship between children and competence. Their statement included the following,

> "... there is no precise or fixed rule as to the time within which infants are excluded from giving evidence but their admissability depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found to be incompetent to take an oath their testimony cannot be received."

In Brazier's case the mother's testimony being hearsay and the child not being called, led the prisoner to being pardoned.

The relationship between oath-taking and competence turns fundamentally however 'on the child's understanding of the moral rather than the legal aspect of the oath'. (James; 187). Knowledge of good and evil as a test of discretion turns out to be simply little else than a knowledge of the existence of God and a knowledge of the catechism rather than any capacity to reason or to understand moral issues. In R. v. White (1786 1 Leach 430) an adult witness was declared incompetent as a witness because he acknowledged 'that he had never learned the catechism, was altogether ignorant of the obligations of an oath, a future state of regard and punishment, the existence of another world, or what became of wicked people after death". In a footnote to the case, the reporter records a later case where Mr. Justice Rooke in 1795,

> "finding the witness was an infant who was wholly incompetent to take an oath (the case involved a 7 year old girl), postponed the trial till the following assizes, and ordered the child to be instructed in the meantime by a clergyman in the principles of her duty, and the nature and obligations of the oath."

At the next assizes the prisoner was put upon his trial, the girl being found by the Court, on examination "to have a proper sense of the nature of the oath, was sworn, and upon her testimony the prisoner was convicted and afterwards executed". The act of postponing trials until child witnesses received proper legal instruction seems to be not uncommon. Macpherson (1842;453) notes this practice, especially where a child is a key witness for the prosecution. Blackstone noted that the competence test rests upon "whether a child has a conception of Divine punishment being a consequence of falsehood" (quoted in Macpherson;454).

What constituted a competent child witness is perhaps best put by Macpherson,

> "... the admissability of children depends not merely upon their possessing a competent degree of understanding, but also, in part, upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may, from defect of religious instruction be wholly unable to give any account of the nature of an oath or of the consequences of falsehood." (Macpherson; 453).

There is no evidence to suggest that this test of discretion - a knowledge of Christian doctrine was ever applied to offenders, or that it was used as a plea for mitigation!

The uncertainties attending the notion 'the age of discretion' worked several different ways. Matthew Hill noted in 1852 that the presumption that a child under fourteen was doli incapax 'fell into desuetetude' (Magarey 1978; 18-19). In Hill's magistracy he was able to use the judicial space to pass on offenders to suitable guardians within the community, saving children from prisons and worse. But his comments of 'falling into desuetetude' were passed critically against magistrates who deemed that any one over seven, was by their actions alone, displaying sufficient reason for them to stand trial. These varying responses by magistrates will be developed more fully in the following chapter. One feature remains constant however. The uncertainty about 'discretion' devolves upon the judiciary an element of power, beyond the power of disposing of convicted offenders; for in the case of the child, the magistrate had the additional power to determine whether they were to stand trial at all. Whereas for offenders between 7 and 14, the presence or absence of 'discretion' could break either way, for the judiciary, the process of determining 'discretion' is merely an increment to their material and symbolic significance.

We have outlined here the significant age-lines, operative within the criminal law in the first third of the decade, and, we have indicated the principles upon which those lines were demarcated. The logic of our argument suggests that any attempt to redraw these boundaries would involve a fundamental reconsideration of the principles of responsibility, discretion, mens rea, etc.. As we shall indicate in the following chapters, the lawyers' obeisiance to fundamental principles sets the limit to what could be done to release children from the 'full' process of trial and punishment. The protracted transactions

between the fixity of the principles upon which the criminal law was founded, and the reforming magistrates and philanthropists struggling to re-write the location of the criminal child, gave birth to a new non-legal category, 'the juvenile'.

CHAPTER THREE

THE BIRTH OF THE JUVENILE:

INTRODUCTION

In brief, and for clarity, the position of the young offender in 19th century criminal law may be stated as follows:

1. In the first half of the 19th century, there were no separate procedures - no juvenile courts and, for the first three decades, no separate penal institutions - for the disposal of young offenders. An offender, of whatever age confronted one law enforcement system. By 1836, it became an established practice to separate 'adult' and 'child' convicted criminals: from 1847 offenders under the age of sixteen could be tried summarily for petty offences, which previously would have been passed on to Crown Courts and assizes.

2. The criminal law, somewhat belatedly, began to draw clear distinctions, along the axis of chronological age, between offenders standing trial and upon conviction, their disposition. Furthermore, we should note the drawing of a new age line, sixteen years, within the law enforcement system. The age line announces a new subject, institutionalised by different court procedures and new programme of punishment, present with attributes, practices and motives radically different from the young offenders constituted by criminal law. The juvenile was not the biologically imperfect, cognitively defective subject (for that was the basis of the general defence of infancy in criminal matters) of lawyers, judges and juries, but a social group bearing entirely different attributes - some said a race apart - deviant and dangerous because of their un-childlike precosity.

The rest of this chapter will be concerned broadly with the conception of the juvenile elaborated in and through the discourses of child-saving, and we shall be concerned to demonstrate its impact on the legal subject of the child in criminal law.

The history of the 'invention' of the social category, juvenile delinquent, has been well chronicled by writers such as Pinchbeck and Hewitt (1973), May (1973), Clarke (1975) and Magarey (1978). In outline, the historical process involved the identification of a social group whose practices were perceived by philanthropic bourgeois social reformers (operating under the aegis of charitable organisations) as both deviant and dangerous . Deviant in so far as these practices included a range of petty criminal offences, pickpocketing, shop lifting, stealing from tills. Dangerous, because the delinquent life-style - living rough, dossing down in boarding houses, living apart from parents, being at large on streets, earning a living by casual labour interspersed with petty thieving, was un-childlike, autonomous, uncontrolled and therefore a perceived threat to a social order whose rules were profoundly structured by the concepts of private property, and, familial obedience. Furthermore, the juvenile delinquent was considered to be the 'rising generation' of hardened criminals.

In effect, however, there is only a loose correspondence between social category 'juvenile delinquent' and the legal conception of the child as a subject in criminal law. In point of fact, philanthropic reformers had as one of their objects the construction of 'the child' as a category within criminal law, a subject which was to be formally separated from 'adult' offenders. The line of discontinuity between the common law child, as bearer of, or protected by the absence of, mischievous discretion, and the juvenile, is actually more than the chronological age line. The law's cognitive definition of discretion was supplanted by an assumption that juveniles were worldly wise, knowing, purposive, and malicious; attributes which sprang not from the individual rationally choosing, nor from possessing a morally evil mind, but from its breeding and its environment.. Innocence was a quality all children ought to possess, but its innocence, whilst assumed, was something in danger of being subverted by breeding and the classed practices of specific social groups. There is considerable tension between the ideologies of childhood and childish innocence. Whereas rationalist utilitarian notions of children granted the child an angel-like quality of inherent goodness and innocence, evangelical notions construed the child as inherently corruptible. Children had to be made good through the constant invocation of the catechism and by insistent filial and familial obedience. The weight of historical evidence suggests the triumph of the evangelical interpretation.

What we are suggesting here then is that juvenile is a product considerably different from the child of criminal law. The legalistic points of reference, mens rea, doli incapax, discretion and responsibility refer to the strict liability of individuals and the cause of criminal offence is located therefore within the offender. Extenuating circumstances were granted only in extreme youth (those under seven) and in the proved absence of malicious discretion. The search for the "alarming increases in juvenile crime" beginning with the statistical societies, individual initiative, charity organisations, in the first two decades of the 19th century, went beyond the legalistic categories of youth and childhood and away from the embedded notion strict individual liability. Cause was conceived in terms of the corrupting environment. The judicial test of discretion was to be counterposed by the construction of individual biographies. The morally evil mind of the offender was to be located within the matrix of specific social, cultural and moral universes. Social surveys did not remain at the level of interesting contemporary accounts,(and presently, fascinating social history),but were deployed in creating new fields of intervention, new programmes of rescue, reformation and treatment. Judicially ordained punishments were to be and remained the overtly coercive end of broader spectrum of interventions - what Garland calls "the welfare sanctions" (Garland 1981) .

We have to be careful of overstating the form of the change, however. For one recent commentator, the principal welfare sanction was the use of the reformatory (either in the form of the reform or industrial school) as a means of combatting juvenile crime. (McGowen 1979, Chap. VII). Judicial statistics reveal a different story. Gattrell argues that "in no year between 1856 and 1914 were more than about 4% of convicted juvenile larcenists sent to reformatories ... while no more than 2% of those against whom charges were proved but whose convictions were waived were sent to industrial schools" (Gattrell 1980 ; 306). Those sent up to reformatories were

generally those with lengthy criminal careers and this may have had some effect in decimating the old criminal hierarchies of the first half of the century (Gattrell ibid.). But equally important was the softer option, pioneered by Matthew Hill, Recorder of Birmingham in 1839. Offenders were handed over to suitable guardians and Hill kept a register and received reports on subsequent behaviour. The scheme was widely adopted by other courts in the first half of the century (McConville op.cit; 334-335).As early as the 1820's, Warwickshire magistrates committed young offenders to the care of their employers (McConville ibid). In spite of these mitigating processes, convicted juveniles were commonly sent to gaol often before internment in a reformatory. Refractory juveniles in the prison colonies continued to receive strokes of the birch for breaking the rules (see Appendix).

The youthful category 'juvenile' was the product of a change in criminal and penal processes and an instrument of that change. Foucault's 'discipline', Garland's 'welfare sanction', McGowen's 'educational solution' and May's 'invention' register in their diverse ways a change in the field of criminal law, penal policy and social policy; a move away from law enforcement premised upon terror and retribution (though these were never wholly absent attributes) to a more dispersed field of interventions, wherein a new social group, known by its youthfulness, became the object of state and state-delegated surveillance and treatment. For what the young possessed was the potential of becoming adult, hardened criminals, a class which preyed on the industrious, 'honest', productive segments of society and on its private property. Intervening on youth was an acceptable means of social engineering, the most efficient way of preventing the reproduction of depradators and predators. The natural condition of youth made it inherently malleable and its social location necessarily depend on and obedient to adults.

LOCATING THE JUVENILE

Read with a contemporary eye, the documents and reports constituting the field of the 19th century enquiry into the problem of 'juvenile delinquency' have the revelatory qualities of explorers charting an undiscovered country. And in one sense it was, though the undiscovered country began at the end of the road inhabited by the urban bourgeoisie. But who produced this knowledge and why? Certainly, the magistrates, prison inspectors, charity officials - routinely in touch with young offenders - were responsible for collecting data, writing reports, giving evidence, and in diverse ways, indicating to parliament (and the classes represented there) that there was 'a problem'. And a problem which daily impinged on the public at large (through depradations of private property) and on various organs of the state (the problems of recidivism).

While the experiences, observations and perceptions of officials qua officials are writ large, the 'scientific' basis of their knowledge, its claim to be objective and 'true', resided in the deployment of the biography. It was the young offenders themselves who revealed the details of the undiscovered country, made manifest in recounting the social relations, sites and practices of juvenile delinquency.

These themes emerge, for example, in the first report of the Society for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis (1816). The causes of delinquency listed as most significant were:

1. The improper conduct of parents.

2. The want of education.

3. The want of suitable employment

4. The violation of the Sabbath and the habits of gambling in the public streets.

5. Other auxiliary causes, which aggravate and perpetuate the evil. These may be traced to and included under the following heads: a) The severity of the criminal code, b) The defective state of the police , c) The existing state of police discipline.

(quoted in Pinchbeck and Hewitt op.cit.; 435).

The means by which the society collected its information is no less interesting than the conclusions the Report draws. Over a twelve month period, with the help of a questionnaire framed by the Society, members divided up London into districts (each with a sub-committee) and set about completing questionnaires 'with the help of friends whose names had been given to the Committee by boys in prison' (Pinchbeck and Hewitt; 433). Some 'pecuniary inducement' was needed in the first stage of business. The questionnaires unwittingly provide rich biographical material on youthful offenders, which formed an integral part of the Report. For example:

> " E. F. aged 8 years. His mother only is living and she is a very immoral character. This boy has been in the habit of stealing for upwards of two years. In Covent Garden Market there is a party of between thirty and forty boys who sleep under the sheds and baskets. These

> "pitiable objects, when they arise in the morning, have no other means of procuring subsistence, but by the commission of crime. This child was one of a number; and it appears that he was brought up to the several police offices upon eighteen separate charges. He has been twice confined in the House of Correction, and three times in Bridewell. He is very ignorant but of good capacity ...
>
> Q.R. aged 12 years. He has no education, has a mother who encourages the vices of her son. She turns him into the street every morning and chastises him severely when he returns in the evening without some article of value."
> (quoted in Pinchbeck and Hewitt;433-35)

The biographies themselves spoke the causes of crime. The repetition of the deprived circumstances of juvenile delinquents 'decentres' the cause of crime. Individual responsibility, the legalistic notion of the morally evil mind manifesting itself in criminal behaviour is displaced by knowledge constituted by facts of the offenders' economic and social conditions of existence. Legal discourse of voir dire and the presence or absence of mischievous discretion did not admit the salience of the biography. Social investigation through biographical detail was a technique which occurs in the Reports of the Parliamentary Commissioners (e.g. P.P. 1852 Vol. VIII), and in Chadwick's attempts to bring about a national constabulary force. The latter deployed the use of questionnaires, filled out by prison inspectors and prison chaplains, drawing on juvenile convicts as a source of information. So we find the Rev. W. Bagshaw in 1837 questioning Jane Doyle aged 18, convicted of

felony and sentenced to transportation for 10 years (Item 12 Chad. MSS Uni. College). The questionnaire comprised 71 questions, running through her parents occupations, regularity of worship, her own religious attendances, form of education, employment record, leisure activities ('used to play in the street till about 9 o'clock and then go home'), causes of first offence and subsequent criminal career (which began when she was 11 years old). Besides the questionnaire, but attached to it, is a lengthy 'confession' (some 12 large pages) setting the circumstances of Jane Doyle's entry into prostitution.

Here we have '<u>the administrative extraction of knowledge</u>'. For what accompanies the birth of the juvenile is a set of techniques and procedures which establishes a field of knowledge about classed practises in the 19th century. At the heart of this science stands the biography. The biography in Foucault's scheme is the articulation of the human sciences in and to the disciplinary society (Foucault 1975 189-193), for threshold of knowledge is lowered sufficiently to encompass and describe the lives of unexceptional individuals. Through the technique of the biography we find:

> "... the bringing of everyday life into discourse, the insertion of a kind of administrative grid which systematically utilized old and previously localised procedures such as the denunciation, indictment, inquiry and report to Constitute and accumulate dossiers and archives, to formulate knowledge about and to regulate everyday life."
> (Smart B. 1982;129).

It was Peter Bedford, W. A. Miles, the Rev. Bagshaw and the like who documented and dossiered the juveniles, brought them into discourse. "For a long time", argues Foucault,

> "ordinary individuality - the everyday individuality of everybody - remained below the threshold of description. To be looked at, observed, described in detail, followed from day to day by an uniterrrupted writing was a privilege. The chronicle of a man, the account of his life, his historiagraphy, written as he lived out his life formed part of the rituals of his power. The disciplinary methods reversed this relation, lowered the threshold of describable individuality, and mode of this description a means of control and a method of domination. It is no longer a monument for future memory, but a document for possible use."

And he continues:

> "this new describability is all the more marked in that the disciplinary framework is a strict one; the child, the patient, the madman, the prisoner were to become, with increasing case from the eighteenth century and according to a curve which is that of the mechanisms of discipline, the object of individual descriptions and biographical accounts."
> (Foucault; 191-192).

In this sense, juvenile lives became the objects of social scientific knowledge and the programmes of intervention. But the knowledge itself, the very process of 'bringing into discourse' was premised in the beginning at least on the 'old' coercive institutions - the prisons, the House of Correction, the Bridewells - in which the targets of intervention were already incarcerated. The processes of writing and speaking are valorised by old forms of power relations - the semi-literate speakers are written into discourse by the social statisticians, the philanthropists, the prison chaplains and the prison inspectors. In a strong sense the speakers were used, deployed or became instruments in documents which took away their biographical lives that were then put to use by the state and delegated agencies. The relationship between speaker and writer, the fundament of the discourse, is structured profoundly by the extra-discursive, by class, by the possession of literacy itself and by the statuses of the investigator and the investigated. The system of knowledge production is only marginally different in _form_ from the judicial _voir dire_ though the content is of a radically new order. "The examination", writes Foucault, "surrounded by all its documentary techniques, makes each individual a 'case'; a case which at one and the same time constitutes an object for a branch of knowledge and a hold for a branch of Power." (Foucault;191).

Jane Doyle's three day examination by the Rev. Bagshaw plumbs the innermost secrets of her life, including the circumstances of the loss of her virginity. But her biographical life was simply part of Chadwick's investigation into the practices of local watch and constabulary practices. Question 42 of the questionnaire:

> "Did you (or your companions) use any means with the constables, either to distract their attention, _or induce them to permit or facilitate your escape_? If so, what kind?"

Unwittingly, the confessions of Jane Doyle and all of other prisoners who submitted to the investigation were supplying the knowledge which Chadwick hoped would compel the state to establish a national police force that would more efficiently prevent the very activities through which the Jane Doyles provided a means of subsistence.

The biographies provided a field of knowledge and programme of intervention. In the case of the Society, its conclusions fell into three broad categories. Juvenile crime had its causes located in the following:

1. Parental neglect, and in some cases, parental inducements to commit crime. Neglect and moral ineptitude were demonstrated by the lack of education and the want of religious observance. The cause of crime is therefore fundamentally premised on poor parenting.
2. Dangerous associations and practices (gambling, unsupervised leisure) located on the public streets.
3. The system of law enforcement. Here the society was concerned not only with the severity of the criminal and penal system but also "the uncertainty of its operations (which) encourages the offender to calculate even if convicted, on a mitigated punishment." (Pinchbeck and Hewitt;437). Furthermore, the Society concluded, "Many a poor and unsuspecting and even guileless youth was enticed into crime ... by the police themselves, who then gave information of, and received a bounty for, the very offences which they have conceived, planned, suggested, aided and secured the commission of." (Pinchbeck and Hewitt; 437).

The strategic targets, the causes of crime - the home, the street and the law enforcement system - is a decisive shift away from legalistic conceptions of the morally evil mind and strict liability of individuals. There were extenuating circumstances, the evil influences of everyday life, which

compelled juveniles to commit offences. The solution lay, not in stiffer or more brutal penalties but the reordering of the cultural and moral practices which gives rise to the hardened breed of juvenile criminals. Reforms were premised not on the inequalities of wealth and power but on the want of education, the neglect of the sabbath, the associations formed on the streets, the un-childlike precosity and autonomy displayed by the youth of'the dangerous and perishing classes'. The strategy was to interrupt the processes of cultural and social reproduction (relations of production are remarkable by their absence). Poverty, the want of secure employment by parents, the marginalised position of juveniles in the labour market, were contingent problems rather than the seat of all causes (McGowen op cit; Chap.VII). The writing into discourse of the diverse biographies occurs at the level of Reports such as the one discussed above. The terrain it mapped was enriched by the evidence given before parliamentary commissions and we can perhaps illustrate its pervasive net by reference to the accounts presented to parliamentary commissions, analytically divided under two heads; the home and the street, and, reform of the law enforcement system.

a) The home and the street

Let us begin with Matthew Hill's evidence before the Select Committee on Destitute and Criminal Juveniles (P.P. 1852 Vol.VII). A representative account of the field of juvenile investigation, differing little either in the descriptive language, the causes and the remedies of the variety of private reports on the same problem (c/f May op cit). In response to a general question of causation, Hill notes, like many of his contemporaries, that it is the growth of towns which is responsible for the rise of juvenile crime, bringing the breakdown of 'natural policing' and the growth of obscurity (p.42-43). The second effect of urban growth was the separation of the classes such that 'large masses have gathered together without those wholesome influences which operated upon them when the congregations were mixed."(p43).

Asked to elaborate on living conditions, he continued:

> "... it seems very difficult to imagine how it is possible that a dirty, unwholesome, ill-drained tenement, which is too small for the due separation of the sexes, and therefore which is too small for the purposes of decency, should contain respectable inhabitants (respectable in the moral sense) and I should conceive that every improvement of a sanitary kind will have its operation in the diminution of crime"(p.43).

This is the soil of the rising generations of criminals. The social relations of crime he describes in the following passage:

> "The first class is the children of criminals; they are the hereditary criminals: they are very often trained to crime: they are practically taught to think lightly of it, or even when they are not expressly taught to consider it a merit, which they generally are, to commit offences."

The second class comprise illegitimate children;

> "the testimony of inspectors of prisons, and of gaolers and the chaplains of gaols, is uniform to the fact that illegitimate children form a very large class of juvenile criminals."(p44)

Thirdly, were orphans, and finally "the children of the very poor form a class". "But", he continues,"the result of 30 years observation on the subject has been to convince me that poverty, though a cause of crime, is a very much smaller cause than is usually supposed."It is poverty accompanied by 'idleness' (where poverty is either voluntary or caused by unemployment) which brings moral destitution (moral destitution being 'the want of training'). His characterology of the morally destitute child has all the resonances of William Beaver Neale's 'street arabs'.

> "... they have in truth all the vices and some of the virtues of savages... He is indolent, averse from any settled or steady employment, averse to restraint of any kind; on the other hand, he is patient of hunger and thirst, and cold; and as to dirt he rather delights in it ... and he would rather be permitted to roam about at large, even suffering at times great privations than he would be at school or work under restraints which belong to civilized society"(p44).

The nomadic habits, enjoyed since early childhood, have to be countered, not by education (reading and writing) but training; 'it is training, moral, religious and industrial to which we are to look as the chief means of reformation' (p44).

Hill was no extremist in his views. He was a kindly man in his way; his entry in the Dictionary of National Biography records that he bought a rifle to defend the Chartists against an expected armed attack from the state: his practices in dealing with young offenders spared many from the gaol and transportation. His testimony however condenses a view of

juvenile crime dispersed over a wide range of texts and testimonies. The object of investigation and reform, the juvenile, inhabits some mysterious qualities; immunity to hunger, thirst, cold, dirt and settled living. More a wild animal in its attributes than human individual. Crime is a disease; flourishing in dirt, spreading by contagion or by hereditary means. It is fostered by moral turpitude which sometimes but not necessarily accompanies poverty. Its social context is the cultural and moral universe of the home and of the street. Hill's testimony was in fact also cogent, sensitively broad in the reflections of the causes of crime, compared with some of the evidence put before the Commissioners. An Appendix (Appendix 2) attached to their Report is an extract from the Report of a prison inspector of the Lancashire district, 1841. The opening pages of the Report generally outline the causes of delinquency: the fluctuating variety and vicissitudes of the population in a great maritime city (Liverpool), the ingress of the Irish, the absence of factory work for children, destitute orphans as a result of epidemics of cholera and fever, temptations to want and idleness afforded by unguarded property in markets, stores and docks and'the incitement to criminal pursuits induced by the low shows and theatres' (p 146). Only <u>the latter</u> is pursued in the Report with any vigour. It was, says the Report, shows at <u>The Penny Hop</u> and <u>Sanspareil</u> theatres which, by celebrating the exploits of Jack Sheppard etc. ,

> "have invested these ruffians with indoubtable courage, impertible sang froid, fertility of expedient, lively conversation, indeed with every quality that can interest or divert".(p416).

The large number of interviews which formed an integral part of the Report, display an excessive concern with the link between crime on stage and juvenile crime.

> "R.F. aged 17. I have been seven times in prison, hundreds of times at the _Sanspareil_ and almost as often at the amphitheatre, and I have been several times at the others also. I have no home, no parents. I was in work when I went to the _Sanspareil_; paid the money out of my wages. It was at the theatre I first became acquainted with bad boys who enticed me to steal anything I could lay my hands upon."(p.417)

> "J.F. (no age). I think I have been to the _Sanspareil_ twenty times, I have also been at the _Queen's_. The first time I went I sold my cap; it was so late when we came out I dare not go home; I went with another boy to sleep in a stable; I slept there for four nights. Since then I have always mixed with bad boys." (p.418)

One can almost hear the prompting questions! The theatre causes its crime through its celebration of highwaymen but it is also the site of contagion; the good and the bad mix to reproduce the activities of disorder.

Certainly the power of the biography as a methodological tool for data collection resides in part in the numerous facets and sites of social life which are brought into a unity simply by the passage of the biographical subject through them. The biography reveals the criminal hierarchies, the fences, the flash houses used for dossing down and fencing property, the associates congregated in pubs, drinking houses and theatres, the barn or stable used for overnight rough sleeping. In a sense the biography is a condensation of all the sites that are pernicious and malevolent, a map of the dark side of town untraversed in the everyday perambulations of the bourgeoisie.

Crucial to the circulation of stolen goods and for the subsistence of the young criminals for example, were the boarding Houses. W. A. Miles presents a potted biography for a number of incarcerated juveniles, (Chadwick MSS: Item 4). The document itself is marked secret and was meant only for the attention of the Select Committee on Gaols and probably dates circa 1837. One example reads:

> "-------------This lad is a -------thief; he is fourteen years of age and has twice been in prison. His father is a coal higgler and drinks very hard. The boy has been to a National school and can read and write. Boys in the county sell to the rag shop people and to trampers at lodging houses. There are established 'fences' who keep no shops, living both at -------- and at --------; one lodges with his girl at the ------- and his name is ----------. This man collects for a jeweller who keeps a very respectable shop."

The Artful Dodger is alive and living in other biographies. Micahel Dobby, 13 years old, for example:

> "The first thing I stole was was apples. Stole them to eat. Did the same thing 7 or 8 times afterwards ... stole a handkerchief off a line, intending to sell it. Was not living with his parents at the time. Was taken in for it and got seven days ... Stole goods from outside shops. Stole a shirt, sold it to a woman in the Oxford Road. Taken in the same night, got 14 days ..."

> "Got work at the factory in the place of a boy who was sick, he got well, I got sent away. The next day got through a window into a farm house and stole some pies and bread. Got seven years transportation.... Stayed in lodging house; woman fenced stolen property; extended credit 6^{d} - 1/- in return for stolen goods at a future date. She charged 2^{d} a night."

According to Miles, many young thieves had their girls (Chadwick MSS Item 4). Often he said, they were young prostitutes working for a pimp. Often as not 'the girls pay seven pence a room for four and twenty hours, and they take strange men into them: the men are generally robbed or bullied by the men who keep these girls or live with them.' This was certainly the lifestyle reported by Jane Doyle and her associates; the offer of sexual intercourse was deployed to get unsuspecting clients into back alleys, into rooms etc. where they could be pick-pocketed. The boys, however, would not teach the girls to earn a living by pickpocketing alone as this would hurt the trade! (Miles, Item 4 Chad. MSS).

There is a hardness to the claim by Miles and others that juveniles had a career in crime. Stealing fruit from gardens or stalls preceded the more artful techniques of picking pockets and stealing from tills. The latter required some knowledge of the social connections of the underworld for the purpose of fencing stolen property. These associations - the women at boarding houses for example - would grant credit in advance of acts of petty larceny. One young thief reports that he would always have a halfpenny in pockets when shoplifting so that if challenged, he could always claim an intent to pay for the goods in his hands. (James McGinnis; Chad MSS Item 12).

Jane Doyle and her two associates always got rid of any money or property 'picked' from a client so that if the Watch was called, nothing would be found on their persons. One of Doyle's associates, Ellen Reece, went so far as to secrete money in her vagina (once it was found when the Watch made her jump off a bed to the floor several times!). The other trick was to work in tandem with a friend. Once a client had been enticed into an alley, the friend called out that the Watch was coming, giving the prostitute a chance to run away with anything that had been stolen. (Chadwick MSS; Item 12, questionnaires on Doyle, Ellen Reece, Mary Kay).

And the hard fact remains that for many, criminal activity at least provided a means of subsistence- for some, thieving was definitely more lucrative than earning a living by waged labour. Milês questionnaire went to some lengths to establish comparative earnings between honest labour and a life of crime. According to the information collected by Miles (Chadwick MSS- Item 12) 12 hours labour a day in a variety of jobs earned between 8 shillings and 15 shillings a week. Thieving yielded considerably more; the amounts vary. Many replied that in some weeks nothing was earned by thieving, in other weeks anywhere between £1 to £10. In his tables of juvenile offenders in the Borough Jail at Liverpool, on information collected in 1837 (Chadwick MSS; Item 4), Miles calculates that many young offenders were picking up as much as 6 to 10 shillings a day. Samuel Abbosley, aged 13 years, by pickpocketing, stealing from shops and tills and then selling any stolen property 'to a woman who kept a boarding house' (who gave him half the value for it) claimed to make between 6 pence and £8.00 per week and thought it a bad week if he made less than £4.00. (Miles, Chadwick MSS: Item 12). Knowing the boarding houses where one could stay overnight when pickings were scarce was a necessary part of the street savvy; it meant not

only lodgings, as opposed to sleeping rough (thereby running the chance of being picked up as a vagrant), but also a source of credit. It also suggests a pattern of quickly expended plenty and times of scarcity. James McGinnis reported he always sold property to a woman who keeps a boarding house where he always slept after coming from the theatre. If he had nothing to sell, she would lend him 6 pence or a shilling to be repaid when he had. (Chadwick MSS: Item 12).

Street life, the network of lodging houses, outhouses for sleeping rough, the system of credit and fencing, the hierarchy of criminal practices and the 'career' of young offenders speaks the absence of the familial home. Where home life was written into discourse, it often figures, itself, as a source of crime, firstly by parental inducement and secondly by the hopelessly deprived circumstances on the other. Miles' questionnaires, and his parallel studies of juvenile offenders in Borough Jail at Liverpool carefully elaborated the relationship between parenting and crime. His study of Liverpool juveniles notes that the greatest proportion of thieves were Irish lads or of Irish parents, and continues

> "... it would beggar description to give an account of the filth, misery, drunkenness and sometimes starvation state in which these people exist."

He goes on to claim that many of the Irish are pig mongers "and share their rooms with the animals in which they traffic", (Chadwick MSS Item 4). The presentation of poverty, of the dire conditions of existence of the casual poor is constantly elided by inferences of poor parenting practices. Pig mongers allegedly keeping animals at their lodging clearly falls into this category. As a discursive technique, the elision of poverty and poor parenting as causes of crime finds its

expression in Sir Frederick Roe's explanation of juvenile crime. Crime arises,

> "... from the enormous luxury and wealth of the town, from the great negligence of masters in looking after their servants and their houses, from an inability in the lower classes to devote time to the restraint of their children, and the extreme temptations from the exposure of property, and the want of caution in the protection of it in every class of society."
> (P.P. 1837 Vol XXXI; 17).

Even where remarks acknowledge the enormous luxury and wealth of the few, and the temptations it provides for those who do not share it, they are overlaid by a moralising attitude to the lower orders. If only they would restrain their children.

The second line of force connecting crime with parenting was the references, made by Hill, Miles and Mary Carpenter, to the prevalence of orphans, illegitimate children and children from the workhouse, that is children without, or separated from, natural parents, in the statistics of juvenile crime.

The notion of proper parenting found its most comprehensive articulation in Mary Carpenter's works. While we shall elaborate her views in more detail later, the premise of her argument was that parenting had to be the handmaiden of proper training and if parents would not, or by their absence, could not, provide it, then institutions must be established which could. The problems of the unequal distribution of wealth, the uncertainties of the labour market, the rhythms of existence of

the casual poor, problems of housing, sanitation and disease, that is the conditions of existence of the urban working classes who were the discursive subjects of all of these writings, disappear and are displaced by a single strategy of intervention: the moral and cultural reform of familial practices. There is abundant evidence that poverty and its attendant miseries were writ large in studies of juvenile crime but the programme of intervention was not aimed at poverty itself but at familial relations which were profoundly structured by poverty. To emphasise the point, we should note that the number of juveniles imprisoned in 1848 was 13,900 and during 1853, 11,3600 (Magarey op cit; 16-17) and in 1857, 12,500 (McConville; 337). These numbers, however, are slight when we compare them with those registered as <u>destitute</u>. In 1851 there were 43,028 under-16 year olds in <u>workhouses</u> and 275,000 receiving <u>outdoor relief</u> in England and Wales (Magarey; 17).

Moralising economic problems as though they were problems of poor parenting belied the hardships faced by juveniles living rough, sleeping out and subsisting by thieving and prostitution. That orphans, illegitimates and workhouse children show up in the gaols of Liverpool for petty theft indicates the categories of the young who were <u>made</u> independent and autonomous, who were on the streets because they had <u>no</u> adults to be dependent upon. Their biographical lives speak out, often as not about sorely tried but caring parents, sometimes rough in their ways. Jane Doyle reported "Great care was taken of me. I ran away three times. First time got in company with some bad girls of the town. Left work on Monday morning and stayed away a fortnight." Her mother found her living in the cellar, with six other girls, all aged 12, in the house of a woman called Old Granny. But "Mother fetched her out of that cellar. Old Granny made her go under the bed. Mother found her there - took her home, beat her severely with a rope for five minutes. Stripped her clothes off -

felt it for a fortnight - brought blood in two places on back. Kept her upstairs without clothes - in bed three days. Promised to be good and go to work. Went to work for 12 months and never went with bad girls or men ," (Chadwick MSS Item 12). Ellen Reece's biography reveals much the same. Both girls left home shortly after their fathers died; Doyle's father had been a labourer (sinking wells), but two years before his death, hawked nuts: Reece's father was a slap-dasher (self-employed). Both mothers 'kept house' for the family. Clearly, at the death of the father, the girls were major contributors to the family economy (Doyle was a piecer at a cotton factory- Reece, bound apprentice to a dressmaker and later a domestic servant).

Juvenile precosity was not some moral malaise but the result of early work experience (if work was available) and the struggle to survive often without adults to depend upon. The nomadic habits, the attributes of surviving hunger and thirst, written into discourse, were more than probably real enough but they were not animal-like attributes acquired at birth, or by instinct, nor were they freely chosen. They were the conditions of existence consequent upon a marginalised position in the labour market and on the absence of adults (parents, natural or surrogate) on whom to depend for the necessary means of life - generally - the only means of surviving in an urban environment with a measure of freedom. The alternative was the care and attention lavished by the workhouse and the poor law guardians. Prison at least offered the prospect of release after a short custodial sentence.

The 'godless depravity' exhibited by juvenile street life; thieving, gambling, drinking, theatres, going with men, living with girls, constitutes a subject where the legal niceties of 'discretion', knowingness, guilty mind and catechistic knowledge are rendered silent. The juvenile may not have known the

catechism but did know how to survive, regardless of 'the laws of man and God'. Once the category of juvenile was established, and by the biographical technique, displayed, to parliament, to the churches, to the police and prisons, as an animal-like depradator on property, (for juvenile crime was predominantly petty theft of one form or another, even for casual prostitutes such as Jane Doyle) the problem remained; what was to be the appropriate response in law?

b) Reforming the law enforcement system

.... (Newgate) nine times in prison,

> "Some policemen take bribes from the boys; City police much better to young thieves than the Metropolitan Force. No, ... does not take a boy if he thinks it will only be a summary conviction as he will get nothing for his trouble; he sometimes stops them to take property from them and then lets them go, but if it is an Old Bailey Case, he keeps the boy."
> (Miles, Select Cttee on Gaols; Chadwick MSS Item 4).

Evidence from Richard Mayne, Metropolitan Police Commissioner;

> ".... the principle the Commissioners have always laid down for the police is, not to allow parties to go on to commit a greater offence, but to lay hold of them the moment they have done anything that justifies interference. And so it is with respect to boys picking pockets in the street; if the police see a boy feeling pockets, which is the first attempt, they lay hold of him

> "at once, but then the punishment is only confinement for a short time, whereas if they had committed a felony they might be transported: but the Commissioners always enforce the police, that they must not allow a greater offence to be committed for the sale of increasing the punishment".
> (P.P. 1837 (79) XXXl; App l; 23).

Jane Doyle's 'confession' to Rev Bagshaw, 1837:

> "The first time I got fourteen days. That imprisonment did me harm. There was a deal of girls in the Prison, who used to talk about things as I never knew about. I used to take it up. My sister used to lick me for it. I learnt to swear in Gaol. Never thought of men till I heard them talking about them. They said they'd plenty of money and plenty of clothes."
> (Chadwick MSS Item 12).

Jane Doyle was eleven years old when she was first put in gaol.

The technique of deploying biographical lines to map out the sites of the reproduction of juvenile crime did not leave the law enforcement system immune. Biographies were grafted on to the medical discourse of crime as a disease; crime therefore spreads by mixing, by contagion, and one of the prime sites was the penal establishment. The second area where the disease was thought to circulate was the street. What the biographies revealed, because those interviewed were asked specifically, was the degree of integration of the police

into the underworld of gambling dens, small brothels, 'lodging house, gin palaces and the like', and to what extent were constables turning a blind eye on petty pilfering in the hope of richer pickings at the Old Bailey on another occasion. Finally, of course, the investigations were working towards an end, namely to determine the best procedure for bringing juvenile offenders before the law and disposing of them in a manner that would either prevent, or seriously disrupt the process of the reproduction of more juvenile crime. For it was perceived by legal and penal reformers alike that the very system of law enforcement itself was threat to social order, insofar as it was providing, unwittingly, places where information, skills, technique and attitudes were being passed down from one generation to the next. To understand the complexity of the processes by which reforms were brought about, we shall proceed by distinguishing two broad areas of concern. i) the nature of juvenile offences and its policing, ii) penal reform. Changes in the criminal law will be dealt with in the next chapter.

i) Susan Magarey (1978) in her short but excellent study of the invention of juvenile delinquency in the early 19th century, argues two main points. Firstly that the fears of property owners about a rising tide of young offenders was real enough in the second quarter of the 19th century (p 13), though the increase of delinquency in the under-seventeens did not continue to rise through the 1850s. Secondly, she argues, statutes such as Vagrant Act (1824), Malicious Trespass Act (1827), Police Acts (1829, 1839) and the Larceny Act (1827) 'criminalised a whole range of behaviour peculiar to the young' (20). Her statistical tables suggest, for example that more than 50% of the total convictions of juveniles from 1838-1853 were for offences under these statutes, that is, for offences only recently made criminal, and which often did not involve any violence towards property or persons. From 1836, prison

statistics and prison officials generally treated persons under 17 as juvenile (p16). An examination of the 'juveniles' carried on the prison ships to Van Dieman's Land in post-1836 confirms this practice, although there was no particular warrant for this age classification in criminal law at this time. Peel's legislation was not aimed exclusively at the juvenile, but its provisions, perhaps unwittingly, provided a widely cast net of practices which allowed for the apprehension of a social category whose milieu was the street, the penny theatres and other public places. Furthermore, petty criminality, petty larceny in legal terms was put on a new footing by the Larceny Act of 1827. It provided that:

> "the distinction between grand and petty larceny be abolished and every larceny, whatever be the value of the property stolen, shall be of the same nature, and shall be subject to the same incidents in all respects as Grand Larceny was before the commencement of this Act."
> (Larceny Act 7 and 8 Geo IV Cap 29; SII).

And, all courts who had the power to try Petty Larceny would have the power to try every case of larceny (Sect. II). Those convicted were thus liable to transportation for seven years, or, to be imprisoned for two years, and if male, whipped once twice or three times (Sect. III). The consolidation of grand and petty larceny, and their removal to Magistrates Courts, a seemingly liberal move, in effect, made the range of 'trifling delinquencies committed by children' (Magarey, 20), open to summary conviction, extending the powers of the magistracy to try offences which once would have been tried on indictment in an open court. One effect was to confuse the administration of justice for children under the age of discretion; whether those doli incapax could claim defence on

these grounds in Magistrates Courts was unclear. Some magistrates simply dismissed young offenders; others passed savage judgement. In 1851, an Essex Magistrate sentenced a boy to seven days imprisonment and two whippings for stealing a pint of gooseberries, (Magarey 22-23). So the petty thieving, pickpocketing, stealing money from tills, clothes from lines, fruit and groceries from trees and from stalls, under the Larceny Act rendered young offenders open to summary conviction and severe sentencing.

The Malicious Trespass Act of 1827 is probably better known for the protection it offered, under the threat of capital punishment contained in many of its provisions, to industrialists. Persons setting fire to churches, houses, stables, mills or any building used to carry on a trade, on conviction could suffer death as a felon. Those destroying cloth, looms, weaving machines, were liable to transportation and whipping, (7 and 8 Geo IV C.30 Sect. II and III). But the Act, by prescribing specifically 'carrying away any trees, plants, shrubs, fruit or vegetables', transformed street urchins scrumping apples from nuisances to criminal offenders (Magarey; 20).

Peel's Acts,especially the Vagrancy Act of 1824, and the Metropolitan Police Acts of 1829 and 1839 extended the 'loose and idle' practices which were to be considered criminal.

> "By the Vagrant Act alone hundreds who were formerly permitted to remain at large, are committed not for the commission of a specific offence but as 'idle and disorderly' or 'reputed thieves' ".
> (Crawford and Russell 1836 quoted in Magarey;18).

As prison inspectors, Crawford and Russell pointed up the causes for the influx of juvenile offenders into prisons. Idle and disorderly persons under the Act included petty chapmen, unlicensed pedlars, common prostitutes, persons begging in streets, fortune tellers, persons wandering abroad with no fixed abode and those with no visible means of support. The Police Act of 1839 extended the categories of people the 'new police', using their own discretion, might arrest, beyond the category of 'idle and disorderly persons found abroad between sunset and eight in the forenoon' (provision of 1829). These include audiences watching plays in unlicenced theatres, dogfights, cock fights, badger baiting, people in gaming houses or people playing games in public thoroughfares, (including kite flying and making ice slides), (Magarey; 21). Practices which accurately reflect the leisure activities of the working classes, in general, and the milieu of street children in particular. Mayne's evidence before the Parliamentary Commissioners in 1837 suggest that the new police actively engaged on watching operations outside public houses in order to round up (unsuccessfully) reputed thieves. Police were also empowered, under certain conditions, to enter public houses to check on illegal gambling, disorderly conduct but also to check on the fraternization of young thieves. Further, the police had powers to stop and search 'persons carrying parcels', abroad at night. There were limitations to the effectiveness of the new police; there were after all only 3,500 in Metropolis; there existed considerable confusion as to what constituted an arrestable offence;there was a strong risk of a counter-claim for wrongful arrest if the police mistakenly entered indictments against innocent parties (which constables had to pay for out of their own pocket (Mayne op.cit., Magarey op.cit.). Police had now powers to prevent the young congregating and drinking in public houses, such as the 'Finish' in Covent Garden, in other 'low saloons' and penny theatres because there was no age limit to bar admittance. But in spite

of Mayne's assertions that the Metropolitan Police were severely limited in their preventative capacities, the majority of juvenile offenders committed to prison were sent there under the provisions of the Vagrancy Act, the first Police Act and the Malicious Trespass Act; almost certainly for offences which did not involve theft of property (which would have been tried under the provision of the Larceny Act) (Magarey; 22-23). That is to say, the cause of the influx of juveniles into prison in the 1830s and 1840s, was probably not an outbreak of petty thievery, but an attack on the urban juvenile street dwellers, who were charged with such offences as 'frequenting', being 'reputed thieves', and living as 'idle and disorderly persons'. In this regard, the police were granted wide discretion as to the individuals who fell into these categories, and who could be apprehended without a warrant.

If those researching the increase of juvenile crime in 1816 were disposed to place some of the blame on the law enforcement system, particularly corrupt policing and the rigours of the criminal code, then we can only surmise, along with Magarey, that juvenile crime was further 'legislated into existence' by the Peel Acts. But it was already clear by 1836, and this unease finds expression in the Report and evidence of parliamentary commissioners in 1837, that magistrates were finding the severity of the Larceny Act, particularly with young offenders, a major problem in the administration of justice. And indeed, the main recommendations of the 1837 Commissioners were in respect of the provisions of the Larceny Act.

ii Penal Reform; the juvenile prisoner

The principle that there should be separate penal establishments and regimes for adults and for children was established by the Select Committee on Gaols 1835. The Committee recommended the establishment of a juvenile-only prison. It was to serve two purposes. First, it would provide the deterrent element which transportation was said to lack. Second, it would provide 'such occupational training as would enable fit young convicts with little or no criminal record, to make a new life ...', (McConville 1981; 204). These twin objects, terror trimmed by reform (where reform was to be effected 'by a judicious course of moral, religious and industrial training ...' P.P. 1834, XXII; 643) prefigures the regimes to be instituted under the control government prisons for adults, including Pentonville and other penetentiaries between 1835 and 1850.

Separation from adults, the retention of penality(locking up, corporal punishment) and the notion of reform through religious and moral persuasion and industrial training combined to form a juvenile-specific regime observable across the dispersed sites of juvenile incarceration. We have three particular examples well documented. Firstly, the juvenile only convict ships used to transport juveniles from England to Van Diemen's Land from 1837 - 1846 (Archives of Tasmania; Index of Shipping Arrivals). Secondly, the establishment of settlement for juvenile prisoners in 1834 at Point Puer in Van Diemen's Land, a site guaranteeing its isolation from the adult prisoners' settlement at Port Arthur (Backhouse and Walker (1838), CSO 1/807/17244).

Finally, the juvenile prison at Parkhurst (opened in the Isle of Wight in 1838 to receive juveniles who had been sentenced to transportation). Though the history of Parkhurst is well-known to criminal and penal historians, the history of the juvenile-only prison ships and the settlement for juvenile prisoners at Point Puer is less well known in England. The differences in form and location however cannot mask their similarity of purpose.

Reporting on the voyage of the convict ship, Frances Charlotte in 1837, Mr. Alexander Nesbitt in charge of the first complement of juvenile-only convicts to be sent from these shores to Van Diemen's Land, wrote:

> "His Majesty's Government having determined to transport boys by themselves, as a trial, whether by removing them from immediate contact with hardened and veteran offenders it would not tend to their ultimate improvement, and having been selected to conduct the experiment I was furnished in addition to the usual instructions with an additional, directing my attention to their moral improvement and to the conduct of the convicts who also accompanied them."
> (Archives of Tasmania; CSO 5/35/728).

Nesbitt's statement about the experimental nature of the voyage, about the necessity to separate juveniles from 'hardened and veteran offenders' and about the priority of attending to their 'moral improvement' could equally describe the purpose and function of Parkhurst and Point Puer.

We should not be deceived into thinking that the regimes broke entirely with traditional forms of imprisonment. The other marks of prison life were to be found at Parkhurst in 1840:

> "deprivation of liberty, wearing an iron on leg, a strongly marked prison dress, a diet reduced to the minimum ... the enforcement of silence on all occasions of instruction and duty, and uninterrupted surveillance by officers."
> (P.P. 1840 CCCVIII, 637, quoted by McConville; 205).

These aspects of penality were part of the life of prison ships and Point Puer. Underlying the educative and reformative side of juvenile prison life was the overtly coercive system of punishment, prison-style. It serves to remind us that these sites were still <u>penal</u> responses to the reproduction of 'a criminal class' however much it attempted to be a regime of reform.

From the records of individual juvenile prisoners kept in the Archives of Tasmania, it is possible to construct the penal career of juveniles passing through the new regime. Thomas Whitton is an illustrative example [16].

Thomas Whitton, aged 14, was tried at the Central Criminal Court on 13 June 1836. His bill of indictment records a charge of larceny, for stealing five yards of printed cotton of the value 5s/9d. By his own account, he had been charged once before 'for what I don't know', and flogged for stealing beads. He was returned to the hulks prior to transportation. On the first of January 1837 he embarked on the 'Frances Charlotte' for Van Diemen's Land,

arriving there on 15 May 1837, where he was taken to Point Puer, a settlement for convict boys on the Tasman Peninsular (across the bay from the main settlement at Port Arthur). An ex-shoemaker's lad from Shoreditch, Whitton spent approximately three probationary years at Point Puer; by Parkhurst standards, a rough and ready set of buildings, barricades and farm land (but better fed than he would have been at Parkhurst). The daily routine included five hours of labour at one of a number of trades and 1¾ hours scholastic instruction and ¾hr of devotional exercises. Playing, washing, eating and mustering took up about eight hours. While at Port Arthur, Whitton suffered a number of punishments for minor infractions of the rules - in July 1837, 'for making use of a blasphemous expression ' - two days solitary on bread and water: October 1837, 'having thread implement in his possession' - three days solitary on bread and water, and three or four similar incidents. More serious punishments included up to thirty six stripes on the breech - not uncommon amongst some of Whitton's colleagues. Whitton would have left Point Puer to go into the service of a colonial employer, probably as a skilled tradesman. His sentence ended in 1843. He was tried for burglary in 1844 but found not guilty.

Whitton's biography demonstrates the extent to which the context of his reformation, or attempted reformation anyway, the educative and inspirational and industrial training aspects, was prison discipline, and its attendant punishments - solitary confinements with bread and water. Given the politics of the Society for the Improvement of Prison Discipline and for the Reformation of Juveniles, whose members and supporters, especially William Crawford (a strong advocate of the Philadelphia separate system) and their special influence on the 1835 Act, it should not be surprising that reformation was embedded in a system

of hard labour, solitary confinement and scanty diet (Cooper 1981). The 'juvenile' in the penal system however was a category which did carry with it the notion of reformation; unlike the adult prior to 1840.

Parkhurst, the 'Frances Charlotte' and Point Puer received only juvenile boys destined, by the courts, for transportation (the majority of those on the 'Frances Charlotte' had been convicted of larceny, housebreaking and other forms of theft), that is those charged on a bill of indictment in sessions or assizes. Those going before magistrates still served their sentences in local jails, bridewells or houses of correction. The existence of Parkhurst had one unfortunate side effect. Capt. W. J. Williams, Inspector of Prisons for the Home District reported that the judiciary were inclined to sentence juveniles to seven years transportation, so that they would be sent to Parkhurst (whose early function included the reception, classification and training of juveniles for two years prior to transportation), while adults charged with similar offences were being sentenced to one year imprisonment. He quotes one case of a boy who stole four steel rings; the boy was sentenced to seven years transportation, although he had never been in prison before. The boy was 10 or 11 years of age. (P.P. 1852 Vol VII Select Committee on Criminal and Destitute Juveniles; 22). The judiciary's partiality to the transportation solution of juveniles lay in the belief that separation of the juvenile from their natural milieu and their transplanting in the rough and ready world of New South Wales and Van Diemen's Land.

While the papers and records lodged in the Archives of Tasmania contribute to our understanding of the regime of juvenile-only establishments, and document how individuals fared within the system , their significance

goes well beyond this. The records are of more general importance to the history of prison administration in the U.K., and they are crucial to our understanding of what constituted 'the juvenile' in 19th century penal ideology. These documents, especially those relating to Point Puer and the 'Frances Charlotte', are significant in three major respects.

Firstly, the loose notion of 'boy' or 'juvenile' is striking for the range of chronological ages it is used to describe. In the modern English penal system, anyone over 17 would be described as 'young adult offenders'. Whether or not the use of 'boy' pertains to physique, we cannot be sure. In the context of 19th century prison administration something interesting seems to have been happening. Parkhurst, Point Puer and the convict ships were elements of the convict service, dealing only with those sentenced to penal servitude or transportation (McConville; 339), that is with convicts serving lengthy sentences for 'serious' crimes.

Unlike local prisons, the national convict service instituted an age-related system of punishment and reform, premised on the separation of adult from juvenile prisoners. Few local jails had sufficient cells or wards to permit such a classification. It would appear then than in pursuing the principle of rescue and reform, the convict service was very generous in its classification of 'boy' and juvenile, for in local prisons we doubt whether anyone over 16, (and probably over 14) would be considered as a juvenile.

Now, one of the effects of this meant that an 18 year old arriving at Point Puer, received stripes on the breech, solitary confinement etc., as a 'boy'; in other contexts - in VDL or local English prisons - infractions of the rules

could mean the lash, the chain gang and the tread wheel. Moreover, he could be a 'boy', even after attaining the age of majority.

Secondly the documents display the regime of rescue and reform actually at work, instilling habits of industry and honest endeavour. That judicious mixture of religious exhortation, trade training, teaching literacy and hard labour speaks the Christian-Philanthropic means of achieving social order. Furthermore, it announces a particular view of minority status. For example, there is no clear distinction between 'boy' and adolescent; all are amenable to the rigours of moral teaching, training in literacy and trades and all are regarded equally as malleable material to be prepared for the dull routine of hard work and honest labour.

The ideology of childhood made material in the regime's expectations and practices construes 'the boy' not so much in terms of age - for we have noted the range of chronological ages the term encompasses - but in terms of fallen innocents who must be returned to civil society. Childhood is a time of preparation for the world of labour and production.

Thirdly, the total absence of separate institutions and regimes for juvenile girls is quite remarkable (though not too much remarked on by social historians). Their absence is an important one for if, as we argue, the boundaries between adults and children are socially constructed and are made concrete by the development of institutions specifically for the management, control and education of particular age-groups, does the absence of the female equivalents of Point Puer, Parkhurst and the 'Frances Charlotte' actually write out girls as children? We turn to this issue below.

Though the local prisons of the 18th century permitted the association of men and women in the prison yard, by the 19th century, prison generally separated men and women convicts into separate wings or wards (Ignatieff op.cit.; 32-33). Newgate had its own women's wing, (Ignatieff Chap. 6) and by mid-century, Brixton, a pentagon at Millbank, Parkhurst and prisons at Woking and Fulham were sometimes used as women's penitentiaries (McConville; 425-426). We can find no record of a separate establishment for juvenile girls and no record of separate ships for young convict women either. The smaller number of establishments for women convicts and a smaller women convict population may well account for the absence of a separate juvenile penitentiary and the absence of juvenile women-only convict ships.

In other words, we can find no separate institutions devoted solely to punishment and reform of young women convicts. This does not necessarily mean the absence of a system of reform, but rather that all women convicts were subject to the same (or similar) regime, regardless of age.

There is one particular instance of convict women being classified by age and by length of criminal career. Elizabeth Fry's 'reformatory' experiments in the women's ward of Newgate Prison beginning in 1816 set about 'imposing order upon (women) prisoners by classifying 'the tried and the untried, the young and the old, the first offender and the 'hardened, drunken prostitute', and placing each category in a separate ward.' (Ignatieff op.cit.; 143). A regime of discipline was imposed; all finery and adornment were forbidden - instead, hair was close-cropped and a plain white uniform issued. The women were set to work sewing, overseen by a matron, and run in small groups along the lines of Lancaster's monitorial

school (Ignatieff op.cit.; 144). The regime became a public spectacle, with members of the bourgeoisie attending the women's service in the prison chapel to observe how 'the lowest order of people' had been transformed into 'dutiful, orderly and pious penitents' (Ignatieff; 145). Fry's regime is probably the exception, at least until the coming of the women's penitentiaries.

So far as a cursory inspection allows, the convict ships carrying women only did not make any classification by age. The 'Angelina' (arrived in Hobart 28 August 1844) and 'Emma Eugenia' (arrived 24 April 1844) each contained some juvenile women convicts in the 14-16 year age range (this happening at a time when age-segregated shipping was established practice for male convicts).

The authorities clearly believed that girl juvenile convicts did not need to be isolated from 'veteran and hardened' adult women offenders. The basis of this assumption is never made explicit.

Comparing the offences of juvenile girl convicts with those of boy juvenile offenders, and then looking at the length of sentence, it is clear that courts made little distinction between the sexes. Jane Brady, 14 years, received 7 years for stealing 2 waistcoats and a jacket. Mary Hinson, 16 years old, was sentenced to 10 years transportation for stealing a bonnet and a pair of shoes. These girls however were <u>not</u> destined for a probation station (Point Puer), nor for a regime of reform and trade training. They were to be sent first to the Female Factory in Hobart, with other adult women convicts, then to servitude as assigned domestic servants [17]. Whereas the prison authorities in Van Diemen's Land took great care to classify male convicts by age, juvenile girl convicts could be adequately disciplined, trained and

reformed through the routine imposition of domestic service. For them 'papa's discipline' exerted in the isolation of the private household seems to be the way forward to enlightenment and reform. For them there is no special treatment because of their tender ages; they shared the same fate as the adult women prisoner.

As an extension of the British system of law enforcement, an aside on VDL usefully alerts us to the significant differences between the penal system and the criminal law in the matter of age segregation. What is surprising is the wide chronological latitude given to the term 'convict boy', ranging as it did from 10 to 18 years (and beyond, by the time the probation period was completed). Compare this with the criminal law accounting anyone over 14 as 'adult'.

In terms of 'historical discovery', historians of juvenile delinquency and penal reform will have to reassess the importance of Parkhurst, given the substantial evidence from VDL that Point Puer and the juvenile-only convict ships embodied age-segregating practices, some time before the establishment of Parkhurst.

But, equally revealing, are the significant differences between convict boys and convict girls. We have argued that until 1847 anyone over 14 was tried as though they were adult, but from the mid 1830's, the penal system established a category 'juvenile'. But did it? Certainly <u>not</u> for juvenile girls. There are no female equivalents of Point Puer, Parkhurst or the 'Frances Charlotte', and this point has to be driven home. It is seductive to write accounts of juvenile crime, the rise of juvenile penitentiary, and extend this to say that age-grading 'arose' as a significant feature of British society during the 19th century, when in fact we are writing 'the history' of <u>boy</u> delinquents and convicts.

We have to write back into chronological categories, 'juvenile' for example, the sexualised quality that has slipped out. The problem resides partly in the nature of historical evidence. Girls become invisible partly because there are <u>no</u> institutions devoted to their incarceration and reform that we can write about. Why this was so becomes the new historical problem, the lines of which we have set out above, and explanations of which we have only briefly speculated about. The fact that convict girls did not receive probationary training, tells us a great deal about 19th century ideologies of fit work and punishment for convict women and girls.

But the absence of special regimes for girl convicts raises another problem. Juvenile penitentiaries and regimes offered a 'softer' form of incarceration for boys, and offered magistrates a range of optional dispositions. Convicted girls on the other hand still went to 'adult' prisons, some of which (evidenced by Fry's organisation of the women's wards at Newgate) separated prisoners by age. Mc Conville's lengthy text on prison administration makes scant reference to the organisation of women's penitentiaries and offers little evidence as to whether age-segregation was an established practice. It may well be that no systematic and wide-spread separation of the old and young took place until 1854 when girl offenders could be sent to reformatories. In the last analysis, it could be argued that girl convicts received tougher and more exacting treatment than convict boys.

The history of childhood then needs to be case in a gender-specific way. The evidence suggests, for example, that the process of creating boy and girl juvenile prisoners is not unitary, rather it displays gender-specific temporalities. In the context of prison administration, it is possible to demonstrate that boys were 'boys' <u>20 years</u> before girls were separated out from women.

Moreover, the process of creation and age-segregation takes place within quite separate referents. Habits of industry and moral regeneration for convict boys locates the process in terms of the waged-labour market; girls' destinies are defined in terms of the home and the family and domestic labour. So while age-segregation develops and extends, it does so within larger continuities, namely the material and ideological differences between men and women.

CHAPTER FOUR

FROM PARKHURST TO METTRAY: SAVING CHILDREN FROM THE LAW

We noted in the last chapter the first phase of saving young offenders from the 'full' disposition of the law enforcement system, taking place through the age-segregation of offenders within the convict service. We now turn our attention to two related themes; the second phase of child saving which posited the inappropriateness of prison as a place for reforming youthful criminals, and secondly, changes in the criminal law, the crucial moments being 1847 and 1879, which allowed summary justice for juveniles. Key moments because the criminal process of trial breaks along the categories of age. We shall continue the narrative of the previous chapter, firstly for clarity, and secondly, because the attack on the Parkhurst system set the conditions for magistrates to mobilise forces at the parliamentary level for a statutory change of the criminal law. It is essential to understand the overlap between social forces engaged in a sustained critique of the policy of merely segregating juvenile convicts within prisons and the manoeuvres to re-write the position of the child in criminal law. The analytical route is circuitous but reflects the priorities of the child-saving movement in the second half of the 19th century.

i. The second phase; the 'failure of Parkhurst'

The inappropriateness of prison, as a means for the prevention of the reproduction of a juvenile criminal class was clearly enunciated in the Minutes of Evidence presented as part of the Brougham Report (Select Committee, House of Lords; Execution of the Criminal Law Respecting Juvenile Offenders and Transportation, P.P. 1847 Vol VII). The 'failure' of Parkhurst is the key discursive element of the reformatory movement. We shall not pursue here the organisational politics of the movement, the series of meetings, reports and evidence presented to Parliament, calling for a national system of reformatories for juvenile delinquents. The Brougham Report displays the continuities and discontinuities between the purely penal and the reformatory programmes. It was in response to the Report that Mary Carpenter wrote, Reformatory Schools for the Children of the Perishing and Dangerous Classes and for Juvenile Offenders for what the Committee recommended was an extension of the Parkhurst system (a judicious mixture of confinement and restraint with a touch of industrial training and occasional

use of corporal punishment). 'A plague of Parkhurst's', was Carpenter's response; prisons in name and fact, designed for incarceration and not reform. The 'failure' of Parkhurst was construed in three ways. Firstly, its brutalising effect; according to Carpenter, in one year, 34 boys had tried to escape, that 165 were whipped and 79 had been returned to Millbank Prison as incorrigible (Pinchbeck and Hewitt;471). This was no basis for reform but a regime of fear. Secondly, Parkhurst in particular and the prison system in general was having no effect on rates of recidivism (and this was the most potent claim against Parkhurst). Thirdly, the cost of the failure to reform young offenders was costly, in terms of immediate financing of prisons. Against Parkhurst were set the Continental reformatories, the Rauhe Haus at Hamburg (1833) and more especially Mettray in Touraine, France (1839). It is interesting to recall that the impetus for the 1835 Act (the statutory basis of Parkhurst) came partly from visits by prison inspectors, to the United States; the reformatory movement drew exclusively on the Continental experience.(In passing, it is striking on reading the Brougham Report 1847 and the Parliamentary Report on Criminal and Destitute Juveniles 1852, P.P. 1852 Vol VII, just how many of those giving evidence had either been to, or were able to report in some detail on Mettray).

What then was to replace Parkhurst? The Brougham Committee suggested its extension, a system of asylums based on reform plus 'a modest use of corporal punishment', to be used for juveniles convicted of their first offence. Recidivists would go to ordinary prisons. The Brougham Committee strongly supported separate establishments for juveniles; justified in the language of 1835

> "That the contamination of gaol as gaols are usually managed, may often prove fatal, and must always be hurtful to boys committed for a first offence, and that they may be trained to the worst of crimes is clear enough. (P.P. 1847 Vol VII;5).

If the first gaol sentence failed to reform, all was lost, and ordinary prison was then sufficient. The rest of the penal system - the convict service (transportation), the death penalty, whipping and the separate system of the penetentiary - were kept intact (though the Committee had doubts about the deterrent capacity of capital punishment). The Committee also recommended that parents or natural guardians should help bear the costs of juvenile offenders who were put in asylums on their first conviction.

A synoptic form of the reformatory movements programme for juveniles was set out in paper before the Committee by Matthew Davenport Hill, reporting a meeting of the Society for Promoting the Amendment of the Law held in 1846. Their proposals were:

1. That a national system of asylums should be established.
2. These asylums would receive young persons, to be classified according to age, sex and strength as well as past pursuits and associations.
3. The asylums would be conducted by government officers, and placed on the lines of the great trunk roads to admit cheap and ready access.
4. Out-door labour should be united with mental and religious education and with instruction in mechanical employment.
5. The cost of feeding inmates should be borne by the labour of inmates and by their parents' contributions.
6. All children, under a given age, violating the law, or, 'found in such a state of destitution as experience abundantly shows must lead by sure consequences to crime, shall by order of a magistrate, be sent to one of the intended asylums'. (P.P. 1847 Vol VII appendix to Minutes of Evidence).

The decisive shift is two fold. The asylums were not to be prisons with anclets, prison guards and prison discipline, and, they would embrace the young whose only crime was to be declared, judicially, destitute. The model institution was to be Mettray.

> "The children are received into what are called Families. They are taught trades. The principle of self-control and self-respect is cultivated from the moment they cross the threshold. They make no mistakes such as we made at Parkhurst in our first attempt, when we kept an anclet, an iron ring on the leg which of course was a badge of degradation from the beginning. (my emphasis).
> (Edward Rushton, Stipendiary Magistrate, Minutes of Evidence, P.P. 1847 Vol VII; 192.

Parkhurst was at once a 'failure' and a necessary pre-condition for the emergence of the reformatory. For Parkhurst was penality materialised; anclets, prison garb, shaven heads, meaningless tasks and corporal punishment. Mettray was a condensation of future possibilities and programmes. Whereas Parkhurst materialised the separation of the adult from the child in the penal system, it retained the old and adult symbols, rituals and practices, without sufficiently advancing its reason for existence, as an interrupter to reproduction of juvenile crime. The 'failure' of Parkhurst and the promise of Mettray unify the diverse voices and texts of Serjeant Adams, Edward Rushton, Frederick and Matthew Hill and Mary Carpenter. It was the latter who most eloquently articulated the problems of Parkhurst with the necessity of establishing a reformatory. But her public declamations, the texts and speeches weave in not only a programme of reform, but specific conceptions of the child, images of the family, critiques of the criminal law,

which at once signifies both the conditions which made the discourse possible and future meaning of reform.

1. Of Parkhurst children Carpenter wrote, "those unhappy young persons, who have become, to their unspeakable misfortune, the children of the state' (Juvenile Delinquents - their Conditions and Treatment, 1853; quoted in Pinchbeck and Hewitt; 475). Children of the state encompassed the workhouse children - the orphans, the destitute young whose considerable misfortune was to be placed outside the natural circumstances of the family. She was candid on this point:

> "... I believe that a well conducted family is the order of Providence, and is more calculated to develop the human being than any school can do".
> (P.P. 1852 Vol VII; 123).

Her works resonated the distinction between the children of the state and children regulated by 'the well conducted family'. For her, the first principle of reform was to model any institution on 'the well conducted family', and this principle was to apply to the reformatory (the proposed replacement for Parkhurst's criminal children), the Free Day Schools for the poor but industrious classes, and the Industrial Training Schools for the 'half dressed little savages', vagabondising in the street'. (P.P. 1852 Vol VII; 114). The state - the cold, coercive, publically funded institutions - was to be replaced by the family - the warm, personal, affective domain.

> "The child ... must be placed where the prevailing principle will be as far as practicable, carried out-where he will be gradually restored to the true position of childhood. He must be brought to a sense of dependence by re-awakening in him new

> "and healthy desires which he himself cannot gratify, and by finding that there is a power far greater than his own to which he is indebted for the gratification of those desires. He must perceive by manifestations which he cannot mistake, that this power, whilst controlling him, is guided by wisdom and love; he must have his affection called forth by the obvious personal interest felt in his own individual well-being by those around him; he must in short be placed in a family ... This it is apprehended, is the fundamental principle of all true reformatory action with the young, and in every case where striking results have followed such efforts, it will be traceable to the greater development of the principle, to a more true and powerful action on the soul of the child, by those who have assumed the holy duties of the parent. (Juvenile Delinquents 1853; 298).

The rhetoric of caring, loving guidance, the affectionate gratification of desires, the individual action on the soul of the child masks the true location of the child as a dependent appendage, whose loss of autonomy is a necessary process to the awakening of new and healthy desires. Clarke (1975) comments.

> "Carpenter reveals, inadvertently through the agency of the context into which it is being inserted, (the family) an institution of coercion creating and enforcing dependency in the child through the calculated manipulation of those rewards which constitute its 'surface appearance' - love, affection and interest."

This is the nature of the familial form, which in its structure, is transferable to the institutions whose regimes were not to retribution but to reform. The reformatories were to be staffed by individuals assuming the holy mantle of 'the parent'.

2. The precepts of political economy were to be paramount. The institutions of reform were not to be state agencies, but paid for and managed by philanthropic, religious individuals, signifying their distance from the state and the responsibility of civil society. Like the family, reforming was a process outside the domain of the state. Drawing on the provision of the 1834 Poor Laws, Carpenter further argued that parents of criminal children should pay for the upkeep of their children in reformatories, as they were required to do for any dependants placed on indoor relief (P.P. 1852 Vol VII; 126).

3.

> "I can speak thus far, that we have been the means of rescuing a number who had either begun to fall into crime, or were on the verge of doing so; but what I rely upon is beginning earlier with the members of families whose children would inevitably fall into crime if left in the streets without education. That is the particular object of the ragged schools."
> (Mary Carpenter P.P. 1852 Vol VII;131).

With remarkable candour, she addressed the problem of 'the class below ' the criminal children;

> "you could not say that they were guilty of any crime; but supposing an active police were constantly walking in these parts, or supposing any individuals had the power to take the hand of any such child, as he or

> "she might meet in this vagrant condition, in the streets; supposing in going into the courts of Red Cross Street, which you probably know, and seeing the half-dressed little savages there ...; supposing these could be gathered compulsorily, being no longer permitted to be vagabondising in the streets, and forced to go to this Industrial School, that would be the class that I would contemplate."
> (P.P. 1852 Vol VII;114) (My emphasis).

The institutional solution seemingly runs counter to Carpenter's professed anti-statism. But at the same time, the pre-conditions for the institutional solution was the state itself. From 1837, to the end of the 19th century, some 105 pieces of legislation concerned with the care and protection of children provided a material basis, for the possibility of apprehending children, guilty of no crime, taking them out of the family, setting and placing them in institutions. In the name of social order, Carpenter was prepared to extend the powers of surveillance and control (by the agency of 'active police'), using the powers of the magistracy for the appropriation of juveniles in 'the class below'. Once the coercive powers of the state had been properly deployed (the process of appropriation) matters of reform were to be left to institutions - private and philanthropic - organised on the familial principle.

4. The programme of reform was premised on a distinct view of the child. "A child is physically and spiritually in a very different condition from a man ... youths are in an excitable state of body and mind; they have not the power of reflection, but they feel intensely." (P.P. 1852; 99). "The juvenile mind is flexible" (p.112). "In the man the character is to a certain degree formed, he cannot be altered except by a very great change in his mental condition; but a child acts on the impulse of the moment. It is not generally from

any essential evil in his character that he commits the faults which make him a nuisance to society ... nor do I know how any children can live free from sin, in the condition of things which I described as existing in Bristol ... (125)." Images of innocence, unformed but flexible minds corrupted by parents of vicious habits and degrading surroundings locate the child as a suitable case for protection and treatment, away from the formative environments of the home and the street.

The reformatory regime proposed a mixture of education, a moral and spiritual training, and useful and financially productive and (rewarded) labour; agricultural labour along the lines of Mettray - the rural image - was thought especially suitable (121). But the child must participate in the process of reform. The child's will must be enlisted, not broken (the Parkhurst 'treatment'). "We must act upon his spiritual nature and make him cooperate in the work of reformation" (p.99).

> "He has", she continues, "therefore, been acting without any discernment of his true position. He must now be bound to those who are with him from a feeling that they have his true interests at heart, and that being the case, he will more readily submit to discipline, which will be quite ready to exercise it, and which is intended for his good. This should be the principle of every Reformatory School ..." (100).

The pre-condition of reform is surrender and submission, the return to dependent, childish innocence, to be guided and formed by these assuming the true duties of parents. Allied with the twin objects of industrial training,

'to give habits of industry and to develop the powers of the child, ' (p.121). Carpenter's reformatories would produce children who would be useful members of society and render them independent (ibid). Reformatories themselves were constituted with productive capacities; their discursive appeal was a structure of inputs and outputs. The very notion of retribution in Carpenter's view was not only brutal but also wasteful. Redhill, Stretton on Dunswood, the early reform schools were constantly measured against Parkhurst in terms of the cost per head or rehabilitated juveniles.

5. 'What is the industrial training of girls that you propose, corresponding with the industrial training of boys?'

Carpenter; "In all industrial establishments there is a very great amount of housework, which very probably would devolve on the girls, as preparing them for their future position in life; this occupation calls out the girls' minds, very much in the same way as agricultural labour does a boy's mind, and the establishment may have to be conducted with very much less expense if boys and girls are in the same school, as they will perform different departments of work."
(P.P. 1852 VII; 135).

Such arrangements, for this was the basis of the Raue Haus, and the New York reformatory had much to recommend it, she explained, because it returns boys and girls 'more closely to the family system ' (ibid). There is no indication whether domestic labour would be paid as was boys industrial labour. The reformatories were to deploy the sexual division of labour of the family, because it saves expense, because of the moral influences one gender exerts on another but at the same time the reformatory was to be the great amplifier of good order - the well conducted family.

Adequate accounts of the apprehension, prosecution and incarceration of girl offenders in the 19th Centruy have yet to be written. There were no female equivalents of Parkhurst, Point Puer and the Frances Charlotte; young female offenders seem to have been contained within the same institutions as women offenders, and for this reason, they are remarkable by their absence when the institutional analysis of penality is conducted. Only recently have Australian social historians been providing accounts of the network of female factories established in New South Wales and Van Dieman's Land. Accounts of'the invention' of juvenile delinquency are largely accounts of young male delinquency. Not that this is a problem peculiar to the present; contemporary accounts were similarly orientated to the problem of young male delinquents. The biographies of Jane Doyle and Ellen Reece are two of the very few biographical lives dossiered by the prison inspectors and the societies advocating penal reform. Neither Magarey (1978) nor McConville (1981) break down their figures of juvenile convictions by gender.

On this point, Mary Carpenter's evidence before the Select Committee is very thin. She intimates that no separate establishment was available in Liverpool for "the prison chaplain of the Liverpool gaol ... has greatly desired permission to send the girls (to reform schools), instead of their being exposed to contamination in the prison (136). Yet her attitude to girl offenders is abundantly clear.

> "Although girls may be considered altogether as rather more virtuous than boys, if they are kept out of temptation, yet when they do fall into vice, they are even more danger to society" (ibid).

And furthermore,

> "It is very important that the greater attention should be directed than has hitherto been done to girls, especially when we remember that they are to be the mothers of the next generation. I have known numerous instances in which a family has been well brought up, with a bad father and a good mother, but I have never known an instance of a family being otherwise than vicious with a bad mother." (ibid) (my emphasis).

The discursive positioning of girls, as future mothers, articulates both to the well ordered family and its location as a reproducer of good order. But their danger also lies in their sexuality. Jane Doyle and Ellen Reece were not only thieves but also prostitutes. "Falling into vice" in that perishing and dangerous class, sunk the girls very far below the boys (136). Because of the depths of their moral degradation, and the contaminating influences of the prison, Carpenter was to assert that reformatory discipline would be more necessary than prison discipline (136).

The passing of the Youthful Offenders Act 1854, represented only a partial victory for Carpenter and the reformatory movement. Whilst legislatively establishing the possibility of reform schools, it required 14 days penal servitude before the programme of reform was to begin. In a congratulatory letter from Matthew Hill to William Miles M.P. (185[4]), Hill wrote:

> "You have established three great principles. First, the value of voluntary action in the institution and conduct of Reformatory Schools.

> "Secondly, the substitution of reformatory treatment for retributive punishment as the rule ... Thirdly, you have recognised the duty of the parent to maintain his offspring, and not to cast the burden on the public." (quoted in Pinchbeck and Hewitt op cit;477).

The reformatory schools were established along the lines of three great principles (though whether Miles 'established' or merely 'facilitated' these principles is an open matter). State-delegated reformatories, privately run with government inspection were followed in 1856 with a network of industrial schools for the 'class below'. But we must be careful not to overemphasise the impact of the reformatory. Certainly they and the Industrial Schools lay down markers, institutional boundaries between treatment of adult and child offender, but this did not constitute the immediate end of the penal sanction for children.

Whilst the Youthful Offenders Act provided for reformatories for juvenile offenders, under the age of 16, by 1866 there were 65 reformatories accommodating fewer than 5000 offenders, whilst the 50 industrial schools provided for 2500 needy children (McConville op cit;338). They did not stop the flow of children into prisons; partly because the act stipulated an initial 14 day imprisonment, and further, there were insufficient places for the young offenders. A few prisons, Tothill Fields, Holloway and the City House of Correction had special juvenile wings (McConville ibid).

There was a long term decline in the number of offenders committed to prisons (McConville;339), due partly to the new powers granted to magistrates for summary disposition. Significantly though over a thousand children under the age of 12, were receiving prison sentences of some form. Alternatives to the penal sanction; the informal practices

of magistrates delegating responsibility to suitable employers and parents, the use of sureties for good behaviour (formalised in 1879), the reformatories and industrial training schools, and the closure of Parkhurst seem to have a long effect in reducing the number of children spending time in gaols.

Parkhurst and Mettray display the shifting models of reformatory action on juveniles; the former clearly lcoated as a penal institution, the latter condenses the hopes, aspirations and programme of the second phase of the separation of adult and child offenders. The discursive positioning of the child offender as a corrupted innocent - the sources of tainted innocent being the home and the street, not the morally evil mind - displays the contradictions between the legal criminal discourse and that deployed by the various factions of penal reformers. But the shift from punishment to discipline entailed as a necessary part of its logic, a shift in focus from the class of juveniles who had already offended against the legal rules, to those who were potential offenders; 'the class below'. The deployment of the biographical technique from 1816 through to Carpenter's reports in 1852 and 1853, yielded the knowledges of juvenile sub-cultural life; the points of dangerous contamination, which included the prison and the system of policing. The biographies provided the practical knowledge of, and programme of reform for, juvenile offenders, giving at the same time a means of illustrating the size of the 'juvenile problem' easily comprehended by legislators and state officials.

The shift from the penal sanction to reformatories, industrial schools, the use of sureties, and the release of young offenders to the supervised care of parents and employers marks a displacement of the rituals of retribution by the celebration of individual, personal-affective action on the soul of the subject, who was considered to be inherently

reformable. The techniques of control away from the purely penal context to a context which is familial and educative speaks a new and different organising principle, applicable to a group beyond the category of the criminal class.

Drawing on the precepts of laissez faire liberalism (private, non-state, institutions - the reformatory, the employer) political economy (child labour and parental contribution) and evangelical christianity (inherent innocence which can be saved) reformatory action drew its legitimacy from the fact that it was <u>not</u> (in practice it was argued that it was in opposition to) <u>penal retribution</u>, therefore it was legitimately extensible to juveniles legally 'innocent' but living in conditions inherently 'dangerous' (displayed by their location in relationship to the labour market, the home and leisure activites). The notion of 'saving' inherently meant the separation of the child from the working class adult world of gambling, drinking, theatres and community street life.

Both the Parkhurst and reformatory phases, by locating causes of crime in the home, celebrate the notion of reasonable parenting. In the absence of the proper parent-child relationship - where children exhibited autonomy, precosity and worldliness and displayed less than filial obedience - the lack could be legitimately replaced by returning the child to its 'true position' within an institutional, familialy orientated setting (master-servant relationship, the industrial school or the reformatory). Whilst the reformatory movement advocated the more extensive use of surrogate family settings, the legal position which gave their advocacy its effectiveness rested upon the Chancery Court rewriting the relationship between the State and the private domain of the family, broadly under the principle of extending child protection measures. In short, the programme of reform was premised upon the child being located in the power relationship consonant with the image of the bourgeois family; dependant

upon and obedient to a male head of household, cared for and guided by a non-labouring wife-mother.

The long term effect of the reformatory movement can be judged by considering the position of children in relationship to reformatory action at the end of the 19th century. Clarke Hall states in 1897 the following:

> "The Law is at present, that any child, within the following categories, may be sent to a reform school for 3 to 5 years.
> a) Children between 12 and 16 who have been convicted of any offence punishable by penal servitude.
> b) Children under the age of 12 who have been so convicted and against whom a previous conviction has been proved.
> c) Children at an industrial school convicted of wilful refusal to conform to the rules of the school.
> d) Any boy under 16 convicted under Sect.4 of the Criminal Law Amendment Act.
> (Clarke Hall 1897; 105).

What is more striking is the categories who could be compulsorily sent for industrial training. The Prevention of Crimes Act 1871, added the category of children of any woman convicted of a crime, whilst the Education Act of 1876 added children whose 'education was habitually neglected' or found 'habitually wandering or consorting with disorderly persons' (a breach of the school attendance order). Juvenile activities were further policed by the school attendance officers. Beyond this there were 20 other categories liable to industrial training, if so ordered by a magistrate. These included any child under 14, found begging or receiving alms, found wandering and not having any

home or settled place of abode, found wandering and having no proper guardian, found being destitute and an orphan, children found habitually in the company of rogues, vagabonds, disorderly persons or reputed criminals, frequenting the company of prostitutes or lodging, living, residing in a house frequented by prostitutes (Clarke op cit; 109-110). Clarke reports that in 1895 there were 142 industrial schools, holding some 13,000 boys and 4241 girls and further, there were truant day schools and day industrial schools (where the period of compulsory attendance was about 12 weeks) treating some 2000 boys (Clarke Hall, 131).

In spite of Carpenter's sense of frustration at the retention of the 14 day period of imprisonment prior to reformatory action (which ceased in 1893), the power of her work, and that of her colleagues, has its monument in the extensive network of institutions, existant at the end of the 19th century, premised on the positive belief that children who offended, and those who were potentially 'criminal', were different from adults and therefore required separate and different treatment; reformation by the action of moral and industrial training.

iii) Summary justice; the child of the courts

There was no institutional corollary of the reformatory within the judicial procedures of criminal law at the end of the 19th century; no juvenile or children's courts existed, nor was any such institution generally advocated by the reformatory movement. Apart from the exemptions granted to children under the age of seven, and the rebuttable assumption of innocence granted to offenders between seven and fourteen, adults and children were liable to the same process of trial, in the same courts, before magistrates, and in the case of felonies, before judges at assizes and sessions. The evidence suggests that magistrates frequently passed down dispositions which kept children out of gaols but these were informal practices,

mitigating the full extent of judicial power. In the first half of the 19th century, an offence, whether misdemeanour or felony, committed by any child was liable to prosecution as though that child was an adult. Reformers concerned with the 'juvenile problems' advocated the process of summary trial and dispositions for petty offences against property, but did so generally in the context of keeping young offenders out of the contaminating influences of the prison. This is a separate argument, however, and is not in opposition to the legalistic conceptions of mens rea, responsibility and retribution. To a large extent, despite the summary dispositions allowed under the Acts of 1847 and 1879, the legalistic conceptions of the child before the court, remained undisturbed.

Whether a mode of trial 'peculiar' to children charged with criminal offences was an appropriate response to juvenile delinquency and to the excesses of the absolutist criminal law system had been discussed at the Parliamentary level a decade prior to the revisions of 1847. The Third Report on Criminal Law, had as its brief to consider making any distinction in the mode of trial between 'adult' and 'juvenile' offenders (p.p. 1837 Vol. XXXl). The Commissioners' opinion was, "that it would not be desirable to make any distinction in the mode of trial of adults and juvenile offenders, except by increasing the summary jurisdiction of magistrates". (p.p. 1837 Vol. XXXl;6). The Report consciously avoids any radical change in the legal form of the child's responsibility before the courts, whilst recognising that in practice, courts take account of "the youth of the offender, usually rendering him more an object of compassion than a fit subject of punishment; and if the jury do not, under such feelings, acquit him altogether, they recommend him to mercy on account of his youth" (ibid; 7).

Extending the summary powers of the magistrate, which was certainly the most radical recommendation of the 1837 Report seems to be concerned to accomplish two objects. Firstly, to decrease the exposure of young offenders 'to the evils of idleness and contamination of bad associates' caused by lengthy pre-trial spells in prison. Secondly to reconcile the widespread and popular practices of Magistrates courts, Assizes and Sessions of treating young offenders more leniently than adult offenders, contrary to the legalistic requirement to treat both categories as though they were both fully responsible subjects.

The Commissioners recognised that the majority of offences committed by juveniles were petty thefts and 'wanton acts which come under the general denomination of vagrancy' (ibid; 7). While the latter could be tried summarily (under the provision of the Vagrant Act and Petty Trespass Act), petty theft, where it constituted larceny, Magistrates had no power to fine or dismiss the case, but were bound to send the case to Sessions or Assizes (ibid;7). For the offender, this meant 'weeks or perhaps months in prison without being subject to compulsory discipline', (and therefore idlenss and 'contamination'). Accordingly, the Commissioners recommended that offenders not exceeding the age of 15 years, convicted of stealing property not exceeding 10 shillings, should be summarily sentenced to 6 months imprisonment; where the value of property exceeded 10 shillings but was less than £5.00, then sentence could be up to 12 months imprisonment. In effect, this meant imprisonment would be in the form of compulsory discipline (separate and silent incarceration) so that the two great objects of penal laws,'the prevention of crime' and 'the reformation of the prisoner', could begin immediately.

In the second instance, the Commissioners openly stated:

> "To a certain extent, the discretion of absolutely discharging a prisoner is already assumed by many Magistrates though <u>without any direct authority from the law</u>; and it is now not an infrequent practice to dismiss charges against children ...." (ibid;8) (my emphasis).

To give these practices 'direct authority', they further recommended that Magistrates should be empowered to dismiss charges for trivial offences against children. Saving time and money, and retaining the awesome spectacle of the full trial for more serious offences were some of the reasons advanced for extending this power to Magistrates.

The Report of 1837 is notable for the manner in which the legal subjectivity is made consequent upon the restructuring of the powers of the Magistracy. The silence about the mind, the discretion and the criminal responsibility of the young offender, indicates the extent to which the fundamentals of <u>mens rea</u> went undisturbed. The discussion is largely about appropriate dispositions necessary to confront the problem of juvenile crime, not the appropriate mode of trial for young offenders. Any recommendation for a change in the legal subjectivity of the child was hedged in by the fundamental precepts of the criminal law, especially the notion of responsibility. But the Report did attempt to institutionalize - to make formal already existing practices - categories of adult and juvenile offenders, by allowing more lenient dispositions for offenders under the age of 16 years.

That the Report only confronted the 'problem' of juvenile delinquency, as a specific social malaise, rather than addressing the issue of the positioning of the child locked into a system of criminal law - which was dissonant with the position of children in property, family and contract law - is partly accounted for by nature of the evidence presented to the Commission. For the evidence came from Inspectors of Prisons, from prominent Magistrates such as Sir Frederick Roe, from Richard Mayne, the Guildford Bench of Magistrates and from the Chief Justice of Australia. Their presentations collectively constituted the system of penality as the cause of the reproduction of juvenile crime. The system of law enforcement was deficient only to the extent that Magistrates were not entitled to try larceny summarily, thereby ensuring the continued mixing of the young offender and old lags.

While the 1837 Report was never put into statutory form, it seems to have set limits to the debate about the position in criminal law. The Juvenile Offenders Act 1847 (10 and 11 Vict. C.82), specifically states in its head notes that it was an Act "to ensure the more speedy trial of juvenile offenders, and to avoid the evils of their long imprisonment previously to trial ....".The provisions of Section 1 declare that;

a) Any offence committed and deemed and declared to be simple larceny or punishable as simple larceny, and where the offender is under the age of 14, they can be committed by two Magistrates.
b) Sentences can be up to three calendar months with or without hard labour in a common gaol or House of Correction.
c) If male, the offender can be privately whipped, either instead of, or in addition to prison.
d) Magistrates can dismiss the accused if they deem it expedient not to punish them.

The Brougham Report (p.p. 1847 Vol VII) and the head notes of the Act, leave no doubt that it was the pre-trial, non-disciplinary form of imprisonment which was to be reformed by extending the summary dispositions of the Magistracy. Of the Act, one commentator noted:

> "firstly as being practically the earliest recognition by the legislature of any distinction between the crime of an adult and that of a child (and secondly) as conferring for the first time upon justices of the peace, the power of dealing summarily with an indictable offence". (my emphasis)
> Clarke Hall (1897; 144-145).

The Act achieved the reconciliation of the criminal code with the informal practices of the Magistrates, outlined in 1837 . In one sense it celebrates the notion of judicial discretion, an elementary feature of the English legal system. There appears to have been no criticism of Magistrates displaying leniency to youthful offenders, more a recognition of their right to do so.

The extent to which the legal subjectivity of the child in criminal law was rewritten by the Act is somewhat more difficult to assess. The consequences of the Act in this sense were:

a) Given that the majority of juvenile offenders before the courts were charged with petty theft and forms of vagrancy, the effect was to limit court appearances to summary trial before Magistrates, with only more serious offences going before Judge and Jury on an indictment. And, there was no right to appeal for a trial before a higher court. No change was made in the mode of trial.

b) Magistrates' power to dismiss offenders under the age of fourteen and to pass limited gaol sentences constituted a boundary (along the axis of chronological age) between adult and a 'child', but in effect, was less generous than the boundary operating <u>within</u> the penal system (where prisoners under 16 years were separated from adult prisoners).

c) While powers to try cases summarily were extended, in practice, children under 14 could still be sent to trial before Judge and Jury; there was no absolute exclusion from the full rigours of the criminal law.

d) Critical boundaries; the age of responsibility and discretion (7 years and 14 years) were not changed. Nor was there any fundamental reassessment of <u>mens</u> <u>rea</u>.

A little known Act (13 and 14 Vict. C.37. 1850) extended summary justice for simple larceny to offenders whose age did not exceed sixteen years. However, the Act 'corrects' an ommission of the 1847 legislation; Magistrates were <u>required</u> to offer a jury trial, and objections to summary trial could be entered either by an offender under 16, <u>or the parent</u>. It has been commonly assumed that a <u>later</u> piece of legislation (1879 Act) extended summary justice to all young offenders.

The Summary Jurisdiction Act 1879 (42 and 43 Vict. C. 49) extended the Magistrates' powers to deal with young offenders still further. The Act conferred on Magistates:

a) Powers to try all children under the age of 12, for any offence, except homicide, and unless a parent of the prisoner opted for a trial by jury. Available dispositions were: a maximum of one month's imprisonment (with or without hard labour), fines up to 45 shillings, whipping (if male) of up to 6 strokes of the birch.

b) Power to try offenders aged 12, but under 17 years summarily for offences in the nature of larceny, embezzlement, railway or post office offences. Punishments were limited to 3 months imprisonment, £10.00 maximum fine, or 12 strokes of the birch. (James 1957, Clarke Hall 1897). *

Legal historians such as Sharpe (1982) and Cockburn (1978) in their studies of crime of the law (principally in the early modern period), have cautioned that 'the law' and its 'practice' display certain discontinuities. The badly drafted indictment, containing slight inaccuracies about abode and occupation, could in theory lead to a charge against a prisoner being thrown out of court. In practice, such inaccuracies often presented no obstacles to the presiding Judge, and the cases proceeded. With young offenders, Magistrates, drawing upon the capacity of judicial discretion, for some 50 years disposed of young felons - releasing them to the custody of parents, employers, workhouses, dismissing cases out of hand - in a manner that had no 'direct authority' either in statute or case law. Thomas Mayne, a Metropolitan Police Magistrate, declared that he 'laid it down never to convict (offenders) under nine years of age'. And with children under seven, charged with a felony, 'I have either sent him to Union workhouse or got his parents to take him home', (p.p. 1852 VII; 91). Magistrates appear to have drawn their own lines of the age of responsibility (nominally 7 years), adopted esoteric ages of discretion (nominally 14 years) for a complex variety of reasons; saving the expense of a full trial, saving children from the rigours of a full trial, keeping young offenders out of the contamination of prisons, and recognising a popular sentiment that prisons, transportation and whippings were inappropriate sanctions for offenders of tender years. Perhaps we are sketching here a

*(Right to trial by jury disappeared in 1952; James:162).

'history' of statute and case law, and the hard and fast categories of 'responsibility' and 'discretion' - being systematically undercut by the informal, 'unauthorised' practices of the Magistracy. These customary practices were made clear, in parliamentary reports, as early as 1837, but the fundamental categories of criminal responsibility and discretion remained resiliant to change. We have argued here that the categories were not transformed because they were constantly undermined in the Magistrates courts.

CONCLUSION

We have noted the unchanging grammar of the common law categories applicable to children in criminal law. The chronological boundaries of criminal responsibility and discretion were the same at the end of the 19th century as they were at its beginning. The absence of a separate court for children indicates the continued inclusion of children in a process of justice which was also applicable to adults. There were no absolute exclusions; child offenders went before Magistrates and the Crown Courts on the same charges, under Bills of indictment which formally made no distinctions in terms of age. Children under the age of seven were regarded as 'sans discernment', between seven and fourteen, liable to punishment if intention could be proved. However, the element of judicial discretion, allowed Judges and Magistrates, operating a variety of rule-of-thumb measures - age, possession or absence of discretion, physical maturity - and being sensitive to popular sentiment, continuously transformed the criminal law's grammatical inflexibility. Cases were dismissed, convicted offenders were released to the care of employers, parents, workhouses and charitable organisations. It was the operation of judicial discretion, the informal practices of Judges and Juries which kept the young away from the gibbet, not the absolute forbidding of the criminal law.

Discussing the operation of judicial discretion in an earlier period, Hay (op.cit) argued that the greatest beneficiary of the court's magnanimity was the network of authority relationships displayed in the discretionary process. Offenders arguing for leniency, pleading mitigating circumstances acknowledge powers greater than their own, to reduce the severity of sentences thereby reproducing a system of authority and deference. It acknowledges, through the process of discretion, a power structure outside 'the legal' (constituted by sharply etched charges, clear rules of procedure and a fixed tariff of dispositions), made known by informal and formal appeals to judiciary from landlords and employers - a paternal patronage - deployed to offset the worst excesses of the law enforcement system The network of authority relationships was sufficiently powerful to ensure that certain offenders never went before the courts, or that some offenders were tried for non-capital offences. Historians of crime acknowledge that we have an imperfect knowledge of the process by which some offenders went to the courts, while others were not charged, and, that we still know little about the changes in the kinds of offences that ensured the offender would go before the courts, while at other historical moments, the judicial solution was not pursued (e.g. Cockburn, (1978), Sharpe (1982), Hay(op.cit.).

Following Hay's broad argument, we have indicated the extent of judicial discretion with regard to young offenders, and we have indicated the extent to which the dispositions applicable to them were consequent upon the extension of the Magistrates' powers to try summarily, clearly set out in the Acts of 1847 and 1879. This is crucial because it is the level and range of dispositions which separates the adult from the child, more so than the grammar and the process of the criminal trial. Parkhurst, the convict ships bearing

juvenile-only passengers, Point Puer in Van Diemen's Land, the reformatories and the industrial schools indicate that adult-child boundaries were operative within the penal system from the mid 1830's, and these were extended, becoming more important classifications of 'difference'. The socially constructed status of childhood, is dependant upon institutional forms of separation, the elaboration of a difference and the confirmation of 'the other'. We have noted the unsentimental theories shaping this movement in penology; the emphasis was firmly on the prevention of the reproduction of juvenile delinquency, expressed in the medical discourse of disease, mixing, aeriation and contamination. Such theories are 'naturalistic' insofaras young were conceived rather like plants, 'tender', 'malleable', and especially open to training, shaping, or 'hardening'. The young were regarded as especially receptive to crime either by breeding, parental inculcation and less resistant because of their youth, to its infectious disease, located in the streets, parental culture and the loose and disorderly life of the 'unclassified' prison. Naturalistic theory programmes the response to youthful crime in social policy. Separation from 'adult' life (on the streets, in the family and in the prison); shaping and training by regimes of instruction, continuous industry, moral uplift, arousing sentiments of familial dependence and obedience - all underwritten by the coercive violence of incarceration, regimentation and liberal punishment. Retributive justice for the young - hanging, whippings, prison and transportation was displaced by a dispersed set of institutions profoundly 'reformative' and 'educative' in character; a possibility premised upon naturalistic differences posited in terms of old and young, 'tender' and 'hardened.'

The significant allies of the Magistrates, the network of power and authority relations 'outside' the legal system, were not the old traditional social forces mapped by Hay,

but the prison inspectorate and the private, urban-based child saving organisations (the societies for the prevention of juvenile crime). Their elaboration of 'the juvenile' as a social category with distinctive modes of existence, committing identifiably different crimes penetrated the legislative arena through their own published accounts, and by their evidence before successive parliamentary commissions on the criminal law. Drawing upon the biographies of convicted juveniles, they mounted a sustained critique of the Parkhurst system and provided an alternative system of reformatories, prior to the system of state-delegated industrial and reformatory schools with the informal complicity of sympathetic Magistrates. Their image of 'saving' was to place young offenders in settings which were in combination 'total' (hour by hour regulation, industrious, educative), familial, (dependant children, regulated by figures assuming parental roles demanding obedience, organising inmates along the lines of sexually-divided labour), rural, (sites away from the dangers of urban settings), and in spite of the rhetoric, coercive, (infractions of the rules entailing restricted diet, beating etc.). In ethos and setting, the reformative institutions were not unlike the public schools of the 19th century. Theorists concerned with the purely class content of the reformative institutions tend to overlook the obvious 'generational' similarities between two sets of dissimilar institutions [22].

The child saving institutions bear considerable sociological import given the <u>social</u> significance assigned to putative biological differences through their naturalistic mode of discourse. Part of the child saving discourse is premised on the fact that the young were considered to be capable and moreover, worth, being 'saved'. Their very plasticity, the attribute of 'not yet formed', designated the distinctive attribute of the juvenile criminal. This gave considerable

strategic leverage to the critique of the absolutist form of law enforcement. For the child savers were able to offer a programme which was genuinely protective (by removing the child from the threat of capital punishment and degrading and brutal imprisonment) - its most radical and liberationist intervention; educative (in terms of both 'useful' training and moral uplift); while offering the means of 'interrupting' the reproduction of juvenile crime (separation from the urban parental and prison cultures). Such programmes, concentrating on individual reformative action posed no radical break with legalistic notions of individual responsibility. For example, whilst the Magistrates and their allies stressed the social matrix of juvenile crime, its cause was located not in the poverty, the unmet needs and the marginal position of juveniles in the labour market, but in the cultural and moral degeneracy of parental cultures. In this context, the juvenile offender is the hapless victim of circumstance. The solution was the institution premised upon classical familial order where juveniles would learn their place and habits of sobriety, industry and moral restraint; principles central to the Protestant,patriarchal family, celebrated in assumptions of family law.

Biographical evidence, suggests however that young offenders rather than being hapless victims or passive receptors of parental culture were active and reflexive participants in crime, sometimes out of dire need, often because petty thieving at least offered a modicum of 'civilised' existence. They were victims but not in the sense propounded by the child savers. Nor were they individuals freely 'choosing' a life of crime; the legalistic 'responsible subject' of the criminal law.

In what is still the most sensitive and authorative account of child saving (albeit in the context of the USA in the late 19th and early 20th century), Platt notes that "The child saving movement was 'anti-legal', in the sense that it derogated civil rights and procedural formalities while relying heavily on extra-legal techniques". (Platt 1982;159). His invocation of 'rights' and 'formal procedures' as expressive of 'the legal' permits us to consider something of the character of the child saving movement, and to consider any transformations in the legal subjectivity of the child in criminal law.

Carpenter and her colleagues were prepared to 'reform' compulsorily, social groups who had not yet committed a crime, or had not even gone before the courts formally charged with a crime (here defined formally as committing acts proscribed by the welter of criminal statutes). They were quite prepared to lower the threshold of criminality, encompassing a range of youthful activity not formally proscribed by laws, in order to appropriate and reform a class of 'potential' criminals. This is the effect of the classification of essentially working class youth into 'perishing' and 'dangerous' classes. In this sense, the movement was quite prepared to derogate 'rights' (assigned by the process of formal charge, proper trial, fixed disposition - constitutive of criminal law - where formal charges etc. could be made on the commission of specific acts). The movement was prepared to criminalise the practices of youthful activity whose conditions of existence were chronic poverty, overcrowding, marginal economic activity, and whose milieu of circulation was the street.

In effect, the machinery for this process existed but not necessarily activated on a large scale- the activities of the 'new police', and the Vagrancy Acts selectively picked

up street children to take before Magistrates. With the addition of industrial and reform schools to the workhouse, we can discern the emergence of a 'system', specifically concerned with, and whose target was, the juvenile delinquent - not the juvenile criminal. The sociological importance here is not simply the axis of class, but also of 'generation'; class-embedded age groups, were target populations for a new set of state apparatuses.

We have indicated that the numbers coercively reformed were small. However, we should not deny the symbolic power of the reformatory institutions, particularly in their articulation to the rise of mass compulsory schooling. Oral historians such as Humphries (1981) and Thompson (1981) record in their interviews, how these institutions permeated the consciousness of working class families. The threat of the 'truant' school (used generically) and the 'reformatory' was constantly invoked by school teachers, the police and welfare officers. For the young then, their conditions of existence were experienced not only in terms of class membership - and all the cultural and social effects that entails - but also in terms of confronting boundary riders, the police, welfare officers and teachers marking off prohibited areas of activity and who confirmed their status as youthful and different.

The construction of system of control specifically targeted on juvenile delinquency is of fundamental importance to any analysis of the legal subjectivity in criminal law. To reiterate, the grammar of responsibility, of individuals freely choosing crime, remained resiliently unimpressed by the 'outside' category of 'juvenile crime'. The child's rights (except for a brief period between 1847 and 1850) were not formally derogated; trial before Magistrates or an elected trial before judge and jury remained as a necessary

preliminary before reformatory action could take place. Formal privileges, the powers of Magistrates to dismiss cases summarily for offenders under 12, and the summary trial of persons under 16 years certainly removed the young offender from the worst excesses of the law enforcement system. At the formal level of procedure, the distinctions between adult and child over 12 were few - both were regarded as responsible, unless judges and juries decided otherwise. But this was subject to judicial discretion, and not necessarily an outright claim of a right to lenient disposition. We should recognise, however, that the child of criminal law was still distinctly at odds with the infant of property and contract law.

Any such legalistic analysis must remain blind to the significant importance of the juvenile delinquent and its location within the system we referred to earlier, operating from 1854. As Magarey (1978) demonstrates, the majority of juvenile convictions from 1848 to 1853 were under the Vagrancy, Malicious Trespass, Larceny and Police Acts and the Juvenile Offenders Acts (1848, 56%; 1849, 60%; 1850, 61%; 1851, 62%, 1852, 63%, 1853, 64%). The pattern of juvenile crime involved mainly petty theft and various forms of vagrancy and wandering. Vagrancy, if proved, meant imprisonment (with hard labour, for one calendar month). The Juvenile Offenders Act permitted imprisonment for up to 3 calendar months. The Larceny Act was more severe, permitting sentences of transportation for seven years or two years imprisonment with a whipping. Given the demise of Parkhurst and the system of transportation, the introduction of the 1854 Reformatory Schools Act, actually <u>increased</u> the time that juveniles might be incarcerated. For its provisions allowed for a detention of <u>not less</u> than 2, <u>nor more than</u> 5 years (Clarke Hall 1897;95).

Moreover, we should note the emergence of a system dealing with juvenile delinquency which at each stage (arrest, trial, reform) which was highly discretionary, operating alongside the formal legal system of criminal law. Given the nature of juvenile crime, the police were in a unique position to proceed selectively against street children. At the trial stage, considerable latitude was allowed for judicially determined 'responsibility', and, finally, within the reformatory system, the authorities were permitted considerable freedom to determine when an inmate had been reformed. Furthermore, the system targeted a population least able, materially and symbolically, to resist the operations of a highly discretionary process. The presence of discretion is not some deformation of the criminal process in its applicability to the juvenile delinquent, but a fundamental and characteristic feature of the form of that system, post 1854. The industrial and reformatory schools are best conceived as additions, not alternatives to, the law enforcement system, permitting a wider range of dispositions for offenders whose difference was to be youthful. For it remains a salient fact that industrial and reformatory training were not, and given that their character, were never popularly conceived, as claimable rights, in place of a prison sentence. Nor did the possibility of prison entirely disappear. The law enforcement system was more profoundly generationally divided by 1880 than it was at the beginning of the century. Certain privileges had been extended to offenders of 16 years or under, without 'fixing' that chronological boundary as the difference between adult and child. More crucially, however, the elaboration of the category juvenile carried with it clear messages about appropriate social conduct and practices, which, if ignored or violated, the response was not gestural or symbolic, but formal and coercive.

PART IV : SUMMARY AND DISCUSSION

Our foregoing analysis suggests the following historical developments, which may be summed up as follows:

a) By the end of the third decade of the 19th century, capital punishment for offenders under 14 years had virtually disappeared. Sentences were commuted to transportation.

b) By 1840, the prison service was systematically segregating convicts by age, to the extent that separate establishment (Parkhurst, Point Puer) were built specifically for male offenders under the age of 17 years. Moreover, the service experimented with separate convict ships for juvenile prisoners (e.g. the 'Frances Charlotte') in transit to convict colonies.

c) Whereas the 'phase one' reforms (a) and (b) above proceeded on the principle of age-segregated punishment, <u>pre-trial</u> prisoners mixed in loose and idle disorder, with few attempts to classify prisoners by age.

d) To this, there were two responses, evident in parliamentary commissions post-1837.

i) Attempts by magistrates to extend the power of summary justice for offenders 16 and under, so that the pre-trial 'contamination' of young offenders could be reduced.

ii) A successful attack on imprisonment as a useful means of dealing with juvenile criminals, focussing on the reformatory as the principal means of replacing Parkhurst.

e) Until 1847, few <u>formal</u> distinctions existed in the criminal law between adults and children over the age of 7. Over this age, young offenders relied absolutely on the discretion of

magistrates and judges for any mitigation of sentence, or, for dismissal of case (based on the judicial perception of 'capacity'). The evidence suggests that judicially exercised discretion mitigated the extremes of the law enforcement system.

f) Statutes of 1847 and 1879 drew age lines in criminal law, setting down unambiguously the ages (14 years in 1847, 16 years in 1879) at which magistrates could try summarily most of the offences which constituted the majority of juvenile crime. It is at these moments, the criminal law (as distinct from the penal system) distinguishes most effectively between 'the adult' and 'the child'.

g) The distinctions between convicts within the penal system along age lines, constantly runs ahead of the ambiguities of age distinctions which operated within the criminal law, and became one of the determinants of change within the criminal law.

h) Social reformers interested in 'the problem' of juvenile delinquency elaborated a subject, the juvenile, constituted by reference to the pathological, physical and cultural environment which necessarily produced victim delinquents. Unlike the precepts of criminal law (mens rea, responsibility), these social circumstances were seen as mitigating circumstances, making imprisonment inappropriate, but rehabilitation absolutely necessary, in order to interrupt the process of the reproduction of crime and the criminal class.

i) But a short step away, exampled by Mary Carpenter, was the extension of reformatory principles to children who had not yet offended, but were enclosed in a physical and cultural environment which would lead them to doing so.

j) The 'softer' institutions of the reform school and the industrial and training establishments, made available an extended range of dispositions, and gradually in response to

them, the extension of the range of offences (wandering, truancy, having licentious or criminal parents) which were applicable <u>only</u> to children. More so for children under the age of 17, than for 'adults', we find a shading off in distinction between criminality non-criminal-but-dangerous, between offence and existence.

k) The organising principle of reformatory action was premised on the well-ordered family, whose 'absence' caused the emergence of the refractory juvenile.

A recent American study interestingly confirms some of the findings presented here (Sutton 1983), albeit in a different context. Sutton demonstrates how the houses of refuge and reformatories for juvenile delinquents prefigure changes in the legal status of the child in a variety of states.

In many respects, the discovery of 'the juvenile' the institutional forms of salvation arising out of its discovery, and finally, the re-conception of young offender before the courts as a victim of a pathologically aberrant physical and cultural environment, is a sequenced process common to both countries. Perhaps this is hardly surprising given the similarity of the metropolitan contexts providing the milieu of the two child-saving movements (though the US concern was with immigrant paupers), and the shared ideologies of child saving movements - here and in the US - rooted in evangelical beliefs based on moral regeneration of young offenders, which was to take place in a suitably reforming environment (away from the home and the sreet, in a setting imbued by the qualities of the well-ordered family). The earliest refuges for juveniles were established in the US in 1824. Those, and the reformatories which followed, were known to prison inspectors such as Miles and Crawford, and to reformers such as Hill and Carpenter (though they referred to Continental institutions more often), so providing another strand of connectivity.

And like Sutton, this analysis is not primarily concerned with reformatories and industrial and training schools 'as organisational end-products of social change, but rather with them as exemplars, as sources and carriers of further changes in social definitions of childhood ... (Sutton op.cit.; 916). It is to this aspect we now turn.

The criminal law in the first half of the 19th century continuously offered a measure of protection to legal subjects under the age of seven (constituted by their total lack of criminal capacity) and to young offenders between seven and fourteen (whose lack of capacity was presumed, unless and until the contrary was proved. Note that privilege and protection was premised upon capacity; the age lines were not hard and fast, and were susceptible to judicial reinterpretation.

The statutes of 1847, 1850 and 1879 not so much re-wrote the age lines (after all allowing magistrates to try summarily all children under 14, then under 16, simply adopts the already existing chronological boundaries of the common law and the penal system), rather the statutes gave a new solidity and significance to <u>age</u> as opposed to <u>capacity</u>.

Aside from the obvious advantages of certainty in determining adult and minor status, before the law, classification by age has one other important consequence. Chronological classification homogenises the capacities of all individuals within a given age grouping. In this sense, the criminal law begins to move closer to adult-infant distinctions found in property and contact law. It facilitates the possibility, for example, of thinking about generic categories, such as juveniles, as opposed to individuals bearing differentiated capacities.

While we shouldn't attach too much importance to shift from capacity to age classification, for the two remain inextricably linked (and the relationship between the two is never entirely settled), the significance of falling on one side of an arbitrary

chronological age line begins to assume its modern form.

And where this is related to new forms of state and state-delegated institutions, which are established to deal with particular age-sets (the industrial and training schools, the reformatory, and from 1908, the juvenile court, along with compulsory schooling introduced from 1876), then age not capacity sharply etches the distinctions between adult and minor. Moreover, the chronological boundary itself becomes a form of legitimacy for treating all young 'offenders', criminal and non-criminal, differently from adults. Because they are 'children', they need protection for their own good - even where they have committed no criminal offence, but live in circumstances where they might do so.

Within the law enforcement system we can detect a significant shift in the ideology of protection and privilege. Whereas lack of capacity had the concrete effect of saving very young offenders from both criminal trial and the gibbet, with the emergence of regimes focussing upon reform and rehabilitation, then the ideology of protection serves to cast the net more widely over youthful practices. And 'protection' is offered at the expense of participating in a regime of reform, premised as we have argued, on moral regeneration within an institution structured on the principles of the well ordered family and geographical separation from the cultural practices of the working class. At this point, the very limited, moralistic character of the reformatory principle is most clear, for what was to be inculcated with bourgeois values, of filial obedience, spiritual purity, biblical notions of correct conduct, habits of industriousness at the work place and in the home, but without the significant advantages of economic security, a settled and well furbished place of residence and some purchase on the means of parliamentary participation.

We argued earlier that institutions concerned with youthful delinquency only ever directly affect small numbers of children, even from the classes most susceptible to their attentions. This, as we also argued, is not the limit of its coercive effect, because its existence is invoked as a constant threat by social controllers and by parents. In practice, the compulsory clauses of the 1876 Education Act more effectively cleared the streets of problem juveniles than the combined efforts of police, magistrates and child savers (Gattrell op.cit.; 306-307). But as with the other apparatuses of the law enforcement system, the classifications elaborated by prison officials, magistrates and child savers and made concrete within the criminal law and in the penal and reformatory system, produce within the social formation generationally located subjects. By this means, particular class and bureaucratic views, about chronological age and its relationship to criminal capacity, about appropriate age-specific behaviours, practices and attitudes, about proper parental practices and about adequate forms of treatment and rescue, acquire a universal significance.

By 1880, the possibility of a young offender under 16 being tried by judge and jury had considerably diminished (for the majority of offences except homicide, they were tried summarily), the possibility of capital punishment all but disappeared (though capital punishment remained on the statute book), the incidence of imprisonment greatly reduced (replaced by reform, rehabilitation and release to approved guardians). Considered in light of the circumstances obtaining at the beginning of the century, these exclusions mark a considerable change in location of the child within the system of criminal law enforcement. But this liberalizing trend away from shaven heads, anclets, flogging, the prison cell and prison ship, contains a central paradox. Having defined the qualities of youthfulness in terms of reformability and rehabilitation, the criminal law enforcement system could be, and was, deployed against juveniles in instances where no crime, in adult terms, had been committed.

NOTES

1. For some applications of Foucault's work to the English system of law enforcement, see John Lea (1978) and Dario Melossi (1978).

2. See for example Gattrell, et.al., study of the London Garroting Panics in 1862, a 19th century equivalent of 'mugging'.

3. Penal colonies were established at Sydney 1788 and then Van Diemen's Land 1804, necessary following the loss of the North American outlets. Transportation as a punishment can be traced back to the 12th century (banishment from the realm). In 1597 justices were empowered to banish to the galleys, rogues, vagabonds and sturdy beggars (McConville: 105).

4. See Sheehan (1977; 243) for an extended description of Newgate in the 18th century, and the free and easy traffic between prisons and the world outside.

5. The two penetential models observed in the USA were;

   a) Philadelphia system of solitary confinement. Kept in absolute solitude for five years, prisoners existed in separate cells with small exercise yards attached.

   b) Auburn and Sing Sing, the associated silent system. Prisoners worked in silence but at night were separately penned. Crawford and Whitworth returned as advocates of the solitary system, though advised that five years solitude was too long. The appeal of the separate system lay in its destructive effect on prison sub-cultures, and a much reduced reliance on corporal punishment. Pentonville and the penetentiaries which followed it, generally organised themselves on the solitary system.

6. Beccaria's study, An Essay on Crimes and Punishments was translated into English in 1767, and four further editions appeared by the end of the century (McConville, op. cit.; 80). His thesis propounded the idea punishment being in 'just proportion' to the crime, rather than asserting the doctrine of 'maximum severity'. Secondly, he asserted the end of punishment was 'to prevent others from committing the like offence' (quoted in McConville; 81). Here we can detect a shift away from the use of punishment as retribution, to the idea of sufficient punishment for the purpose of deterrence. See McConville, pp 80-82).

7. Bentham's writings on prison architecture and the function of the penitentiary come to us most forcefully through his work, Panopticon; or the Inspection House (1791). As early as 1786 however he had observed his brother's workshop in Russia and began to design an institution, 'a mill for grinding rogues into honest men' (quoted in Cooper, 1981; 676).

8. See Bentham (Chap. XIII, Collected Works (1970), An Introduction to the Principles of Morals and Legislation, 1789).

9. The pupil-teacher scheme was introduced in 1846. After a five-year apprenticeship, pupil-teachers could then compete for a Queen's Scholarship, taking them into teacher-training colleges (see Digby and Searby, 1981; 41). The Queen's Scholarship were abolished in 1861 under the Revised Code.

10. The impact of the Revised Code was to emphasise the importance of the Three R's as the foundation of the elementary school curriculum. After 1867, certain other subjects could be offered for examination (e.g. grammar, geography and history) for the purpose of obtaining grants.

11. Girl minors seem to have escaped the hulks. They also escaped the beatings but in exchange for hard labour.

12. For a brief account of the antecedents of criminal trials by jury - ordeal and battle - see Pollock and Maitland II; 632-33.

13. Under the Code Napoleon of 1810, it was a defence to show that the accused was mad at the time the offence was committed; it did not require the defence to show a causal relationship between madness and the alleged criminal act. The English conception of madness as an extenuating circumstance does require proof, both of madness and its causal effect on the alleged criminal act (Jacobs, 1971; 31).

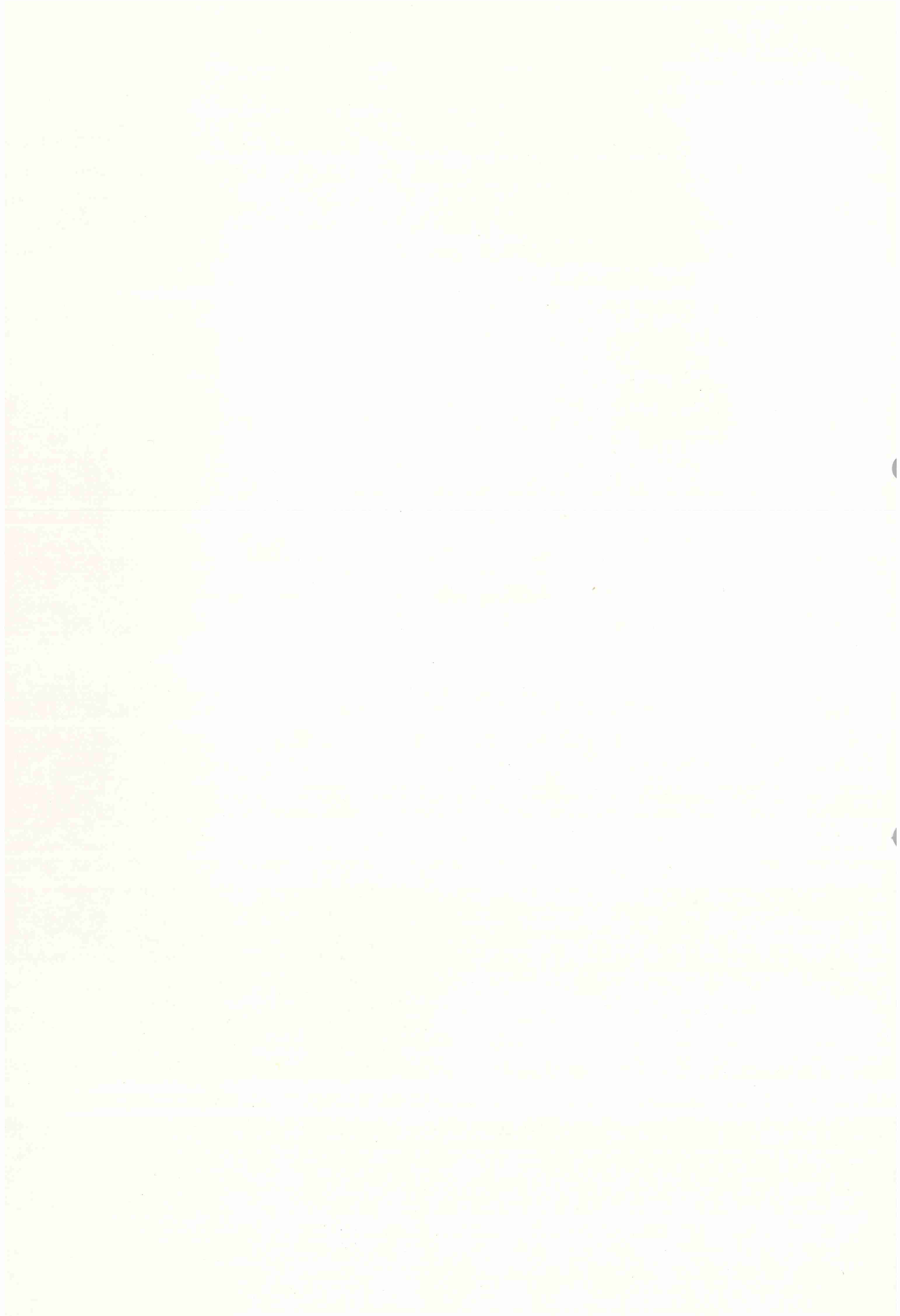
14. Bentham draws a relationship between 'circumstances and sensibility'. 'The circumstances of insanity of mind correspond to that of bodily imperfection', (Bentham 1970; 58). He then goes on to note other kinds of bodily imperfections; infancy, deqrepitude and, 'the imperfections of females' ! (Bentham, bid.). For a general account of philosophy's treatment of women, see Okin (1981).

15. Notably Humphries (1981), Hooligans or Rebels, and John Clarke (1975).

16. Convict Registers 31, 33, Archives of Tasmania.

17. See L. M. Heath (1978) 'The Female Convict Factories of New South Wales and Van Diemen's Land; an examination of their role in the control, punishment and reformation of prisoners 1804-1854'. Unpub. M.A. diss. A.N.U..

CONCLUSION



The 'history of childhood' is best realised through the analysis of the ideologies and practices which socially divide adults from children. The historical evidence suggests that the social processes which have constructed a 'difference' between generations have also rendered childhood as a protected, dependant and subordinate status.

The analysis I develop here takes as its object inter-generational relations as the means of more adequately describing and accounting for the social category of 'childhood'. Inter-generational relations have been theorised in terms of power and authority, domination and subordination, the means by which power and domination are exercised and the social consequences they have for minors. The generative ideas for this approach draw up Marxist conceptions of class and recent theorisations of patriarchy. Both are ultimately concerned with the unequal distribution of resources and with the unequal distribution of power and control. I have attempted to apply those sociological traditions to the analysis of inter-generational relations.

In terms of sociological analysis this framework represents a considerable shift away from two earlier approaches to the study and analysis of childhood and youth; the writings of Aries and the English writings on youth sub-cultures.

Aries' study of cultural and iconographic representations of children, combined with his dichotomous history (societal indifference to child-centredness) leads to the unsustainable conclusion that childhood is a relatively recent social phenomenon.

Recent 'youth studies' have focussed on two themes; street-wise cultural practices and the articulation of youth to the labour market. I have argued that the outcome has been to subsume inter-generational relations under a more overarching concern with class formation and class divisions. Early critics

of this approach pointed out that its definitions of youth were essentially male. Beyond that however, its specification of the generational qualities of youth was and remains weak because 'youth' is a category defined by shared cultural practices and by its location increasingly on the margins of the labour market. No real attempt was made to compare and contrast the situation of 'youth' as a category in relationship to the category of 'adult'. In many ways, it shared Aries' concern with sentiments, feelings and icons, though it has been informed by a sophisticated theorisation of the state which is absent from the core of Aries' study of childhood.

Unlike the above approaches, I have focussed, in a formal analysis of the law, upon the unequal distribution of economic resources, political chances and legal capacities obtaining between generational categories and the means by which those relations were achieved and maintained.

In Parts 1 and 2, the argument runs that to be 'an infant' or 'a minor' in law means to be one of the dispossessed; of land and productive capital. And if not actually dispossessed, then it means the young have no control over protective assets. The study of infancy and minority in terms of their economic significance, alone marks considerable theoretical shift away from Aries and youth studies. More generally, the concern with 'possession' and 'dis-possession' is considerably at odds with most histories of children and childhood, where the object of analysis has been child labour (its character and exploitation) in capitalistic economics. Terms such as 'infancy' and 'minority', the legal definitions of 'childhood' and 'youth' are not simply social constructs or cultural categories, they also have and imply economic meanings and consequences.

Much the same applies to legal terms arising from the laws of succession ('heir', 'bastard', 'illegitimate', and 'descendant'). Commonsensically, these are significations of social approval or stigma. In Part 2, I argue the importance of these categories because they define the legal family, membership of it and the consequences arising from inclusion or exclusion from that membership. Most importantly, the laws of succession maintain and reproduce relations of power and authority, between parents and their descendants. These laws spell out, as my formal analysis shows, the powers that elders have to dispossess their descendants and the considerable leverage they have to shape the life-chances of the young.

What else the study of the laws of succession reveals is the poverty of research on British inheritance practices. Empirical work has been the labour of economists and historians. Sociologists have had relatively little to say either in theory or substantive research. We can speculate about the changes in inheritance practices, arising from chances in the laws regulating them. We are still in the dark about transmission of property routinely passed on at death, its volume, its character, and the rules by which it is informally distributed. There is nothing as yet to suggest that the unit of transmission is other than the family.

In one respect, the analysis of inheritance systems places the study of inter-generational relations within the framework of historians of the family. Haraven, Stone, Flandrin, Vincent and Goody, to name but a few, have written about childhood within the context of inter-generational relations. They have been concerned with the <u>familial</u> distribution of power and resources, confronting not only the relations pertaining between elders and minors, but also reflecting on the relations of husband and wife, master and servant(s). One of the themes

I have tried to develop has been to locate the analysis of inter-generational relations within the family, moving the study of childhood and youth away from recent place in sociology as sub-set of class theory and class relations. I should add immediately this is partly a practical necessity pressed on the analysis by law's construction of the legal subjectivity of 'the child'.

Aside from the criminal law, the legal construction of 'infants', 'minors', 'heirs' and 'bastards', and the drawing of significant age lines such as 'majority', 'discretion', 'marriage' and 'consent' takes place in respect of the rights, duties and responsibilities of parents and/or guardians. The law relating to children is predominantly family law, or law regulating families. That conclusion is inescapable. The salient fact of infancy and minority is always to be under the protection of an elder, usually a blood-related adult. The length and nature of that protective relationship, and the character of the relations of independence and subordination which accompany it, depends on three factors, class, gender and chronological age.

All the evidence suggests that the chronological age relevant to the assumption, possession and control of property, consent to marriage and the right to leave parental custody were written by and for the landed classes. So are the differential legal incapacities which have characterised boy and girl minors. Historically, girl minors could consent to marry at an earlier age than their brothers, but could only assume an inheritance in the absence of any brothers. In that matter, males took precedence over females of the line. There are numerous other examples of male privileging. The message of the law is clear enough; the line and the estate are 'his' to maintain and reproduce. 'Her' minority status, while it could be

postponed at an earlier age, was reimposed on marriage, and with it, dependence on and subordination to patriarchal authority.

We might fairly claim that the analysis of infancy, minority and inheritance practices has thrown considerable light upon the construction of gender divisions within English law. We have argued that these divisions depend, not on the prejudice of male judges and lawyers, but on the operation of legal categories endowed with gender-specific qualities. Erase one cohort of the judiciary and replace it with another but little changes because the engendered categories and subjectivities of family law remained intact and in place. Like Carol Smart, it is argued here 'that law does not just reflect patriarchal relations, but in addition (it) reproduces patriarchal relations inside the family' (Smart 1984; 220).

The analysis of 'parens patriae' in Part 3 provides an historical account of the changing relationships obtaining between the courts, parents and children. Fundamentally, it is concerned with the process by which the state acquired the legal basis to regulate the personal relations of parents and children. Very little is known about the precise origins of 'parens patriae'. It is this doctrine which Chancery assumed and adapted for the purpose of limiting the absolute authority of fathers over their children, right he enjoyed by Common Law. 'Parens patriae' it is argued is crucial to any analysis of the state's right to regulate and intervene in the formerly private sphere of the family. Though it referred originally to the sovereign's duty to protect those who have no familial protector or guardian, through Chancery's reworking of the doctrine, it became the means by which the courts generally moved in to arbitrate familial disputes. Later legislation concerned with the protection of children

transformed the old 'sovereigns's duty' to an enforceable legal right held by a range of state (and state-delegated) officials to curtail the absolute powers of parental authority.

The rights of parents (or their designated surrogates) over children are no longer 'paramount'. The power of mothers to determine the life chances of their children has increased as against the absolute authority of the father. I have argued that this situation was accomplished by the dual system of judge-made law and by statute but the beneficiaries are not necessarily either minors or their parents. For minors at least, of those going before a court there lies the promise of freedom from want, neglect and abuse. However, these are not civil rights that minors may press for as a right *per se*. In the distribution of life chances, via education, training, privileged entry to the labour markets, access to property (and the mode of its distribution) the divisions of class and gender still obtain; as for adults, there are formal rights to be unequal. For parents of minors, the rights of parenting are still discretionary upon adhering to modes of living adjudged to be 'normal' by the professionals of welfare, and ultimately by the judiciary. You can be different, but not too different. As with teachers, I argue, parents have a 'licensed autonomy'; the trouble is, we never know is advance what that license permits until the account is called.

But the changing relations between the state, parents and children is not merely of historical interest. Since 1979 the Thatcher government has been fundamentally concerned with 'the family' in general and parental rights and obligations in particular.

The clear re-establishment of parental authority as the basis for good social order, runs concurrently with economic pressures (high youth unemployment, low rewards on training schemes and young workers' schemes), forcing minors to be more dependant upon their parents for longer (see Rhodes 1982). This is reinforced by the absence of a mandatory system of educational maintenance grants and increased pressure on parents to support their children's passage through higher education by requiring them to contribute more towards fees and maintenance. By these means childhood, and the dependant and subordinate status this entails for minors, is being visibly extended. The economic significance of 'crossing the bar' by attaining the age of majority is of decreased significance when young adults do not have the means to purchase property, enter marriage or take out credit facilities.

The study of childhood and the law would be complete without focussing on the criminal law and its subjectification of 'juvenile' offenders. The theoretical framework of Part 4 drew on Foucault's theorisation of 'discursive transformations'. In respect of how 'the social is and has been 'governed', he postulates a shift from 'punitive' to 'disciplinary' regimes of social governance. The study of the criminal law and penal system's treatment and disposition of child offenders is a sustained attempt to employ Foucault's theories in an English context. While Foucault's theoretical framework is not without its problems, it does evoke an attempt to construct a multi-faceted history of the generation of a 'social problem' and the institutionalised responses to it. The imagery of the 'juveniles', their social environment and the causes of crime identified by philanthropic bodies and by the magistrates in the early and mid-19 century (the 'mixing' of young and old on the streets and gaol),'programmes' the penal response - a regime of moral regeneration and industrial training for young offenders.

Two other findings are important here. Firstly, though I am not concerned directly with a 'history of juvenile delinquency' my study suggests that the authoritative accounts by May and by Magarey are seriously deficient in one respect. They have produced histories of boy delinquents. Girl juveniles are notably absent. A concern with generation has not been matched by a focus on gender. These partial accounts probably result partly from the absence of institutions devoted exclusively to the punishment and reformation of 'girl' offenders. These appeared post-Carpenter, after 1854. Yet, as I indicate, albeit briefly, there were girl offenders and they were imprisoned and/or transported. Unlike 'the boys', they were not segregated from 'old lags' who happened to be women.

The second point to note is the considerable variation between the criminal law's and penal system's interpretation of 'young'. Until the mid-19th century, in criminal law, offenders over 14 were strictly fully responsible for their offences, while offenders between 7 and 14 could be held responsible for any crime they committed, and providing they could distinguish between 'right' and 'wrong', they could be punished as if they were adult. The evidence suggests that in the 1830's, magistrates were subverting these age lines by constructing forms of punishment (with no strict basis in law) in order to keep the young out of gaol. Also, it is now clear that penal authorities were segregating 'juveniles' from 'adult' offenders well before the criminal law made any such formal difference as between juvenile and adult offenders on trial.

Juvenile courts have persisted with divisive dispositions directed at boy and girl offenders. Girl offenders are more likely to be placed under supervision orders than boys, for a first offence and receive supervision orders for committing lesser offences than do boys (Webb 1984). The repertoire of dispositions available for girls found guilty of committing

offences have until recently been less than the range of provision for boys (Webb op.cit.; 367). Practices we find in the 19th century criminal-penal system are strongly present in today's administration of juvenile justice. The findings here give considerable weight to one argument which runs throughout this work, namely that the law's child is a non-unitary subject.

How the diverse discourses comprising the law each constitute 'the child' as a legal subject has proved to be an effective indicator of the values and assumptions embedded in the several branches of the legal system. 'The child' has functioned as an object of inquiry and has provided the means for exploring a technique for writing a sociology of law. We have focussed on the legal subject and the means and consequences of its construction in law. The attributes the law endows on legal subjects is both a comment of the law, as institution, ideology and practice and an explanation of rights, privileges and disabilities which differentiates individuals. It is argued that these differences are not abstract but have practical consequences for individuals in all facets of social life, in the economy, politics , the family and in courts of law.

The study of law illuminates the understanding of 'childhood' to the extent that it explores the formal relationships obtaining between generations. A study of 'the child' in law adds significantly to 'the history of childhood' because is it concerned with laws, legislation and institutions which separate and divide populations on the basis of chronological age. This by no means fully realises the 'history of childhood', but contributes to that project.

We have adhered to the concept of childhood as descriptive of the material situation (historically) of infants and minors. We have argued that it speaks of the two systems which characterize that status; personal subordination and economic dependance. We have tried to indicate that these systems individuate 'the child' through the differential impact of these systems on specific age groups and to girl and boy minors. We argue that different branches of the law produce 'children' defined by their attributes as non-adult. The 'child' that the law produces is non-unitary, except in one important respect. The law's child seems to be incapable, or being non-rational or pre-logical, and as such enjoys little autonomy within the set of social relations and practices which the law constitutes around it. Granted privileges and protections, but little effective capacity to initiate legal actions, the lot of the law's child is to be in perpetual custody and all that entails.

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