CHILDREN AS PROPERTY:

HINDSIGHT AND FORESIGHT

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"Peter had heard there were in London then, –
Still have they being? – workhouse - clearing men
Who, undisturbed by feelings just or kind,
Would parish-boys to needy tradesmen bind:
They in their want a trifling sum would take
And toiling slaves of piteous orphans make"
(George Crabbe, ' The Poor of the Borough: Peter Grimes' Letter 22, **The Borough**, 1812)

Although these well-known lines from George Crabbe's poem **The Borough**, refer to the practice of workhouses, in essence, selling children (a similar instance, may of course, be found in **Oliver Twist** by Charles Dickens), it is equally clear that the practice was not confined to the workhouse. Although the workhouse may have been the ultimate Victorian method of dealing with poverty and certain types of dysfunctional family (Henriques, 1979), there can equally be no doubt that the practice was not thereto restricted. It is the purpose of this article to consider, albeit briefly, the more obvious manifestations of children as property in Nineteenth Century social history and to inquire as to how far those attitudes are still pertinent to Anglo-Australian law.

The most immediate example of children being regarded as property, and the changing nature of property as it relates generally to the subject matter of this paper and will be discussed later, relates to child labour. In the words of Pearsall (1975 at 142), 'The Victorians exploited Child Labour, not because they were particularly brutal, but because it never dawned on them that there was anything wrong with such exploitation. The use of child labour in agriculture has been sanctioned by tradition, and the pioneers of the Industrial Revolution had seen no reason why they should not use the cheap labour offered by children. The economics of the time, with the poor existing just below the poverty line, meant that any jurisdiction to make child labour illegal was greeted with hostility by the parents and it was the impassioned opposition of outsiders who eventually succeeded in curtailing a kind of slavery.' In particular, Pearsall refers to the position of apprentice chimney sweeps (or 'climbing boys') many of whom were, effectively, sold to chimney sweeps; Pearsall writes (at 144) that it was generally regarded that six years of age was the best for starting children in their trade, many were inculcated into the business eighteen months earlier, frequently Pearsall notes, by their parents. Eventually, legislation was passed which prohibited the indenture of apprentices under the age of 21, but, as Pearsall notes, that merely, '...worked to the advantage of the more avaricious parents, from whom the sweeps would buy a likely lad for a sum of money down'.

Throughout Pearsall's study of child labour, the role of parents, even though not the primary theme of the chapter on child labour in his book, continually recurs: Pearsall quotes one William Sedgwick, a cotton spinner of Shipton, who was vociferous advocate of child labour, claiming that if children of under the age of ten were not permitted to work, their parents would be injured, depriving them of the child's wage. Pearsall, indeed, points out (at 147) that, 'The ghastly conditions in which many of the children worked would not have been possible but for the tacit co-operation of the parents. ... The willingness of fathers to let their children earn enough coppers to prevent the family starving while they themselves idled indeed was capitalised by factory owners and the operators of sweat shops (1). Pearsall goes on to write that children were worked still harder by their parents if they were doing outwork.

Opportunities for proprietorial conduct were also present in the home: amongst the working class, particularly in cases where parents were not married and, indeed percentage may have been itself uncertain, '...children were convenient scapegoats, expected to starve, to bring in extra money, to fetch and carry.' That statement is all too reminiscent of the notorious and disastrous story of Maria Colwell (Stone, 1974; Howells, 1974). As Pearsall, however, points out, such instances were not confined to the lower socio-economic groups. Generally, Pearsall comments that, 'Children were often regarded as an alien species or as miniature adults; they were slotted into convenient pigeon holes. Parents were not to be inconvenienced by them. Disobedience, cheek, arrogance, these were ominous signs that life was treating the children too well, and these defects had to be eradicated.'

Lest it be thought that these views are only the product of the febrile attitude of one writer, similar attitudes have been referred to by Glyn (1970) and Altick (1973). Despite a determined attempt by Hefan (1976) to suggest that such was not the case, it is quite clear that during the Nineteenth Century, children were regarded as being capable of being sold, or as being treated as parents unequivocally wished. Put another way, they were treated as some species of property.

Before going on to discuss the present situation, it is proposed initially to consider the notion of property as it might refer to children - especially as this article is concerned both with foresight and hindsight.

Although there can be no doubt that children once were regarded as property, the situation now is rather more complex and requires some consideration of the conceptual notion of **property** before examining it. There can be no doubt that the broad idea is beginning to change, not least in relation to family matters. There have been substantial attempts to describe and encapsulate the notion of 'property' - in Australian Law, the term has been used to include whatever has a present or potential matrical value (see **Minister of State for the Army** v **Dalziel** (1948) 68 C.L.R. 261; **Bank of New South Wales** v **The Commonwealth** (1948) 76 C.L.R. 1). Posner (1977) has identified these characteristics of the idea of property. These are **university**, **exclusivity** and **transferability** (though, albeit in a difficult context, the present writer has sought to include a fourth - that of ascertainability (Bates, 1987). In Australian Family Law, 'property' is defined in s 4 of the **Family Law Act** 1975 as meaning, '... in relation to the parties to a marriage or either of them, ...property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion' Although the definition has been interpreted broadly, notably by the Full Court of the Family Court of Australia in **In The Marriage of Duff** (1977) 29 F.L.R, 46, (Tennekoon, 1981), the notion has been considerably expended since the original legislation. Thus, in **In the Marriage of Barkley** (1977) F.L.C. 90-216, the husband had assaulted the wife in the course of an argument, causing her severe ear damage. She prosecuted him privately and obtained an order for compensation and it was, thus, apparent that she had a right of action against her husband. Carmichael. J, of the New South Wales Supreme Court, took the view (at 76, 216) that the right of action was incapable of assignment and, hence, lacked one of the essential qualities of property. It must be said, in relation to **Barkley**, that the findings was not central to the decision on the broader facts of the case which he ultimately reached. Although it is quite clear from **Duff** that 'property' includes choses in action, the Full Court there did not discuss whether it included non-assignable choses in action, such as right to damages.

Since **Barkley**, however, the position has changed: in **In The Marriage of Holden** (1987) F.L.C. 91-842., the parties had commenced living together in 1975 and, in February 1985, the husband suffered a work related injury and subsequently filed a statement of claim seeking compensation for personal injuries. The parties were married in

August 1985 and separated in September 1986 and, almost immediately afterwards, the wife filed a property application and sought an injunction restraining the husband from dispersing any funds which he received in respect of his claim for personal injuries, which was the only asset belonging to the husband. The husband argued that his claim did not fall within the definition of s 4(1). Purdy J. refused to accept that contention and held that, since wide a meaning should be given to the term `property' as possible (**In the Marriage of Duff**, above), a personal injuries claim was a chose in action falling within the definition of `property' in s 4(1) of the **Family Law Act**.

Although, unfortunately perhaps, Purdy J. did not discuss the applicability of Posner's criteria (above) to the case at hand, **Holden** is consonant with developments both actual and presaged. Thus, there is an ongoing dispute in the United States as to whether degrees and professional licenses can amount to property for the purposes of distribution on dissolution of marriage (Dates, 1986). It is, of course, clear that the major hurdle which supporters of the view that such awards should be regarded as matrimonial property is the question of assignability. Although it does now appear (see the decision of the Colorado Supreme Court in **In re Olar** (1988) 14 Fam. L.R. 1125) that the majority of United States jurisdictions will not regard qualifications as property, it is an argument which is frequently raised, sometimes successfully (**O'Brien** v **O'Brien** (1985) 12 Fam.L.R. 2001).

Developments along these lines had been predicted by Pound (1954) who attributed the increasing recognition of new types of property, particularly group property, to the increase in number and influence of groups in our presently highly organised society. One such group is, of course, the family. Although the family has received scant recognition as a legal group (Bates, 1979; Dickey, 1982), notions of **family** and property have long been intertwined (Bell, 1962) and, indeed, their linkage has been regarded as a precondition of established society. Yet again, the likelihood of significant change has been emphasised by Glendon (1981). Drawing on an important article by Reich (1964), Glendon suggests that, for most people, their employment or profession, and work related benefits such as pensions, have come to be the principal forms of wealth, and, for many others, claims against government are their main source of subsistence. These writers argue that these with forms of property are, not only our chief forms of wealth, but are the bases of the various statuses in society and, as such, they ought to be accorded legal protection similar to that which the legal system has accended to more traditional forms of property and wealth. Glendon goes on to tie the notion of the `new property' to the 'new family' which she designates as, '...referring to that group of changes that characterizes 20th century western marriage and family behaviour, such as increasing fluidity, detachability and interchangeablity of family relationships; the increasing appearance, or at least visibility, of family behaviour outside formal legal categories; and to changing attitudes and behaviour patterns in authority structure and economic relations within the family.' Glendon concluded her study by stating that, 'Current changes in family behaviour, property and law, and ways of thinking about them, contain bewildering possibilities for good and ill, for renewal or deterioration. It seems likely that, in the future, what we have called the new family and the new property will be seen as transitional phenomena and identified with a period of extreme separation of man from man, and man from nature.'

All of this, Glendon's last sentence notwithstanding, does not mean that children are, or should be, treated as some species of property, within or without orthodox family structures. Though there have been **dicta** in various Nineteenth Century cases which emphasised notions of parental or, more accurately, paternal right. - in Australia, the statement of Lilley C.J. of the Supreme Court of Queensland in **Re Ewing and Ewing** (1981) 1 q.l.d. 15 AT 15 to the effect that, 'There is no question as to the legal right of the father to the custody of his children. The law makes the father the absolute lord of both wife and children...' will be remembered. Similar statements may be found throughout the common law world (in England, see **R** v **De. Manneville** (1804) 5 East 221; In Canada, **Re Coram** (1886) 25 N.B.R. 404). However, it is generally clear that the history of parent-child relationships has also been the history of the weakening of such claims of right (Hall, 1972; Bates, 1977). However, the indirect use of property type concepts in the area of parent and child law may be, or has been, of some relevance: thus, in the early but well-known case of **Herring** v **Boyle** (1834) 6 C. & P 496 a schoolmaster (in the words of Bolland B, '...quite improperly...') had detained a boy at school during the holidays because his parent had not paid the fees. Despite the apparent impropriety of the defendant's action, the Court of exchequer held that he was not liable in false imprisonment. Although it is clear that the decision turned on whether the child knew of any act of detention and whether there was evidence of actual restraint, the fact that no liability on the defendant's part was found is not without significance, the more so, as Dias and Markesinis (1984) point out, it was not clear from the report as to whether the boy was imprisoned in fact. Further, as Dias and Markesinis (1976) comment, the case was in no way treated as involving an interference with the point's right to custody as it might have been in other European jurisdictions. Although the parent in **Herring** v **Boyle** ultimately recovered the child after making an application for **habeas corpus**, the matter does not end there. Weir (1983) uses **Herring** v **Boyle** as authority for the rule that there is no lien (that is, a right to detain a chattel until a money claim is made) on people, but, at the same time, it raises the issue of whether the result would have been different had a written contract for the child's education contained the term, 'Under no condition will boys be allowed to return home until outstanding fees are paid.'

In the United States, there have been similar developments: hence, Tribe (1978/9) has compared (at 989) cases where the child is pitted against outside institutions with cases where the child is seeking aid from outside institutions, and concludes that both lines of cases, '...move in the parallel situation of reduced parental control.' Tribe has also found that cases which have been categorised as involving '...``family rights'' emerge as rights of individuals only.'

All of this would tend to point away from children being regarded as property, both at the present time and in the future, but it is only a part of the story. First, at least some of the developments which have been outlined above have not gone uncriticised. Hafen (1977), for example, sees many of the case law developments as introducing arbitrary and subjective tests of `maturity' and `competence' instead of the simple and objective test of majority. It is likely that this approach is flawed, both conceptually and contextually, for, as I have pointed out elsewhere (Bates, 1978), the law is frequently required to make assessments of individual competence, involving both children and others. More fundamentally, Hafen has critcised the cases on the grounds that they place children on the same plane as their parents in relation to the state and its agencies, which, in turn (Hafen, 1976), would be a possible step towards, '...child initiated divorce on simple incompatibility grounds.' Although such an idea is not unknown in Australia, it has not taken (one journalistically publicised instance apart) hold, but Glendon (1981) cites the Swedish commentator Jacobson (1979) who has urged just such a course. In the United States, contrary to Hafen's thesis, Karst (1979 at 644) has identified a developing constitutional right of `intimate association,' which would include the right of a child, '...after some critical stage of child development...' to choose her or his parents. Against this broad background, Hafen's views are of no little importance, even though there may be, in a society which ought to be aware of physical (see, for example, Oates, 1985) and sexual (Briggs, 1986) abuse, little objective justification for them. Hafen's views are important because they are indubitably shared, probably in less sophisticated terms, by many individuals and parents, in the Australian Community at large. Put another way, although the English writers Dingwall, Eekelaar and Murray (1983) have argued a strong and cogent case for a greater level of state intervention, many people would, for whatever reason, seem keener to adopt the view of Watson (1977 at 96) that the family is an area of human activity where 'Law keeps out.'

The reason why many parents would subscribe to the latter view is that the closed family enables them to impart their own values to their children without fear of state agency intervention. Although in the vast majority of cases, that process is inevitable, desirable

(Parsons and Bales, 1956) and uncontentious, there may be instances where that is far from the truth. Indeed, with increasing frequency, or so it seems, the courts are being required to make determinations on the scope of parental influence over children, and, further, the way in which they exercise that influence can tell the observer much about the way in which they perceive their relationship with their children. A useful starting point is provided by the decision of the Full Court of the Family Court of Australia in **In the Marriage of Plows (No2)** (1979) F.L.C. 90-712. There, in a dissenting judgement Asche S.J. identified , (at 78,799) eight areas of social activity which were denied to the children interested in the custody issue by reason of their mother's membership of a particular religious group. These were that, first, the children were not permitted to eat with others outside the sect; second, that they were discouraged from socialising with others; third, they were not permitted to visit public beaches; fourth, were not permitted to pursue tertiary education; fifth, were not allowed to listen to radio or watch television: sixth, were not allowed to visit places of public entertainment; seventh, they were not allowed to participate in team sports or, finally, to join clubs or take part in communal activities. Despite these considerations and the comment of Asche S.J. (at 78,801) that the mother's, ...whole life revolves round her church and its members. One could hardly forbid her to have members of the church visit her when she had the children; or never to discuss church or religious affairs with other people in the children's presence. By her own choice the only people she associates with are members of her church...,' the court ultimately made an order for joint custody. Although the order was made subject to the conditions that the wife was to have care and control during the working week and the father (who had been expelled from the sect) at weekends and that the father's consent was to be obtained before the wife could take the children to religious meetings, it seems clear that the mother's influence on the children would still have been considerable. **Plows (No2)** is a very disturbing case because it, first of all, involved overturning a decision at first instance **(In the Marriage of Plows (No1)** (1979) F.L.C. 90-607) where the trial judge had had the opportunity of observing the parties directly. Second, orders for joint custody are themselves fraught with inherent difficulties (Bates, 1983;**cf** Lehmann, 1984) and the potential for further litigation ought to have been immediately apparent (such, indeed, proved to be the case; see **In the Marriage of Plows (No3)** (1980)F.L.C. 90-854). Finally, and most important, it is highly unlikely that, given the mother's commitment to her religious group, she would refrain from seeking to inculcate her religious values in the two children of the marriage and would, doubtless, have considered herself justified in so doing.

Although it may be argued the participation in religious activities is, of itself, beneficial (Goodman, 1981), the participation of children and young people in other forms of activity may not be so regarded. Such was the emphasis of Lord Templeman's minority judgment in **Gillick** v **West Norfolk and Wisbech Area Health Authority** [1986] A.C. 112. The facts in **Gillick** are, by now, well known: in December 1980, the British Department of Health and Social Security issued a circular to area health authorities containing, *inter alia, advice to the effect* that doctors consulted at family planning clinics by girls under 16 would not be acting unlawfully if they prescribed contraceptives for the girls so long as in doing so they were acting in good faith to protect them against the harmful effects of sexual intercourse. The circular further stated that, although doctors should proceed on the assumption that advice and treatment on contraception should not be given to a girl under 16 without parental consent and that they should try to persuade the girl to involve her parents in the matter, nevertheless the principle of confidentiality between doctor and patient applied to girls under 16 seeking contraceptives and, therefore in exceptional cases, doctors could prescribe contraceptives without consulting the girls' parents or obtaining their consent if, in the doctor's clinical judgment, it was desirable to prescribe contraceptives. The plaintiff, who had five daughters under the age of 16, sought an assurance from her local area health authority that her daughters would not be given advice and treatment on contraception with the plaintiff's prior knowledge and consent while they were under the age of 16. When the authority refused to give such an assurance, the plaintiff brought an action against the authority and the department seeking, first as against both the department and the area health authority, a declaration that the advice contained in the circular was unlawful, because it amounted to advice to doctors to commit the offence of causing or encouraging unlawful sexual intercourse with a girl under 16, contrary to s. 6(1) of the English Sexual Offences Act 1956, or the offence of being an accessory to unlawful sexual intercourse with a girl under 16, contrary to s. 6(1) of that Act. Secondly, as against the area health authority, a declaration that a doctor or other professional person employed by it in its family planning service could not give advice and treatment on contraception to any child of the plaintiff below the age of 16 with the plaintiff's consent, because to do so would be unlawful as being inconsistent with the plaintiff's parental rights. By a majority, the House of Lords upheld-the action of the local authority.

A detailed analysis of this important decision is beyond the scope of this paper and has been attempted elsewhere (Eekelaar, 1986; De Cruz, 1987), but certain of the views expressed both in the House of Lords and in the Court of Appeal, the decision of which was reversed, are of direct relevance. In particular, Lord Templeman in the House of Lords (at 201) commented that, `...a doctor with the consent of an intelligent boy or girl of 15 could in my opinion safely remove tonsils or a troublesome appendix. But any decision on the part of a girl to practise sex and contraception requires not only knowledge of the facts of life and of the dangers of pregnancy and disease but also an understanding of the emotional and other consequences to her family, her male partner and to herself. I doubt whether a girl under the age of 16 is capable of a balanced judgement to embark on frequent, regular or casual sexual intercourse fortified by the illusion that medical science can protect her in mind and body and ignoring the danger of leaping from childhood to adulthood without the difficult formativeyears a girl under 16 needs to practise but sex is not one of them' His Lordship continued (at 206) by saying that, although a medical practitioner was entitled to give confidential advice to an infant, the law would uphold the right of a parent to make a decision which the minor was not competent to make. "The decision," he said, "to authorise and accept medical examination and treatment for contraception is a decision which a girl under 16 is not competent to make. In my opinion a doctor may not lawfully provide a girl under 16 with contraceptive facilities without the approval of the parent responsible for the girl save pursuant to a court order, or in the case of emergency or in exceptional cases where the parent has abandoned or forfeited by abuse the right to be consulted.'

Lord Templeman regarded it as 'offensive to professional standards, that a medical practitioner should provide contraceptive facilities against the '... known or presumed wishes...' of the parent. Still more strongly, he went on to say that, "If the doctor discovers, for example, that the girl is not living with a parent but has been allowed to live in an environment in which the danger of sexual intercourse is pressing, the doctor may lawfully provide facilities for contraception until the parent has been alerted to the danger and has been afforded the opportunity to reassert parental rights and to protect the girl by means other than contraception." Further, Lord Templeman referred in more detail to abuse of parental rights, which might result in the dangers of sexual intercourse emanating from the girl's home. In such a case, the medical practitioner would be, '...entitled to provide the girl with contraceptive facilities but would then be bound to consider whether the local welfare authorities should be alerted to the possibility that the girl is in need of care and protection. Again, the doctor may be satisfied that the parent is a brute and that the girl has been driven to seek solace outside the family. The doctor might decide that it was necessary to provide contraceptive facilities for the girl without informing the parent but the doctor would be bound to consider the possible consequences if the parent, known to be brutal, discovered the truth.' Last his Lordship referred to medical emergencies where, for instance, the minor was, "...unable to control her, sexual appetite or is acting under an influence which cannot be countered immediately" - when the doctor would be entitled to prescribe contraceptive facilities as a temporary measure, but would be bound to inform the parent.

The views expounded by Lord Templeman were similar to those expressed by all of the judges in the Court of Appeal, before whom the plaintiff had been successful. In particular, Eveleigh L.J. (at 148) states that, 'On the one side it is said that the child must be protected against the stress which pregnancy will cause. On the other side it is pointed out that the girl who indulges in sexual intercourse may suffer from remorse not only for having herself transgressed but for involving a man who may find himself charged with a criminal offence. One would like to think that a great majority of girls would not take part in unlawful sexual intercourse if it were not made easier to do so with impunity and if they did not feel that they would be seen to be standing apart from their less inhibited associates. A parent should be helped not hindered in providing the assurance and the comfort and the advice which such a child might need.'

The Judge continued by commenting that, '...the courts have always lent their assistance to the parent who seeks to prevent harmful associations between the child and an undesirable man. The provision of a contraceptive device by a doctor who knows nothing of the girl or her companions may be furthering such an association.' Eveleigh L.J. further stated that, "The responsibility of a parent for the upbringing of the child is emphasised by the fact that the parent may be made to answer in the criminal courts for a child's misbehaviour. Home background and parental indifference are frequently pleaded as the reason that the child is a delinquent. Parental authority should not be undermined.' At the same time, Eveleigh L.J. conceded that, in some families, `...even where the members are closely united and where the parents try to maintain high standards, the parents may prefer not to know. They are best able to understand the relationship between themselves and their children and to decide what it best. A mother may wish to protect her child against the wrath of a puritanical father should he learn that a child has sought contraceptive help.' Hence, it followed that it was impossible to say that a parent who adopted the attitude of the plaintiff was not acting in the interest of the child.

Parker L.J. relied (at 124) on s. 86 of the **Children Act** 198G, which described the notion of legal custody of children as involving, '...so much of the parental rights and duties as ..... to the person of the child (including the place and manner in which is spent)...' He went on to say that if a right and duty existed to determine the place and manner in which the child's time is spent, such right or duty must cover the right or duty **completely to control the child** (author's italics), subject only to the intervention of the court. Again, Parker L.J. (at 133) said that, at least so far as the civil law was concerned, he had not found any legal authority supporting the proposition that, '...at **least** up to the age of discretion after a child itself or anyone dealing with the child can lawfully interfere with the parents' rights flowing from custody.' Parker L.J. then continued (at 133) by remarking that he fully appreciated that, '...information to the parent may lead to family trouble and that knowledge that going to the doctor involves disclosure to parents may deter others from seeking advice and treatment with, possibly, highly undesirable or even tragic results. A parent who, for example, had fought hard for the rights which Mrs. Gillick seeks and had won the battle, might thereafter wish that she had never fought it, for it might lead to pregnancy, a back street abortion and even death. Such matters are, however, matters for debate elsewhere. If it be the law that until a girl is 16 no one may, save by the intervention of the court, afford advice or treatment without the parent's consent, then that law must be observed until it is altered by the legislature.'

Similar points were made by Fox L.J. : notably, in a tone reminiscent of Hafen (1977, above), the judge commented (at 144) that, ` That the common law developed a principle enabling a child to override parental wishes and to consent to the taking of major decisions concerning him provided it could be shown that he was of sufficient understanding seems to be unlikely. It is inconvenient in practice in that it may give rise to subsequent doubts, and difficulties of proof, as to whether the child does have sufficient understanding. The degree of such understanding might vary considerably according to the nature of the matter to be decided.' He went on to reject (at 145) a suggestion that, whilst the medical practitioner should be bound to inform the parents of his intention to provide contraceptive treatment, if the parents do not consent within a reasonable time, he should be at liberty to proceed, even if the consent is ultimately refused. The judge took the view that such an interpretation, `... reverses the existing legal position which, subject to the ultimate power of the court, gives the final decision to the parents and not to the doctor. That is the consequence of the right of control which, as I have indicated, seems to me to follow from the right to custody.'

Although this article, as stated earlier, does not purport to attempt a detailed analysis of the **Gillick** decision - and Mrs. Gillick did not, in the end, prevail - the phraseology employed by Lord Templeman in the House of Lords and the three judges in the Court of Appeal seems to carry the rhetoric of property (Goodrich, 1986). Words such as 'rights', 'control', more applicable to property than personal relationships, occur with obvious regularity. As Berman put the matter (1974), 'The Protestant concept of the individual became central to the development of the modern law of property and contract. Nature became property. Economic relations become contract. Conscience became will and intent... The property and contract rights so created were held to be sacred and inviolable, so long as they did not contravent conscience.'

It is not hard to move from rhetoric to a serious attempt to justify property rights - especially **alienability** (above). Not wholly surprisingly, Posner (1977) has advocated the sale of babies instead of the present form of adoption. Posner's immediate rationale for such a process is the shortage of babies available for adoption in the common law world (Green, 1982; Samuels, 1982). This, Posner regards as an artifact of government policy, particularly the uniform state policy specifically forbidding the sale of babies, and he refers to the `black market' in babies (94th Congress, 1975). He is critical of adoption agencies, whose monopoly of adoptions ensures that the supply of babies remains inadequate. Posner then goes on to attempt to refute the arguments which are most generally advanced in opposition to the sale of babies. First, he rejects the argument that there is no assurance that adoptive parents who are willing to pay the most money for a child will resurringly provide it with the best home on the grounds that, '...willingness to pay is a generally reliable, although not infallible, index of value, and the parents who value a child the most are likely to give it.' He further claims that the existence of a market in babies would increase the natural mother's incentive to produce healthy babies or, indeed, make her more selective her choice of sexual partners.!

Posner goes on to suggest that, at the very least, the sacrifice of a substantial sum of money would attest to the seriousness of the purchaser's desire to have the child. The argument against that, as Posner admits, is that such parents may value the child for the wrong reasons - exploitation, for instance, for sexual purposes. Posner, thereupon, claims that permitting the sale of children does not mean their sale for all purposes. Hence, '... the laws forbidding child neglect and abuse would apply fully to the adoptive parents (as they do under present law, of course).' Yet the fact that these laws exist does not mean that they are capable of effective and immediate enforcement.

Posner then seeks to counter the argument that the payment of a large sum might exhaust the adoptive parents' financial ability to support the child. Were that the case, he argues, the equilibrium price of babies would be low, as potentially adoptive parents would consider the total cost of rearing and obtaining the child, rather than merely the purchase price. Furthermore, in a free market, competition would tend to compress the price of babies for adoption to the opportunity costs of the natural mothers.

In the present situation, Posner claims, the black market price is high because it is required to cover the seller's expected punishment costs for breech of the law and also because the existence of these legal sanctions presents the utilisation of the most efficient methods of matching up sellers and buyers. At the same time, the black market price might be lower than that in a legally regulated market, as buyers receive no legally enforceable warranties or guarantees. 'The buyers in a legal baby market,' he writes, 'would receive a more valuable package of rights and it would cost more: the seller would demand compensation for bearing risks formally borne by the buyer.

Posner also rejects the view that the rich would, '..end up with all the babies, or at least

all the good babies.' Although he seems to suggest that the result might be in the children's best interests but would be unlikely to eventuate because people with high incomes tend to have higher opportunity costs of time and tend to have smaller families than the poor and permitting the sale of babies would not change that state of affairs. 'Moreover,' he says, " the total demand for children on the part of wealthy childless couples must be very small in relation to the supply of children, even high-quality children, that would be generated in a system where there were economic incentives to produce children for purchase by childless couples. Not only would the supply of high-quality children be greater, but a consistent positive correlation between quality and price is not to be expected because of the difficulty of determining the quality of a newborn child...' The poor, indeed, Posner continues, might actually fare worse under present adoption laws than under the scheme which he urges, as individuals who presently fail to meet the economic criteria specified by adoption agencies might, in a free market with low prices, be able to adopt children just as they may now buy colour television sets.!

Posner finally rejects the idea that the selling of babies is **per se** unacceptable because it involves the process of trafficking in human lives. He notes that the basis for that objection is unclear, but may, in any event, have been discredited by changes in public policy relating to abortion.

It is unlikely that Posner's views will have much currency with most groups of people if, for no other reason, than that they would be regarded as immoral. Posner would be unlikely to be troubled by such a suggestion as the thrust of his work is the innate compatibility of economic analysis and law. Similarly, the strict adherents of Hayek (1952) and Friedmann (1980) would be similarly untroubled and, given the wide acceptance of those views, Posner's thesis might not prove unattractive to some persons of influence. At the same time, modern writing on jurisprudence has tended (Finnis, 1980; Detmold 1984) to emphasize the relationship of law and philosophical ideas of morality.

However, preponderance of theory is, of itself, insufficient to refute Posner's radical suggestion. Curtailing of unofficial adoptions seems to have been a policy throughout the common law world (Hoggett and Pearl, 1987) and justified on the grounds of lack of success of such adoptions (Wither **et al**, 1963). Analogous situations have been recently disapproved by United States courts: first, in **In Re Baby M** (1988) 14 Fam. L.R. 2007, the New 5 views will be of little practical effect.

The law has also concerned itself with the position of unborn children: in **D (a minor)** v **Berkshire County Council** [1987] 1 All E.R. 20, the House of Lords decided that, when considering the need to make a care order in respect of a baby born with drug withdrawal symptoms, the juvenile court had properly taken events into consideration which had taken place before the birth of the child. The child's physical condition at birth, which had required her removal into intensive care of several weeks, was the drug addicted mother's persistent and excessive use of drugs during her pregnancy. That situation, coupled with the mother's continuing to take drugs after the birth of the child, resulted in the magistrates finding that, as required by s 1 (2) of the English **Children and Young Persons Act** 1969, the child's proper development was being avoidably prevented or that her health was avoidably impaired at the time of the hearing and that a case order was necessary under the Act. The point of the decision is, as Fortin (1988) notes, is that, first, although medical practitioners may recognise the idea that a child's ante-natal existence should not be ignored, it is a well established principle of law that a child does not acquire an independent legal status until birth (see **Paton** v **British Pregnancy Service Trustees** [1979] Q.B. 276; **CvS** [1987] 1 All E.R. 1230) and **D** demonstrates how that, in certain circumstances, the law may properly concern itself with the welfare of unborn children. Second, and following, as Fortin concludes, the fact that an unborn child is physically dependent on its mother prior to birth, need not lead to the assumption that it has no relevant separate existence nor to the assumption that it has no moral or legal significance. Here again, from a court of high authority, one finds refutation of the notion of property in children.

All this must appear remote from Australia, but developments, particularly in the United States, frequently presage developments elsewhere (Bates, 1982) and forces tangential to Posner's thrust are not unknown here. Thus, Division 6 of the **Family Law Amendment Act** 1987 is principally aimed at ensuring, '...that children receive a proper level of support from their parents.' It is clear that the purpose of this Division is to remove the burden of maintenance of children of parents whose marriages have been dissolved is moved to these parents rather than fall on state agencies. The high level of non-compliance with maintenance orders, both in Australia (Kovacs, 1974) and elsewhere (Eekelaar and Maclean, 1986) is well known, but one must question the wisdom of the financial welfare of children being imposed on families which are provenly dysfunctional. It is quite proper to ask whether at least a part of government motivation in seeking to shift that particular burden was because the children could be regarded as the generated property of the parents.

The conclusion to this paper is inevitably tentative, but, nonetheless important: although we have come some considerable distance from the situation which pertained in the mid-Nineteenth Century, some of the attitudes which helped to bring that state of affairs about are still represented in judicial opinion and academic writing. As earlier suggested, individual parts must be evaluated in the context of the whole. Attitudes towards the tripartite relationship between child, family and state are in a state of flux because of the many and desperate influences to which it is subjected. Just as attitudes to property change, so do attitudes towards children; it is certainly true that property is an expanding, rather than a deceiving notion, whilst ideas regarding control of children, both in terms of control of behaviour and physical custody is less clear cut. Care must be taken to ensure that the two areas of socio-legal activity do not come too close together without careful theoretical, moral and practical scrutiny.

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