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**Law and norm: justice administration and the human sciences in early
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**David McCallum
School of Social Sciences
Victoria University
Box 14428 MC Melbourne
Australia
david.mccallum@vu.edu.au**

Law and norm: justice administration and the human sciences in early juvenile justice in Victoria*

David McCallum

ABSTRACT

A recurring motif in law and legal studies literature is the relations between justice and legal administration on the one hand, and the social and human sciences on the other. Judicial and non-judicial systems of knowledge and practice are viewed as separate and distinct, as in some recent critique of the 'New Penology' that posit fundamental tensions between justice and welfare models of penality. Alternately, theorists have 'de-centred' law by focusing on the way in which problems form at the intersection of both legal and extra-legal institutions. This paper reviews the literature on the close interconnectedness of 'welfare' and 'justice' models of penal policy and ways of conceiving these relations in terms of a 'complex' involving justice administration and the conduct of the human sciences. It then attempts to demonstrate these relations, historically, in the 'cross-talk' of agencies involved in establishing the children's court and the court clinic in Victoria. Finally, the paper argues that the specific effects of law in this particular jurisdiction were to mandate the social scientific instruments needed to construct and promote the notion of a 'normal family'. This account may have implications for contemporary juvenile justice policy and images of family in the present.

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JUSTICE ADMINISTRATION AND THE HUMAN SCIENCES

The history of juvenile justice has often been characterised in criminological and socio-legal literature as a dichotomy between two seemingly opposite models of 'justice' and 'welfare'. Irreconcilable tensions between judicial and non-judicial agencies overseeing

juvenile justice, or historical pendulum swings between these models, were considered to be the springboard for changes in penal policy over time. However, following David Garland's¹ identification and analysis of the 'penal-welfare complex' taking shape around the turn of the 20th century, socio-legal critique has shown that shifts in penal policies are more complex than the two-model approach suggests, particularly as applied to juvenile justice. Evaluation of moves towards a so-called justice model in Australia during the 1980s, for example, concluded that the contrasting models should be viewed as 'ideal types', given that actual changes in the workings of the justice system were not as substantial as the 'two models' rhetoric seemed to suggest.² The distinction also camouflaged important strategic alliances between judicial and non-judicial agencies in the business of 'judging families' in children's court proceedings.³ Pratt proposed a third model, 'corporatism', focusing on the operational aspects of delinquency management, that attempted to describe an increasingly centralised level of administrative decision-making and greater sentencing diversity. The model drew attention to the ways in which commonsense, agency structure and routine, rather than professional knowledge, informed the practices of child experts.⁴ In 1994, a conference of European juvenile and family court magistrates discussed a total of five models that have been used to describe

¹ David Garland, *Punishment and Welfare* (1985)

² Ngaire Naffine, 'Philosophies of juvenile justice' in Ngaire Naffine and Joy Wundersitz (eds), *Juvenile Justice. Debating the Issues*, 1993, 2-17; John Seymour, 'Children's Courts in Australia: their current role and functions' in A. Borowski, and I. O'Connor (eds) *Juvenile Crime Justice and Corrections* (1997) 292-306.

³ Kerry Carrington, 'Policing families and controlling the young', in Rob White and Bruce Wilson (eds), *For Your Own Good. Young people and State intervention* (1991), 108-117.

⁴ John Pratt, 'Corporatism: the third model of juvenile justice' (1989) 29 *British Journal of Criminology*, 236-254.

different approaches to juvenile justice, arguing that the diversification and multiplication of agencies involved has led to the ‘elaboration of complex models which draw all those who deal with juvenile delinquency into a single network’.⁵ Indeed, some authors have identified a ‘deep crisis’ in juvenile justice thinking, led in part by the incessant demands for repression and punishment, that has raised doubts about the survival of a specialised justice system for minors and has accelerated calls for the abolition of juvenile courts altogether.⁶

The characteristics of penal policy in the past decade or more, such as actuarialism and the ‘New Penology’, have been linked to the effects of broader political

⁵ Gatti, U. ‘Types of Judicial Response to Juvenile Delinquency’ in *Young Offenders and their Families – The Human Rights Issue* (1998). Proceedings of the 14th International Association of Juvenile and Family Court Magistrates Bremen, Germany, August 28 to September 2 1994, 182.

⁶ Gatti, ‘Types of Judicial Response’, above n 4. See also Janet Ainsworth, ‘Re-imagining childhood and reconstructing the Legal Order: the case for abolishing the Juvenile Court’ (1991) 69 *North Carolina Law Review*, 1083-1133; B. C. Feld ‘Juvenile (in)justice and the Criminal Court Alternative’ (1993) 39 *Crime and Delinquency* 403; J Doek, ‘The juvenile court: an endangered species?’ (1994) 42 *European Journal on Criminal Policy and Research* 2.

movements, in particular, the rise of neo-liberalism or ‘economic rationalism’.⁷ Its more punitive measures, in both adult and juvenile jurisdictions, incapacitate and incarcerate rather than seek to correct and reform, and increase the efficiency of penal power. As Simon put it, ‘... changing people is difficult and expensive’.⁸ According to some critics, the number of available approaches to penalty has led to diversity, volatility and even incoherence.⁹ The mix of crime control policies such as retribution, restitution and incapacitation has been understood as a result of tensions and contradictions internal to neo-liberalism. But O’Malley argues that the rise of neo-conservatism has extensively modified and curtailed programs based on ‘risk models’, and expanded those based on punishment and discipline. In his view, models of penalty reflect the nature and fortunes of political programs with which they are aligned.¹⁰

⁷ Ngara Naffine and Joy Wundersitz, ‘Trends in Juvenile Justice’ in D. Chappell and P. Wilson (eds) *The Australian Criminal Justice System: The mid 1990s* (1994); Pat O’Malley, ‘Neo-liberal crime control – political agendas and the future of crime prevention in Australia’ in Chappell and Wilson, *The Australian Criminal Justice System: The mid 1990* (1994) above, n 6; O’Malley, ‘Volatile and contradictory punishment’ (1999a) 3 *Theoretical Criminology* 175-296; O’Malley, ‘Social justice after the “death of the social”’ (1999b) 26 *Social Justice* 92-100.

⁸ Jonathan Simon, ‘The Ideological Effects of Actuarial Practices’ (1988) 22 *Law and Society Review* 773.

⁹ David Garland, ‘The limits of the sovereign state. Strategies of crime control in contemporary society’ (1996), 36 *British Journal of Criminology* 445-471; Pat O’Malley, ‘Risk, power and crime prevention’ (1992) 21 *Economy and Society* 252-275; O’Malley, ‘Volatile and contradictory punishment’, above n 6.

¹⁰ O’Malley ‘Risk, power and crime prevention, above n 8.

A number of the important questions pursued by Garland in his original study of the penal-welfare complex in Britain remain unresolved or unexplored in Australia.¹¹ They include the relations between penal policy and broader patterns of social change, and also the specific historical effects of the human sciences (criminology, psychiatry and psychology, social work, etc.) on penal practices. These kinds of questions underscored Garland's major claim that the penal-welfare strategy formulated in Britain at the end of the 19th century represented a decisive break with classical Victorian penality. In Garland's study, the criminological program carried much of the significant reformist, welfare-oriented and scientifically-based technologies such as preventative and curative instruments that could identify criminality and remove it from the community. However, Garland claims that while criminology repeatedly offered the arguments and legitimations for intervening in the social body, it had no effective means of carrying this out.¹² This is an important argument, particularly since there is a working assumption in much of the history of penality that so-called welfarist approaches involved 'real' interventions – therapeutic, educative, economic - in the lives of children and families. But the weakness of many accounts, which Garland himself acknowledges, derives from a dependence on discursive resources like government reports, scientific inquiries or criminological texts to describe these systems. In his overarching conclusion about the relations between penal discourse and penal practices, Garland writes:

penal discourse is as much concerned with its projected image, public representation and legitimacy as it is with organising the practice of regulation. With regard to penal practice, then, it can hardly be taken as an accurate account ... Instead it should be regarded as partly constitutive of penal practice, and partly its ideological representation. Only detailed study of particular instances can specify the precise balance of these elements.¹³

¹¹ Garland, *Punishment and Welfare*, above n 1

¹² Garland, *Punishment and Welfare*, above n 1, 106

¹³ Garland, *Punishment and Welfare*, above, n 1, 261-2

Problems in positing justice and welfare as separate historical entities have led researchers in ‘governmentality’ studies to question how law and discipline act to regulate modern societies. Genealogical approaches have attempted to ‘de-centre’ law and judicial administration, and focus instead on the regulatory ‘action of the norm’ and normalisation.¹⁴ The literature deriving from Foucault’s account of law and norm questions assumptions about the specific power of law, as distinct from the kind of power exercised through interventions aimed at normalising family life and regulating the upbringing of children. But whether they read or ‘misread’ Foucault as having ‘expelled’ the law along with the sovereign, these innovations warn against forging distinctions that would simply replace techniques of law with techniques of normalisation.¹⁵ Ewald captures the sense of complementarity that exists at the intersection of both legal and extra-legal institutions, using the concept of ‘social law’ to describe historically the welding of law to the power of norms:

The norm is a means of producing social law, a law constituted with reference to the particular society it claims to regulate and not with respect to a set of universal principles. More precisely, when the normative order comes to constitute the modernity of societies, law can be nothing other than social.¹⁶

Rather than leading to the ‘expulsion of law’,¹⁷ strategies of discipline and bio-politics – central concepts in the Foucauldian notion of government in modern societies – have required to be framed in the languages of law. For Rose and Valverde for example, law

¹⁴ Michel Foucault, *The History of Sexuality, Volume 1* (1979); Garland, *Punishment and Welfare*, above n 1.

¹⁵ Allan Hunt, ‘Foucault’s Expulsion of Law: Towards a Retrieval’ (1992) 17 *Law and Social Inquiry*, 1-38; Allan Hunt and Gary Wickham, *Foucault and Law. Towards a Sociology of Law as Governance*, (1994); Nikolas Rose and Mariana Valverde, ‘Governed by Law?’ (1998) 7 *Social and Legal Studies*, 541-551.

¹⁶ F. Ewald, ‘Norms, discipline and the law’ (1990) 30 *Representations* 154-5.

¹⁷ Hunt, ‘Foucault’s Expulsion of Law’, above, n 14.

not merely legitimated various strategies and interventions in the governing of everyday life ‘... but actually composed the authorities, techniques and lines of force that have made them possible’.¹⁸ They deploy the term ‘legal complex’ to refer to the assemblage of legal practices, institutions, discourses, text and norms and forms of judgement that, according to Foucault, had become increasingly pervaded by forms of knowledge and expertise that were non-legal. It is a ‘complex’ composed of elements with diverse histories and logics:

Regulations, practices, deliberations and techniques of enforcement increasingly required supplementation by the positive knowledge claims of the medical, psychological, psychiatric and criminological sciences, and the legal complex thus enrolled a whole variety of petty judges of the psyche.¹⁹

This paper looks at the intersection of a number of agencies that in differing ways intervene through reward, discipline, incitement and punishment, to produce norms of family. The next section takes a series of questions to the specific events leading to the establishment of the children’s court in Melbourne in 1906, and to the establishment of a children’s court clinic in the early 1940s, two moments in the history of an emergent juvenile justice administration. The aim is to examine the relations between the practice of penal policy and the conduct of the human sciences. I wish to show how the establishment of the children’s court in Victoria authorized a set of calculative and moralizing practices directed towards family, and brought these into the sphere of the practical. The material is divided into three parts: an analysis of governing the habitual offender through so-called reformative (‘welfarist’) provisions of juvenile sentencing policies; the transformation of philanthropy into a more regulated and reformist approach to probation and foster care; and finally, the emergence of social work, psychology and psychiatry as an expert witness to the habitual juvenile offender. Among other things, this material provides evidence of a thoroughgoing meshing of judicial administration and the human sciences, and suggests that the court’s judicial role is subordinate to its

¹⁸ Rose and Valverde, ‘Governed by Law’, above, n. 14, 543

¹⁹ Rose and Valverde, ‘Governed by Law?’, above n. 14, 543

role in the promotion of the normal family. In this respect, it provides evidence of the relative effects of law and legal practice on the one hand, and the ‘action of the norm’ on the other, in the constitution of the pathological family.

Historically, there is an attempt to prize open some of the activities which have helped to produce particular images of family. From the turn of the 20th century, how family becomes problematic is a product of modern knowledges of child and family, such as child rearing techniques or developmental psychology, and their relation to educational, medical, philanthropic and judicial practices.²⁰ We are looking, here, at a specific and bounded population – perhaps a group under ‘supervised freedom’²¹, a group needing to be governed. In this sense, the normal was defined by default, as that which did not need to be governed.²² Perhaps, then, a history of the present normality of the 21st century family may render it less secure and natural, less of a universal given. This vantage point allows questions to be posed of literature that assumes the existence of a

²⁰ Jeffrey Minson, *Genealogy of Morals. Nietzsche, Foucault, Donzelot and the eccentricity of ethics* (1985) 207; David McCallum, ‘Problem children and familial relations’ in Denise Meredyth and Deborah Tyler (eds.) *Child and Citizen: genealogies of schooling and subjectivity* (1993) 138; Gail Reekie, *Measuring Immorality: social inquiry and the problem of illegitimacy* (1998).

²¹ Jacques Donzelot *The Policing of Families* (1979) 103.

²² Georges Canguilhem, (1978) *On the Normal and the Pathological* (1978); Nikolas Rose, *Powers of Freedom. Reframing political thought*, 1999; Barry Hindess, ‘The Liberal Government of Unfreedom’ (2001) 26 *Alternatives: Social Transformation and Humane Governance* 93-111.

once-dominant ‘welfarist criminology’,²³ but also of the governmentality literature that is sometimes reluctant to acknowledge the ‘stick’ behind programs of familialisation and incitement to self-govern.²⁴

SCIENCE, ADMINISTRATION, JUSTICE

The Victoria Royal Commission into the Police Force in 1906 reflected the problem of policing the habitual criminal that had existed since at least the mid 19th century: under the first of its terms of reference, to report on ‘The Efficiency of the Police Force in Connexion with the Repression of Crime’, the commissioners claimed ‘there is practically no control of any criminal once he leaves Pentridge [Gaol]’.²⁵ The new technology of fingerprinting had recently been incorporated into procedures for identifying the criminal, supplementing photographs and descriptive records. The Chief Commissioner of Police thought it vastly superior to the tedious and inexact anthropometrics of the Bertillon system.²⁶ Notwithstanding this, existing forensic science techniques were inadequate, and while centralized accumulation of criminal records was useful for the detective they were of little use to the ordinary constabulary - ‘the one body ... there to prevent the commission of crime’.²⁷ The ordinary constable on

²³ D. Garland, ‘The limits of the sovereign state. Strategies of crime control in contemporary society’ (1996) 36 *British Journal of Criminology* 461.

²⁴ Barry Vaughan, ‘The government of youth: disorder *and* dependence?’ (2000) 9 *Social and Legal Studies* 347-366; Nikolas Rose, ‘Inventiveness in Politics’ (1999) 28 *Economy and Society* 467-93.

²⁵ Victoria (1906a) Royal Commission on the Victorian Police Force. VPP, vol. 1, xiii.

²⁶ Victoria (1906a) above n 24.

²⁷ Victoria, (1906a) above n 24, para. 1644

the beat 'may pass by notorious criminals and be unaware of their character'.²⁸ Better dissemination of descriptive and photographic records were called for, and every constable 'should be compelled to make himself familiar with them'.²⁹ But in the mind of the Chief Commissioner of Police, that was 'an utter impossibility': 'You will see whole volumes in the criminal office, whole rows of large volumes. You could not give them to every man'.³⁰ What was needed was a different way of knowing the 'habitual offender' -- systematic, objective, tractable -- but one that emanated from a change in judicial administration rather than policing practices.

The classificatory system recommended by the Chief Commissioner of Police had two notable features. It was possible to recognize the habitual criminal in quantifiable terms: 'on his third conviction, you would have fair evidence that he is going to live a life of crime'.³¹ And it offered a program of reform in which the criminal came to know, keep trace, and act on his own habit: 'so a man knowing the system as he would from having it put before him while in gaol, and knowing that he was determining his own fate, would naturally get out of the more serious class, and go down to the other'.³² The quantitative measure of the habitual criminal had appeared earlier in the New South Wales *Habitual Criminals Act* 1905.³³ After two or three convictions for a similar offence a judge was empowered to declare a person to be a habitual criminal, serving first a definite sentence and then an indeterminate sentence until authorities were satisfied that he had been sufficiently reformed. The Inspector General of Penal Establishments and Gaols cited the *Act* with approval. It could be extended to other states, and it had the

²⁸ Victoria, 1906a, above n 24, xiii

²⁹ Victoria, 1906a, above n 24, xiii

³⁰ Victoria, 1906a, op. cit., n. 19, para. 1648

³¹ Victoria, 1906a, op. cit., n. 19, para. 1253

³² Victoria, 1906a, op, cit., n. 19, para 1253

³³ New South Wales, Habitual Criminals Act 1905

effect of ‘creating the desire on the part of those who may be affected by its provisions to go beyond it reach’.³⁴ A dual track procedure laid down in the Victorian *Indeterminate Sentences Act*³⁵ 1908 meant, however, that after serving a sentence of imprisonment for the crime committed, the habitual criminal ‘may be detained during the Governor’s pleasure in a reformatory prison.’³⁶

Between 1905 to 1908, the legislative and administrative machinery of the Children’s Court in Victoria was formed, hailed as the budding of a new kind of judicial administration shaped to accommodate the special nature of the child, and representing the bifurcation of a system geared to the welfare of its subject and the more punitive aspirations of the adult system. But there was a clear continuum between the adult and juvenile populations in dealing with the problem of habitual, with provisions akin to the indeterminate sentencing principle having been applied to juvenile offenders for many years. Section 333 of the Victorian *Crimes Act* (1890) permitted the transfer of young prisoners from jail to the Department of Reformatory Schools, from where they were placed either in private reformatories or ‘in service’.³⁷ The transfer operated as a remission of the residue of the sentence of imprisonment unless, under Section 334, the offender was transferred back to gaol for bad behaviour. In the five years from 1900, no cases had been transferred back to gaol.³⁸ Section 333 was ostensibly applied in the name of ‘welfare’: the transfer out of gaol was seen as providing ‘freer and healthier moral surroundings’ and the department congratulated itself for its enlightened approach

³⁴ Victoria (1906b), Report of the Inspector General of Penal Establishments and Gaols for the Year 1905. VPP, vol. 2.

³⁵ Victoria. Indeterminate Sentences Act 1908

³⁶ John Pratt, *Governing the Dangerous. Dangerousness, law and social change* (1997)

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³⁷ Victoria. Crimes Act 1890 s. 333.

³⁸ Victoria, 1906b, above n 33.

to young offenders.³⁹ In 1905 for example, there were eleven transfers from gaols to reformatories, and visitors whose duty it was to recommend transfer were ‘deserving of praise for the valuable service they have rendered in promoting the welfare of these lads’.⁴⁰

On the other hand, there were a number of instances where Section 333 was used to perform a second punishment. Boys who had served their full fixed term of imprisonment, less a day or two, were then transferred to a reformatory to begin a further, indeterminate sentence; as the Superintendent of Excelsior Reformatory, Brighton remarked, ‘one cannot expect to reform a boy who is punished a second time for the same offence’.⁴¹ Moreover, although there were no transfers from reformatory to gaol under Section 334, there were indeed transfers for bad behaviour – not *to* gaol *from* reformatories but *from* various kinds of placement in foster homes or employment *to* reformatories and training schools. Children under care of the Department of Neglected Children and Reformatory Schools in foster homes or sent into service – not necessarily offenders but children who were reported to the Department as exhibiting ‘depraved habits’ and ‘serious misconduct’—were subject to a *de facto* indeterminate sentencing in the form of a transfer to reformatories, at the discretion of the Minister and by-passing a court appearance. The provisions had particular implications for Aboriginal children. Under its Act the Aborigines Board was initially able to transfer children described as ‘half-caste’ orphans to the DNCRS, but from 1900 this provision was extended to all ‘suitable’ Aboriginal children whether orphans or otherwise ‘in order that they may have the advantages of being dealt with in the same way as other wards of the State’.⁴²

³⁹ Victoria (1901), Department for Neglected Children and Reformatory Schools. Report for the Year 1900 Victorian Parliamentary Papers vol. 3.

⁴⁰ Victoria, 1906b, above n 33.

⁴¹ Victoria (1904), DNCRS Report for the Year 1903. VPP, vol. 2

⁴² Victoria , 1901, above n 38

Hence, the provisions of the Act show that ‘welfarist’ sentencing policies incorporated a scheme of indeterminate sentencing as a core element of justice administration, and also that a component of judicial administration instituted for the ‘welfare’ of the child substituted for a ruling by a court. All children sent to foster homes or placed in service, whether they had committed an offence or not, were subject to the provisions of Section 333. Their behaviour was set against the norms in the foster home. In such circumstances, positing meaningful distinctions between welfare and justice is both hazardous and irrelevant. Moreover, there was strong continuity between adult and juvenile populations in the problem of managing the habitual criminal, so to assume the efficacy of reform in the name of welfare is to overlook these continuities in the kinds of questions that vexed administrators in both systems.

PHILANTHROPY AND GOVERNMENT

Through the 19th century a network of both government and philanthropic agencies were concerned with juveniles in terms of habit. Here, the role of philanthropy in these networks will be demonstrated in just one organisation, the Society (previously Presbyterian Society) for Neglected and Destitute Children. The main principle of categorisation of juveniles was malleability: whether, over time, habit had hardened into the habitual. For the child-savers and the superintendents of homes and reform schools, there were those who could still be worked on and those for whom the prospect of reform of bad habits was much less likely. The criterion was age. The Society’s agent, Selina Sutherland explained:

A single boy or girl over fourteen years of age who has lived a street life gives more trouble and worry and is less hopeful than fifty who are under seven or eight ... Sad as it may be it is nevertheless a fact that the efforts made on behalf of these older boys and girls are seldom rewarded with satisfactory results, in proportion to the labour expended on them, leaving them morally and physically weak, preferring a street life with all its hardships to a home life with work, order and obedience. It is not so with children of tender years, who are largely susceptible to good or evil according as they are taught. If they are removed

before bad habits are formed and placed in suitable homes they grow up amenable to domestic rule.⁴³

The networks between philanthropy and the police had been established through the more general policing of destitute, disorderly and dissolute adult population, rather than juveniles. Children were sent to the Society's home rather than being locked up with their parents in the nearby police cells. These premises were seen as an annex of police work, to the extent that in 1904 the Chief Commissioner of Police agreed to pay the yearly rent of the Society's premises.⁴⁴ By 1910, besides foundlings, neglected children removed from parent(s) or found wandering, and cases where their parent(s) had been locked up, children were brought to the home had absconded from various other institutions, or been charged with offences such as loitering, begging, gambling on the streets or theft, with a court hearing pending.

The Society's home became in effect a short-term remand center, and a relay point between the police and the court. In the early committals of neglected children the child's physical presence was required in the court no matter how sick or fragile, in some cases dying babies being hauled before the court.⁴⁵ A place for the philanthropic agent in court proceedings had been established well before the formal establishment of the children's court. The philanthropists began to relay knowledge of the child from, and between, the police and the court. In the form of questions, instructions, advice and information, a formal and informal dialogue began to take place that established a space for special knowledge of the child, by the agent, that then found its way into the

⁴³ Victorian Children's Aid Society Records (1893-94). Annual Report of the Presbyterian Society for Neglected and Destitute Children, MS 10051, Box 1/2 (a), La Trobe Collection, State Library of Victoria.

⁴⁴ Victorian Children's Aid Society Records (1897-1908), Reports and Statements of Accounts. MS 10051, Box 1/2 (b), La Trobe Collection, State Library of Victoria, 1904.

⁴⁵ *Argus*, Jan. 10, 1908.

committal procedure. So from the earliest reports of the Society in 1893, the agent of philanthropy, in this case Miss Sutherland, became a witness speaking for the child in the court.⁴⁶ She bore special knowledge of the child's background, collected from neighbours and other informants, that included knowledge of the father and mother's character and the state of the house. Sutherland also helped shape decisions about the disposition of children. When it finally appeared, the *Children's Court Act* (1906) required that these previously informal arrangements for providing specialist knowledge of the child be transferred from philanthropy to the newly appointed probation officers, who henceforth were to 'inquire and furnish the court with information as to the child's habits, conduct and mode of living'.⁴⁷

Philanthropy considered the home, particularly the 'country home', as a kind of ready-made mechanism for the reform of habit. Domestic routine was seen as a kind of processing machine, preventing those with bad habits from becoming 'habitual'. Children placed in country homes away from their 'evil surroundings' and under 'judicious supervision' would be 'treated as members of the family, thus changing their whole course of life, forgetting their old names and taking the names of their foster-parents...

The children have an opportunity of learning gradually and naturally the laws of right conduct and high principle which are simply a part of the everyday life of the ordinary home ... if left unchecked until they reach the age of fourteen or fifteen the struggle for truth and right is indeed a hard one, and they rebel against the necessary restraint and discipline of a well-ordered home, and long to return to their old life of freedom.⁴⁸

⁴⁶ *Argus*, Jan. 29, 1894; VCASR, op. cit., n. 37, November 1893-September 1894

⁴⁷ *Children's Court Act* 1906 s.9

⁴⁸ VCASR, above n 43, 1897-1908: Report for Year Ending 30 Sept., 1900

Foster parents were required to have testimony from a clergyman that they were ‘in every respect fit and proper persons to be entrusted with the moral training of a child’.⁴⁹ Hence, sending a child to a ‘good home’ in the country as a formal disposition need not be read as enlightened compassion; thinking of the home or service as the context for regimentation, rule, discipline and hard work questions any easy opposition, in practice, between welfare and justice. But at this time the influence of philanthropy began to wane, especially with all the problems of surveilling the ‘good country home’. By 1906, despite the existence of a paid agent to visit and report on children sent out to service or foster care throughout the state of Victoria, questions began to be raised about inadequate records of inspection.⁵⁰ Subsequent Society visitors reported ‘great trouble in tracing many of the children on our books’.⁵¹ By 1909 the role of visiting children in country foster homes was taken over by the Neglected Children’s Department, whose Official Visitors continued to report an inability to trace a considerable number of children and families.⁵²

⁴⁹ Victorian Children’s Aid Society Records (1894-1921), Applications for Foster Children, MS 10051, Box 19/4, La Trobe Collection, State Library of Victoria, 1894

⁵⁰ Victorian Children’s Aid Society Records (1902-08) Minute Book for Committee Meeting, MS 10051, Box 1/5, La Trobe Collection, State Library of Victoria, Dec. 3, 1908

⁵¹ Victorian Children’s Aid Society Records (November 14 1902 - May 29 1933), Correspondence re Reports on Children, MS 10051, Box 21/2, La Trobe Collection, State Library of Victoria, Nov. 14 1908

⁵² Victorian Children’s Aid Society Records (1909-12) Register of Foster Parents/Departmental Inspectors’ Reports, MS 10051, Box 1/2 (a), La Trobe Collection, State Library of Victoria.

So while there was a degree of judicial innovation connected with the passing of the *Children's Court Act* (1906), in the sense of requiring hearings separate from adults, the main change resulting from the Act was the provision of oversight over the probation system, an ever-expanding network of voluntary child supervisors who would more systematically link the activities of courts, police and families. The arrival of the court was significant because it brought philanthropy under the aegis of the court system, and set about authorizing agents to do the work previously undertaken by philanthropy but now to be performed by a more regulated group of honorary probation officers appointed under its jurisdiction. Continuity with the adult system was maintained by AE Clarke, who headed the Prisoner's Aid Society, being appointed Chief Probation Officer. He used church and philanthropic contacts as his recruiting agencies for 'a lady or gentleman' willing to act as honorary probation officers, and who would welcome 'a splendid chance for accomplishing much good work'.⁵³ Clarke enrolled familiar philanthropic names such as Vida Goldstein and the committee members of organisations like the Charity Organisation Society, the Victorian Neglected Children's Aid Society, the Society for the Prevention of Cruelty to Children, the National Council of Women of Victoria, and the Women's Political Association. He reaffirmed the efficiency of the probation officers reports in registering 'habitual': in certain cases 'which on facts before the Court appeared childish or trivial', a preliminary investigation as provided for in the Act 'would, if undertaken, have shown that the child was on the way to acquire bad habits and in danger of becoming a habitual criminal'.⁵⁴

In summary, although welfare historiography understands the creation of the children's court as the consequence of a struggle between reformer philanthropy and

⁵³ Public Records Office of Victoria (1907). VPRS 266/P. Law department Inward Registered Correspondence, Unit 630. A. E. Clarke to Sec. Law Department, September 6.

⁵⁴ Victoria (1909) Report of the Chief Probation Officer for the Year 1908, 3.

reluctant government,⁵⁵ the evidence suggests that a network of relations between police, penal and reform institutions and proto-social workers was established well before the court appeared, that strong continuity existed between adult and juvenile administration of the habitual criminal, and that government and philanthropy (justice administration and child welfare) had clear lines of connection rather than separation. These networks, rather than simply the tentative beginnings of the new children's court jurisdiction, were the significant precondition for the collection of social information and the calculation of the pathological family.

PSYCHIATRY, PSYCHOLOGY AND SOCIAL WORK

By the 1940s, the role played by Selina Sutherland in the early 1900s had been assumed by an expanded range of expertise under the aegis of the Children's Court Clinic. At the discretion of the magistrate, each child appearing before the court could be referred to the Clinic. The examination of the child involved a physical examination, a psychological report, a social report, and a preliminary report written by the psychiatrist. A summary 'Medical Report' written by the psychiatrist, was produced for the information of the court. Immediately prior to the establishment of the Clinic, a magistrate could call for a social background report to be produced by the then Stipendiary Probation Officer, a former schoolteacher A J Meadows. With the establishment of the Clinic, that task was reassigned to a newly appointed psychologist. Was this the moment perhaps of the displacement of administrative with scientific and clinical expertise? In fact, the first appointment as psychologist was filled by the same A J Meadows.⁵⁶ The moment of entry of the clinical scientist was one of a seamless transition, rather than contestation or displacement of the bureaucracy.

⁵⁵ see for example Donnella Jaggs, *Neglected and criminal: foundations of child welfare legislation in Victoria* (1986).

⁵⁶ Victoria (1933-49), Reports on Victorian Children's Courts for the Years 1932-1948, 1945.

After the appointment of a social worker towards the end of 1945, the principal role of the psychologist in the Clinic was the administration of a series of tests, educational, vocational and, first and foremost, intelligence.⁵⁷ As Binet and Simon remarked at the time of the development of the intelligence test some decades earlier, it was not forged as a diagnostic tool for the clinician, nor indeed for the welfare of the individual.⁵⁸ Rather, it was shaped specifically to assist an administration bogged down in its attempts to sort a newly massed school population and to more economically sift children through a series of graded stages. The intelligence test was wielded as a means of efficiently sorting a population into manageable groups. In the Clinic, the psychologist's emphasis was on 'vocational adjustment':

This boy is of normal intelligence...[T]he indications are that with due regard to his physique he should seek employment in light manual work ... He is...of normal intelligence, though bordering on dullness ... Vocationally he is suitable only for unskilled work ... on speed and accuracy of reaction he does fairly well. He is qualified to become an apprentice⁵⁹

Apart from a few uncommon instances of overseeing a series of Saturday morning 'sex instruction' lectures, there was no suggestion at all that the role of the psychologist involved clinical 'treatment'.

Similarly with the psychiatrist. A historical analysis reveals no clear lines of separating the scientific, the administrative or the judicial. From the earliest administrative procedures that carried over from England during the colonial period in Australia, the man-of-science was inseparable from the legal process for determining the

⁵⁷ Victoria, 1933-1949, above n 55.

⁵⁸ A. Binet and T. Simon, 'The development of intelligence in children' [trans. E. Kite] in W. Dennis (ed.) *Readings in the History of Psychology*, [1905] (1948), 412-424.

⁵⁹ Victorian Children's Court Clinic Case Files (1945-1948) Department of Human Services Victoria Archives, AN 93/293, Psychologist's Report 1945.

soundness of mind of individuals before the courts for offences or for commitment as a 'lunatic'.⁶⁰ His earliest involvement in the committal procedure was as a member of a jury, overseeing the management of the individual's personal and financial affairs, and had little if anything to do with his credentials as a scientist. In the early years of the Clinic we see the psychiatrist mediating between child and court as a primary arbiter in questions of disposal.⁶¹ His final report to the court typically concludes on a recommendation for disposal and is followed by a postscript indicating the decision of the magistrate:

The boy is unlikely to improve in his present environment, and placement in a suitable institution appears advisable *Case Committed to CWD ...*

...his conduct should improve under suitable guidance on probation. *Probation 52 weeks ...*

A further period of moral re-education in an institution appears advisable....

Committed to Castlemaine Reformatory

Placement in a suitable institution and moral re-education are indicated. He is morally defective and is not amenable to control at home. *Committed to the CWD.*⁶²

⁶⁰ David McCallum, *Personality and Dangerousness. Genealogies of antisocial personality disorder* (2001); Michel Foucault, 'The dangerous individual' in L. Krizman (ed.) *Michel Foucault. Politics, Philosophy, Culture* (1988), 125-151.

⁶¹ Gerry Johnstone,, 'From Expert in Responsibility to Advisor on Punishment – The Role of Psychiatrists in Penal Matters', in P. Rush, S. McVeigh and A. Young (eds) *Criminal Legal Doctrine* (1997).

⁶² VCCCF, above n 58, Medical Report 1946.

The relation of professional and client was not the tête-a-tête relationship invoked by Robert Castel in his analysis of modern psychiatric ‘governing at a distance’.⁶³ The psychiatrist’s first and usually final face-to-face interview with the child is conducted as the last of a chain of investigative procedures and in the context of full knowledge of a dossier of accumulated inscriptions. These included information transferred from the court hearing - typically, police record, and the prosecuting officer’s brief, including statements from witnesses and from the child, the prosecuting officer’s own investigations as to home and social circumstances [Police Form 80], reports from honorary probation officers, and existing Departmental and other governmental and non-governmental welfare agency reports. Along with the Clinic’s psychologist’s and social worker’s reports, these formed a kind of palimpsest of inscription upon inscription: of *character...*

The boy is cunning and self-confident, apparently conscienceless and ready to take advantage of any person or circumstance ... He scoffs at the idea of Christianity not to mention Church membership. ... Frankly I have never known such a character – at 15 years!⁶⁴ ... The boy is ... untruthful and unreliable and requires character training under strict supervision⁶⁵ ...

...of *intelligence*,

The boy is mentally bright and has a good school record⁶⁶ ... Intelligence appears to be: Above average / Average / Below average / Backward / Dull / Subnormal.⁶⁷

...of *the home*,

⁶³ Robert Castel, ‘From dangerousness to risk’ in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect. Studies in Governmentality* (1991), 281-298.

⁶⁴ VCCCF, above n 58, Honorary probation officer’s report 1946.

⁶⁵ VCCCF, above n 58, Psychologist’s Report 1946.

⁶⁶ VCCCF, above n 58, Honorary probation officer's report 1946.

⁶⁷ VCCCF, above n 58, Police Form 80.

Home of ordinary comfort, but (possibly through father's hours of work) garden very neglected, and grass growing wildly back and front of house⁶⁸ ... This is a six roomed house. The outside in uncared for, inside the place was not very clean, and very untidy when visited. There are four bedrooms, a lounge room, and a kitchen. All the rooms are well furnished.⁶⁹

... of peer influence, social activities, parental character, and so on. Further, the social worker's report included an array of information gathered in the field—from teachers, and other welfare agencies, hospital almoners, neighbours and again from probation officers and police.

It was difficult to elicit definite facts from [the mother] and many of her statements varied from reports for the Headmaster and Society for the Prevention of Cruelty to Children⁷⁰ ... Police reports made in 1942 indicate that he was, at that time, very untruthful⁷¹ ... The attendance officer reports that [the child] is “naturally depraved”. That he is filthy at school and has upset the sanitary pans... The teaching staff consider that he is a bad influence on the other children. The attendance officer also reported that the child's parental history is morally bad.⁷²

Likewise, the psychologist's report:

I have consulted the officers of the Vocational Guidance and Employment section of the Department of Labour and National Service... They are emphatic that the boy's record is unsatisfactory and this largely because he is unreliable and dishonest.⁷³

⁶⁸ VCCCCF, above n 58, Honorary probation officer's report 1946.

⁶⁹ VCCCCF, above n 58, Social Report 1946.

⁷⁰ VCCCCF, above n 58, Social Report 1946.

⁷¹ VCCCCF, above n 58, Social Report 1945.

⁷² VCCCCF, above n 58, Social Report 1946.

⁷³ VCCCCF, above n 58, Psychologist's Report 1946.

Indeed, it is these highly mediated inscriptions in the child's dossier that attain a primacy over and above the information elicited directly from the child by the psychiatrist:

Repeats reason given in Police Brief that he wanted money to repay [an acquaintance]... When told this explanation appeared rather unconvincing he still stuck to it ... He appeared to be most untruthful, denying passages in the social report re his truancy, delinquency, etc., and later on admitting that these reports were true ... Admits truth of social report re his behaviour.⁷⁴

By eliciting confessions and cross-examination cross-checking against sources such as police and social reports, the psychiatrist acted less as a new form of independent scientific expert than as an extension of the prosecuting apparatus. The child would often go to court with one offence of stealing, and return after visiting the clinic with a whole host of 'offences' to which he had confessed, under psychiatric examination:

It appears that [the boy] has been stealing for some time. When a small boy he would bring home short change. He was evasive regarding stealing from his mother's purse, but eventually admitted that he had probably done it. Other thefts which he admitted were... [items from shops, the hotel, the sporting club]⁷⁵ ... W... has now reached the stage of habitual dishonesty. His conduct is unlikely to improve in the present unsettled home environment, where he is a bad example to his brother ... There is a past history of wandering away from home in early childhood. When a small boy he would steal coins from his mother's purse. At the age of eight he began stealing small articles from chain stores. At the age of ten he first got into trouble over stealing...⁷⁶

The newly established clinical report represents an elision, rather than a separation, of ways of knowing: the lay and the hearsay intersect with the information from philanthropy, welfare and justice agencies; economy pervades science. At the turn of the twentieth century, a juvenile justice administration congealed over the question whether,

⁷⁴ VCCCF, above n 58, Psychiatrist's preliminary report 1946.

⁷⁵ VCCCF, above n 58, Medical Report 1946

⁷⁶ VCCCF, above n 58, Medical Report 1946

over time, habit had hardened into the habitual. On this question the contribution of the psychiatrist was more as a member of the prosecution than as a man of science:

Conclusions: this boy is an habitual truant and an habitual thief. He is morally defective and is not amenable to control at home. Recommendation: Placement in a suitable institution and moral re-education are indicated. *Committed to the Child Welfare Department.*⁷⁷

CONCLUSION

The normal and pathological may be defined in legislation⁷⁸, in the activities of non-judicial agencies, such as probation and social work and their role in defining gender and sexuality issues,⁷⁹ or in the disciplinary techniques deployed in policing risk and dangerousness.⁸⁰ A recent example of a complexity of these elements is perhaps to be found in the parental responsibility order, implemented by the Blair government in the UK, and under consideration by some Australian governments. I have argued that Garland's concept of penal-welfare complex, or Rose and Valverde's notion of legal complex readily demonstrate the closeness of judicial and allied social interventions in the ways in which deviant or pathological families come to be both conceived and regulated. But notions of complexity are only partly helpful in developing the kind of

⁷⁷ VCCCF, above, n 58, Medical Report 1946.

⁷⁸ Graham Burchell, 'A note on juvenile justice', 5 *I & C*, 125-135.

⁷⁹ Carrington, above n 3.

⁸⁰ Malcolm Feeley and Jonathon Simon, 'Actuarial Justice: the Emerging New Criminal Law' in David Nelken (ed) *The Futures of Criminology* (1994); Russell Smandych, *Governable Places. Readings on Governmentality and Crime Control* (1999).

analytical precision needed to inform specific historical inquiries about the increased governing role of the family. Donzelot, in the European context, described these kinds of processes as formally liberating the family and giving parents their ‘rights’, while at the same time tightening a stranglehold on the working-class family.⁸¹ Garland questions the effects of reformist, welfare-oriented and scientifically-based technologies on the actual practice of penalty.⁸² In a study of expanded state intervention in child welfare in New South Wales during this same period, van Krieken concludes that despite lip-service being paid to modernity and science, ‘a major feature of the role of science, psychological or social, in child welfare was in fact its minimal impact’.⁸³ I would argue that the innovative theoretical insights in both the governmentality and sociological literature need to show the workings of law and normalisation in social regulation through the family - about how problem populations come to be known in order to be managed.⁸⁴ A satisfactory analytic needs to capture the way in which power makes bodies move through systems.

In this respect, law and the human sciences here could be understood as conjointly involved in the conduct of a historically specific project in the ‘liberal government of unfreedom’ concerned with the problem of ‘governing those in whom the capacity for

⁸¹ Donzelot, above n 20, 103.

⁸² Garland, *Punishment and Welfare*, above n 1.

⁸³ Robert van Krieken *Children and the State. Social control and the formation of Australian child welfare* (1991) 124.

⁸⁴ Paul Q. Hirst, ‘The genesis of the social’ (1981) 3 *Politics and Power*; F. Ewald ‘Norms, Discipline and the Law’ (1990) 30 *Representations* 138- 161; David Garland, “‘Governmentality’ and the problem of crime: Foucault, criminology, sociology’ (1997) 1 *Theoretical Criminology* 173-214; Ian Hacking, *The Social Construction of What* (1999); Nikolas Rose *Powers of Freedom. Reframing political thought* (1999).

autonomous conduct is thought to be insufficiently developed'.⁸⁵ The human sciences contributed to processes for identifying and allocating such individuals and groups, developing the instruments of technical, political and social measurement of the 'normal family' as an object of governing.⁸⁶ Underpinning the discursive elements of the changes towards the new 'science' of crime in this period were the attempts to produce new categories of person through the assembling of detailed, and indeed infinite knowledge of the 'habits, conduct and mode of living' of populations needing to be governed. The specific effects of legal process centred around the children's court was to mandate the conditions of possibility for the collection of this 'social information' upon which norms came to be constructed, and enforced a system of allocating persons on the basis of their measured capacity for self-governing.

⁸⁵ Hindess, above n 21 .

⁸⁶ Ewald, above n 15, 138- 161; J. Donzelot *The Policing of Families* (1979).