

"Private and Public aspects of Trespass : Problems of
Theorising Law"

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Ch. 5. Concrete particular and concrete totality of law securing relations of possession and separation.

(1) The concrete particular (initial object): the equal right to exclude.

The concrete particular, and therefore the point of departure for concrete analysis, is the right of the subject to exclude the world from interference with possession of land. This is the simplest and most irreducible element of the law as it is expressed in a historically determinate and socially constituted practice, at the concrete level of the Apparent movement and in the corresponding organization of legal categories..

This particular "right" is interpolated within the structure of Society at a definite stage in its historical development in accordance with an economic determination yet to be specified. It may form the basis of legal claims by private individuals or non-human legal persons such as Corporations and Public Authorities (its limits are not exhaustively defined in its interpellation of human subjects¹). Yet its sphere of influence extends far beyond the resolution of disputes, informing the concrete practice of legal subjects in everyday social situations: it is the foundation of the Company's exclusive control of production within the enterprise, and of the individual's reaction to intrusion: "Hey, you there, what do you think you're doing

1. Since not all legal subjects are "human", the mechanism of interpellation cannot completely account for their creation (requiring as it does a human "recognizing" subject.) [see Hirst, 1979/80]

in my garden?"²

It is not necessary, to justify this starting-point, that legal subjects should "know" that their practice in relation to the possession of land is founded on this simple right, or that they be able to explain their attitudes by reference to it. It is sufficient that it exists, on the surface of Society, at the level of Appearances and in social practice, in the unproblematic assumption (however incoherent) of the right of exclude.

This "right" is therefore a concrete rather than an abstract category. The fact that it has been identified by a process of reasoning, that it does not announce itself from the outset as obviously the correct point of departure, does not make it any less concrete. In observing the rigorous distinction between Scientific practice (Essential movement) and Social practice (Apparent movement), the simple "right to exclude" thus becomes the initial object of scientific Abstraction³; however irreducible at the level of the concrete, this object nevertheless remains a "chaotic whole", precisely by virtue of its concreteness, and Abstraction must perform the role of revealing its constituent elements, the real social and economic relations that underlie and determine it.

Whilst it is clear that there can be no question of beginning with "general and abstract determinants obtaining in more or less all forms of society", or with a particular abstract such as "possession" or the

2. [see Althusser (1971) p. 163] Here human individuals are indeed "interpellated", ideology being the medium through which they may "live" a relation to their real conditions of existence.

3. see supra. (Ch. 4.)

"subject" (as is the case with Pashukanis),⁴ the concrete "right to exclude" is just one amongst a number of concretes that might equally have served as the point of departure, and whose particular selection must therefore be defended.⁵ Indeed, the concrete legal "subject" (understood concretely contra. Pashukanis) would have the advantage of being concrete in the tangible sense in which the commodity is concrete, whereas the "right" is of an altogether different and more ethereal character. Nevertheless, the criterion of "concreteness" is satisfied in the socially constituted nature of legal practice, and need not require a literally concrete object. The crucial question is which of these alternatives is the most irreducible, and most likely to provide a basis for the development of theoretical determinations which will ultimately reveal the essence of the law of Trespass. Three observations may be made at this stage of the analysis:

(1) The "right to exclude" is more prominent at the level of the Apparent movement than the "subject" of that right; persons may "know their rights" without conceiving of themselves as "legal subjects". In other words, the language of "rights" provides an important medium, for human individuals, through which they are able to live a relation to their real conditions of existence. It is an everyday ideology forming the spontaneous consciousness of social agents - and this is precisely the level of Appearances at which the analysis must begin.

(2) The "right to exclude" can also be shown to be a more

4.starting with an analysis of the legal form in its "most abstract and pure shape" : see Ch. 4. Section V. (supra.)

5. Similarly Marx abandoned the abstract categories of Labour and Value at the end of 1857, but had yet to determine which particular concrete would constitute his starting-point (see supra Ch. 4. Section II.

simple and a less problematic, starting point. Whilst a variety of quite different legal subjects may share the same basic "right to exclude", to begin with a unitary subject of that right would raise the problem of how such a "subject" should be conceived (in Production or Consumption, as human or non-human, as tenant, wage-labourer or Corporation?) thus risking a crucial reduction from the outset. There is also the problem of the relation between the legal subject and the socio-economic subject (can the former be considered in abstraction from the latter?), whereas the legal right exists logically quite independently of any particular subject. What is most fundamental is thus the right to exclude - the different categories of social agent constituted as the bearers of this right being a matter for secondary consideration.⁶

(3) The analytical departure from the "right to exclude" best enables the necessary transition from Apparent movement to Essential movement, ensuring the most theoretically productive transition from concrete to abstract concepts.⁷

(a) Trespass : an equal right.

The "right to exclude", like Marx's Commodity, appears at first sight an extremely obvious, trivial thing. But it is precisely this natural and unassuming appearance that has to be explained. To begin with, this "right" does not exist in a vacuum, but must have some function and reference outside itself. Of what elements may this concrete whole be said to consist? What role does it perform? The "right"

6. These points are elaborated in the course of this Chapter, and should become still clearer in Ch.6.

7. cf. Echeverria supra Ch. 4. Section IV.

only makes sense as the property of socio-economic subjects, whose relations are governed precisely by a framework of rights and obligations. Beneath this form of "right" are concealed an almost infinite number and considerable variety of different subjects; what they have in common is "ownership" of the identical right. Considered apart from such shared "rights", however, subjects are merely heteronomous socio-economic atoms; it is specifically legal rights that give them unity by providing something in which they can share. Thus human socio-economic subjects have quite different capacities, powers, attributes and abilities, but their particularity is lost in the shadow of "right", and the same may be said of non-human subjects such as business enterprises and units of Public Administration. Besides the differences between subjects of the same type, there is a distinction to be drawn between the various kinds of socio-economic subject: that human individuals, enterprises and public corporations have the same universal "right to exclude" serves to obscure the heterogeneity of essentially different subjects with different characteristics and capacities. The "right to exclude" creates socio-economic subjects in its own image as legal subjects of that right; hence the over-determined status of these subjects as legal subjects (be they juridical individuals, joint-stock companies or Corporations) with the right of exclusive possession.⁸

Since all subjects unite under the banner of the "right to exclude", all subjects are equal in respect of this right, and hence it is

8. of course Trespass is merely one amongst a number of areas of Law - private, public and criminal - interpolated within the fabric of society and defining the practices of socio-economic subjects. Quite specific legal elements constitute non-human, as opposed to human, legal subjects - nevertheless the effectivity of Trespass in relation to all such subjects remains.

an equal right within the juridical meaning of "equality": all subjects have an equal right to exclude all other subjects from interference with their possession of land. With this recognition the analysis is returned, with the results so far achieved through abstraction, to the level of the concrete, where the simple "right" which formed the irreducible point of departure is confirmed in its dimension of equality.

Thus the analysis is conducted in relation to a historically determinate and particular right, that of "exclusion from interference with possession of land", in the form in which it appears in contemporary social practice at the very moment of analysis. The dimension of "equality" is not "logically deduced" from an essential and abstract right, rather it is discovered as an aspect of a practically constituted and concrete object through a process of scientific abstraction. This quality is not of course unique to the particular "right to exclude", but a crucial component of every bourgeois right. Neither is it suggested that it is specifically and solely this right that makes its subjects equal (the law of Contract has a central role to play here). The claim is merely that equality is a principal aspect of this right. Again, the "right to exclude" is only one of a number of rights enjoyed by a diversity of subjects. It does not exhaustively define those subjects, but is merely something they have in common; in other respects, different subjects - human individual, government body, business enterprise - may have quite different powers and characteristics secured through a variety of other rights and legally sanctioned capacities.

The first analytical steps thus suggest no more and no less than that the particular "right" with which we are concerned has a part to play in the creation of equal subjects of that right. At this stage we are interested in its most general and formal qualities as an equal right, leaving its specific content - embodied in the categories of exclusion, interference and possession - temporarily to one side.

The idea that subjects should enjoy reciprocally equal rights in respect of land in their possession is of comparatively recent origin. Indeed this conception is so taken for granted that a historical digression⁹ will serve a useful purpose in highlighting its specificity, presently concealed in its abstracted and timeless appearance. The early Medieval law, as Holdsworth has commented, did not recognize such a thing as a "normal person", rather it conceived of:

".....various ranks and groups and classes, each occupying its own legal position in a loosely organized society. The very idea of a normal person is the creation of a common law which has strengthened the bonds of this society by administering an equal justice to all its members. All through this period the medieval common law was creating the idea of the normal person - the free and lawful man of English law.¹⁰

9. "history" may here be described as an "auxiliary recourse" (see Echeverria : supra. Ch. 4 Section IV (2) (a)) for comparison and contrast with the present structure of law.

10. Holdsworth Bk. 3. Vol. 3. Ch. IV p. 457. Similarly for Maitland: "the time has already come when men of one sort, free and lawful men, can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional". (in Pollock & Maitland Vol. 1. P. 390) (1968)

What, then, were the various legal conditions of land "possession"¹¹ in the early medieval period, and how did they develop during it in the direction generally suggested by Holdsworth? How do they compare and contrast with the modern universal and equal right of exclusion?

(1) A first category of subject in the 12th and 13th centuries "held land of" a feudal superior by one of the Free Tenures: Frankalmoin, Knight-service, Serjeanty or Socage, with their various appropriate incidents: Homage and Fealty, Relief and Primer seisin, Wardship and Marriage, Aids, Escheat and Forfeiture.¹² In the event of a dispute concerning the "seisin"¹³ of land, the correct form of redress was here through one of the Real actions: the Writ of Right was appropriate where the demandant claimed Land as "his right and inheritance"; the Royal Writ "breve de recto tenendo" might then compel the mesne lord to "do right" in his own court to the demandant, or alternatively the "Praecipe in capite" might order the Sheriff to hear the case in the King's court if the demandant claimed to hold directly of the Crown.¹⁴ The Assize of Novel Disseisin was appropriate, on the other hand, where the demandant claimed to have been unjustly "disseised"; here the Writ ordered the Sheriff to summon twelve neighbours (the Assize) to determine whether or not such a disseisin had

11. The category "possession" is highly problematic, and examined below in some detail; for the moment it is the dimension of equality with which we are directly concerned.

12. see Cheshire [ed: Burn, C. (1972)] pp. 10-28; Holdsworth Vol. 3. pp. 40-72.

13. a category of feudal property including elements of what are now conceived as "ownership" and "possession", without being reducible to either (see infra. for analysis of seisin).

14. see Pollock & Maitland (op. cit.) p. 62 ; Maitland (1968) p. 18 ; Milsom (1969) pp. 106-107; and supra. Ch. 1.

occurred.¹⁵ Or the claim might be based on the demandant's expectation that the recent death of an ancestor entitled him to seisin, in which case the Assize of Mort d'Ancestor was appropriate.¹⁶ Or again, the Writ of Entry was the correct form of action where the demandant sought seisin by alleging some recent flaw in the tenant's title (for example insanity) in which case the "brevia de ingressu" took the same form as the Praeceptum writ.¹⁷ Additionally, probably by the reign of Edward I and certainly in the 14th Century, the demandant could recover damages for the breaking of his close "against the King's peace" through the Trespass Writ "quare clausum fregit vi et armis".

(2) A second and much larger class of subject in the early period, however, consisted of those holding land by Unfree Tenure. Here the nature and extent of the tenant's services were fixed by the custom of the Manor, the performance of labour-services lying more within the control of the feudal lord than was the case with the Free Tenures. The Villein tenant was also liable to arbitrary fines upon alienation of goods, a heavy burden of fees was due to the steward upon use of the lord's court, he could not sell cattle or allow his son to take holy orders without consent, and "Heriot" must be paid from his chattels after death. Most important, the Villein had no freehold "seisin" but held land merely at the will of his Lord (although this will was increasingly subject to the custom of the Manor), and was consequently denied access to the common law courts and the Royal

15. see Pollock & Maitland (op. cit.) p. 47; Maitland (op. cit.); Milsom (op. cit.) ; and supra. Ch. 1.

16. see Pollock & Maitland (op. cit.) pp. 56-62; Maitland (op. cit.); Milsom (op. cit.) ; and supra Ch. 1.

17. ibid ; see Pollock & Maitland (op. cit.) p. 64-72.

Writs, having to seek justice instead in the Manorial Court.¹⁸

(3) A third category was composed of those lessees for years who, like the Villein Tenant, had no freehold seisin and could not therefore bring any of the Real Actions in the event of a land dispute. The personal action against the lessor on the Covenant for damages or recovery of the term was supplemented in 1235 by Raleigh's Writ "quare ejecit infra terminum", available against both the lessor and his grantee for specific recovery and damages.¹⁹

During the early Medieval period, then, "economic possession" of land is protected in the Royal and Manorial Courts by a number of different forms of "Right", addressing a diversity of socio-economic subjects with quite different legal statuses. (Here it may be noted that these "differences" are of a fundamentally more radical nature than those acknowledged to distinguish modern legal subjects). And yet today, unlawful interference with land in the possession of any legal subject whatsoever can result in the central enforcement of a universally applicable and uniform right of exclusion. How was this transformation effected, and how can it inform the analysis of the modern law of Trespass?

In the process of its late Medieval and subsequent development, the Common law gradually dissolves the particularity of feudal relations

18. On the position of the Villein Tenant, later "Copyholder" (because holding land by "copy" of the Court Roll) see: Holdsworth (op. cit.) pp. 29-38, Ch. IV pp. 491 et. sequ. The situation of the Villein tenant was further complicated according to whether he was personally free or unfree (a question strictly separate from the nature of his tenure of land): see *ibid.* pp. 29-33; and Vol. 2. pp. 264-265.

19. see. Ch. 1. (*supra*).

in creating the conditions of abstract-universality characteristic of the modern legal system. Whilst a number of different areas of law are involved in this transformation, Trespass plays a particularly crucial role as the vehicle of the equalization of disparate subjects according to a common standard of right; and it is specifically the peculiar position of the lessee for years in the 13th and 14th Centuries that lends itself to the application of Tortious principles and enables Trespass to secure an influence in the domain of Real Property Law.

At the time of Henry II, the lease for years is still a comparatively rare form of land tenure. Unlike the more commonly found "tenant for life in fee", the Termor has no freehold interest and therefore cannot resort to the Assize of Novel Disseisin in the event of ejectment - a restriction that applies whether the land leased is Copyhold or Freehold. What he does have however is a "chattel-interest", increasingly seen as a means of investing capital through the beneficial lease, having the advantage of bequeathability, and avoiding conflict with the Usury laws.²⁰ By the reign of Henry III the termor has a choice of remedies for dispossession between Raleigh's "quare ejecit infra terminum", available against the lessor or one having purchased from him and giving specific recovery, and the Trespass action "de ejectione firmæ", giving protection against any ejector (because of its Tortious character) acting with force and arms in breach of the King's peace, but sounding only in damages. Towards the end of the Medieval period the lease for years gains in importance over the tenancy for life, and broadens its sphere of operation to include

20.similar in this respect to the chattel-interest of Wardship and Marriage (see Cheshire op. cit. p. 39.)

leases, generally of 21 years duration, to miners, farmers, builders and other commercial interests, in conformity with the general process of commercialization brought about by the breakdown of the labour-service system and the commutation of labour-services for rent.²¹ Here an action "against the world" for ejectment resulting only in damages was increasingly perceived as inadequate protection. Confronted with the formidable legal obstacle to giving the lessee access to the Real actions - that "seisin" remained indisputably with the lessor and freeholder - the Courts took the line of least resistance and enabled the demandant in Trespass "de ejectione firmæ" to recover his term specifically.²²

So it was that at the end of the 14th Century the lessee for years was in an enviable position in respect of his possessory rights. The greater advantages of the specially adapted Trespass action - its speed, certainty and flexibility - were denied both the Freeholder, who must proceed by the comparatively hazardous Assize of Novel Disseisin, and the Villein Tenant, who had no locus standi in the common law courts. The process by which these distinctions were broken down is described in Chapter 1. Trespass was "licked into the form of a Real Action" as Ejectment and became available to the Freeholder in the 16th Century through the elaborate fiction of John Doe and Richard Roe: beneath the complaint of Tortious interference with possession lay the question of which party to the dispute had better Title to the land. By the early 17th Century the Copyholder,

21. on this process, and the effects of the Black Death (1349) and the Peasants Revolt (1381), see Holdsworth (op. cit.) Vol III. Ch. 1. pp. 202-206; also Dobb (1978) Ch. 2. pp. 33-82.

22. as described in Ch. 1. (supra)

and his lessee, could also maintain the action.²³ In the ensuing centuries the limitations on the scope of Ejectment were gradually removed. The Judicature Act of 1873 completed this process and abolished the Forms of Action, leaving the now re-named Action for Recovery of Land supreme as the uniform and universal remedy for dispossession.

At this point Trespass has exhausted its capacity as progenitor of equalization of the legal conditions of land possession, and further changes in this direction are made strictly within the law of Real Property. The distinction between Socage (the major surviving Freehold tenure) and Copyhold, already undermined by Trespass, was abolished by the reforms of 1926, which reduced all tenures to free and common Socage. The law was further simplified by the absorption of leaseholds into the law of Real Property, though their classification as "personalty" still survives in the nomenclature of "chattels real".²⁴ With the abolition of certain other anachronisms, the Law of Property Act 1925 finally completed the process of legal homogenization begun by Trespass in the 13th Century: One fundamental and equal right of exclusion, abstract, general and universal, now attaches to a single and undifferentiated legal subject-category, whose members recognize it as "their right", the natural and eternal right of the free juridical subject to exclude the world from

23. by this time also the law of personal Villein status had sunk into virtual disuse - clearing away another obstacle to the unification of subjects ; (Holdsworth Vol. III Ch. 4. p. 491 et. seqi.)

24. on these and other reforms see Cheshire (op. cit.) pp. 83-111; Evans (1974).

interference with his/her/its possession of land.²⁵

Returning the analysis to the level of the concrete, therefore, the value of this historical excursus is seen to lie in its confirmation of the historical specificity of the conception of an equal right of exclusion. But we are still far from explaining the basis of this apparent equality - the mechanisms which produce it and the conditions (real relations) that underlie those mechanisms. For this it is necessary to shift the focus of analysis from the form of the right to its particular content, as a right of "possession" and "exclusion" from interference with land.

(b) Trespass : an equal right of possession

To resume the basic conclusions of Chapters 1 and 2, the present law of Trespass comprises, beneath the general umbrella of the "equal right to exclude", both a "right" to claim redress of a wrong and a "right" to recover possession of land; in the first case the action is through Trespass *quare clausum fregit*, and in the second, through Ejectment (the Action for Recovery of Land). The problem of the legal commentaries (to the extent that they recognize it as such) is that conflicts over landed property right in the latter case are masquerading as issues within the sphere of competence of the law of Tort, when they should strictly be part of the Law of Real Property. How can

25. At the level of Historical analysis, therefore, it is legitimate (by way of contrast and comparison) to refer to the creation of a single subject-category of exclusive possessory right where previously there had existed many such categories - without prejudice to the contention that, at the level of the concrete, juridical subjects may continue to differ widely in other important respects. (see n. 8. and *supra*.)

the basis of Trespass be defined as "Unjustifiable interference with possession of land"²⁶ when one of its most important contemporary functions is the resolution of disputes turning on questions of real property ownership? What does the fact that Trespass was made to perform this function reveal about the socio-economic content of the categories of "ownership" and "possession"? What insights are offered into the contradictory nature of legal reasoning by this historical accident?

So long as Trespass is conceived as a form of redress for interference with possession of land, any legal subject wishing to benefit from it must show "possession" - neither "seisin" nor "ownership" are by themselves strictly sufficient. An "owner" out of possession in the early Medieval period was unable to recover damages for a trespass committed in his absence, or to recover the land itself by "de ejectione firmæ" in the event of disseisin. His increasing ability to succeed in the Trespass action depended on his being able to show, in however tenuous a manner, the fact of interference with a personal (as opposed to Real) leasehold interest in possession: In the event of disseisin, he must enter upon the land and "make a lease" to a third party, John Doe, who must then be ousted by the defendant so that Doe can bring Ejectment against him; In the event of the simple act of trespass committed whilst he was out of possession, he must enter upon the land, and is then deemed to have had possession from

26. per Winfield (op. cit.) p. 335; or as "unjustifiable intrusion upon land in the possession of another" (per Clerk & Lindsell op. cit. para. 1311.)

the moment his right to enter accrued.²⁷ Whilst the modern Action for Recovery has erased all trace of the need to prove "possession", leaving the issue to be decided on the basis of superior Title and rendering obsolete the fictitious procedures of John Doe and Richard Roe, the doctrine of "Trespass by Relation" continues to require at least some entry by the plaintiff, however slight, and the Courts here at least have balked at equating "possession" with "ownership". But in either case the conclusion is inescapable that the interest really being protected is ownership rather than possession.

What then of the relationship between the modern categories of "ownership" and "possession"? The suspicion should already have arisen that "possession" cannot be conceived as a socio-economic category independently of its legal definition; it is not a pre-existing "state of affairs" which the law then subsequently recognizes. A possible action in Trespass is available to any subject in possession of land, but what constitutes "possession" is determined through the juridical process, and not according to any definite extra-legal criteria. Thus an owner may to all intents and purposes have possession recognized by law because of his Title rather than on account of his actual physical relation to the land. Conversely, direct occupation and exclusive physical control of lands and tenements may be evidence of

27. according to the doctrine of "Trespass by relation": supra. Ch. 2. p. 18 ; Clerk & Lindsell (op. cit.) para. 1329; and see also the action for Mesne Profits (ibid) para. 1381.

"possession"²⁸, but whether this is conclusive depends on the operation of law: a person previously regarded as a tenant with "exclusive possession" may suddenly be defined as a mere lodger without such possession because of what the courts decide was the "intention of the parties"²⁹, and a squatter previously able to bring Trespass against all but the true owner may find him or herself without this protection - because deemed to longer to have "possession" - literally overnight³⁰; in neither case need the bare occupation or physical control of the land have altered one iota.

"Possession" may therefore be better understood here as a legal right to possess in the economic sense - to occupy and control lands or tenements to the exclusion of others: a servant may look after his master's premises while he is away but have no right of occupation and control (which would enable him to bring Trespass), even though he occupies and controls the land in fact, and similarly in the case of the lodger, the right may remain in the landlord even though the immediate occupier has exclusive physical control of the premises. The interest protected by Trespass as a form of redress is the legal right of possession, not mere occupation, however well established

28. The legal commentaries have some difficulty in defining possession; the temptation is to state the obvious, that it varies "with the circumstances", or with the "type of land under consideration" (see supra. Ch. 2.), without recognizing its specifically legal character.

29. the tendency has been in recent years for the "intention of the parties" to supplant "exclusive possession" as the test of the existence of a tenancy as opposed to a mere licence. (infra. Ch. 6.)

30.as happened in the case of McPhail v. Persons Unknown (1973) - fully considered (infra) Ch. 6. (The test of whether one has possession recognized by law then becomes precisely whether one has possession recognized by law.)

that actual presence may be in fact.³¹

If "ownership" is also conceived in this context as a legal right to possess (to occupy and control) with the difference that it is a greater interest than the legal right of "possession", then the conceptual difficulties encountered in the legal commentaries may be considerably reduced. What is infringed in the tortious act of trespass is the "right" of the subject to occupy and control lands and tenements to the exclusion of others, and it matters not whether this right is the property of the freehold "owner" or the leasehold "possessor". Thus in the Action for Recovery, although the sole contentious issue may really be the plaintiff's Title to land, it is nevertheless possible to argue that a "remaining-on" amounts to an infringement of the plaintiff's right to possess - to occupy and control that land to the exclusion of all others, including the defendant. Of course, such a defendant may at least have bare physical occupation and control, which may be accompanied by a legal right to that occupation and control - the "possession" recognized by law; in that case the question for the court is which of the parties has the greater "right of possession" and thus right of occupation and control of the land. Returning to the doctrine of "Trespass by Relation", although the plaintiff cannot claim to have been physically in occupation at the time of the trespass, he does have an ownership

31. Here we are concerned with reformulating on a more adequate basis the category of "possession" as it appeared in Chapter 2. The legal commentators (see for example Winfield op. cit. pp. 336-339) distinguish "possession in fact" from "possession in law" without realizing that even the former has specifically legal conditions - revealed in McPhail (see n. 30. supra.) On the methodological status of "reformulation" see discussion of Sayer (supra Ch. 4.): "What is at stake is not just conceptual precision....it is the provision of categories capable of grasping the historicity of the phenomena they describe....(hence) Marx systematically reformulates the categories of his predecessors" (ibid)

right directly infringed by the tortious act - to exclusively possess, occupy and control his lands and tenements. This right is the real basis of his successful recovery, although the Courts may still require him to "enter" in some small degree, so that the fiction of interference with actual economic possession may continue to be maintained.³²

In this manner the various functions of the law may be brought within the definition of the basis of the Trespass action as the "right to exclude the world from interference with possession of land"; the right to exclude embodies the right to possess - and this is precisely a modern bourgeois ownership right. Conventional statements of Trespass law, on the other hand, fail to investigate the relation between "ownership" and "possession", with the result that the real unity of the various trespass actions - Ejectment, Mesne Profits, Reversion - is missed, only to be substituted by a catalogue of remedies evolved through Statutory and Common Law. Trespass by Relation and the simple action for Mesne Profits still require "possession" - but what is the real content of this category when its requirement here is so nominal? The Action for Recovery and the action for Mesne Profits (if bought at the same time as the former action) do not require "possession" - in which case what is the significance of their inclusion under the heading of Trespass? These questions are not even addressed by legal commentators, yet it is such peculiarities in the law of Trespass that provide the best opportunities for truly socio-legal analysis.

32. see also the action for Mesne Profits (Ch. 2. supra.)

The suggestion here is that rights of "ownership" and "possession" are situated on the same continuum of greater or lesser relative claims to land. Even the freeholder's interest in land - the greatest recognized by modern law - does not amount to an absolute right like the abstract "dominium" of Roman law protected by the "Vindicatio", and cannot therefore form part of the polar opposition "ownership - possession". Whilst English law is not completely clear on the point, it is probable that all a Plaintiff must prove in an Action for Recovery is a title relatively better than that of the defendant, not one good against the whole world.³³ The explanation for the difference between Civil and Common Law systems is historical. In Britain the feudal system of land tenure recognized only "seisin" - the tenant was "seised of" his lord, the lord was "seised of" the King - to which attached the burdens and incidents of the particular freehold tenure; such "seisin" was an enjoyment of property based upon a form of Title and not distinguishable from a separate "right", and can be characterized as "possession" only where this category does not appear in the conceptual dualism "Ownership - Possession".³⁴ Thus in the ancient Writ of Right the demandant need not establish "absolute ownership" but merely an earlier and therefore better seisin than the defendant. With the other Real Actions it formed a hierarchy of remedies from the most "proprietary" to the most "possessory", the relativity of the claim being a characteristic in each case: in the "possessory" assize of Novel Disseisin the question for the Court was simply whether the demandant had been seised before the defendant and whether the disseisin had taken place; here the "right to seisin" is asserted in its possessory rather than proprietary form, and if the

33. see supra. Ch. 2. and *ibid.* notes 53 & 54.

34. see Pollock & Maitland (*op. cit.*) Vol. II pp. 29-46; Holdsworth Vol. III. pp. 88-100. ; and *ibid.* Vol VII pp. 23-57.

defendant wishes to raise the latter issue, he must do so through the "more proprietary" Writ of Right.³⁵ This relativity of claims to land eventually enabled the development of the doctrine of Estates; ownership could be divided in time between different "estates", vesting either immediately or upon some future contingency, in a manner quite impossible under Roman law which could recognize only one absolute owner at any given moment.³⁶ Whilst the categories of "ownership" and "possession" are found only in the most modern legal system, and cannot be directly related to the proprietary and possessory forms of the "right to seisin", the conception of rights in land as relative rather than absolute may therefore be considered as having had roots in the early Medieval law.

Seisin remained, however, a condition of the enjoyment of land attaching only to the Freehold Tenures, giving particular rights of occupation and control denied the other subject-categories. In the cases of both Termor and Villein Tenant, the lord remained seised of the free tenement, so that an act of disseisin against either could be remedied in the Royal Courts only by the lord who was indirectly "disseised". Nevertheless, the Villein's rights in land were also governed by rules of seisin, laid down in the Lord's court according to Manorial custom, and these increasingly provided protection against arbitrary feudal authority until such time as the Copyholder was admitted to Royal Justice. The Termor, on the other hand, because his interest was personal rather than real, could not apparently be seised of lands and tenements in any sense; and it was specifically this predicament that gave birth to the modern category of "possession" as

35. see Pollock & Maitland (op. cit.) pp. 74-76.

36. see Cheshire (op. cit.) pp. 28-40.

the basis for the action of Trespass: whilst the lessee could not bring Novel Disseisin against the Freehold grantor, he had "de ejectione firmae" where he could establish tortious interference with his mere possession. Thus the freeholder's conditions of occupation and control continued to be defined according to the rules of "seisin", whilst those of the lessee, which might not differ at all in actual economic content, were regulated by the new law of "possession". On no account could the freeholder benefit from developments in Trespass in the 14th Century because he did not have "possession" required by law as the foundation of that action.³⁷ No better example could be found of the specific effectivity of legal categories in defining socio-economic conditions. Only with the universalization of Trespass in the form of Ejectment and its extension to include Freehold and later Copyhold tenure does "possession" in its modern legal sense come to define the conditions of occupation of land by all categories of subject. All claims of right (Title) and complaints of wrong may now be cast in terms of interference with a uniform right of "possession", the triumphant progenitor and bearer of modern exclusive private property right. Trespass was, therefore, able to perform a role of equalization in the sphere of legal relations by virtue of its capacity to impose a universal and uniform conception of the legal conditions of land occupation upon a hitherto disparate and heteronomous variety of subjects with correspondingly diverse rights and obligations.

37. On the two protected interests - "seisin" and "possession" - see Maitland (1968) pp. 43 - 44. This did not mean that the freeholder was denied any redress through Trespass: the action "quare clausum fregit" (vi et armis) could still be brought for the breaking of his close, sounding in damages; but to recover possession he must (because "seised") continue to bring the Assize or Writ of Right or Entry, whilst the lessee alone had "de ejectione firmae". (ibid).

Only the basic dimensions of the modern category of "possession" have so far been provided, and the content of the "equal right" from which we began still remains largely unspecified. To complete the initial stage of the analysis, therefore, it is now necessary to turn to the all-important category of "exclusion" - the key to the understanding of the "right" and the form of economic possession protected by it.

(c) Trespass : an equal exclusive private property right

Direct occupation and control of land (bare possession) must, in order to be recognized as "possession", not only satisfy those legal requirements already considered but also be "exclusive". The right to exclude the world from interference with possession presupposes an initially exclusive possession; the control of lands and tenements exercised by one legal subject must be to the exclusion of others for Trespass to be available as a remedy. In other words, the property interest of the plaintiff must be private rather than common, otherwise the basis of the Tort as infringement of private exclusive right is undermined. Thus farmer, tenant, owner-occupier and business manager all well understand that their proper control and occupation of lands and tenements requires the exclusion of unlawful intruders, and that this power simultaneously gives rise to the legal right to exclude. But it is necessary that this relation be seen for what it is, as a particular historical form of possession (exclusive possession) protected by a specific form of right (private exclusive property right). The typical English village community of the 12th to the 16th Century would have been familiar only with a very different form

of "possession" to which would have attached a correspondingly quite distinct property right. The open field system of cultivation and the various methods of pasturing³⁸ required communal organization and co-operation, giving rise to individual common rights not to be excluded from the common lands or the revenues therefrom: The arable fields after the corn-harvest, the meadow after haysel and the fallow field for most of the year, were all "Common of Pasture", giving grazing rights to the free Tenants of the village; and similarly on the Waste, the unredeemed common land between townships and Parishes, various common rights of pasturage, turbary, estovers and so forth benefitted both Freeholders and Copyholders alike.³⁹

To the extent that the land to which such rights attached was not "exclusively possessed", it could not be brought within the scope of the new action of Trespass. What the Freeholder did have recourse to, however, was the Assize of Novel Disseisin, available by the mid 13th Century for virtually any interference with his use and enjoyment of "his own".⁴⁰ Thus the free tenant was "seised of" his lands and the Common rights appurtenant to them, this being the inclusive form of property right protected by the Royal Courts. The disseisin complained of might literally be an ejectment from freehold lands and tenements, but more commonly it was either a nuisance amounting to "disseisin" (as caused by the construction of millponds, the raising

38. see Tate (1967) Ch. 2. pp. 32-44.

39. Common rights were not therefore restricted to those with "seisin" (Freeholders) recognized in the Royal Courts. Thompson (op. cit.) catalogues such rights as were enjoyed by Foresters in the 17th Century and before: to turn cows, horses, sheep and pigs on the forest without limitation; to cut turf, fern and heath; to take gravel, sand, fallen timber, "lops and tops", rootage and so on. (pp, 239-240).

40. see: Sutherland (op. cit.) p. 145. The Copyholder was similarly protected (if with less certainty) in the Manorial Court according to the custom of the Manor, being "seised by rod".

of banks, the planting of hedges, the obstruction of rights of way or the diversion of watercourses) or a disseisin of common rights - as of Pasture, Turbary or Estovers of wood.⁴¹ In the latter case the defendant would invariably be the feudal lord, attempting to enclose the Waste and later the Common fields for the purpose of Emparcment or the grazing of sheep. In fact, the free tenant was so successful in such actions through the Assize to the detriment of the Lord's interest that the Statute of Merton (1236) provided that the Waste might justly be enclosed so long as "sufficient" common land was left for those entitled to it.⁴² The Statute of Westminster of 1285, however, enlarged the scope of the Assize to include various other common rights previously dealt with by the Sheriff - in fisheries, nuts, acorns and woodland products - and by Bracton's day Novel Disseisin was considered capable of protecting all common rights without exception.⁴³ All the demandant need prove before the Assize in order to succeed was his disseisin of the interest or revenue in respect of which, as a free tenant, he had a right "not to be excluded".

The conflict between "inclusive" and "exclusive" conceptions of property right emerges equally clearly in the opposite situation, where the Manorial Lord resorts to law in order to protect his interests against the encroachments of his tenants; here, having acquired the termor's remedy in the 16th Century, the plaintiff can allege interference with possession of his land and benefit from the new

41. *ibid.* p. 48.

42. *ibid.* p. 50. The lord's action was then at least partially legally sanctioned by a limited right of exclusion.

43. *ibid.* p. 135.

right of exclusion.⁴⁴ At the centre of the struggle are the very conditions and principles of the occupation and control of significant areas of land; whether such organization is to remain communal, as indeed it must where the inhabitants of the village have strips in the open field and incidental common rights in the Waste, or whether it is to become privatized, as necessarily occurs when the open field and Waste are enclosed to form separate allotments each subject to control according to autonomous processes of decision-making. The transition is from a community producing principally for its own consumption, to a society producing principally for market-exchange and profit; this transformation requires, as a necessary condition of its possibility, the domination of communal by private control, and is reflected and simultaneously secured in the legal sphere by the triumph of Trespass over the Assize of Novel Disseisin. The small farmer, the Cottager and the squatter on the Waste must all lose control over the conditions of the production of their own subsistence. The small farmer in the 18th Century might not be able to afford the legal, drainage and fencing charges that must be paid as a contribution to the cost of Enclosure, and have to sell-out to larger interests; or the greatly increased rent demanded by the landlord and the system of rack-renting in an earlier period might already have forced him to leave the land. The Cottager was similarly squeezed by Enclosure, since even if his tenure was freehold, the allotment allocated by the commissioners scarcely compensated for the loss of common rights, and if his interest was less than freehold, the value of such rights was credited to

44. The Assize could of course also be used as an "exclusive" Action, as where one free tenant contested the rights of another in land regarded as "his own", but here the claim would be founded on interference with seisin rather than possession. In any case it is the capacity of Novel Disseisin to protect common rights, in contrast to Trespass, that predominantly concerns us here.

the landlord. As for the squatter on the Waste, with his few geese or sheep, he might be allowed to keep his encroachment, but again essential rights of common were irrevocably lost in the process of re-allocation.⁴⁵ The Landlord and larger farmer, on the other hand, correspondingly benefitted by enclosure to the degree that control over agricultural production in the new consolidated units was increased and concentrated, and involved the employment and deployment of available labour resources as an essential part of modern farming methods. In contrast, even the villein tenant of the early 14th Century, who was required to perform labour-services for so many days a week on the lord's demesne, retained control over the production of his own subsistence in the remaining period, and may also have exercised some control over the methods involved in farming the Manorial demesne.

Thus common use-rights were replaced by private "exchange-rights" as the "free" labourer was drawn into developed commodity production within a cash market economy. The law gave all an "equal right" to "possess" land, but the relation of "possession" was defined so narrowly by comparison with its traditional meaning that common rights were automatically excluded from its ambit. During this period great numbers of people were "disseised" of their use-interests - whether by the Lord's rationalization, as in the conversion of arable land to sheep pasture, or by Parliamentary Enclosure - yet the claim of Novel Disseisin, even supposing that the disseised had access to the law, would increasingly be met by justification (under the Statute of

45. On the Enclosure Movement see Tate (op. cit.) esp. Chs. 15 & 16; Johnson (1963); Hammond and Hammond (1924) esp. Ch. 4. In the early period enclosure was generally of the Waste, opposed by the Crown. By the 18th Century the open fields were increasingly being enclosed with the sanction of Parliament, both by private and general Acts.

Merton) or by a counter-claim for Trespass; for if the Landlord could prove "possession" in its modern sense, the mere continued exercise of common rights would constitute interference with his right to exclude, and the fact was that the concept of "possession" was in the ascendant and that of "seisin" in decline. The consequence for the newly dispossessed, apart from a decline in their standards of living, was a decline also in the quality of life, expressed in the loss of control over production and consumption, and the mediation of both through the exchange-economy. That it was essential for such control to be exercised exclusively according to the principles of capitalist enterprise is clear in the ideological onslaught conducted against the minority of cottagers, foresters and other smallholders who clung tenaciously to their various common rights in the 18th Century. From the view-point of the labour-discipline required by the capitalist system these traditional practices were disastrous: "Nothing more favours irregular and lawless habits of life among the inferior classes than the scattered and sequestered habitations of the forest", reported the commissioners for Windsor forest in 1809⁴⁶, and the Board of Agriculture similarly concluded in its Report on Somerset in 1794 that:

"Moral effects of an injurious tendency accrue to the Cottager, from reliance on the imaginary benefits of stocking a common. The possession of a cow or two, with a hog and a few geese, naturally exalts the peasant, in his own conception, above his brethren in the same rank of society.....In sauntering after his cattle, he acquires a habit of indolence. Quarter, half, and occasionally whole days are imperceptibly lost. Day labour becomes disgusting; the aversion increased by indulgence, and at length the sale of a half fed calf, or hog, furnishes the means of adding intemperance to idle-

46. quoted in Thompson (op. cit.) p. 239.

ness".⁴⁷

With the reduction of common rights to their residual form in "commons", modern private property re-inforced its dominance over competing conceptions.⁴⁸ By the beginning of the 19th Century, the "inclusive" right not to be excluded from the enjoyment of land revenues had finally all but completely given way to the private right of exclusion.

(d) Conclusions : the Concrete particular

Returning once again to the concrete level from which we began, the apparently simple "right to exclude" is revealed in its complex dimensions of form and content, as a composition of historically specific determinations and relations. It can successfully appear to spontaneous consciousness as an equal right because the essential mechanism of bourgeois law (here as elsewhere) abstracts from the existence of real socio-economic inequalities and concrete differences - characteristics, needs, abilities and class positions - rendering in this case different possessory categories and interests equivalent, and making the subjects of those interests also abstractly equivalent and exchangeable in an infinity of market relationships. No legal subject is formally denied the protection uniformly afforded "possession"; all have an identical "right to exclude", and therefore must be equal in respect of that right. But still more important than

47. quoted in Tate (op. cit.) p. 164.

48. A right of access for air and exercise is granted (by the Law of Property Act 1925) to the public in respect of common lands as defined by the Act. To the extent that common rights in land continue to exist, therefore, they are protected through Public rather than "Private" law. see also "National parks & access to Countryside Act" (1950) creating National Parks.

the mechanism creating the appearance of equal right are its underlying conditions and real relations.⁴⁹ For the content of this equal right is a particular form of "possession", revealed by historical analysis as consisting of the specific separation of the majority of subjects from control over their conditions of production and reproduction. Thus beneath the appearance of equality are hidden the real relations of exploitation of wage-labour by Capital, the working-class being dispossessed of all but its labour-power which it is compelled to sell because the capitalist class has acquired a monopoly of the means of life and labour; control of production being organized through principles of profit maximization and capital accumulation, within which process wage-labour is deployed as a resource just like any other commodity. But at the level of the Apparent movement the Law recognizes nothing of all this: tenant, lessee, freeholder, sub-tenant, public authority, Corporation, business enterprise, even the squatter may all have "possession" and therefore bring Trespass. Yet in reality this "possession" is in fact a separation - indeed the two categories can properly be defined only in relation to one another, bourgeois private exclusive possession automatically and inevitably entailing the dispossession of labour of its independent means of subsistence.

All subjects may thus be credited with the same formal "possession", but the real extent and nature of their effective occupation and control differs significantly depending on their class position within the social relations of production and reproduction. At the level of Reproduction (also the sphere of Distribution and Consumption for

49. This adoption of "mechanisms" and "conditions" corresponds to their use by Sayer in his argument for a Realist Marxist epistemology (supra. Ch. 4. Section IV (2) (b).)

present purposes) all subjects really are likely to have some form of possession, realizing the possibilities promised by the formally equal right, as owner-occupiers, weekly or monthly tenants, shorthold tenants, or tenants for lives or years - the nature of the "right of possession" depending on the estate interest in the land.⁵⁰ At the level of Production, on the other hand, possessory rights vest entirely in the capitalist enterprise, the management having occupation and control whilst the labour-force has merely licensee status with no right of possession whatsoever.⁵¹ This relation of separation must continually be re-imposed upon Labour if Capital is to maintain its monopoly of the conditions of economic production: as licensees, workers may become trespassers and thus subject to legal intervention by exceeding the conditions of licence or through its revocation. At this level also, a number of different possessory rights (or degrees of "ownership" in more conventional terminology) may lie behind the direct managerial control of the production process, without however altering the fundamental relation of possession and separation.⁵²

The success of the "equal right to exclude" as a means of ideological concealment lies precisely in its ability to fulfil the promise of equality in the spheres of Exchange and Consumption whilst systematically defining the level of Production out of consideration. All

50. The exceptions being the comparative minority with no "legal possession" - licensees, ex-licensees, squatters, intruders and others with "no colour of right", (fully considered infra. Ch. 6.)

51. This does not of course prejudice the question of the effectivity of other rights secured through Trade Union struggles in limiting the absolute power of Capital - but these do not fundamentally challenge the basic relation of possession, separation and control.

52. for example, plant and machinery may be hired, land and premises rented; shares in the company may be owned by pension funds, city institutions or private individuals. The implications of this analysis of Trespass for the "separation of ownership from control" debate are considerable, and are examined infra. Ch. 8.

that is visible in the Apparent movement and thus reflected in spontaneous consciousness is equal right (hence the need to reveal the Essential movement, the real relations of Production, through scientific Abstraction). The litigious subject may quite correctly perceive that he shares with others an equal right to prevent a neighbour from encouraging dogs to run onto his land, or to prevent vagrants sleeping in his garden, without realizing that his landlord's Action for Recovery or the conditions of his employment or unemployment (the ultimate separation) are founded on the same basis in Trespass. The categories reproduced in legal textbooks similarly apprehend only the phenomenal forms of the Apparent movement, abstracting law from the existence of other aspects of the totality, and resulting in a partialized conception of Trespass divorced from its economic and social determinations.⁵³ The significance of this area of law is lost because it is understood superficially as primarily a recourse for the resolution of trivial conflicts in the sphere of Consumption, as concerning instances of interference with private rights enjoyed by everyone - where a gun is fired into your soil, a ladder placed against your wall, a nail driven into your door or a body thrown into your front garden.⁵⁴ In fact, the socio-economic function of Trespass is to define and regulate the conditions of occupation and control of land, not only in Reproduction, but also and more importantly at the level of Production, where specific relations of possession and separation constitute the basis of the capitalist mode of production. In the process of subjecting legal categories to critique, social and economic determinations, absent from the accounts of Trespass summa-

53. Hence the need for "reformulation" of the content and order of legal categories in a more scientifically adequate (and total) manner. (see latter part of n.31 supra.)

54. see Ch. 2. supra.

rized in Chapter 2, should have been revealed, resulting in the re-
formulation on a firmer basis of the essential elements of the law.

This adoption of a total perspective broader than that conventionally recognized by lawyers has also provided reformulations of certain "legal problems" previously inadequately addressed because of the failure of commentators to progress beyond a partialized view of the law.

The results of the analysis so far may now briefly be summarized, and some tentative conclusions drawn.

(1) In all human societies, some degree of direct economic occupation and control of land (a resource limited in supply) is essential in securing the material conditions of production and reproduction.

(2) Such immediate occupation must be governed by more or less definite principles of social organization, conventional, customary or legal. Where it is regulated by law, specifically legal principles define and thus over-determine the physical conditions of land occupation in accordance with a definite historical determination by those conditions: feudal economic and social relations are legally expressed in the category and principles of "seisin", bourgeois relations in those of "possession" and "ownership". Such interpolated legal forms are analytically distinct from their socio-economic basis in the economic conditions of occupation and control of land.

(3) Capitalism requires a particular form of private occupation and exclusive control of land in order to develop as a mode of production. Such control was established historically over six centuries by a variety of pressures, directly coercive, economic and legal. The

law was specially important in securing this transformation as a terrain of struggle upon which different conceptions of property right were opposed.

(4) The historical importance of Trespass lies in its flexibility and responsiveness to the economic needs of the developing order: as progenitor of equalization in the sphere of legal relations; as disseminator of the modern conception of "Possession"; and hence also as vehicle of the domination of common by private forms of property - expressed in the triumph of Trespass over the Assize of Novel Disseisin.

(5) In English law, "ownership" is best conceived in relative rather than absolute terms, as giving various "rights of possession" which either are already or may at some future time become rights to immediately occupy and control land - in accordance with the doctrine of Estates. It is "exclusive possession" and the "right to exclude" that constitute the crucial revolutionary elements of bourgeois law. "Ownership" is in reality a relative "right of possession" that may be infringed even if a plaintiff does not enjoy direct physical occupation and control; the claim of a right and the complaint of a wrong in respect of land may logically be united in the same action claiming interference with possession.⁵⁵

The "equal right to exclude" is thus shown to be composed of and determined by specifically capitalist relations of possession, separation and control. In revealing the concrete particular as concentration of many determinations and relations, unity of the diverse, a

55. It goes without saying that the more general of these propositions are arrived at only in the later stages of the concrete analysis - and that they are in no sense "a priori" to such analysis.

broader object suggests itself for analysis: Law relating to and securing the conditions of possession and control of, and separation and exclusion from, land as both a factor of Production and a scarce resource in the sphere of Consumption. Methodologically, in reference to the conical figure described in Chapter 4, this involves an expanding spiral movement outwards from the central axis of the circular surface plane of the concrete, in the trajectory from simple to ever more complex elements which will ultimately embrace the concrete totality of Trespass and related laws securing the fundamental relations of Production. Thus the "equal right to exclude" is only one (albeit the most irreducible) amongst a multiplicity of legal interpolations governing modern capitalist relations of possession and separation, the general dimensions of which may now be given.⁵⁶

(2) The concrete totality (redefined object): Law securing fundamental relations of possession, separation and control

Trespass has already been considered in connection with the law of Real Property, an inevitable course for the analysis to follow because of the close present and historical relation of this tort to modern private property right.⁵⁷ It should be apparent that the rigid separation of law into discrete areas renders genuine socio-legal analysis impossible: the "right to exclude" was found to have embodied within it a historically specific right of, and to, possession - precisely the private property right of the capitalist mode of

56. The central focus must however remain throughout upon law relating to Land, and upon Trespass. The many opportunities for detailed consideration of other areas of law opened up by this methodological approach are discussed (infra: Ch. 8.) at the end of this Thesis.

57. supra Section I.

production - without which the tortious action would have no legal foundation. The category of "right" framed within the law of Real Property was thus the first new element to be introduced into the analysis, in the expanding movement away from the concrete particular embracing ever more complex aspects of the fundamental relation of possession and separation. Yet however basic are the legal elements so far considered from the point view of the order of inquiry and presentation, this need not imply that other fields of law are not equally "important" for the maintenance of modern bourgeois relations. Most crucial in this respect are the obligations legally owing to the State not to violate Public and Criminal laws established by that central authority for the preservation of certain standards of behaviour.⁵⁸ Here a defendant may be the subject of State intervention and prosecution, as well as having to answer a private action by another individual claiming a right or complaining of a wrong. The significance of the presence of the State is that its monopoly of force can be immediately directed towards the maintenance of certain norms and standards, and the punishment and discipline of transgressors who under private law are required only to redress injustices committed against other individuals by specific restitution or the payment of damages. Thus private property right continues today as in the past to be buttressed by an array of criminal sanctions and statutes that contribute an essential dimension to the securing of specific historical relations of possession and separation.

The most immediately obvious of such criminal provisions (at the concrete level of the Apparent movement) for present purposes are the

58. Of course "duties" are also involved in Private law, the obverse of "rights", owing to other individuals. The above analysis has concentrated on "rights".

offences relating to entering and remaining on property contained in Part II of the Criminal Law Act 1977.⁵⁹ The right of the private individual to exclude the world from interference with his or her possession is now directly supplemented by the obligation imposed upon potential trespassers not to contravene public norms by using violence for securing entry, adversely occupying "residential premises", trespassing with a weapon of offence or on the premises of Foreign Missions, or obstructing Court officers executing process for possession. In each case the State may intervene through its police force upon suspicion of an offence being committed, and a guilty defendant is liable on summary conviction to a maximum six months imprisonment or 1000 fine or both.⁶⁰

This direct involvement of the State in the conditions of land occupation is hardly new (although it certainly represents a change in the direction of the law of Trespass - all trace of whose criminal element was finally abolished in 1694). The Common Law and Statutory offences of Forcible Entry and Detainer,⁶¹ widely developed between the 14th and 17th Centuries, functioned principally not so much to protect particular forms of property as to discourage any activity involving claims to lands and tenements that might lead to breach of the King's Peace. Throughout the Medieval period, the Crown was engaged in a constant struggle with the feudal lords to acquire for itself a monopoly of the legitimate means of coercion, and this involved directing peaceably through the Royal Courts disagreements that might

59. for criminal provisions more incidental to trespass (concerning Railways, Theft etc.) see summary at end of Ch. 2. supra.

60. (see Appendix F. infra.) In the case of S.8. (Trespassing with weapon of offence) the maximum period of imprisonment is 3 months.

61. see Law Commission Working Paper No. 54. Appendices for full re-production of the Statutes.

otherwise have been privately resolved by force. A strong central authority was required to impose stability in the 14th Century because the Assize of Novel Disseisin, which had always discouraged any disseisin without Judgment, was increasingly being interpreted as not applying to a disseisin where the disseisor had good Title to the land - enabling such claimant to enter by force and eject the current tenant to the detriment of public order.⁶² The Common Law in response then sought to protect all possession howsoever acquired, even where a claimant bore good Title, by requiring that his right to enter be exercised peaceably without such conduct amounting to Riot or Unlawful assembly. Between 1381 and 1623 the statutes of Forcible Entry and Detainer gradually increased the scope of protection afforded by the Crown, until Civil protection from the Justices was available even to the tenant for a term of years.⁶³ According to L. Owen Pike:

"Forcible Entry was practically extinct before the first half of the 18th Century was completed, and has never been revived in its ancient form. This is perhaps the greatest triumph of law and order over violence and rapine to be found anywhere in the history of civilization".⁶⁴

However, Pike's enthusiastic conclusion that "at last the old instincts and the old traditions are so far weakened that obedience takes the place of violence and the law is never or but rarely dis-

62. see Milson (op. cit.) pp. 132-140; Russell on Crime (1964) p. 279

63.by the Statute of 1623. On Civil actions for Forcible Entry, and its Criminal indictment, see Sutherland (op. cit.) pp. 173-176. The Act of 1429 provided a summary remedy for the recovery of possession.

64. L. Owen Pike (1873-1876) p. 260

obeyed"⁶⁵ must be qualified by the observation that a number of prosecutions for Forcible Entry and Detainer were undertaken in the 'seventies in circumstances very far from peaceful, involving squatter's allegedly violent defence of unlawfully occupied property. Moreover, whilst all common law and statutory offences of Forcible Entry and Detainer were abolished by S.13. of the 1977 Act, the legislature saw fit to replace them with the comprehensive S.6. ("Violence for securing Entry") which performs a similar function with none of the anachronistic "defects" of the old law.⁶⁶

With the growth of Trespass in the later Medieval period and the increasing predominance of exclusive possessory right, private property became precisely the form of property principally protected by the Statutes of Forcible Entry. But these specific relations of possession and separation were also more directly protected by the Criminal law, in its attempt to secure discipline within the new labour-force freed from feudal bonds and compelled to engage in market relations. The Black Death of 1349, which wiped out nearly half the population of Britain, increased demand for free labour already encouraged by a growing money economy and the commutation of labour-services for rent. A series of Statutes of Labourers enacted in the same year, variously affecting shoemakers, carpenters, tilers, Masons and carriers, provided that all able persons must work at a certain rate, refusal

65. *ibid.* p. 511.

66. This and other aspects of law outlined here are fully considered *infra.* in Ch. 6, where the "real concrete totality" is confronted in all its complexity.

constituting a Criminal offence.⁶⁷ And a Statute of Artificers in 1562 similarly provided for the compulsory work of the able-bodied upon demand by two Justices, the breach of its particular provisions resulting in imprisonment.⁶⁸ Even in the 19th Century, the employee's freedom of action was strictly controlled by the criminal law, and between 1858 and 1875 10,000 workmen on average were prosecuted each year for breach of some aspect of their "contract of service".⁶⁹ Most important here also is the Common law of Conspiracy developed as an "engine of government" by the Star Chamber in the 14th Century, and increasingly used to break embryonic forms of labour organization. The principle became established that criminal prosecutions for conspiracy could be brought in respect of activity that in itself amounted only to Civil Wrong. Not until the Conspiracy and Protection of Property Act 1875 were trade disputes finally excluded from the criminal law and the right to strike properly recognized; worker's organizations could no longer be declared illegal merely by virtue of their existence, nor could they be prosecuted specifically on the grounds of their being "combinations" against their masters.⁷⁰ However, S.7. of the same Act retained the offence of Conspiracy for industrial conflicts in which violence, threats or intimidation, themselves subject to the Criminal law, were involved; and it was on such a charge of "conspiracy to intimidate" that the Shrewsbury pickets were gaoled for their part in the building workers' strike of 1972, one defendant receiving a sentence (3 years imprisonment) twelve times heavier than

67. see Holdsworth (op. cit.) Vol II p. 461.

68. see Manchester (1980) p. 328.

69. *ibid.*

70. per section 3. On Conspiracy and its complex Civil and Criminal History see Manchester (op. cit.); Robertson (1974); Spicer (1976).

the maximum criminal penalty for direct intimidation.⁷¹

Even in modern society, therefore, the criminal law of Conspiracy functions to preserve definite relations of possession, separation and control ; The decision in R v Jones that "sheer numbers" could constitute "intimidation" enabled the dramatic reactivation of this apparently dormant field of law. However, the State is concerned with the conditions of possession and control not only at the level of Production, but also in the spheres of Consumption (where housing is a scarce resource) and Exchange - in the realm of the "public" where certain standards of behaviour and respect for property must be maintained. In 1974, the offence of "Conspiracy to Trespass" was virtually created where a wrongful action was considered to have involved "invasion of the public domain", surprising legal commentators who had long assumed that an agreement to commit a civil wrong was not indictable.⁷² The specific offence of "Conspiracy to Trespass" was abolished by S.5. (1) of the 1977 Act, but, as with the replacement of Forcible Entry and Detainer, its continuing function is more than adequately provided for by the creation of other offences of entering and remaining on property; moreover, since Trespass has thereby been brought within the domain of the Criminal law, the conspiracy charge may still be brought in respect of any of the five new offences.

Thus the 1977 Act unites under the banner of Trespass two previously separate trends of development in the Criminal law, buttressing existing relations of possession and separation at all levels of society because the greatest possessory interests now have the direct pro-

71. R. v. Jones and Others (1974) IRC 310.

72. Kamara v. DPP (1974) AC 104.

tection of the State with its police force and legal sanctions, whilst lesser possessors are confronted by this fact - and are under obligation to the State not to violate its property norms - in any struggle over the conditions of their separation. At the level of the Apparent movement, the State stands impartially above the conflicts of civil society as a neutral and independent arbiter, protecting the "possessions" of all its subjects to an equal degree against the invasions of criminal intruders; this level appeals directly to the "man in the street", who may reasonably expect the help of the police in circumstances where private legal remedies are plainly inadequate: squatters have moved into his house whilst he has been out shopping, or a drunk is behaving threateningly with a broken bottle in his front garden. At the level of the Essential movement, on the other hand, the same real exploitative relations of production and reproduction that have already been detailed in respect of the private law are again revealed as underlying the ideological appearances given to spontaneous consciousness.⁷³

The re-definition of the object of study thus requires that the analysis move beyond the "private" law with its simple "equal right to exclude" to consider various relevant aspects of the Criminal law.

73. of course the categories of legal commentators remain just as trapped at the level of the Apparent movement: for Winfield the 1977 Act belongs to the Criminal law, not the Tort of Trespass to land, and thus merits only six lines in a footnote (op. cit. p. 335 n. 1 a.) Because the connection between Civil and Criminal aspects of Trespass cannot be explored, the crucial inter-relation is missed. Clerk & Lindsell mention the Act in their 1979 Cumulative Supplement to the 14th edition of their work (para 1332) only briefly, and actually state the law incorrectly: "Industrial occupations are not within the provisions of the Act, as the Act does not apply to premises which are wholly or essentially non-residential" (ibid). On the contrary, only section 7. (Adverse occupation) is specifically confined to residential premises. It is precisely the breadth of the Act's implications that is considered in Ch. 6. (supra.)

Similarly, various areas of "Public" law must also be considered as regulating fundamental Capitalist relations of possession and separation. In the law of "Landlord and Tenant", residential tenancies have increasingly benefitted from protection under the Rent Acts since 1915. Extensive regulation of the conditions of tenant occupation was introduced in 1965 with the conception of a "fair rent" to be determined by the Rent office, the scope of this measure being broadened in 1972 and 1974 to include tenants of non-private landlords and those in furnished accommodation. Once a tenancy has been brought within the system of regulation, a landlord cannot evict the occupant without a court order for possession, and this will be granted only in certain circumstances. The effect of legislative intervention has been to greatly curtail the landlord's basic Common law rights, and to vest control over the conditions of possession in State institutions such as the Rent Tribunal and Rent Officer.⁷⁴ Thus the landlord's private "right to exclude", based on his Title to land and embodied in the modern Action for Recovery, may, in these circumstances, have been considerably overshadowed by the legislative enactment of "public" rights to the great advantage of the small possessor. This does not of course alter the fact that private property remains the basic form of land occupation; the landlord's rights have been reduced in scope and the tenant's increased, but there is no question of a fundamental transformation in the form of property.

This is still more obvious when the focus of analysis is shifted from Consumption and Distribution to Production, where, despite advances won by organized labour through Industrial Relations legislation, the

74. see Beirne, P. (1976); Evans (1974); Housing booklets 1-18 Dept. Environment (1980).

fundamental control of both labour-process and planning organization remains with the management of the Capitalist enterprise. Here the struggle has recently been conducted through forms of industrial action in which Capitals right to control has been not so much explicitly challenged as indirectly threatened, by work-ins, sit-ins and mass picketing, all of which have involved "interference", despite their generally limited objectives, with the private exclusive property right of the Enterprise. Workers in such circumstances are technically trespassers, having had their licenses to work withdrawn, and may be removed with the exercise of lawful force where this is not impracticable because of the size of the occupation or its political sensitivity, but clearly such action is not conducive to harmonious industrial relations, and other legal initiatives have been sought on more particular issues, involving the "closed shop", picketing, the secret ballot and Civil immunities; the present Tory proposals threaten to restrict protection from civil actions in Tort given in the Trade Disputes Act 1906, and increased by the Trade Union and Labour Relations Act 1974 and the Labour Relations (amendments) Act 1976.

This then is the concrete totality of Law securing the basic relations of production and distribution, as regards the scarce resource of land, in modern England: the "Private" law of Trespass founded on exclusive property right; the Criminal law of Trespass replacing Forcible Entry and Common law conspiracy to trespass; and the "Public" law governing Industrial relations and the residential occupation of land. Only the most general determinations of this concrete totality have as yet been outlined, the purpose here having been to merely indicate the fundamental areas of law without whose consideration an

analysis of Trespass would be incomplete.⁷⁵ In order for the legal concrete totality to be fully encompassed, the restraints on diachronic analysis must be lifted, so that this totality may be located in the context of its real historical and conjunctural development - in relation to the most broadly defined Concrete Totality which is the ultimate object of analysis and explanation. This analytical process involves close examination of the historical/conjunctural transformation in the structure of rights and duties within the various areas of law securing the fundamental conditions of land occupation and control, and simultaneous consideration of the distribution of socio-economic subjects into and out of legal categories defined by such structures of rights and duties. These are the two crucial axes of legal development. Unless they are studied together, the total understanding of the object will be lost: the significance of an improvement in the position of tenants or those having possession, for example, is qualified by the fact that the courts may be defining increasingly restrictively the criteria for admission into the subject-category of "Tenant" or "possessor". Even at this stage of the analysis the significance of the Criminal Law Act is apparent in the change of legal principle embodied within it - the State being directly involved, for the first time in six hundred years, in the maintenance of property right through the criminalization of certain acts of Trespass. Because the category "Trespasser" is so universally definitive of relations of private property, the new Act draws to-

75. Certainly many other legal developments (most notably in the sphere of Public law) have affected and continue to affect the conditions of land occupation, but to examine these in any detail would be to depart too far from the central object of study - Trespass and its related institutions. Neither is it suggested that capitalist relations of occupation and control are secured only through law (other ideologies and practices - scientific and technical, managerial, corporatist - have an important part to play here), merely that the law itself has a crucial role.

gether previously disparate threads of law - Conspiracy, Criminal trespass, Forcible Entry, Landlord and Tenant and Industrial relations - under a central unifying principle applicable in all regions of society: thus workers, public employees, demonstrators, pickets, tenants, sub-tenants, licensees and squatters may all be brought within its ambit. The next chapter will therefore trace conjunctural legal developments up to and beyond the Criminal law Act 1977 and attempt to demonstrate the convergence of legal functions in Criminal Trespass, providing at the same time an account of the real economic and social relations of determination that explain such changes and thus locating the concrete particular fully within the broadest Concrete Totality of social practice from which it was initially abstracted.

First, however, some of the more important conclusions of this chapter may briefly be resumed, and its theoretical consequences generally indicated.⁷⁶

(3) Conclusions : from concrete particular to concrete totality

(1) The concrete particular within the initial object [Trespass as described in Chapter 2] was taken to be the "right to exclude". This was analyzed in its dimensions of equality, possession and exclusion before a broader object was defined - "law securing fundamental relations of possession, separation and control" - requiring consideration of various aspects of Public and Criminal law, constitutive of a legal concrete totality over-reaching the basic "right to exclude" with a

76. [to be understood in conjunction with the conclusions to part (1) of this Chapter (supra).]

number of other rights and duties, but not fundamentally detracting from its foundation in private property right.

(2) Whilst all socio-economic subjects were formally found to share the same potential basic property rights of possession and exclusion, free from feudal and status restriction, the capitalist system of production was seen to require (and to have achieved historically) the separation of Labour from its independent means of reproduction and the monopolization of control by Capital, resulting in degrees of greater or lesser possessory interest in land depending on the class position of economic agents.

(3) Law governing the conditions of land occupation in Society operates by interpolating subject-categories within its structure, varying in their centrality and importance from the most fundamental (possessor/non-possessor)⁷⁷ to the various sub-categories (or associate categories) of this basic relation - licensee, tenant, sub-tenant, squatter, employee, business enterprise and Corporation - created through "public" aswell as "private" fields of law. To each sub-category attaches a different structure of rights and duties, the tenant's powers and legally sanctioned capacities being given under the Rent Acts, the squatter's under the Common and Criminal law, the workers most importantly under the Employment Acts and the Corporation's according to the principles of Company law. All such subject-categories remain nevertheless subordinate to and are subsumed within the principal subject-category which embodies the rights

77. The universality and uniformity of the "master" subject-category is of course the historical achievement of Trespass in its domination of the diverse feudal forms of seisin, personal status, etc.

of private property and exclusive possession; exclusive private property right remains the foundation of the concrete totality of law relating to the occupation and control of land in modern society.

(4) The socio-legal analysis of law in this area proceeds by demonstrating the conjunctural transformation in the structure of rights and duties constitutive of the principal subject-category and the various sub-categories, and examining their complex inter-relation. Of equal importance, however, is a second axis of legal development, involving analysis of the process of recruitment of socio-economic subjects into the different subject-categories and sub-categories. The criteria for inclusion of an agent within the principal subject-category of "possessor" or the sub-category "tenant" may change over time and this may result in the expulsion of some agents from the category and the inclusion of others hitherto excluded from it.⁷⁸ Similarly, socio-economic subjects must "qualify" for inclusion in the sub-category "Corporation" in order to benefit from the provisions of the Companies Acts, or for inclusion in the sub-category "employee" if they are to be brought within the sphere of operation of Industrial Relations legislation.

(5) A given socio-economic subject may belong to a number of different legal subject-categories; the human individual is the point of intersection of a diversity of interpellations which enable that individual to recognize him or herself as member of various subject-categories: he/she may work in a factory and live in a flat as tenant of a private landlord; or may be unemployed and in receipt of social security payments, an owner-occupier or a lodger, or living in a

78. supra. concluding remarks to section (2) of this chapter.

council house. In each case the rights and duties of the subject vary according to the particular legal subject-categories in question.

(6) Thus whilst the private law of Trespass gives all socio-economic subjects potentially the same formal right of exclusion, whether such a subject has this right in fact and if so to what degree depends, not merely on his/her position within the relations of production and distribution, but also and in consequence on the operation of other fields of law, which distribute economic agents into different legal subject-categories with quite specific rights and capacities: tenant, worker, Corporation, Public Authority, owner-occupier - all may be subject to the law of private property and have access to the tortious remedy of Trespass, yet this basic right may be greatly qualified or enhanced by the various provisions of Public Law. Thus the worker at the point of Production cannot be conceived merely as a licensee (the status given at private law) because numerous statutory rights protect and regulate his or her employment conditions and restrict the exclusive control rights of Capital; the Corporation enjoys particular legal capacities and must perform duties quite beyond the province of ordinary private legal subjects; and the tenant has acquired through the public provisions of the Rent Acts a degree of protection moderating significantly the exclusive property rights (for example over eviction) of the private landlord.⁷⁹

79. the existence of many "sub" or "associate" categories does not imply a return to the diversity of fundamental statuses characteristic of the feudal law, since all remain within the principal subject - category "Possessor/non possessor" (whereas feudal occupation and control was governed according to a variety of competing fundamental subject-categories: seisin protected by the Royal Courts, the different "Copyhold" seisins of each Manorial Court, and the "new possession").

These conclusions (points 3-6) are the result of theoretical reflection at an intermediate stage of the concrete analysis. Whilst they must at least to some extent inform what follows, there is no question of such general and abstract considerations dictating the direction of the analysis, which will continue as before to be firmly rooted in the concrete in accordance with the principles set out in Chapter 4.⁸⁰

This Chapter has located the concrete particular within a wider "concrete totality of law", explaining the forms of appearance of both initial and redefined objects and demonstrating how the law operates to secure fundamental bourgeois relations of possession and separation. The concrete totality of law must now be set in the context of the broadest Concrete Totality of social practice - and therefore the ultimate object of study - Britain in the 1970's.

⁸⁰. A full Methodological review of this Chapter and Ch. 6. will be provided in Chapter 8. (infra).

Ch. 6. The Concrete Totality (1): Trespass and related law in the

1970's

The previous chapter showed how, under Capitalism, definite relations of possession and separation give rise to phenomenal forms of Appearance expressed in the determinate legal categories of "possession", "ownership" and "exclusive right". This demonstration was accomplished methodologically in a movement which began with the concrete level of Appearances and therefore with the categories of legal commentators, proceeding to an explanation of how and why such appearances and categories should assume the form they do - resulting in the laying bare of their determining conditions and real relations.

The procedure in this Chapter is basically no different, except here Trespass is located in its conjunctural context, the emphasis being on the process of ideological mobilization of the categories of private exclusive property right which enables the further development and transformation of the law. Whilst the legal commentaries isolate and digest the constitutive categories of concrete social practice, popular ideologies are their living embodiment, actively involved in everyday discourses securing and maintaining definite economic and social relations. Again the level of Appearances, of ideological and spontaneous consciousness, is treated with circumspection, the purpose being to explain its movement by reference to Essential determinations that can fully be revealed only through a Scientific practice which, building on the analytical results already to hand, produces through abstraction adequate knowledge of the concrete object.

We begin therefore by examining the process and content of the re-

presentation of real economic and social developments concerning the conditions of land possession and control, taking as our point of departure the simplest and most irreducible expression of this real object in concrete social practice: the threat to possession posed by the phenomenon of of squatting.¹

I Domestic Possession

A. The Re-presentation of the Squatting phenomenon: The threat to possession.

After a hesitant revival in Redbridge in 1969, squatting had become by the mid 1970's a national phenomenon involving more than 50,000 people.² If the Redbridge squatters had been mainly "respectable" families, obvious victims of inadequate Council housing provision and for this reason considered deserving of at least some public sympathy, then the "new wave" of squatters at the beginning of the decade consisted of a larger proportion of the young, single and unconventional, for whom was reserved an unprecedented degree of unfavourable public reaction.

By the summer of 1975, squatting had been constructed in popular consciousness by a vigorous media campaign as a serious danger to

1. The broad application at this analytical level of the methodological principles already described breaks new ground in the method debate - which has tended to ignore the implications of the work of Sayer and Echeverria, for example, for conjunctural analysis. These questions are discussed (infra) Chs. 7. & 8.

2. see Wates & Wolmar (eds) (1980): "Squatting : the real story" p. 230; and Bailey (1973) "The squatters".

Society,³ through the mobilization of the following representations:

(a) The threat to immediate possession: squatters as intruders;

The ordinary occupier's right of possession and exclusion was now under immediate threat:

"An Englishman's home used to be his castle....but now he stands a good chance of having it taken over by Britain's growing army of squatters. It used to be the long-vacant premises of property speculators that were the targets of the live-for-nothing intruders. Now it's anyone's homeeven a family coming back from holiday can find itself locked out, with strangers in occupation. Squatting, 1975, is highly organized, nationwide, spreading rapidly - and dangerous.⁴

This fundamental representation appealed directly to equal legal subjects⁵; all possessor had "castles" (whatever their tenure and however humble their homes in fact) which were portrayed as liable to imminent intrusion.

(b) The threat to future possession: squatters as queue-jumpers;

Similarly, persons with a right to future possession, but not in immediate occupation, were also under threat, since squatters were holding up re-development schemes by refusing to move out of condemned buildings, and taking over houses and flats meant for people on the Council waiting lists. The Sunday People explained "How the new squatters ruin the hopes of the real needy":

"The years of waiting on the Housing list seemed to be over for Tom and Gwynneth Reed when their local council offered them a new flat. Eagerly they signed the tenancy agreement, took over the keys, packed their belongings, and got ready for the move. Then....Heartbreak. They discovered that squatters had moved into their new flat.

3. see Wates & Wolmar (op cit) Ch. 5. pp. 48-63

4. The Sunday People, 8th June; emphasis original. A large amount of research material, newspaper articles etc. relating to squatting has now been centrally collected at the Self-Help Housing Resource Library (SHHRL), North London Poly. Much of this has been analyzed in Wates & Wolmar (op cit). Both sources were frequently consulted in this research.

5. see Ch. 5. supra. Section (1)

The locks had been changed and 73 year old Mr. Reed was greeted with a shout through the letter box: 'go away'. Said Gwynneth: 'I used to walk past the flat at night and see the lights on. Someone else was in our home. It was heartbreaking.'⁶

Squatters here became queue-jumpers, preventing the socially just allocation of housing to those in real need (the weak and the elderly) and refusing to abide by the "rules" of the waiting-list game.

(c) Squatters as freeloaders and scroungers;

Neither did the squatters have a deserving case, "many thousands - in all probability the majority - being freeloaders and layabouts",⁷ flouting society's work-ethic and getting something for nothing in return. The Times summarised the situation:

"It has become increasingly clear that the art of squatting is no longer carried out by, or on behalf of, deprived and homeless people. The new generation of squatters are not by any test poor (or if they are, they need not be). They are usually articulate and sophisticated, and their motives are often cynical in the extreme".⁸

An Evening News investigation revealed the "true face" of the "new breed of squatters who seem to have taken over central London":

"And what a nasty face it turns out to be. Many of them are foreign scroungers here for the social security and free accommodation.....By the time MP's get back from their summer holidays, how many more of the world's waifs and strays will be enjoying their free stays in London?"⁹

Here, scrounging is linked with foreign nationality, adding an alien dimension to the threat to possession.

(d) Squatters as wanton destroyers;

Having broken into your home, or the premises you were about to

6. see Wates et. al. (op cit) quoted on p. 60

7. according to the Daily Mail of 19.8.75

8. The Times 16.8.75.

9. London Evening News 30.7.75

occupy, the squatters were then likely to add insult to injury by indulging in the wanton destruction of property:

"It is not merely that they deprive those who have been waiting in the queue for a home patiently. The havoc they cause is unbelievable to those who have not seen it. To describe their living habits like those of pigs is unfair to pigs who are generally of a kindly disposition, not given to wanton destruction, and react reasonably favourably to clean living conditions. The GLC handed out pictures of the devastation caused in a block of new flats at Paddington, but they could have taken similar pictures almost anywhere in inner London. Baths piled high with rubbish, ceilings collapsed by rubbish piled above, mindless slogans scrawled on doors and decorative panels, posters and newspaper articles hammered to the walls and kitchens piled high with the debris of feeding habits that would disgrace a chimpanzees tea party".¹⁰

(e) Squatters as a threat to dominant social values;

Perhaps most disturbing of all, "it's not just your house they're after but your whole way of life", ¹¹ since they threaten to undermine the fundamental principles of civilized society - respect for possession, property, public order, hard work and just reward:

"Many of the squatters are motivated politically. Their aim is not to improve the lot of the homeless (indeed by their actions they are achieving precisely the opposite) but to make political points about the concept of private property, the Capitalist system and so on...."¹²

The Daily Telegraph, in a leading article entitled "Squatting Conspiracy", went even further in representing the threat to life as we know it:

"Of the many strange and frightening features of contemporary British life, none carries a more obvious and direct threat to Society's survival than the growing phenomenon of squatting. Innumerable houses up and down the country are now in illegal occupation by organized gangs of thugs, layabouts and revolutionary fanatics. Costly and irrecoverable damage is continually being done to private property from sheer malice.....In reality the

¹⁰. South London Press 24.1.75. To these images were easily linked those of human degeneracy drug abuse and promiscuous sex ; see Wates et. al. p. 60 for some other headline examples.

¹¹. per Angus Maude M.P. in an article reproduced in *ibid.* p. 61.

¹². The Times: 16.8.75.

motive for most of this squatting is either political - a settled purpose of subverting public order - or simple greed and aggression".¹³

Behind these five key representations lay the assumption that existing law was inadequate to meet the growing threat from squatting, and that it should be strengthened accordingly in the interests of individual and public protection: "What is needed is a law specifically aimed at illegal squatters. The Government should urgently consider such legislation".¹⁴

"If you came back from your holiday and found that a gang of vicious vandals had taken possession of your house, barricaded themselves inside and refused to move, you would no doubt confidently send for the police to eject them. Well, the police wouldn't do it. They say the law does not allow them to act, since this is a matter of civil law, not Criminal offence".¹⁵

"The impression remains that the present legal remedies against squatting are dangerously inadequate...What is needed is not merely an efficient way of getting squatters out, but a strong deterrent to squatting, much of which is recklessly undertaken from purely destructive political motives. Only a law severely penalizing the illegal occupation could provide that".¹⁶

A close relation will be shown to exist between the discursive representation of the "squatting crisis" and ensuing legal changes, effected in 1977 by the legislature and throughout the 1970's by the Courts. The images of squatting fostered by the media especially intensively in 1975 became common currency, not only in public discussions, but in Law Commission Reports, debates in Parliament and judicial decisions, testifying to their strength and depth of penetration within Society. Before turning to such broader issues, however, the media discourse on squatting must be subjected to Criti-

13. The Daily Telegraph: 16.7.75.

14. The Times: 16.8.75.

15. per Angus Maude MP op. cit.

16. The Daily Telegraph; in Wates et. al. p. 61.

que.17

B. Critique of the Re-presentation.

The first analytical movement away from the level of Appearances must question the accuracy of this representation of the undoubtedly real squatting phenomenon - examining the relation between the concrete ideological practice of the media and the concrete social practice of squatting.

(a) The claim that squatters actually threatened immediate possession by moving into premises whilst their legal occupiers were on holiday or even out shopping has never been substantiated. The origin of this idea and the basis of its acceptance in "serious" circles was a letter to the Times in July 1975 from a Miss Elizabeth Harper, who claimed to have just:

"had the appalling experience of turning squatters out of our home in Kensington, left locked and secure three weeks earlier. The squatters arrogantly assumed the right to break in, to live in our home with their dogs, to sleep in our beds in our sheets, to daub their crude drawings in black on our walls, to use our food, light, heat and telephone, to steal / 300 worth of antique furniture and above all to dispose of all our treasured possessions".¹⁸

She concluded that the police had declined to take any effective action, and that Times readers could expect to return from holiday and find their homes squatted. A spate of letters, articles and editorials followed, condemning squatting and demanding tough new legislation. The Labour Chairman of the GLC Housing Management Committee thought that Miss Harper had "rightly drawn attention to the illegal

17. In Chapter 5. the critique was of forms of appearance and their corresponding categories; here it is of their concrete mobilization in a definite conjuncture: Britain in 1975.

18. The Times : 11.7.75.

behaviour of squatters who invade private homes, and the reluctance of the police to take action against them".¹⁹ However, three weeks after the publication of the original letter, the Metropolitan Police Solicitor felt obliged to point out that Miss Harper's story was "not in accordance with the facts on police records". The real name of the complainant was Mrs. Such, she had not been on holiday, her permanent home was in Northumberland, and the Kensington house was up for sale. Moreover, on being told by the police that the house was occupied, the squatters had left "without any incident occurring". The letter concluded: "I think you will agree that the facts I have set out present a very different picture from the facts set out in the letter to the Times and that the letter is, to say the least, disingenous".²⁰ In September, the London Boroughs Association reported having had "no genuine cases of squatting in occupied property drawn to its attention, being forced to regard his particular area of discussion as a red-herring, if not deliberate scare-mongering".²¹ And in Parliament, Home Office Minister Brynmor John admitted in June 1976, in reply to a question about squatting in occupied property: "The limited evidence available suggests that instances of this kind of squatting are rare".²²

(b) The idea that squatters held up local authority re-development and prevented the allocation of properties to those on Council waiting

19. The Times : 14.7.75.

20. The Times : 6.8.75.

21. in Wates et. al. (op cit) p. 231

22. see Hansard : 21 June 1976

lists²³ was also largely the result of media sensationalism. In February 1976 the London Evening News headlined a story "Squatters won't quit crash-widows home", stating that "two squatters have deprived a Moorgate tube disaster victim of a new home and today refused to get out".²⁴ A subsequent investigation showed, however, that the woman was not a Moorgate crash victim, that she had not been offered a "new home" but a standard "pre-fab" on a site where there were numerous other such empty constructions, and that the squatters had been more than willing to move into any of these to make way for her.²⁵

No doubt there have been instances of squatters moving into local authority or housing association property already allocated to permanent tenants,²⁶ as is inevitable given the difficulty of finding out whether premises are empty for a valid reason, or how long they are likely to remain so. But squatters have generally willingly moved out on discovering that a house is genuinely about to be let, and failure to do so is contrary to the policy and ethical code of all the responsible squatting organizations.²⁷

As to the accusation that squatters impeded Council re-development schemes, the evidence from the study of six London Boroughs commissioned by the D of E suggests that the majority of squatters occupied

23.thereby threatening "future possession".

24. recorded in Shelter information Bulletin, February 1976.

25. see Wates et. al. (op cit) p. 62

26.but a report sponsored by the Dept. of Environment ("Squatters in London", 1977, by Mike Kinghan [Shelter publications]) found that only a minority of squatters occupied permanent housing stock - see p. 75

27. see publications (at the Housing resource Library op. cit) of the London Squatters Campaign (LSC) (demised 1969), the Family Squatters Advisory Service (FSAS), All London Squatters (ALS), Student community Housing (SCH), Advisory Service for Squatters (ASS), and the Squatters Action Council (SAC); also the Squatters Handbook, published annually by ASS; see also Wates et. al. (op cit p. 232)

"short-life" property that would not otherwise have been used, either because of its inferior quality or lack of resources to re-develop it;²⁸ in a celebrated case concerning Elgin Avenue in London, where the Chairman of the GLC Housing Management Committee claimed that squatters had held up development by twelve months, building work did not begin until seven months after the squatters had moved out.²⁹

(c) The suggestion that squatters did not really need to squat, and that they wanted "something for nothing" at other peoples' expense, is not borne out by the evidence. Both the D of E study and a survey of 150 squatters in the London Borough of Haringey³⁰ found that the great majority were squatting because they could not find other accommodation at a price they could afford, and that they were willing to pay both rates and a reasonable rent. In both surveys most houses investigated were occupied by people with children, who would otherwise have had to have been expensively accomodated by Local Authorities in hostels or bed and breakfast hotels. This and the fact that the vast majority of squatters paid rates suggests that squatting actually saved Councils significant sums of money, more than offsetting the loss of rent in those rare cases where squatters moved into property about to be let.³¹ A Lambeth Council survey found only a minority of squatters from outside the Borough, and none of the free-loading foreigners described by the London Evening News.³²

(d) The allegation that squatters vandalized the properties they

28. Kinghan (op cit) pp. 66-75

29. see Wates et. al. (op cit) p. 62

30. Steve Platt : "Squatting in Haringey" (1976) (available from SHHRL)

31. see Wates et. al. (op cit) p. 232

32. "Unauthorized squatting in Council dwellings - a survey of 150 squatted council Homes" (1974) ; see also "Before you open your big mouth" - a survey of 17 squats in Cardiff (1976) Cardiff Housing Action ; both at SHHRL.

occupied is still further open to doubt. Whilst there may have been instances of damage to property, the D of E survey found that 71% of squatters had made some kind of improvement - wiring, plumbing, roofing, plastering, replacing windows, floorboards and ceilings³³ - and other studies have confirmed this. The fact is that, in the wake of the failure of the policy of boarding-up houses to deter squatters, a number of local authorities followed the GLC's lead of June 1974 in "gutting" empty properties - ripping up floorboards, breaking windows, destroying sanitary fittings, pouring concrete down sinks and drains, sawing through joists and smashing roof tiling.³⁴ On several occasions, Councils then cynically blamed squatters for damage done by their own workers.³⁵ When the frequently substantial and highly skilled improvements undertaken by squatters are considered in addition to the cost of deterioration that would otherwise have occurred in empty property, "it is evident that squatters have added millions of pounds to the value of the houses they have occupied".³⁶

(e) Squatting obviously challenged dominant social values to the extent that it failed to respect the absolute sanctity of private property and involved the resolution of an immediate problem by direct and unconstitutional action.³⁷ It could not however be accurately described as a coherently organized or politically motivated "move-

33. see Kingham (op cit) p. 71 ; these findings are reproduced in Appendix C. Table 1. (infra).

34. see Wates et. al. (op cit) p. 53

35. *ibid.* p. 232

36. *ibid.*

37. On the other hand, there were aspects of squatting that increasingly appealed to the developing "self-help" philosophy of the Tory centre-right; In the early 1970's, Conservative Councils were generally more prepared to negotiate agreements with squatters than were Labour. Ultimately, squatters were to be permitted to solve Local authorities' housing problems through "licensing" agreements - discussed (infra.) in Section C.

ment",³⁸ expressing as it did the complete spectrum of 1970's non-conformist ideas. The conception of "organized gangs of revolutionary fanatics"³⁹ must therefore be considered fanciful, to say the least.

The question then arises as to why such a discrepancy should have existed between the real phenomenon and the media re-presentation of it, and what possible purpose it could have served. In other words, why did Appearances assume the particular form they did?

In 1975 an entire mythology was developed around the stereotype of the invasive squatter, enabling individuals in Society to "live" a particular relation to their real conditions of existence in the conjuncture, at once threatened and at the same time reassured that the danger was being recognized and taken in hand by the vigilant media. That squatting became quite suddenly a highly visible phenomenon, a subject of common discussion amongst ordinary people, is indicated in a study which shows the dramatic increase in anti-squatting letters, stories and leading articles, measured in column inches, appearing in mid-1975.⁴⁰ The media presentation of events fed what became a genuine public outcry, which was then reflected back in the media in letters and further reports. Why was the stereotype initially so plausible, and why did commentators and letter-writers like Miss "Harper" embellish it so imaginatively?

The stereotype provided a pretext for re-drawing the boundaries of exclusive possessory right and celebrating the institution of private

38. This despite the many attempts by squatting organizations (see n. 27 supra.) to co-ordinate activity and aims. The failure is discussed in Wates et. al. (op cit) Ch. 6. pp. 64-71; see also Cowley, John: "Housing for people or profit"? (1979) Ch. 6.

39. The Daily Telegraph claim, supra.

40. by Brian Winterbotham: "The change in the presentation of squatting 1969-75". M.phil Thesis, Exeter University, 1976.

property, as society re-affirmed its determination to defend "possession" against the threat of invasion. At one pole was presented the image of the ordinary Englishman, defending his "castle" or waiting patiently in the Council housing queue, perhaps suffering from some disability, weakness or old age, or already the victim of some terrible disaster (the Moorgate tube incident) - but the appeal was basically to anyone with possession or the reasonable expectation of it. At the other pole were ranged the squatters, live-for-nothing intruders "taking over" in organized bands, spreading rapidly and causing havoc, disrespectful of your home and its contents, "hammering" posters to your walls, living surrounded by debris like "pigs" and "chimpanzees" and "sleeping in (your) bed in (your) sheets" (a potent image in the Harper letter). Even had some of the more extreme stories about squatters been true, the nature and effectivity of this polar representation would still have required explanation, but the fact is that the symbols that most powerfully excited public revulsion arose literally out of the imaginings of letter writers and reporters. The basic idea of the threat to possession was ingeniously surrounded with a constellation of other emotive significations which could then re-inforce it and increase its potency : images of animality (pigs, chimpanzees, dogs), degeneracy (baths and kitchens piled high with rubbish), primitive backwardness (crude drawings "daubed in black" and "mindless slogans" scrawled on "decorative panels") and violence (posters "hammered" to the walls).⁴¹ The danger is clear: we all have possession, are all threatened by squatting, and are all expected to participate in condemning the violation of our exclusive rights, even if this celebration of private property involves a little

41. supra.

dramatic licence.⁴²

C The Squatting Phenomenon.

The analytical trajectory has so far questioned the level of the Apparent movement by showing the media's mis-representation of the squatting phenomenon, indicating the initial elements in what will ultimately be the complete explanation of Appearances.⁴³ The next step is to provide a more adequate account of the squatting phenomenon, always bearing in mind that this remains precisely the phenomenal manifestation of more essential economic and social processes to be revealed at a later stage in the order of investigation and presentation.

(1) A brief history and comparison of historical representations⁴⁴

So long as rights of access to common land remained an integral part of the feudal peasant economy, there were squatters on the Wastes, accepted to a greater or lesser extent by the local community. In the 14th Century it was widely held that if a person could build a dwelling on the Common and light a fire in it between sunset and sunrise, then he could not lawfully be dispossessed ; the belief in Radnor in Wales was that a squatter was entitled to "as much as he could enclose

42. With these observations on human psychology, the analysis of the re-presentation of squatting is for the moment suspended. The sociological dimensions of the squatting stereotype and its broader social function can be revealed only at the end of this Chapter, when the almost completed analysis is referred back to the concrete point of departure.

43. see supra. n. 42

44. As in Chapter 5, history is a resource for comparison and clarification, whose place in the explanation is determined by the particular needs of the concrete analysis at its various stages.

in the night within the throw of an axe from the dwelling".⁴⁵ By the 17th Century such claims were being definitely discouraged: an Act was passed in the reign of Elizabeth I against "the erecting and maintaining of cottages", and the Act of Settlement of 1662 restricted the freedom of movement of poor non-freeholders who had been mandering the parishes in search of Commons on which to build cottages. Moreover the enclosure movement was gathering momentum, private exclusive right was steadily triumphing over common inclusive use-right, and in the accompanying struggles it was the poor squatters who were the most vulnerable and least represented. According to Christopher Hill, "the Midlands rising of 1607 was caused by Enclosure. Risings in Western England in the late 1620's and early 1630's turned in large part on Royal Enclosure and rights of squatters in the forests".⁴⁶ In 1649 Gerard Winstanley and the "Diggers" took over common land at St. George's Hill, Walton-on-Thames, and began collective cultivation in protest against the encroachments of the enclosers, and by the beginning of 1650 other short-lived Digger colonies had appeared in Northamptonshire, Kent, Buckinghamshire, Hertfordshire, Middlesex, Bedfordshire and Leicestershire.⁴⁷

Despite some minor occurrences in 1918, squatting assumed significant dimensions in its recognizably modern form only after the Second World War. In May 1945, a group calling itself the Vigilantes ("the secret committee of ex-servicemen") formed in Brighton with the purpose of installing its members and other demobilized persons and their families in empty holiday homes. The movement spread to other resorts and major cities, and forced the government to introduce powers for

45. Colin Ward : "The early Squatters", in Wates et. al. (op cit) p. 104. Today squatting can be rendered lawful only by 12 years adverse possession.

46. quoted *ibid.* p. 106 ; see also Thompson's account of the Windsor and Hampshire forests in "Whigs and Hunters" (op cit).

47. Ward (op cit) p. 106.

local authorities to requisition empty property in the private sector for immediate use by the homeless. In May the next year, as the gathering pace of demobilization further exacerbated the housing shortage, an unoccupied anti-aircraft camp outside Scunthorpe was taken over by homeless families, beginning a new trend that by the end of March was confirmed by 20 Local authorities throughout the country⁴⁸ ; six months after the first service-camp occupation Parliament was told that 45,000 were estimated to be squatting at 1000 such sites in the U.K.⁴⁹ But the most audacious and politically best organized act of squatting took place in September, when 1500 people, led by Communist Councillors, occupied luxury West end flats in the Duchess of Bedford House, Kensington. Over the next few days, this example was followed in Pimlico, Bloomsbury and Regents Park, bringing still more forcefully to the Governments attention the plight of homeless families. On September 14th, the five CP members prominent in the squatters organization were arrested and charged with Conspiring and incitement to Trespass, and the next day the High Court granted an interim injunction restraining the continuance of the trespass. In the face of such pressures, the London Campaign collapsed, as did the Vigilante holiday-home movement, leaving only the camp squatters in their Nissen hut colonies to face the bitter winter. Many of the camps squatted in 1946 became legitimized as public housing stock or were taken over by the social services to house homeless families, remaining in use until the end of the 1950's.

Whilst it is possible that squatting continued on a small scale during the 50's and early 60's, it was not until 1968 that the second major

48. see Andrew Friend : "The post-war squatters" in Wates et. al. (op cit) p. 111.

49. ibid. p. 113

post-war phase began.⁵⁰ The London Squatters Campaign was formed at this time mainly in reaction against harsh conditions endured by homeless families in local authority emergency hostels, successfully squatting four families in empty Council houses in Redbridge in February 1969. This example was followed throughout the area, but in April most of the squats were evicted by the Council's bailiffs, without Court orders authorizing re-possession. The result was widespread public sympathy for the squatters and the worst press that a Council has ever received in its dealings with unlawful occupations. The Council was forced to make concessions, housing some squatter families and reviewing its policy on short-life property, and the LSC was re-named East London Squatters as new local groups were established all over the Capital. Other Councils were anxious to avoid the bad publicity received by Redbridge, and December 1969 saw the handing over of 80 "licensed" houses to Lewisham Family Squatting Association, the conditions of this new legal tenure being that the families must vacate their short-life property on its being required by the Local Authority. Licensed "squatting" (not really squatting at all by virtue of the license) gradually spread to other boroughs as Councils became aware of its value in "resolving" the squatting problem, and in September 1970 the Family Squatting Advisory Service was established to expedite the process. By the end of 1971, 12 Local Authorities in London had entered such agreements, housing over 1000 people, and in May 1973 FSAS estimated there were 25,000 licensed "squatters" in 16 London boroughs.⁵¹

The second wave of squatting within this phase was the boom in unlicensed occupations which began in 1972, as the failure of the licensed groups to cope with increasing demand, from single people as-

50. see Bailey's account, "The Squatters" (1973).

51. see Steve Platt: "A decade of Squatting", in Wates et. al. p. 29

well as families, became apparent. At this time also, as the schism between the "respectable" squatting organizations and the "unofficial" movement was developing, squatting became a truly national phenomenon, occurring in the remotest places from Stone in Staffordshire to St. Ives in Cornwall.⁵² By the end of 1973 there were 7,000 unlicensed squatters (compared to 3,000 licensed) in London, and over 4,000 elsewhere in Britain.⁵³ Another novel development during this period was the increasing proportion of squats begun in privately owned property, as speculators deliberately left houses empty; in the process links were often forged with local residents, equally opposed to the destruction of communities by property developers planning to turn homes into office blocks. In January 1974, activists achieved a spectacular publicity coup by occupying Centre Point, the best-known empty office building in London, vacant since its completion in 1973 - and similar "propaganda" squats followed in Coventry and Bristol.⁵⁴ A further development initiated by the "new wave" of squatters was the occupation of entire streets, such as Prince of Wales Crescent in Camden, Charrington Street, Longfellow Road and St. Agnes' Place, which would otherwise have remained empty pending ambitious re-development. The resulting communities with their strong local organization and identity challenged the very conception of the provision of housing in small exclusive units. By mid-1975 there were an estimated 40-50,000 squatters in Britain, the majority concentrated in London, but including 200 in Bristol, 80 in Portsmouth, 150 in Brighton, 50 in Guildford, 80 in Swansea, 40 in Cambridge and 100 in

52. *ibid.* p. 29

53. *ibid.* p. 33

54. *ibid.* p. 35

Leicester.⁵⁵ This date also marks the appearance of the intensive media anti-squatting campaign described at the beginning of the Chapter.

By 1976 the squatting movement was under sustained attack, the climate having been created for some Councils, such as Lambeth, to implement tough new policies of confrontation. On January 19th 1977 the 80 or so squatting occupants of St. Agnes's Place in Kennington were awakened by the sound of a demolition ball and crane being manoeuvred into position outside in the street - closed off by police coaches and swarming with 200 police officers. Lambeth Council, then under Labour control, had spent £13,000 hiring demolition contractors to do a job which its own unionised workers had refused, and by the time a High Court injunction had been obtained to stop the destruction, 16 houses had been wrecked, 10 irretrievably. The Council action here, and in nearby Villa Road soon after, attracted such bad publicity for the Local Authority that policy in Lambeth and other London Boroughs was again directed towards conciliation. In October 1977 the Conservative administration at the GLC suddenly offered to legitimize the occupancy of every squatter in GLC premises⁵⁶ ; 70% of the squatters responded favourably and were rehoused or given tenancies or licenses. Meanwhile the better use of empty property was facilitated by policies making Housing Co-operatives and other self-help groups eligible for Housing Association grants, many Councils welcoming the new opportunity of sharing their housing responsibilities. Nevertheless, the majority of squatters in most areas continued to live in an uneasy relationship with Local Councils and police. In August 1978, 160 people, including 30 children, who had been squatting

55. *ibid.* p. 41

56. Thus the pattern of 1969, when "respectable" family squats had been licensed, was repeated - licenses being extended on this occasion to the single homeless aswell as families.

five adjoining blocks of flats in Huntley St, were evicted by 650 police armed with riot shields and grappling hooks - led by steel-helmeted bailiffs and advised by Special Branch experts. Fourteen people were arrested and charged with "resisting the sheriff" contrary to section 10 of the Criminal law Act 1977.⁵⁷

Although 1978 saw a decline in numbers in Britain, the most recent evidence suggests that squatting is again on the increase, involving an estimated 45,000 people in 1981.⁵⁸ The upturn has been reported both in London, and outside the Capital in Cambridge, Bristol, Stoke-on-Trent and Birmingham.⁵⁹ But it seems that, despite the extravagant claims made by some newspapers, squatting remains pre-dominantly an individualistic response to the problem of housing shortage, limited in its achievements by the weakness of its collective organization and the failure to link its struggle with those of other disadvantaged groups in society.

In summary, squatting this Century has occurred in two major phases, the first from 1945 to 1946, and the second - more sustained and involving a greater number of people - from 1968 until the time of writing.

The manner in which the squatting phenomenon has been re-presented by media and government agencies has varied historically according to the

57. 57. see (infra) Section D. (3).

58. See Fig. 1. in Appendix C. (infra.) which shows extremely roughly the trend in squatting since 1969. Statistics are inevitably approximate, since no regular survey machinery exists in this field. Estimates are based on reports by the squatting organizations, and material collected at SHHRL.

59. see SHHRL.

nature and scale of the unlawful occupation, and the perception of its threat to dominant property values. Whatever the period, however, ideology has always performed a crucial role in de-legitimizing the activity of squatters. In the 18th Century, an indispensable part of the campaign of the "new possessors" in their dispossession of small-holders as well as squatters through Enclosure was the claim that "moral effects of an injurious tendency" arose from the principle and practice of common right, whether in respect of the Waste or the Common fields.⁶⁰ Traditional use-rights that might have been exercised for hundreds of years became, in the eyes of the Enclosure Commissioners, merely conducive to irregular and lawless habits of life, to intemperance and idleness. What had once been a practice commanding a degree of popular support now acquired something of its modern meaning, squatting being increasingly seen as the violation of someone else's private exclusive right rather than as an aspect, albeit contentious, of the exercise of common right.

The fact of demobilization in the first phase of post-war squatting ensured a measure of public support for those occupying holiday homes and service camps. In the newspapers, detailed and factual reporting was often accompanied by sympathetic human interest stories covering such events as squat births and marriages, and Editorials congratulated the squatters in exposing government inefficiency in the provision of housing.⁶¹ With the occupation of privately owned blocks of flats in September 1946, however, the tone began to change : the homeless were being "duped by the Communists", and the Mail and Express "gave front-page coverage to unsubstantiated reports of householders afraid to go out shopping for fear of their houses being

60. quoted in Tate (op cit) p. 164 ; see Ch. 5. Section (1) (supra).

61. see Andrew Friend: "The post-war squatters" op. cit. p.116

squatted, and of a rush to buy padlocks throughout Suburbia."⁶² The movement had become tarred with the brush of "politics" and in so doing had overstepped the boundary between legitimate and unacceptable activity.

The same ambivalence is apparent in media coverage of the second post-war squatting phase. On the one hand, a category of "deserving" squatters was "entitled" to public sympathy and support:⁶³ The original Redbridge families, driven out of harshly disciplined hostels and harried by bailiffs without court orders; the "licensed" family squatting associations to which the Redbridge struggle gave birth; and then, to a lesser extent, the licensed single squatters "legitimized" by the Council amnesties of 1977 and after. On the other hand, no holds were barred in the condemnation of the "undeserving", such as the "hippies" who occupied the infamous 144. Piccadilly in September 1969⁶⁴, and the mythological characters of 1975 anti-squatting campaign. Since 1975, squatting has all but disappeared from the headlines of even the popular press ; given that this is not because squatting itself has died out, and that on the contrary it is once

62. *ibid.* Thus some of the crucial representations of the 1975 media onslaught had already appeared embryonically 30 years earlier.

63. see Wates et. al. (*op cit*) p. 21 for sample headlines: "Squatters fight deserves support", "Bishop backs squatters", "Squatters with support of public", "Residents support squatters", "David and Eileen hold out behind the barricades", and "I'd let squatters in the house next door" are examples.

64. The "London Street Commune" was established at 144. Piccadilly so that a loosely organized group of mainly young, long-haired people could be accommodated in the Capital overnight. The "hippy" dimension of squatting, never more than a small part of the movement, was immediately associated by the media with squatting in general, and partly explains the later stereotypes of 1975: "drug-taking, couples making love while others look on, rule by the heavy mob armed with iron bars, foul language, filth and stench....That is the scene inside the hippy's fortress in Piccadilly" raged the *Sunday People* on Sept. 21. Whilst hippy values may have been different to those of the majority of squatters, such reports were undoubtedly exaggerated; hippys were mis-represented as were other squatters. No. 144 was evicted on September 21. by police without a court order . see Steve Platt (*op cit*) pp. 22-25. The legal aspects are discussed *infra*. Section D. (2) (a).

again on the increase, it remains to be seen whether the current media low profile will be maintained.

(2) Necessary conditions of the squatting phenomenon the housing shortage:

The analysis has so far oscillated between the most immediate aspect of the Apparent movement (the various media re-presentations of squatting) and its next most immediate aspect (because we are still at the level of Appearances), the squatting phenomenon itself. To advance one step further, bearing in mind that much ground has still to be covered before arriving at Marx's "real relations", the question becomes: What historically have been the necessary conditions of possibility of the squatting phenomenon?

The basic necessary condition of squatting is a level and quality of social provision of land or buildings insufficient relative to the historically determined need for them. Shortage of appropriate land in the 14th Century forced squatters onto the unredeemed Wastes between townships and parishes, and the Digger movement of the 17th Century was the "culmination of a century of unauthorised encroachments on forests and wastes by squatters and commoners, pushed on by land shortage and pressures of population".⁶⁵ Post-war squatting on the other hand has been largely characterized by the occupation of

65. Colin Ward (op cit) p. 106

buildings,⁶⁶ the supply or conditions of distribution of which have been inadequate to cope with demobilization immediately after the War and the growing demands of homeless families and single people from the 1970's. Squatting before this Century is distinguishable from the modern phenomenon also in that, together with the customary rights with which it was associated, it constituted the very locus of the conflict between common and private forms of property; what was at issue was the fundamental nature of property right, and the right to exclude triumphed over the right "not to be excluded from" lands and revenues at the same moment that the squatter and the Cottager were dispossessed of their land and use-rights. Today, by contrast, the law quite unambiguously upholds the values of private exclusive property right, and there can be no question, in the squatting act, of a dispute as to the meaning of "property"⁶⁷ - even though squatters may explicitly reject dominant legal and social norms. This difference is manifested in the further distinction between traditional squatting as a condition of land occupation enjoyed for perhaps many years before being subsequently disrupted by the claims of enclosers, and modern squatting as an active and deliberate act of occupation of

66.the most important exception being the various land claims of gypsies: see Manchester Corporation V. Connally & others (1970) 1.ALL ER. 961. The other anomaly in this simplified picture is the activity of the British Workers Sports Federation in the 1930's, more properly an example of the exercise of "use-rights" in fresh air and recreation than involving squatter's claims in the land itself. In April 1932, several hundred ramblers took part in a mass trespass on privately owned Kinder Scout, a 2,000 ft moorland plateau in the Derbyshire Peak District. Confronting them were the keepers employed by the landowners to exclude trespassers, and 800 police at the end of the walk. Six ramblers were arrested and five gaoled for a total of 17 months for their activities.[see Howard Hill: "Freedom to Roam" (1980).] The National Parks and Access to Countryside Act 1950 established the "National Parks" - land over which the public have rights of way although still privately owned. Here the "public inclusive right" of access to land for fresh air and recreation uniquely dominates the private exclusive right of the landlord. Attempts to increase rights of access are being made in 1982 by Andrew Bennett in his private members' Access Bill. see also Ch. 5. n.48 supra, and: "Open Country: public asset or private domain?" Ramblers Association Brief no. 9. (1981)

67. except perhaps in the cases cited supra. in n. 66.

what is known to be private or State property. Thus the modern category "squatting" - like those of "possession", "property" and "right" with which it is intimately associated - has acquired a specific and definite meaning within modern social relations, and can no more correctly than they be applied indiscriminately to previous historical epochs.

One of the legacies of the 1930's as Britain entered the Second World War was an acute housing shortage, which was then exacerbated by war-time conditions : bombing destroyed 110,000 houses, a further 850,000 were evacuated because of structural damage, and the construction of homes was cut by two thirds as building resources were concentrated on the war effort, putting house-building behind six years.⁶⁸ The crisis - as it was now becoming - was compounded at the end of the war by demobilisation, new households having formed at an unprecedented rate due to a million war-time marriages. Labour and Tory parties competed with promises on housing policy in the general election campaign of 1945, and the expansion of public housing became an integral part of the Welfare commitment of the newly elected Labour Government. Improvement in the housing situation could not be immediate, however, and the post-war shortage provided the context for the outbreaks of squatting in holiday homes, ex-service camps and private properties that took place between 1945 & 1946.

The massive post-war building programme was made possible, as were other social welfare provisions, by the prosperity created in the

68. see Andrew Friend (op cit) p. 110

wake of the "long-boom".⁶⁹ The total number of private and council housing "starts" rose throughout the period reaching a peak in 1965 of 392,000,⁷⁰ by which time the number of homes had become greater than the number of households. Whilst in 1951 there were over 8,000,000 households living in unfit, substandard or overcrowded conditions, this figure had been reduced by 1976 to 800,000.⁷¹ A number of factors, however, began from the late 1960's to question the depth of the improvement in the housing situation, and these remain relevant today:

(a) In the decade after the peak in 1965, the annual number of new housing starts declined steadily, before increasing slightly from 1975-1977 and then dropping sharply again to the present post-war low. Given the rate of deterioration of much of Britain's ageing housing stock, this downward trend from 392,000 in the mid 1960's to an estimated 145,000 in 1981⁷² must be a cause for concern: the labour government's 1977 Green paper on housing had considered that a programme of 300,000 new homes a year in England and Wales alone was necessary to avoid decline in housing standards.⁷³

(b) Another indicator of housing conditions is the rate of renovation and repair, as an estimated 150,000 homes are becoming unfit each

69. Economic factors are considered fully at a later stage of the inquiry (infra) section IV

70. Housing Statistics, (Housing and Construction Statistics) D of E: see Table 2 [Appendix and Fig. 2] *ib. op. cit.*

71. House Condition survey 1976, HMSO 1978.

72. see Housing Starts Table; Guardian report 1.12.81.

73. Housing Policy: A Consultative Document : HMSO (Cmnd 6851) 1977 (D of E).

year⁷⁴; instead of having risen in compensation for the slump in new starts, this declined from the early 1970's, and despite a recent upturn remains at about 160,000 compared to 270,000 in 1974.⁷⁵ Local authorities estimated in 1981 that there were 549,000 unfit homes in England alone, plus 1,035,000 homes lacking one or more of the basic amenities and 1,736,000 which, while technically fit for habitation, were in need of major repairs.⁷⁶ The Association of Metropolitan Authorities now estimates a 14 billion backlog of housing maintenance and improvement in its area of responsibility, and in Inner London, one house in seven is reckoned unfit for habitation.⁷⁷

(c) Behind both these factors is the drop in government spending on housing, from 7,154 million in 1974/75 to an estimated 2,790 million in 1983/84.⁷⁸ Whilst the fall began in the early 1970's, the most drastic cut of 48% in four years has been planned by the Tory Government for its first term of office, housing as a whole bearing 3/4 of public expenditure cuts. This programme will further radically affect not only Council building, repair and rent policy, but also housing Co-operatives and Associations funded through the Housing Corporation.

(d) The increase in the number of empty homes during the past 25 years makes a mockery of the bare claim that housing has improved

74. Roof, July 1979, p. 110

75. see Table 3 (Appendix C.) (England only) Housing Statistics (op cit)

76. see 1981 Shelter report, summarised in the Guardian 1.12.81.

77. see Sunday Times Report 8.2.81.

78. see Graph (Fig 3) (Appendix C.) "Government Spending 1975-1984" ; from Wates (et.al.) p. 225

because there are now more homes than households.⁷⁹ During the postwar boom period when housebuilding in the private sector was keeping pace with and even out-stripping public provision, many of the ultimate recipients were the affluent who already had one home, and wanted another for week-ends or holidays ; the D of E estimated that there were 150,000 such second homes in 1977.⁸⁰ Overall, including property in the public sector, the 1971 Census identified 675,000 vacant homes, a figure revised in 1980 to 770,000.⁸¹ As to the distribution of empty houses between public and private sectors, the GLC calculated in 1975 that of 72,000 homes empty for over three months, 30,000 were privately owned, and the 1977 Vacant property survey showed that whilst only 13% of the housing stock in England was privately rented, 40% of empty homes came from that sector.⁸² Another reason for private property remaining empty in the early 1970's particularly was its value for property speculators, who purchased land solely as an investment without any intention of using or developing it.

(e) An index of all these factors is the rising number of homeless people in Britain since the late 1980's. The only available figures chart an increase from 33,000 to 56,000 between 1976 and 1979⁸³ in the number of homeless households accepted for re-housing by English Councils, but this is a severe under-estimate even for England. Many who do have homes but are living in intolerable and deteriorating conditions could be considered "homeless", as could people who are forced

79. The fact of 20.8 million homes and 20, million households (see Wates (op cit) p. 223) is misleading also because "homes" may be substandard or unfit.

80. D of E Housing Policy, Technical Volume No. 1, HMSO (1977) p. 76.

81. see Bone and Mason : "Empty property in England : A Report on the 1977 Vacant property survey"; HMSO (1980) p. 3.

82. *ibid.*

83. Housing and Construction Statistics (op cit) reproduced in Table 4 (Appendix C.) *infra*.

to live as part of another household; and the statistics take no account of those not normally eligible for Council housing - single people, childless couples, and those with no children under the age of 16. Indeed, the Campaign for the single Homeless and Rootless (CHAR) estimates that there are "at least 100,000 people sleeping rough or in hostels, lodging houses and re-settlement units ('spikes'), or living in institutions like mental hospitals or prisons for no other reason than that they have nowhere else to go".⁸⁴

From this brief survey it is clear that since 1966, when the National campaign for the Homeless (Shelter) was set up, the housing situation in Britain has steadily deteriorated. The conditions facing the homeless and the badly housed in 1982 are the result of a long period of declining investment in both sectors, whose effects have yet to be fully realized in the housing crises of the '80's and '90's. The number of new starts will continue to decline whilst the existing housing stock deteriorates, and the number of homeless will rise, an estimated 2,000,000 people being on council waiting-lists by 1984, compared with 1,144,000 in 1981.⁸⁵

The analysis now re-considers some of the results already obtained in Chapter 5, examining developments in the law securing relations of possession and control in the context of the housing crisis and the squatting phenomenon.

D. The Housing Crisis, unlawful occupation and the Law

Demands for legal change have accompanied both phases of squatting

84. quoted in Wates et. al. (op cit) p. 223.

85.and likely to be waiting moreover for 21 years : per CHAR report, reported in Guardian 16.12.80

since the war, justified on the basis of a particular re-representation of the squatting phenomenon. If this mis-representation has been constructed through the mythological stereotype of the invasive squatter, whose media activities and characteristics bear little resemblance to those in reality, this does not imply that the perceived threat to possession is not in some other sense real enough. The real crisis, however, is in the social relations of production, distribution and possession of a particular scarce resource, housing, historically always limited in supply but failing increasingly from the mid 1960's to meet the growing demand for it. Squatting directly challenges the existing relations of distribution of houses or buildings that might be used as homes, any empty property being considered a legitimate target for occupation: luxury flats, second homes, army camps, Nissan huts, office blocks, and Council property scheduled for demolition or re-development. Existing property rights of the "greater possessors" might thereby be violated, but only in the media imagination is there any threat to everyday domestic possession. The portrayal of squatting as such a danger, as a disaster that can happen to any of us (because we all have "possession"⁸⁶) whilst on holiday or out shopping⁸⁷, fuels public paranoia and indignation, and marshalls support behind the movement for legal change: the particular historical interpolation of the "right to exclude" appears no longer adequate to cope with modern conditions, and the rights of possessors must be supplemented by way of compensation. In reality, however, increasing the protection of all possessors is likely to benefit only

86. Supra Ch.5. Section (1)

87. A measure of the seriousness with which this belief was held is the fact that in 1975 Lloyds offered insurance with cover up to 5000 (for legal fees and "alternative accommodation") for the eventuality of homes being squatted whilst their owners were temporarily absent; the cost was £5. The AA ran a similar scheme. Unsurprisingly, no claims are known to have been made under such policies. see Wates et. al. p. 59.

those whose possession was really threatened in the first place - property developers, speculators, private landlords, local authorities and the rich with second homes⁸⁸ - since the ordinary possession of the "man in the street" has been quite adequately protected by the Civil and Criminal law for hundreds of years ; In the wake of the furore caused by the Harper letter, the Metropolitan Police Commissioner, Sir Robert Mark, wrote to the Times on August 8 1975 : "In order to relieve any ill-founded public anxiety resulting from recent press publicity about squatting, I wish it to be known that the Metropolitan police will have no hesitation in assisting the lawful occupiers of furnished accommodation to eject anyone in unauthorised occupation of it".

This section, therefore, describes the process by which, in accordance with the very real threat to particular types of possession posed by the housing crisis and its expression in squatting, certain greater possessory interests in Society were able to maintain their supremacy at the expense of the weaker during the period through the alteration to their advantage of the legal conditions of possession and separation, whilst nevertheless successfully justifying such changes by reference to a quite imaginary threat to possession in wider Society.

(1) The Civil Action for Recovery ; Orders 26 and 113

(a) Squatters;

Until the beginning of the 1970's the accepted remedy for being out of possession of land or buildings was the ordinary Common law Action for

88. The list of "interests" can only be rough at this stage of the analysis; the crucial role of the financial institutions and the interests of Finance Capital are considered infra: part IV and Ch.8.

Recovery as defined by the Rules of the County and Supreme Courts⁸⁹: a judgment for possession could be obtained in either the High Court or the County Court⁹⁰, subject to the plaintiff proving legal right according to the principles already discussed. RSC Order 44, rule 3 (2) provided that a writ of possession to enforce the judgment could not be issued without leave of the Court, for which every person in possession must have had actual notice of the proceedings, and Order 25, rule 72 specified that at least 14 days must elapse between the initial judgment and the granting of the writ.⁹¹ Also available was the common law remedy of injunction restraining Trespass to land.⁹²

At the end of the 1960's it was becoming apparent, however, that these remedies were no longer adequate in their existing form to protect the exclusive interests of legal owners and chargees against squatters unlawfully occupying empty property. The legal framework which had previously been able to accommodate the problems raised by squatting was now becoming, in the context of the housing crisis and the increase in unlawful occupations, rapidly anachronistic. The length of time between the application for an order and the issuing of a writ, and the fact that all the unlawful occupants had to be actually informed of the proceedings, enabled the Redbridge squatters in 1969,

89. see Chs. 1 & 2 supra; Halsbury's laws Vol. 32. p. 371.

90. The County Court was appropriate where the rateable value of the property was less than £1000 p.a. (The limit has been increased a number of times to keep pace with rising property values and in 1982 stands at £5,000).

91. see Law Commission Final Report No. 76., p 45. (similar provisions existed under County Court rules).

92. see Chs 1 & 2 supra; Halsbury's laws Vol. 38 p. 749.

for example, to "play musical chairs with the Council"⁹³ by moving out those named in the original order and installing different families, forcing the Council to begin the entire process again. Still worse from the point of view of property owners, as the second wave of squatting gathered momentum in 1970, was the problem of initially identifying squatters, since the High Court had decided in November 1969⁹⁴ that in an order for possession all the defendants to an action must be represented and specifically named - that in other words "ex-parte" possession orders in such cases were bad in law - and this judgment was confirmed by the Court of Appeal in another case in January 1970.⁹⁵

In response to this situation, two new orders (nos. 113. Supreme Court Rules and 26. County Court Rules) were authorized in 1970 by the outgoing Labour Government, redefining the procedure for Actions for Recovery in certain cases (but leaving others subject to ordinary procedure). Under Order 113, rule 1, the new claim for possession of land is appropriate where the plaintiff "alleges it is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his license or consent or that of any predecessor in title of his". The Order only applies in other words to trespassers, and the RSC digest comments: "Its machinery is summary, simple and speedy, i.e. it is intended to operate without a plenary trial involving the oral examination of witnesses and with the minimum of delay, expense and technicality. Where none of the wrongful occupiers can be reasonably identified the proceedings take on the character of

93. as reported by the Ilford Recorder, April 17. 1969 (in Bailey op. cit.)

94. Territorial Auxiliary & Volunteer Reserve Association V. Hales; the Times, November 14, 1969.

95. Manchester Corporation v. Connolly and Others; (1970) 1. All ER 961.

an action in rem, since the action would relate to the recovery of the res without there being any other party but the plaintiff".⁹⁶

Where the plaintiff does not know the names of every person in occupation, then the form of Originating Summons beginning proceedings is Form 11A⁹⁷ (rule 2). At the time of issue of the Originating Summons the plaintiff must file an Affidavit in support (rule 3) stating his or her interest in the land and the circumstances of its occupation without license or consent.⁹⁸ The service of the originating summons in the case of Form 11A may be made by affixing it to a door or leaving it on the premises, or in such other manner as the court directs (rule 4). An order for possession may normally be made five days⁹⁹ after the issuing of the originating summons, except in case of urgency when it may be issued before then in Form No. 42A¹⁰⁰ (rule 6). In contrast with ordinary Actions for possession governed by Order 45 rule 3. (supra), no leave of the Court is required to issue a Writ of Possession (Form No. 66A¹⁰¹) to enforce the order for possession (rule 7). The digest comments that "the reason appears to be that in proceedings under this order every Occupier, whether named as a defendant or not, will have had due notice of the proceedings before any order for possession is

96. p. 1558 of "Rules of the Supreme Court". The most recent version of Order 113. is reproduced in Appendix D. (infra.); note that this includes major changes introduced by Amendment in 1977 (consolidating judicial interpretation between 1970 and then) - discussed infra.

97. see Appendix D., reproducing Form 11A. (Where the names are known, Form 10 is appropriate). The requirement that "reasonable steps" must be taken to identify persons in occupation was removed in 1977; see digest notes, top p. 1559, and discussion infra....

98. Again, it is no longer necessary that the Affidavit state the "reasonable steps" taken to identify persons not named in the summons; see digest notes, p. 1560, and discussion infra...

99. The 1970 rule originally required 7 days.

100. see Appendix D.

101. *ibid.*

made".¹⁰²

From the moment they became effective in July 1970 it was apparent that the new Orders would be used at every possible opportunity. In GLC v. Lewis and Another,¹⁰³ the first case involving Order 113, the judge was so appalled at the prospect of making a family homeless that, in granting the order for possession, he was moved to ask that eviction should be delayed seven days rather than the customary two. The power of the new procedure and its potential for causing hardship in cases of real housing need were plain even to the court, and the *New Law Journal* wondered "whether RSC Order 113. might not have been left to be first invoked in some worthier and more relevant cause". Unfortunately, however, and despite the sympathetic murmurs of judges and commentators, the priority for property owners and legal chargees was the most effective repossession of land and buildings, regardless of the human cost. One of the questions before the Court of Appeal in Southwark LBC v. Williams¹⁰⁵ was whether necessity was a good defence to an action for recovery - forcing the plaintiffs back to an ordinary repossession action on the grounds that the summary procedure of Order 113 should only be used where there was no arguable defence. Whilst recognizing the existence of some 400 empty houses in Southwark and the obvious need of the two homeless families involved, Lord Denning rejected the defence of necessity (and thereby allowed the use of the Order) in a classic statement of the absolute inviolability of private property:

"If homelessness were once admitted as a defence to Trespass, no-one's home would be safe. Necessity would open a door which no man could shut. It would not only be those in extreme need who would enter. There would be others who would imagine they were in need, or would invent a need, so as to gain entry. Each man would say his

102. see p. 1561.

103. *The Times*, August 6, 1970.

105. (1971) Ch. 734.

need was greater than the next man's. The plea would be an excuse for all sorts of wrong doing. So the Courts must, for the sake of Law and Order, take a firm stand. They must refuse to permit the plea of necessity to the hungry and the homeless: and trust that their need will be relieved by the charitable and the good".¹⁰⁶

The Court of Appeal further held, in actions against squatters by Bristol Corporation¹⁰⁷ and a property development Company¹⁰⁸ in 1973, that the court had no discretion to suspend orders for possession under Order 113. Lord Denning trusted that owners would "act with consideration and kindness in the enforcing of their legal right, remembering the plight which the homeless are in"; but the real point, given prevailing economic conditions, was that the greater possessors were finding themselves impelled to seek whatever advantage they could from the new procedure, and all legal possibilities that might make recovery easier were being ruthlessly exploited.

As attitudes against squatters hardened in the media campaign of 1975, Orders 26 and 113 were further interpreted and developed to the benefit of exclusive property right. A succession of Court of Appeal decisions led by Lord Denning undermined hitherto successful defences based on the failure of plaintiffs to take "reasonable steps" to identify persons not named in the summons, as required by rule 3¹⁰⁹; and to serve notice of the originating summons in the manner prescribed under rule 4.¹¹⁰ The Master of the Rolls concluded in the former case: "Irregularities no longer nullify the proceedings. People who defy the law cannot be allowed to avoid it by putting up technical objections". This decision was followed and its scope extended in

106. *ibid.* p. 744.

107. Bristol Corporation v. Ross and Another (1973) 3. WLR. 71.

108. McPhail v. Persons Unknown (1973) 3. WLR. 71.

109. Warwick University v. de Graaf (1975) 1 WLR 1126

110. Crosfield Electronics v. Baginsky, CA 1975 1 WLR 1135

Burston Finance Ltd v. Wilkins¹¹¹, in which the judge released a Landlord completely of his obligation to take "reasonable steps". In July 1977 these developments were ratified in official amendments to RSC 113. and CCR 26., which cut the period of advance warning from seven days to five and removed altogether the "reasonable steps" clauses from the Orders, substituting the requirement that the property owner merely state in his or her affidavit that the names of the occupiers are unknown.¹¹²

That these changes in Civil procedure for the recovery of Land helped to contain the "squatting problem" in the mid-1970's boom may be inferred from the Judicial Statistics.¹¹³ Applications filed against trespassers under Order 26. increased from 776 in 1973 (when separate records for use of the order began) to 5,683 in 1980.¹¹⁴ The increasing volume of orders granted and presumably enforced against squatters (from 605 in 1973 to 4,759 in 1980) is proof of the resolution of the "squatting problem" by legal means to the advantage of the greater possessory interests. Although applications filed and orders granted under the ordinary Action for Recovery had greatly increased

111. The Times, 16 July 1975.

112. see Appendix and digest commentary. (op. cit.)

113. Some words of warning are in order here on the use of the statistics: (1) Only figures for the County Court are available (but similar trends can be expected in the High Court). (2) Records of the use of Order 26. began only in 1973: statistics before this time concerning actions to recovery in general include an unknown number of actions under the new procedure. (3) Only from 1978 is a distinction made in the statistics - for both Order 26 and actions for Recovery in general - between residential and non-residential premises. (see *infra*. section II. B. on Industrial possession).

114. see Table 6 Appendix, E. compiled from the Judicial statistics. Of course, many explanations for such statistics could be advanced; the suggestion here is merely that the steady increase in applications filed and orders made is indicative of the crisis in relations of possession caused by squatting, and of its attempted resolution by resort to law on the part of the greater possessors. (For fuller details see Table 8).

between 1967 and 1970¹¹⁵ (when the new procedure was introduced), and squatters were successfully removed by these means, the cumbersome machinery of the old orders could not cope with the increase in squatting and its greater sophistication - hence the introduction of summary orders 26 and 113. The time for playing "musical chairs" with landlords and local authorities was over.

(b) Other Unlawful domestic occupiers;

The crisis for the greater possessors in the 1970's lay in that the existing distribution of housing was being radically challenged by direct action - because of the deterioration and depletion of the worst housing stock and the refusal of significant numbers of people to accept these living conditions. Given that a substantial increase in housing supply was discounted for economic reasons¹¹⁶, this crisis could be resolved either by re-allocating existing housing stock to make better use of what available empty property there was, or by forcing the squatters through stronger legal measures back into hostels, over-priced and sub-standard property, other households or literally onto the streets. Whilst the "licensed" squatting movements certainly encouraged the more efficient use of local Authority short-life property, the re-furbished exclusive right of owners and chargees simultaneously ensured that, when it came to the crunch, it was private property rather than social need that was the deciding factor in housing allocation; and this was to affect not only squatters, the poorest class of "possessor" with the lowest legal status, but also other domestic occupiers such as licensees and sub-tenants, who were similarly squeezed by the crisis as landlords (whether in the private

115. see Table 5 Appendix E., compiled from Judicial Statistics. (For fuller details see Table 7).

116. such issues are fully discussed infra. in section IV.

or public sector) came under increasing pressure to make the optimum use of their resources. The crisis in domestic relations, caused by a contraction in housing supply and a relative increase in demand, was accompanied by a crisis in the legal relations of possession and separation which was to be resolved by a weakening of the legal position of all smaller possessors, leading to the further deterioration of their real economic and social circumstances as the greater possessors became better able to repossess land and buildings. Attempts to protect the weaker possessors by curtailing the rights and hence economic powers of the greater - in other words to resolve the crisis against the interests of exclusive private right by means of Rent Acts and Landlord and Tenant legislation - have consistently failed over the last 15 years to prevent the decline in the legal and social position of the smallest possessors.

The common law has always given a greater degree of civil protection against eviction to the tenant than the "mere licensee", the former having an estate interest in the land and the latter only a personal contractual interest enforceable against the grantor. The Rent Acts following the first World War extended the scope of this protection, assuming in the common law tradition that "exclusive possession", and the payment of a definite sum of money for a defined period of occupation, were the characteristics of a tenancy, wholly inconsistent with the mere licence.¹¹⁷ Between 1945 and the great "decontrolling" Rent Act of 1957, however, a number of important judicial decisions undermined "exclusive possession" as the test of tenant status, and substituted the doctrine of the "intention of the parties", whose effect was to re-define as mere licensees occupiers who had been previously regarded as tenants, and thus to counteract

117. Lynes v. Snaith (1899) 1 QB 486.

the protection given to small possessors by the Rent Acts.¹¹⁸

During the middle and late 1980's, the two legal trends continued in uneasy tension, the Rent Acts of 1965, 1968 and 1974 increasing the extent of protection and regulation until most tenants in the private rented sector were covered, whilst the Courts continued to restrict the class of "tenant" by further developing the "intention" doctrine - thus increasingly giving support to the emergence of the "licence" as a distinctive mode of land tenure.¹¹⁹ The present situation under the 1980 Housing Act is that most lettings by non-resident landlords in the private sector will create a Regulated Tenancy, which may be either Protected, Statutory or Shorthold¹²⁰; other tenancies may be Assured or Restricted, conferring a lesser degree of security of tenure. Occupiers in the public sector - of Council, New Town and Housing Association property - are "Secure Tenants" with rights under the Tenants Charter contained in the 1980 Act.¹²¹

Meanwhile, in the least protected area of the housing market, there now exist an estimated 1,000,000 dwellings in England and Wales held on Licence, whose occupants have no security of tenure and are liable to legal eviction without a court order as trespassers after the elapse of a "reasonable time" following termination of their

118. Marcroft Wagons Ltd. v. Smith (1951) 1 All ER 271; Errington v Errington & Another (1952) 1. All ER 149; in both cases the trial Judge was Lord Denning.

119. Barratt v. Barratt (1970) 2. All ER 483 Shell Mex v. Manchester Garages Ltd (1971) All ER 841 Heslop v. Burns (1974) 3. All ER 404 Marchant v. Charters (C. Appeal) The Times 9th July 1976.

120. "Shorthold" is the new tenancy created under the Act; it may be fixed from 1-5 years duration, and gives the landlord a mandatory right of re-possession at the end of the period. Like the increasingly popular license and "sham" tenancy, it is an expression of the housing crisis - aimed at releasing more private property for rent, but guaranteeing the landlord flexibility in his investment (see infra)

121. see Department of Environment Housing Booklets, Nos. 1,3,6 & 7. (D of E 1980).

licence¹²² : More than 15,000 people live in short-life property awaiting re-habilitation or demolition, either as "licensed" squatters or homeless families temporarily accommodated by Councils there instead of in bed and breakfast hotels. A further 6,000 families live in boarding houses, Residential Hotels or bedsits awaiting permanent Council Housing. An estimated 30,000 "residents" live in Hostels, Night-Shelters and common lodging houses, paying generally by the night but many staying for a number of years.¹²³ The numbers of people living as lodgers, guests, flat sharers or as part of another household are difficult to estimate, but must be increasing with the general shortage of housing. Finally, there is the unknown but increasing number of "shams", lettings which would ordinarily be considered tenancies, but are maintained as "licences" or "holiday lets" by legal technicalities which the courts construe favourably to Landlords, conferring no security of tenure or rights of repair or appeal to the Rent Officer.

In a situation of housing shortage and increasing demand, the greater possessors benefit by thus being legally enabled to increase their control over property in which they have all the rights of "possession" and the occupants none at all : Local authorities relieve pressure on waiting-lists by letting sub-standard short-life housing for just as long as they do not require it, and private landlords can speculate freely, demand extortionate rents and refuse to carry out repairs. The creation of the new "Shorthold" tenancy by the 1980 Act continues this development, showing how the crisis is being resolved to the advantage of large possessors against the interests of the small : since a third of private tenants leave every three years, landlords will be able to replace existing protected tenancies with

122. see "Secret Rent Act 1977", CACTL, London 1977.

123. *ibid.* p. 9

short-term ones of between one and five years, and desperate tenants will be reluctant to insist on a fair rent and repairs for fear of being turned out at the end of their term.¹²⁴

The procedure for recovery of possession against unlawful occupiers not having entered as squatters, such as ex-licensees or tenants holding over without protection from the Rent Acts, might be expected to be the ordinary Action for Recovery as defined by the Rules of the Supreme Court and the County Court Rules. Summary orders 26. and 113. had always been thought of specifically as "squatters procedures", the notes accompanying RSC 113. originally stating that "the exceptional machinery of the order is intended to remedy a mischief of a totally different dimension from that created by a licensee continuing in occupation after his licence has ended and against whom the ordinary procedure has hitherto been thought adequate".¹²⁵ However, plaintiffs attempted throughout the 1970's to use the new remedy in place of the ordinary action for Recovery against occupiers they claimed to be unlawful whatever their precise legal status. In Bristol Corporation v Persons Unknown¹²⁶ it was decided that the court had discretionary power to allow an action under Order 26. because the remedy was available whether the defendant entered or remained in occupation without the plainiff's license or consent. In GLC v. Jenkins¹²⁷ one year later, Lord Diplock not only maintained that the order was appropriate in actions against ex-licensees, but went further and insisted that the Court had no discretion to prevent the use of the summary procedure in such circumstances. The most surprizing interpretation came however in 1976 in Moore Propert-

124. see the Observer, 16 March 1980.

125. Supreme Court Practice (1973) Vol 1. p. 1481.

126. (1974) 1 WLR 365

127. (1975) 1 ALL ER 354

ies (Ilford) Ltd. v. McKean & others,¹²⁸ which decided that Order 113. was available to a head landlord against unlawful sub-tenants i.e. persons occupying under a lease or tenancy granted by the head tenant in breach of an agreement with the landlord against sub-letting. Even tenants may be at risk from the summary procedures: the orders apply to premises, not people, court officers being obliged to evict anyone on them regardless of the possibly lawful presence of particular individuals¹²⁹, and the Department of the Environment has itself acknowledged that "landlords have been known to use order 113. against legitimate tenants representing them to be squatters".¹³⁰ Questions also arise as to the status of other occupiers, for example subtenants of Mortgagers. One commentator has concluded in the New Law Journal that:

"The Orders have been most valuable in countering true squatting in recent years, but the facts that they deprive the court of all discretion, they require no defence to be filed, and normally involve unrepresented defendants suggest their application should be clearly and strictly delimited".¹³¹

(c) Conclusion;

Indicative of the inability of law to contain "problems" arising from socio-economic conditions throughout the 1970's was the pervasive fissuring of the legal framework during this period. The domestic crisis became most acute when a necessary legal function was no longer adequately performed by existing law - when the action for Recovery became ineffective because squatters were "playing musical chairs" with plaintiffs who were forced to begin fresh actions whenever the membership of a squat changed: then re-possession procedure was

128. (1976) 1 WLR 1278

129. R. v. Wandsworth, The Times, July 17, 1975.

130. in "Consultation paper on squatting" (unpublished) quoted in Jefries and Martin (1977) p. 8. (CACTL 1977).

131. A. M. Pichard: "The scope of order 113" NLJ Dec. 2 (1976) p. 1194

expedited by the introduction of Orders 26 and 113. Normally, however, the domestic crisis could be more or less adequately contained by judicial "interpretation" of existing rules and procedures until the time when (if at all) an acute stage was reached: then the process of legal buttressing was more gradual, as in the development of the doctrine of the "intention of the parties" (forcing increasing numbers of occupiers into the unprotected tenure category "licensee"), the interpretation of "reasonable notice" under Order 113. until the SCR & CCR changes in 1977, and the continual re-definition of which classes of possessor came within the scope of rule 1.

(2) Developments in the Criminal law

(a) Forcible Entry and Detainer;

The Statutory and Common law of Forcible Entry and Detainer was always principally concerned with preserving the peace.¹³² Before 1977, the offences could be committed by "violently entering or keeping possession of lands or tenements with menaces, force and arms", and according to the statutory provisions actual breach of the peace was not necessary: "It is sufficient if there is any kind of violence.... (but) a mere Trespass will not support an indictment for Forcible Entry. There must be proof of either such force, or such a show of force as is calculated to prevent any resistance".¹³³ Because of the central concern with public order, it followed that the protection of private property interests was only incidental, so if a trespasser had obtained possession by peaceful means - even if this involved using an artifice to break a lock - then the person having the right to possession of the land could not enter by force without him or her-

132. supra. Ch. 5.

133. Halsbury's laws (3rd edition) Vol. 10 p. 591

self being rendered liable to Criminal prosecution.¹³⁴ This was inconvenient for property owners and local authorities who in the early days of the 1969 squatting revival were looking for alternative legal remedies to the then ordinary and ineffective action for recovery. In February, Redbridge Council, accepting that squatters had not entered property in their charge forcibly within the meaning of the law, brought an action for Forcible Detainer under the 1429 Act; the magistrates refused to order restitution and clear the premises, holding that the threat of illegal eviction by the Council's bailiffs¹³⁵ justified use of reasonable force to defend the property.¹³⁶ One year later in R.V. Robinson,¹³⁷ on the other hand, four convictions under the 1429 Act were upheld by the Court of Appeal, Lord Justice Widgery maintaining that, even though no active resistance was offered the police in their execution of a High Court order for possession, the mere existence of barricades indicated an intention to use force to deter the true owner from resuming possession, and this was sufficient to constitute an offence under the Statute. Nevertheless, the antiquated machinery of Forcible Entry and Detainer was to remain as much of a hindrance to property owners as a help, because of the legal protection it afforded squatters against forcible eviction without court orders.

Until, that is, an extra-ordinary judgment in the Court of Appeal led by Lord Denning in 1973, which raised the question of the Criminal liability of owners resorting to self-help against squatters. In the

134. see Clerk & Lindsell (op cit) para. 1332

135. see supra. Section C.

136. Bailey, R. (op cit) p. 59

137. (1971) 1. QB 156,162

McPhail case¹³⁸, the Master of the Rolls circumvented the rule that better title was no defence to forcible entry by arguing that, by entering and remaining as Trespassers, the squatters could never acquire possession so long as the owner did not acquiesce in their presence; if the squatters had not acquired possession, then it followed that this still remained with the legal owner, and since no offence under the statute could be committed by an owner entering property however forcefully in his sole possession, the remedy of violent self-help was legally available to him in the ejection of intruders. This judgment and its implications were reviewed with embarrassment, both by legal commentators¹³⁹ and the Law Commission in its report on Conspiracy and Criminal law reform.¹⁴⁰ Not only was the purpose of the Law of Forcible Entry in preserving public order undermined, but the decision was plainly bad law: Lord Denning had "oversimplified the matter by concluding from the fact that the owner had never acquiesced.....that the squatter had never gained possession".¹⁴¹ What was in fact material in deciding whether a squatter had possession and thus protection under the Statutes was whether the owner was clearly ejected and excluded, after which time the remedy of self-help was not available to anyone however good their title.¹⁴² Nevertheless, the case was followed in Woodcock v. S.W. Electricity Board,¹⁴³ which decided that squatters were not "occupiers" and were therefore owed no duty to be supplied with electricity under the Electric Lighting Act 1899, and by Lord Denning

138. McPhail v. Person Unknown (1973) 3. WLR 71

139. see: Yates, D. (1973) 123 NLJ 764; McIntyre, D. (1973) CLJ 220

140. Final Report no. 76, 1976

141. *ibid.* p. 50

142. see Yates, D. (op cit) p. 794.

143. (1975) 1 WLR 983

himself again in 1975¹⁴⁴ and 1978.¹⁴⁵

These cases show that categories such as "possessor" and "occupier" have a flexible and legally defined rather than a rigid socio-economic content¹⁴⁶, and illustrate the ingenuity, not to say the desperation with which different legal avenues were explored in the 1970's in the attempt to contain the threat to possession; here squatters were stripped of possession and their rights undermined at the same moment that the legal and extra-legal powers of the greater possessors were increased. They also show more importantly, however, that the existing legal framework, despite the efforts of the Courts, could not always coherently manage the socio-economic crisis: The point had been reached where its fissures had become manifest in contradictory judgments which were questioned even by legal commentators.

(b) Conspiracy to Trespass;

It was assumed until recently that, in accordance with the general principle that a conspiracy to commit a Tort was not a Criminal offence, an agreement to commit a civil trespass was not indictable.¹⁴⁷ In R. v. Bramley¹⁴⁸, however, five communists involved in the organization of squatting in London in 1946 were convicted of conspiring to incite others to trespass ; the trial judge had directed the jury that if they thought the matter had "transcended the sphere where the property owner had ordinary redress in the civil courts", and "passed into that sphere where it became a matter of public concern of citizens interested in the maintenance of good order and

144. R. v. Wandsworth (1975) 1. WLR 1314

145. Swordheath Properties v. Lloyd (1978) 1 WLR 550

146. supra: Ch. 5.

147. R. v. Turner (1811) 13 East. 228

148. (1946) 11. Jo. Crim. law 36

security",¹⁴⁹ then they could convict on the conspiracy charge. The case remained of dubious authority until 1971, when a group of students were charged with conspiracy to trespass on the premises of the Sierra Leone High Commission in London. Their conviction was upheld in the Court of Appeal and the House of Lords, where Lord Hailsham (Lords Morris and Simon agreeing) considered that conspiracy to trespass could amount to an indictable offence where the trespass involved "invasion of the domain of the public", or the "infliction of something more than purely nominal damage".¹⁵⁰ Undoubtedly this judgment involved a new departure from the established principles of Trespass, as open to question as the developments in Forcible Entry Law, but its further applications in the domestic sphere was forestalled by imminent and radical changes first mooted by the Law Commission in its Working Report on "offences of entering and remaining on property" in June 1974.

(c) The Law Commission and Criminal Trespass;

The Cabinet minutes for 1946, released in 1977 under the 30 year rule, show that a Criminal Trespass law was briefly considered by the Attlee government after the War - before the squatting threat receded as rapidly as it had appeared. The long boom made any further such deliberations unnecessary, and not until squatting and other forms of

149. *ibid.* p. 41

150. Kamara v. DPP (1974) AC 104. at p. 130. Lord Cross's test was even wider - "where the consequences were likely to be sufficiently harmful to call for legal sanctions". (p. 132)

direct action¹⁵¹ recurred in the late 1960's were demands for criminal trespass legislation again raised. Although the 1970 Tory government had rejected the more extreme proposals of the Selsdon Park Conference, instructing the Law Commission merely "to update the Statutes of Forcible Entry and Detainer", the House of Lords decision in Kamara required that the Commission seek new terms of reference, and these were "to consider in what circumstances entering and remaining on property should constitute a criminal offence".

The Law Commission examined "present day conditions" and found existing law to be inadequate, concluding that there was a "problem of reform":

"In present-day conditions instances of taking occupation of another's property by force are comparatively uncommon. On the other hand, there has been a re-emergence of the problem of squatting, that is, the unlawful taking over of premises by individuals or groups of persons who make at least a temporary home in property that is empty awaiting either occupation or demolition and re-development. This does on occasion lead to at least the display of force to maintain the unlawful occupation....Some public concern has also been expressed about the occupation of residential premises when the lawful occupier is temporarily away....."¹⁵²

The Forcible Entry Laws, continued the report, were appropriate for a society in which invasions were customarily violent, but not for one in which squatting was a peaceful mass activity, and moreover the meanings of "force" and "possession" were uncertain; the test of conspiracy to trespass was vague and difficult to apply; and the existing provisions under the Sheriff's Act 1887 for prosecuting those who resisted the sheriff executing process for possession were either

151. considered infra: Section II

152. Final Report No. 76, p. 53; Here the representations of squatting discussed (supra) in Section I form the "public concern" which has now become part of the Commission's discourse.

unknown or not properly used.¹⁵³ Working Paper No. 54. therefore proposed to protect property rights and preserve public order by abolishing Forcible Entry and Conspiracy to Trespass and substituting two new offences:

- (a) Without lawful authority entering property by force adversely to any person in physical occupation of it or entitled to occupy it, and:
- (b) being unlawfully on property and failing to leave as soon as reasonably practicable after having been ordered to leave by a person entitled to occupation.

Taking account of the views of a wide range of bodies and individuals on these proposals, the Law Commission accepted in its Final Report that the new offences would be too broad in scope. Nevertheless, the "problem of reform" remained, even more acute in 1976 than in 1974. It was not just a question of removing the uncertainties produced by developments in Forcible Entry and Conspiracy to Trespass, the need for which had been generally agreed, but of replacing them with a framework of law better able to perform the role in respect of which they had been found inadequate. The threat to possession, refracted in the 1975 media campaign through the stereotype of the invasive squatter, required that Civil remedies be supplemented by Criminal sanctions and new State powers. Families were returning from holiday "to find themselves not only dispossessed but powerless to evict squatters", the police refusing to act "because this was a matter for civil law not a criminal offence". The Telegraph asserted that "the present legal remedies against squatters are dangerously inadequate" and called for a law "severely penalizing illegal occupation".¹⁵⁴ Many of the media squatting allegations, subsequently shown to be

153. *ibid.* p. 56

154. *supra.* Section A.

either exaggerated or completely false,¹⁵⁵ were incorporated into the Law Commission's discourse: There were "considerable problems in relation to squatters not adequately covered by the present law"¹⁵⁶; squatting was a "serious problem" in boroughs such as Lambeth, where 400 Council properties were "occupied by squatters obstructing rehabilitation and preventing its distribution to those on the official waiting list for accommodation"¹⁵⁷; Council officers visiting squatted houses to ensure the proper service of legal process had a difficult and unpleasant job "as many squatters are obstructive and some abusive". Civil proceedings were inadequate moreover by their very nature, because of the time-consuming need for "investigation of the circumstances of an occupation, preparation of the necessary papers, arranging a suitable day for the hearing, securing the services of a Sheriff or bailiff and the organization of the execution of the writ or warrant"¹⁵⁸ - despite the earlier admission that Orders 26 and 113 had adequately provided "a speedier and less technical procedure for the recovery of property".¹⁵⁹ To meet the pressing problem, therefore, the old law would be replaced by five new specific criminal offences, rather than by the originally proposed general offence of entering and remaining on property, covering Violence for securing entry, Adverse Occupation of Residential Premises, Trespassing with an offensive weapon, Trespassing on Foreign missions and Resisting a Sheriff or bailiff in the execution of process for possession.¹⁶⁰

The Bill based on these proposals received its first reading in the

155. supra Section B.

156. Final Report No. 76, p. 58 para 2.43.

157. *ibid.* para. 2.44.

158. *ibid.* para. 2.47.

159. *ibid.* p. 46. para 2.4

160. *ibid.* pp. 60-72; draft bill pp. 168-184

House of Lords¹⁶¹ in December 1976, at a time when its legitimacy was being challenged by the by now highly organized Campaign Against the Criminal Trespass Law (CACTL).¹⁶² The comprehensive and far-reaching legal change which it embodied - the statutory introduction of a significant element of Criminal law into the field of Trespass - would have to be fought for and won not only in Parliament but in the country at large. The fractures identified by the Law Commission in the anachronistic legal framework of the mid-1970's could not on this occasion be repaired by the stealthy development of procedural orders or judicial interpretation, but must be opened up to inspection in public debate. This was the crucial point at which the re-presentation of the squatting phenomenon intervened to facilitate and justify the passage of the Bill both inside and outside Parliament. Whilst the legislature seems to have been aware at many points of the broader implications of the proposals, it was nevertheless the figure of the invasive squatter that provided the axis around which the debate on Part II turned. Sir Michael Havers could state in the Commons apparently without contradiction that "the provisions relating to squatting are a welcome relief to house occupiers".¹⁶³ In his argument that squatting was unfair "because it occupies accommodation either being used by or about to be used by a new occupier" were incorporated the two key significations of squatting mythology: The threat to the immediate occupation of the "man in the street", and the

161.standard procedure when a Bill has the support of both major parties (although the Conservatives were to table drastic amendments).

162. By March 1977 - when the London demonstration against the Bill was held - the campaign had the support of numerous Trades councils, Trade Union branches, Constituency Labour parties, the TUC, NUS, NUPE, ACTT, AUEW - TASS, and had local groups in Brighton, Bristol, Canterbury, Cardiff, Colchester, Coventry, Liverpool, Manchester, Nottingham, Oxford, Sheffield and Swansea.

163. Hansard: 2nd reading 3 May 1977: Vol. 931 p. 261

threat to "his" future possession.¹⁶⁴ Mr. Bowden referred with approval to GLC claims, later found to be less than reliable, that 1800 of the 9000 people on the Council's waiting-list were "being deprived of accommodation by unauthorised and undeserving squatters... many thousands of whom are nothing short of freeloaders who live off the backs of the homeless and the ratepayers".¹⁶⁵ The facts that there was a progressive housing shortage, that there were at the same-time a large number of empty homes, and that poor people might squat because they had no reasonable alternative, were ignored or denied in the contributions of the majority of members: when asked by Audrey Wise whether he was aware that houses were left empty for long periods either deliberately or through incompetence, Sir Michael replied: "that may happen but I do not know of any instances"¹⁶⁶, at a time when there were an estimated 700,000 vacant homes in Britain.¹⁶⁷ There seems to have been little doubt in the minds of most members that Criminal measures were necessary to protect the exclusive rights of ordinary people that were not being adequately served by Civil procedure. The great advantage of the Adverse Occupation clause was that squatters could be removed immediately from private property with the help of the police and the sanctions of the State:

"It still takes up to 8 weeks in the county court to get possession by Civil procedure, and in a very urgent case it can take four weeks, but that is far too long. Therefore, we believe it to be right that the Criminal

164. see Sections A and B supra.

165. Hansard (op cit) p. 288. Note the almost exact reproduction of the media stereotype discussed (supra) part A. (c): "Squatters as freeloaders and scroungers".

166. *ibid.* p. 261

167. *supra.* Section C. (2)

jurisdiction should be invoked".¹⁶⁸

The Bill was passed with a comfortable majority and the criminal trespass provisions took effect from December 1, 1977.¹⁶⁹

(3) The Criminal Law Act 1977 (Part II)

The low profile of the Criminal Trespass proposals was effected partly by their inclusion within a large Bill - limiting the conspiracy charge to criminal offences and the length of sentence to the maximum for the crime itself in Part I, and restricting the right to jury trial in Part III, following the Report of The James Committee. The significance of these changes for Part II. was that, despite the redundancy of Kamara, conspiracy charges could now be brought in respect of any of the five new criminal trespass offences, and the form of trial would be summary rather than on indictment. Apart from this indirect attack on the rights of lesser possessors, the question remains how far the new measures are merely replacing the old law abolished by S.13, and to what extent they involve significant changes in the legal position of squatters and other disadvantaged occupiers.

(a) Squatters;

Squatters are the ostensible target of the new law and it is they who are the most directly affected by it.

(i) 5.6 Violence for securing entry: Under this section squat-

168. Hansard (op cit) p. 329, per Mr. Mayhew. (emphasis supplied).

169. The full Parliamentary debates may be found: Commons: 2nd reading, Vol. 931 pp237-566, 437-743; 3rd reading pp 743-754; Lords amendments Vol. 936 pp 686-743; Royal Assent p. 1395. Lords: 1st reading Vol. 378 pp. 136-137, 801-873; committee: Vol. 379 pp 144-216, 401-448, 629-716, 733-832, 1302-1389; Report: Vol. 380, pp 539-611, 1176-1184, 1188-1256, Vol. 381 pp. 639-693.

ters have some limited protection against violent self-help eviction as widely practiced in the early days of the Redbridge struggle; owners cannot forcefully realize their exclusive right merely because of their Title. The degree of legal protection is now more than would have applied had McPhail been allowed to stand, but less than that which could have been given under a broader interpretation of Forcible Entry, because: (1) The offence is only committed if there is someone on the premises opposing entry¹⁷⁰, so if squatters are all on holiday or out shopping, their home can be broken into by the owner and their possessions forcefully removed; (2) The offence is only committed if the person using or threatening violence "knows" there is someone on the premises opposing entry¹⁷¹ (and Landlords have successfully argued that they "hadn't heard" squatters shouting inside the house during eviction¹⁷²) ; and (3) The offence does not apply to a "displaced residential occupier" (DRO), whose right of self-help - to use such force as in the circumstances is reasonable to remove squatters - is thereby furthered following the spirit of Lord Denning's pronouncements in McPhail.¹⁷³ It is immaterial for the purposes of this section whether the violence in question is directed against persons or property, or whether the attempted entry is intended to gain possession or for any other purpose.¹⁷⁴ Squatters are themselves of course able to enter property without breaking the law under this section, but the exclusive right of greater possessors under Sections 6. and 7. more than compensates for this unintended concession.

(ii) 5.7 Adverse occupation of Residential premises: Remaining

170. Section 6. (1) (a) ; see Appendix F. (infra) for the Act.

171. S.6. (1) (b)

172. see Squatters Handbook (1978) p. 4.

173. Section 6. (3) (a); for definition of DRO see S.12.

174. S.6. (4); this section covers the situation of "gate-crashing" (e.g. a party) by force, following R. v. Brittain (1972) 1 QB. 357.

on premises as a trespasser, having entered as such and after being asked to leave by a DRO, is an offence under S.7 (1), covering the almost entirely imaginary incidence of "holiday squatting". As Sir Robert Mark made clear in his letter to the Times in 1975,¹⁷⁵ then-existing law was quite adequate to enable the police to intervene in such an event on the grounds of burglary (S.9 Theft Act 1968), Criminal Damage (Criminal Damage Act 1972), abstraction of electricity (S.13 Theft Act), theft and possession of housebreaking implements (S.25 Theft Act). Squatters have become more vulnerable under the Section because unscrupulous landlords could now claim to be DRO's, thus enlisting the help of police powers of arrest, by leaving sticks of furniture in empty property and claiming to use it occasionally - forcing the police to make complex on-the-spot decisions on the basis of the owner's claims. Such landlords would moreover be exempt from prosecution under S.6 for Violent entry if they could successfully pose as DRO's.

The offence is also committed where a trespasser fails to leave after being asked to do so by a "protected intending occupier" (PIO)¹⁷⁶, a significant gain for exclusive possessory interests won by a Lords amendment and originally opposed in the Law Commission's Final Report.¹⁷⁷ This addition protects the right to "future possession" - whether of the individual waiting to move into property purchased but not yet occupied, or of someone authorised to occupy premises by a Council or housing association allocating its housing stock. The "threat" of squatters as queue-jumpers as well as direct intruders is thereby more than adequately met, since the PIO can enlist the help of the police in carrying out evictions, but again, given that instances

175. 8. August 1975 ; quoted (supra) at beginning of section D.

176. Section 7. (2)

177. Final Report (op cit) para 2:74.

of this type of squatting are comparatively uncommon, the section is just as likely to be used for harassment of squatters and other lesser possessors even where councils and landlords do not fall into the category of PIO as defined by the Act.¹⁷⁸

(iii) S.8. Trespassing with a Weapon of Offence: This section fills a gap left by the abolition of Forcible Detainer, the police having powers of intervention and arrest where they estimate that personal violence may be relied upon to maintain an occupation. Sub-section (2) defines "weapon of offence" as "any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use". Since almost anything can be construed as a "weapon of offence", there are clear opportunities for abuse by landlords in claims they may make to the police about squatters on their property.

(iv) S.9. Trespassing on Foreign Missions: The significance of this section, replacing the common law offence of conspiracy to Trespass as established in Kamara, is mainly confined to protest occupations and will be considered later. The Squatters Handbook nevertheless advises its readers to avoid the property of embassies and consulates when selecting a squat.¹⁷⁹

(v) S.10. Obstructing Court Officers: The new offences of resisting or obstructing a bailiff or sheriff executing process for possession supplements S.8 of the Sheriff's Act 1887, and assumes the function of deterring the defence of squats against eviction previous-

178. the Squatters' Handbook (op cit) (p.5) notes that Councils have been known to encourage squatters to vacate premises by claiming that a PIO is about to move in, and threatening police action under the section.

179. *ibid.* p. 6.

ly performed by Forcible Detainer. Under sub-section (5) "Court officers" as well as the police have the power of arrest on suspicion of the offence being committed. There have been at least five convictions under this section, including two following the infamous Huntley St. eviction in which 600 police removed 190 people from 54 flats previously unoccupied for over 4 years.¹⁸⁰ For his part in the occupation, Piers Corbyn received an exemplary 28 days imprisonment, the first immediate prison sentence under the new law, reduced to 200 hours Community service only after Appeal.¹⁸¹ The fact that ten other defendants were acquitted for lack of evidence emphasizes the value of the section as a means of containing street conflict over evictions through official powers of arrest, the ultimate sanction being here of secondary importance. Meanwhile and in addition, the maximum penalty for obstruction under the Sheriff's Act remains two years imprisonment and an unlimited fine.

(b) Other unlawful domestic occupiers;

It has been shown how the crisis in relations of possession led the greater possessors to explore whatever Civil legal options were open to them in order that they might make the best possible use of their resources and hence maintain their position of dominance; squatters were merely the least protected of a number of categories of lesser possessor, whose legal rights and thence real economic and social circumstances were also destined to deteriorate in the course of the 1970's. This tendency is carried further in the Criminal Law Act, whose scope of operation is nowhere explicitly confined to squatters and whose use against other lesser possessors who may be brought with-

180. see Wates et. al. (op cit) p. 94 ; and supra Section C.

181. ibid. p. 96.

in the definition "trespasser" cannot be discounted. Whilst tenants and lawful sub-tenants are protected from eviction and harassment under S.32. of the 1965 Rent Act, the security of tenure of a growing number of licensees and "unlawful" sub-tenants is likely to be significantly reduced by the Criminal Law Act, because the now defunct law of Forcible Entry was the only statutory defence that these groups had against eviction without a court order. Licensees now living in over 1,000,000 licensed homes in England and Wales may now become trespassers after being asked to leave; whereas previously a violent self-help eviction would have contravened the Statutes of Forcible Entry regardless of whether the ex-licensees were on the premises, S.6 of the Act explicitly does not apply when all the occupants are out. CACTL had argued strongly in 1977 as the Bill was going through Parliament that:

"The Forcible Entry Acts are the only effective protection from eviction that licensees and unlawful sub-tenants have.....ex-licensees, unlawful sub-tenants and unprotected tenants holding over have no protection from the sort of harassment this bill will allow. The repeal of the Acts and their replacement are serious threats to the living conditions of millions of people....this is a Secret Rent Act buried in a Criminal law Bill".¹⁸²

Whilst Section 8 could be used by landlords making claims to the police about the alleged use of offensive weapons by protected tenants in order to harass them, its more likely use against ex-licensees might turn on the definition of "being on premises as a trespasser after having entered as such".¹⁸³ Anyone having had their licence or non-protected tenancy terminated could be held to have "entered as a trespasser" after returning from work or shopping (this consideration also applies to S.7. (1)). The vulnerability of ex-licensees and unlawful sub-tenants to eviction through the summary squatters procedure is compounded by the provisions of S.10., under which they

182. Jeffries & Martin "Secret Rent Act 1977" (CACTL 1977) p. 2.

183. S.8. (1)

might be arrested for obstructing a court officer executing process for possession. Moreover, because Orders 26. and 113. apply to premises rather than people, and because the bailiff is obliged to evict anyone and everyone he finds on the premises,¹⁸⁴ an "unlawful" sub-tenant who was not aware of the proceedings could be arrested for resisting the bailiff whilst remonstrating in the course of the eviction. It should also be noted that the power of search and entry by force given the police under S.11. is not confined to premises occupied by trespassers or unlawful sub-tenants, but applies to any premises where a person suspected of committing one of the offences is thought to be. Finally, the rule that magistrates must pass up to the Crown Court any case in which the defence involves a question of Title is waived for Part II of the Act by S.12. (8), leaving complex questions of housing law to be decided by inexperienced magistrates, probably to the advantage of the larger possessory interests with the better legal representation.¹⁸⁵

II Industrial Possession

The media portrayal of squatting in 1975 not only mis-represented that phenomenon but also obscured the broader implications of legal change for other spheres of Society by focussing debate at the domestic level. In fact, squatting was merely one manifestation of the crisis in relations of possession, which was expressed throughout the 1970's also in public disorder and conflict over the conditions of industrial possession - this "threat" being similarly recognized to a greater or lesser degree in various media re-presentations. If, therefore, at the time of the passage of the Criminal Law Act, and in relation to

184. R. v. Wandsworth (1975) op. cit.

185. Jeffries & Martin (op cit) p. 16.

the particular object of study, the dominant signification was the threat to domestic possession posed by the invasive squatter, then the general ideological representation in the conjuncture remained the opposition of law and order to the forces of anarchy and destruction, whether in the form of industrial wreckers, demonstrators, students, immigrants, hippies or squatters. In September 1969 Enoch Powell claimed that "Violence and mob law are organized and expanding for their own sake....the object (of the organizers) is to repudiate authority and destroy it".¹⁸⁶ One month later Quintin Hogg drew attention to the general social malaise:

"When Unions, when University teachers and others, when students, when demonstrators of various kinds, when Labour and Liberal M.P's announce their deliberate detestation of all forms authority save their own opinions, how can you expect the police and the Courts to enforce the law".¹⁸⁷

According to the Conservative Political Centre's report on "Public Order" published in September 1970,¹⁸⁸ the new manifestations of violence and disorder fell into five categories:

- "(1) Mass demonstrations and processions with their attendant dangers to people and property.
- (2) Passive manifestations in the form of sit-ins and the like involving the possibility of obstruction.
- (3) Disruption of public meetings, with consequential denial of freedom of speech.
- (4) Mass invasion and occupation of houses and other buildings or property without legal right.
- (5) Gang warfare in public places".

The fourth of these categories formed the point of departure for investigation, and has been considered in some detail; the second will be the principal concern of this section, whilst the aspects of "public disorder" least directly related to Trespass will be more

186. Sunday Times, 28.9.69, quoted in Hall et. al. (op cit) p. 248

187. Sunday Times, 7.12.69, quoted ibid. p.249

188. "Public Order", CPC publication, 1970, p.4.

briefly dealt with in Section III.¹⁸⁹

A. Factory Occupation: the phenomenon and its conditions.

Whilst conventional forms of industrial action continued throughout the period to pose problems for Labour and Conservative governments alike, the occupation of Upper Clyde Shipbuilders (UCS) in July 1971 following the announcement of the closure of two of its yards marked a decisive turning-point in the history of industrial relations in Britain.¹⁹⁰ The declared aim of the work-in at the outset was ambitious by comparison with the limited objectives of previous industrial struggles: to keep open all four shipyards comprising UCS, to refuse all dismissal notices, and to maintain in employment the total labour-force of 8,500.¹⁹¹ Nearly one year later, after a vigorous campaign and widespread support from the Trade Union movement, three yards became operational as Govan Shipbuilders Ltd. with a £35,000,000 Government contribution, and in October 1972 the fourth yard, under the auspices of Marathon manufacturing, resumed normal production with a further government grant of £12,000,000. Not only had the fight against redundancy been successful, but the Government had been forced to revise its policy of allowing "lame-ducks" to go into liquidation.

189. All these manifestations of "violence and disorder" were re-presented in the media in various ways. The reason Sections II and III do not consider the process of these re-presentations in detail, proceeding directly to the phenomena and their conditions, is that they did not play a crucial role in legitimating the changes that took place within Trespass, the particular object of study (although they certainly served to justify other legal developments).

190. There had of course been sit-ins and occupations before - The "stay-down" miners' stoppages of the '30's' being a prominent example (see Slater, M. "Stay-down miner", Lawrence & Wishart (1936), and also Coates, K. "Work-ins, sit-ins and Industrial Democracy (1981) - but before the 1970's industrial action almost always involved the physical withdrawal of labour (in strikes, go-slows, overtime bans, works-to-rule) from the point of production.

191. see Coates (op cit) p. 34; Thompson and Hart: "The UCS Work-in", Lawrence and Wishart (1974).

September 1971 saw the UCS example being followed at Plessey's machine tool factory in Alexandria, where the planned dismissal of 250 manual workers was countered by a 200-strong sit-in. The occupation forced Plessey's to reconsider its plans for the site, and in January 1972 a partnership with the Lyon group was announced, the new consortium comprising several industrial Companies which together would provide more jobs than had originally been lost. The advantages of the occupation as an industrial tactic were obvious to workers who had faced similar threats of closure before, but had then been powerless to prevent redundancies; as one of the men explained: "In the past in Alexandria, throughout all the closures and redundancies, the men have maintained a passive outlook. In the usual situation you have maybe two days strike, 2 or 3 meetings, then at the end of the day you have to go back and negotiate terms. The last time I was made redundant we took no action at all, I walked out of the gate with my cards in my pocket, down to the labour exchange with my head buried and my tail between my legs".¹⁹² September 1971 also saw the first major extension of work-place occupations from Scotland to England at the River Don Steelworks in Sheffield, where a unique heavy forge was to be closed in the course of rationalization at the expense of several hundred jobs. Although the work-in achieved only a rephrasing of the redundancy schedule, the forge - the only one in the country capable of producing and machining units of up to 200 tons in weight - was re-prieved, after a highly organized campaign in which workers, staff unions and lower management were able to convince both BSC's customers and the government of the disadvantages of importing heavy castings from the continent.

¹⁹². Institute of Workers Control (IWC) Conference speech, January 1972.

Again, in January 1972, 750 employees threatened with redundancy by a plan to close the Fisher-Bendix domestic appliances factory in Kirkby, Liverpool, began a sit-in protest well informed by the lessons of UCS and Plessey's Alexandria. The circumstances were familiar: management had insisted that the plant was not viable, yet five contracts with Potterton for industrial radiators were outstanding, sufficient to maintain production for two years, whilst the washing-machine business was being transferred from Kirkby to Spain. One participant later recalled the explosive atmosphere after the announcement of the closure: "While management were telling our stewards we were all sacked, we invaded the boardroom, secured all the keys and gave the management five minutes to get off the premises".¹⁹³ Another reviewed the strength of the workers' position, deriving from the tactic of occupation, at the time of the take-over: "We will be able to stop the entire servicing operation throughout the country. We now control factory equipment worth over £1,000,000 and thousands of pounds worth of spares, and a vast amount of finished products".¹⁹⁴ On March 21st, following the personal intervention of Harold Wilson, Fisher-Bendix announced that an agreement had been reached for a newly-formed consortium, International Property Development (IPD), to take over production at the end of the month, providing continuity of employment for the workforce and enhanced opportunities for the future.

Further occupations followed in the Summer of 1972. British Leyland's Thorneycroft subsidiary was occupied after news that the entire workforce of 1000 was to be made redundant; the three month sit-in ensuring that most of the jobs were saved, and that those who were

193. quoted in Coates (op cit) p. 61

194. *ibid.* p. 62.

dismissed were found alternative employment within the industry.¹⁹⁵ At B.P. Chemicals' stroud plant 100 jobs were saved when a sit-in reversed the managements decision to close down a processing department.¹⁹⁶ And two hundred redundancies were prevented at Briants' Colour Printers in London after an occupation had secured the sale of the plant to another company which undertook to continue production.¹⁹⁷

Such occupations continued throughout the 1970's with similar aims and varying degrees of success, and can be expected to remain a permanent feature of industrial struggles in the 1980's. Three recent examples illustrate the continued vitality, in the face of adverse conditions, of this form of industrial action. After a five week sit-in, the 240 officers and crew of the Sealink ferry "Senlac" won their fight against redundancy in February 1982, in spite of Sealink's original plans to close the Newhaven-Dieppe route, after the personal intervention of President Mitterand. The 137 workers occupying the Robb Caledon Shipyard in Dundee in protest against its closure by British Shipbuilding were guaranteed jobs in January 1982, after a four month sit-in, through the take-over of the yard by Kestrel Marine, a firm specializing in oil-rig construction. Most prominent of all as a symbol of resistance to closures has been the victory at the Lee Jeans factory in Greenock, Scotland, where 140 women were guaranteed jobs early in 1982 by a Consortium with plans for further development after a seven month struggle to save the modern plant with its new machinery

195. *ibid.* p. 105

196. *ibid.* p. 106

197. *ibid.* p. 109

and excellent production record.¹⁹⁸

The full extent of factory work-ins and sit-ins in the period is unknown, since there is no official machinery for reporting occupations apart from the generality of strikes.¹⁹⁹ Only a rough estimate of individuals and numbers of plants involved may therefore be provided, with little reliable means of plotting trends. The available evidence suggests that, in Britain, 16,000 workers took part in occupations in 1971, 53,000 in 1972, 22,000 in 1973 and 1974, and 21,000 in 1975. The number of locations involved ranged from 31 in 1973 to 24 in 1974 and 44 in 1975, yielding "a total of approximately 150,000 workers in more than 200 occupations from the beginning of UCS until the end of 1975".²⁰⁰

Whatever the precise statistical record, there can be little doubt that occupations had become by the mid-1970's a significant factor in industrial relations. The above examples show how enterprises at the heart of the British economy - in Shipbuilding, Iron and Steel, machine tools, engineering, car manufacture and other crucial areas of production - were frustrated, at least to some extent and for a period of time, in their attempts to carry out rationalizations made neces-

198. For every completely successful occupation, however, there are many absolute failures or merely partial successes (for example saving a plant but only a small proportion of jobs, as at Plessey's, Bathgate, in March 1982) see Section IV.B, *infra*, "Industrial possession, redundancies and factory closures".

199. This has led to some methodological differences in the treatment of Industrial and Domestic possession - for which full and varied statistical information is freely available from a number of sources. Whether the concrete is adduced in statistical or by necessity more impressionistic form, however, its role as support for the analysis - whose path is not determined by purely empirical criteria - remains the same.

200. see Coates (*op cit*) p. 111 for all available statistics.

sary by the unfavourable economic climate.²⁰¹ The advantages to the labour movement of the occupation tactic were obvious in circumstances of threatened closure and redundancy in which the strike, overtime ban or work-to-rule would, by virtue of their removal of labour from the point of production, merely have facilitated the employer's object. They were summed up in The Metra Consulting Group (MCG) report of 1972, which found that work-ins and sit-ins:

- "(1)...gave the Unions control of the establishment, putting an absolute impediment in the way of the importation of non-union labour and preventing the removal of equipment.
- (2)...minimised overt conflict because they obviated the need for pickets of a conventional kind.
- (3)...enabled trade unionists to sit comfortably inside the plant rather than stand around outside it.
- (4)...maintained a high level of morale, since members stayed together and did not drift apart.
- (5)...were an effective last-ditch resort against redundancy when there was otherwise no compulsion for the employer to negotiate".²⁰²

The employment Department at Ford's had no illusions about the seriousness of the threat to production following incidents at the Company's Dagenham and Doncaster plants, and in 1975 prepared a detailed briefing for managers warning that:

"The unauthorized occupation of work-places and offices is becoming an increasingly popular form of industrial action and can take many forms, ranging from a work-in or a sit-in, to marching through a plant, controlling entries and exits, and interfering with the movement of people and materials. All unauthorized occupations have the same objective: to take physical control of the premises".²⁰³

If enterprises were prevented by occupations from executing redundancy and closure plans, they also recognized that this form of industrial action could be used in disputes over wages and conditions. Whilst never as numerous or extensive as occupations to save jobs, such

201.necessary, that is, according to capitalist criteria of economic calculation.

202. MCG Report: "An analysis of sit-ins", London (1972), quoted in Coates (op cit) p. 115. (emphasis supplied).

203. quoted ibid. p. 117 (emphasis supplied)

"assertive" sit-ins and demonstrations constituted a still greater potential threat to management's prerogative of control, as is clearly reflected in the urgent tone of the Ford briefing, since what was under occupation in such circumstances was viable plant considered an essential part of the enterprise's continuing operation. Early in 1972, following the rejection of its national wage demands by the Engineering Employers' Federation, the Confederation of Shipbuilding and Engineering Unions decided to press the same claims on a local basis, resulting in take-overs of more than 30 Lancashire factories involving between 25,000 and 30,000 workers in the Greater Manchester area alone.²⁰⁴ Nevertheless, the majority of occupations have been "defensive" in character, and the past few years have seen an apparent increase in their number, as closures and redundancies have continued at an accelerated rate and unemployment has reached 3,000,000. The problem for management here remains the movement of finished products and the disposal of valuable plant and capital equipment. Just as in the domestic sphere the greater possessors were impelled by market rationality to optimize their economic positions, so in the industrial field the same criteria of calculation determined rationalization plans whose aim was to make optimal use of existing resources and assets, reducing enterprises' losses in an increasingly unprofitable economic environment.²⁰⁵ In relation to such considerations, closures and redundancies became an essential part of Capital's strategy for survival in the 1970's, and may be expected to remain so well into the present decade.

It would appear, therefore, that the work-place occupation is a comparatively recent phenomenon, whose necessary condition in the period

204. *ibid.* p. 102.

205. these points will be elaborated in Section IV, *infra*.

from the beginning of the 1970's has been the threat of closure and redundancy - against which it constitutes the industrial tactic of last resort. In this respect, closures are revealed by the method of investigation as a condition of possibility of the occupation phenomenon, in much the same way as the housing shortage was seen to be a condition of possibility of the squatting phenomenon. This need not imply that all occupations are necessarily "caused by" closure threats any more than that all squatting is necessarily "caused by" housing shortage; indeed, the terminology of "causality" is entirely foreign to the method of inquiry, whose object is merely to show what conditions underlay these phenomena in this particular conjuncture, explaining why, in general terms, they assumed the form they did. It remains quite conceivable, therefore, that squatting and occupations might take place in circumstances of an abundance of housing and full employment, in accordance with the calculations of social agents; but this cannot be shown historically to have been the case in the post-war period.

B. Factory closures, Occupations and the Law

Factory occupation constitutes an immediate challenge to the economic power of management in its capacity to direct resources and make decisions governing the production process; the very ability of the enterprise to function depends upon its exclusive control of factory premises, labour being deployed in production according to capitalist calculation just like any other commodity. The legal framework securing this economic relation became strained in the early 1970's as managerial prerogatives were increasingly threatened: what was at stake in the adequacy or otherwise of legal remedies was the economic power of the enterprise not just to control immediate production, but

in cases of complete closure to dispose of valuable finished products, plant and capital equipment.

In formal legal terms the position was, and remains, that the management of the enterprise have "possession" and the workers merely licenses to be on the premises for the purpose of fulfilling their employment contracts. The implications for factory occupations were stated clearly by Burgess V.C. in 1972:

"Where persons are in employment they are licensees to enter upon the premises for the purpose of their employment....if their employment terminates, their license to go upon or remain on the premises also terminates..... (where) the management have dismissed employees they are not entitled to remain on the premises. If they refuse to leave, then the Company can come to the court for assistance".²⁰⁶

In other words, former employees in such circumstances have become trespassers, and the management have recourse to injunction or the Action for Recovery to redress their "dispossession". The position is straightforward because, unlike in the domestic sphere, there is only one category of lesser possessor, the licensee, who strictly has no possession and therefore no legal rights in the land or buildings whatever.²⁰⁷

^{206.} in Sharston Engineering v. Evans (1972) 12 KIR 409,

^{207.} The position at "private" law does not, however, prevent the worker having various other employment rights, given under public statute. The contradiction between private law right and other rights was recently illustrated in the Bathgate decision (March 1982 - Scottish Court of Session) (see Appendix H.), in which a Scottish occupation was held to be lawful, despite the clear trespass involved, by virtue of S.17. of the Trade Union and Labour Relations Act (discussed infra.) which provides immunity for industrial actions in contemplation or furtherance of a trade dispute. In a capitalist mode of production, this contradiction cannot be satisfactorily resolved by denying the private exclusive right, and hence power, of the enterprise. The Bathgate decision is likely to be challenged in the Scottish courts, and its reasoning is unlikely to be followed in England, where the judgment is not binding.

(1) The Action for Recovery: Orders 26. and 113.

The crisis in industrial possession precipitated by occupations could be resolved in the interests of the "lesser possessors" only in a limited sense, since even successful struggles would invariably result in a continuation of capitalist production without any serious threat to the fundamental relations of possession and separation on which that process was based.²⁰⁸ Hence the same economic criteria used by management in deciding to close a factory on one occasion might be employed again years or even months after a successful occupation opposing an initial closure threat, in which case the struggle would begin anew, as at IPD (formely Fisher-Bendix) in Liverpool and Briant's Colour Printing in London in the mid-1970's; this has been a problem for Labour throughout the period in industries hit hardest by the recession such as iron and steel, Shipbuilding, engineering and vehicle manufacture. On the other hand, the crisis could be resolved to the advantage of the greater possessor, the enterprise affected by the work-in or sit-in. This was obviously the preferred outcome for Capital once the vital decisions on closure or redundancy had been taken (although Companies never lost out absolutely in defeat as this would invariably involve merely changes in capital structure through government aid, partnership, or the creation of Consortia) since the continuing viability of the enterprise would depend upon the execution of its plans for rationalization of production, sale or re-allocation of remaining resources.

In the majority of cases during the 1970's closures and redundancies took their course without effective union opposition, because of the

²⁰⁸. For the comparatively small number of cases in which occupations led to the establishment of co-operative enterprises, see Coates (op cit) pp. 133-147. See also the references to co-operatives in Ch. 8. (infra).

sheer weight of legitimacy behind the enterprise's decision and the problems of labour organization attendant upon the exercise of the industrial tactic of last resort. Where the work-force was not so complaisant, the decision of management to enforce its legal right of exclusion depended on a number of factors, such as the nature and extent of the occupation, the degree of resistance likely to be offered, the possibility of alternatives to announced plans, and not least the damage to industrial relations reckoned as likely to result from large-scale conflict. The evidence suggests that in the case of the larger occupations, such as those at UCS and Fisher-Bendix (which were also politically the most sensitive) the law was at best irrelevant, but that where work-ins and sit-ins occurred on a smaller scale, and where the workers were less well organized and the issues not so publicly visible, the Action for Recovery was more commonly used. Any conclusion on the incidence of the resort to law must remain somewhat impressionistic since domestic possession actions are not distinguished from others in the Judicial Statistics until 1978, from which time a distinction is made between "Residential" and "non-Residential" premises, and the legal reporting of industrial cases, much less extensive than in the domestic sphere, gives no reliable indication of the number of suits undertaken. It is reasonable to suppose, however, that the increase in applications filed and orders made under both order 26 and the ordinary Action for Recovery, recorded in the Judicial Statistics for the County Court during the 1970's, is at least partly to be explained by an increase in the use of Law in the industrial context; and this putative trend is confirmed by the figures from 1978 to 1980, which show an increase in non-residential orders made under the action for Recovery from 1,261 to 2,180, and

under Order 26 from 162 to 258.²⁰⁹

Whilst it is important not to over-estimate the role played by law in industrial relations during the period, it is evident that the Civil law adapted here, as elsewhere in Society, to the requirements of greater possessors whose economic power and legal right of exclusion were under threat. Because the crisis in relations of possession arose from the inability of the then-existing legal framework to contain problems of socio-industrial development, agents of Capital were forced to explore every possible means of extending the protection afforded within the existing system of rules, or to push for legislative changes where legal interpretation was not of itself sufficient. It had always been assumed on their introduction in 1970 that Orders 26 and 113 were exclusively "squatters procedures"²¹⁰, however, just as they were extended in the domestic sphere to cover ex-licensees and "unlawful" sub-tenants by virtue of the central category "trespass", so they were used in the industrial setting against trespassers occupying premises after the termination of their licences; here no sensible employer would seek recovery of possession under Order 6, with valuable stock and equipment being held in the factory perhaps for months, when there was a possibility that a Writ of Possession could be granted and executed by court bailiffs and the Police within a week of the commencement of summary proceedings under

²⁰⁹. see Tables 5 and 6 (Appendix E.) ;and Tables 7 and 8 for further details. Again it must be stressed that these figures relate only to the County Court, and that the use of the Action for Recovery and Order 113 in the High Court must remain subject to speculation. Limited as they are, however, the statistics serve quite adequately the purposes of the concrete analysis.

²¹⁰. see notes accompanying the Orders in 1970: Supreme Court Practice (1973) Vol. 1. p. 1487.

Order 113. One case may serve as an example²¹¹: On March 7th 1975, 300 employees at the Crosfield Electronics factory in Holloway Rd, London, were informed that they were to be made redundant in accordance with management's decision to transfer production to the company's factory at Peterborough. On March 26th they began a sit-in with the intention of saving their jobs, and on May 5th the employers secured a High Court originating summons claiming possession under RSC Order 113. The Summons was heard on May 9th, just four days later, when a possession Order was granted.²¹² Under rule 7. a Writ for possession could then have been issued and executed immediately without leave of the court, had the trial judge not allowed an appeal on a question of law. On this appeal, Lord Denning ruled that the alternative methods of service of the originating summons laid down in rule 4(1)²¹³ were quite independent and need not, as the appellants had argued, be taken in descending order such that the attempt at personal service must be made before merely leaving a copy of the summons at the premises; another possible legal loophole was thus firmly closed.

The exclusive legal rights of enterprises were therefore undoubtedly enhanced through improvements in Civil procedure, but whether this development had direct material effect depended on the attitude of the occupiers and the willingness of employers to seek enforcement. In most cases, where labour organization was comparatively weak and the numbers involved small, as at Sharston Engineering and Crosfield

211. Crosfield Electronics v. Baginsky: CA (1975) 1 WLR 1135.

212. Under RSC rule 6 (1), the order for possession could be made less than 7 clear days after the service of the summons only "in case of urgency and by leave of the Court". (see Appendix D.) The "normal" period was reduced to five clear days in the RSC and CCR Amendments of 1977. (supra)

213. see Appendix D. and RSC commentary (op cit) p. 1560.

Electronics²¹⁴, the occupiers gave up without further struggle after the possession order was granted. In the 150 strong work-in at Briant's Colour Printing in June 1972, on the other hand, "writs were either ignored or publicly burnt, and each new intervention in the courts brought large public demonstrations of Trade Unionists in support of the printworkers",²¹⁵ the occupiers succeeding in keeping their jobs with the sale of the plant to another Company.²¹⁶ In cases where neither side was willing to concede defeat, the struggle would be resolved by legally sanctioned force, as at the Laurence Scott engineering plant in Manchester in September 1981.²¹⁷ Here a sit-in of over 650 workers, which had begun in April after the announcement of the factory's closure, was ended one morning at 2.45 am by 50 bailiffs armed with sledge-hammers and pick-axe handles.²¹⁸

(2) Criminal law and the 1977 Act

Developments in the Criminal law relating to possession of land occurred during the period almost entirely in the domestic rather than the industrial sphere. Both employers and police were well aware that, if the Civil law was of dubious value in the industrial context, then the use or threat of Criminal sanctions could be much more destructive: no prosecution was undertaken against factory occupiers for Conspiracy to Trespass or under the law of Forcible Entry and Detainer, at a time when both were being deployed ingeniously against squatters. The worker might only have the legal status of mere

214. op. cit. - 30 and 31 workers being involved respectively.

215. see Coates (op cit) p. 108

216. When the new company decided to close the plant a year later, the same mistakes were avoided: redundancy notices were received by workers over the week-end, and by Monday morning the factory was heavily guarded by security men with alsatian dogs; see *ibid.* p. 109.

217. see the Guardian: 19/8/81; Morning Star 19/8/81.

218. Compare the eviction of the Huntley St. squatters in 1978, discussed *supra*, S.C. (1). The struggle at Laurence Scotts was continued on another level, with picketing outside the factory gates.

licensee, but, unlike the weakly organized domestic licensees and squatters, benefitted nevertheless from the collective power of the Labour movement, which from the beginning of the 1970's kept changes in the law of Trespass and Conspiracy under constant review.

The proposals of the Law Commission in its 1974 Working Paper, to make remaining-on premises after having been asked to leave by the owner a criminal offence, were strenuously opposed by the TUC, which saw little improvement in the Final Report of March 1976. Following a resolution carried by Congress the previous year, it therefore pressed the government for factory work-ins and sit-ins in contemplation or furtherance of a trade dispute to be specifically exempted from any new Trespass law. However, the draft Bill proposed in the Final Report²¹⁹ was substantially unaltered by its passage through Parliament, taking effect from December 1977, since which time the General Council has been urging the Home Secretary to amend the Criminal Trespass provisions. The TUC summarized the position concerning the Act in Industrial Relations Bulletin No. 5 of July 1978²²⁰:

"....(the Act could be interpreted) to curb legitimate Trade Union action in trade disputes, particularly in relation to factory occupations Pressed by the General Council, the Home Secretary has stated that his view on the lack of dangers of the Act to Trade Union activities has been clearly communicated to the chief officers of police....Should disturbing developments occur in relation to peaceful industrial action, the Home Secretary has said that he will be willing to meet the general council to discuss the need for amending legislation".

The Council then issued a circular to all affiliated organizations requesting them to report any instances in which the new provisions had been used during peaceful industrial action; no such occurrences

219. see Final Report no. 76 (op cit) pp. 186-178.

220. at pp. 4-5 emphasis supplied.

have been recorded up until the time of writing in 1982.

Yet the fact remains that the Act has detrimentally affected the legal position of workers engaging in occupations, since exclusive possessory right, already strengthened by improvements in Civil procedure, has been further buttressed by Criminal sanctions and police powers of intervention whose possible use cannot be discounted. Neither can the re-assurances of the Home Secretary in 1978 about "amending legislation as the need arises" be viewed with any great confidence, given the current Tory administration and the worsening economic and political situation in the 1980's. There are three major Threats to factory occupations:

(i) S.6. Violence for Securing Entry²²¹: Since the new offence is only committed when there is someone on the premises opposing entry, workers who left part of factory buildings unoccupied could render them liable to violent but legal re-possession without a court order - the section reducing protection previously afforded under the law of Forcible Entry and Detainer.²²² Secondly, although most occupations are begun from inside the work-place - and for this reason the section does not immediately apply to the occupiers - because the workers' licence is valid only for the purpose and area for which it is granted, the occupation of administrative offices by shop-floor workers, for example, could make them liable under the section. Third and most importantly, no actual violence need occur for the offence to be committed, so a group of protesters outside a factory building could be held to have used "violence" against those inside by virtue

221. for this and all sections here considered see Appendix F. reproducing the Act.

222. see supra, Section D. (3).

of "intimidation caused by sheer weight of numbers".²²³

(ii) S.8. Trespassing with a Weapon of offence: The "weapon of offence" can be any object intended for use to incapacitate or injure another person, the courts having in the past included banners, placards, shoes, keys and coins - even a bag of flour - within the definition. The opportunities for abuse of the section are wide in industrial situations where tools and implements are everywhere to hand. As with section 6., police powers of entry, arrest and search on "reasonable suspicion" of the offence being committed raise the possibility of direct State intervention in factory occupations.²²⁴

(iii) S.10. Obstructing Court Officers: This is potentially the most far reaching section, as welding factory gates, for example, or otherwise barricading premises could be construed as obstruction, enabling bailiffs to enlist the help of the police in executing process for possession. As with the other two offences, conspiracy charges may be added where the police consider this appropriate.

There can be no question therefore of the potential for direct State involvement in the maintenance of existing industrial relations of possession. The 1977 Act has dramatically increased Criminal police powers in this field, since charges of Forcible Detainer and Conspiracy to trespass had yet to be tested by the courts in the industrial context at the time of their abolition. The statement by the leading exponents of the law of Tort, Clerk & Lindsell, that "industrial occupations are not within the provisions of the Act as it does not apply to premises which are wholly or essentially non-residen-

223.the view of the Attorney-General, Sir Peter Rawlinson, in 1973; see Smith & Hogan "Criminal Law" 3rd edn. p. 127.

224. Section 11. (see Appendix F.)

tial"²²⁵ is therefore grossly erroneous,²²⁶ an effect of the partialization of the legal totality accomplished through the discreteness of the discourses of legal commentators.

III Public order and the "Domain of the Public"

The involvement of large numbers of people in unconstitutional direct action during the 1970's was represented not only as undermining domestic and industrial possession, but as threatening the conditions of public order. The conception of "public disorder" promulgated already by Wilson in the last years of the labour government²²⁷, by the CPC and the Conservative Party in the 1970 election campaign, and by the media "faithfully recording these disagreeable manifestations"²²⁸, went of course far beyond the strictly domestic and industrial spheres to include activities and demonstrations connected only indirectly with relations of possession, symptomatic at a more general level of the crisis in social relations which was to be met increasingly by demands for the enforcement of "law and order". Nevertheless, it is the relation of such developments in the public domain to Trespass in particular and the protection of specific relations of possession and separation that must form the principal concern of this section.

It would be impossible in modern Society for public order to be "neutrally" conceived, since preserving the peace must inevitably also

225. see Cumulative supplement to 14th edition, 1979, para 1332.

226. the statement is true only of S.7. (Adverse occupation of residential premises) and S.9. (Trespassing on Foreign Missions).

227.during the Seamen's Strike in 1966, when the "National Interest" was first discursively opposed to the irresponsibility of Trade Union action.

228. according to the CPC report "Public Order" (op cit) p. 4.

involve the maintenance of quite specific relations of possession and separation, even if this result is only incidental to the declared intention of the public authority. Any threat to existing possessory relations, whether expressed in demonstrations, squatting or other forms of direct action, may serve to undermine public order, and conversely, public disruption may also threaten existing possessory relations: hence the necessarily dual involvement of the State in both buttressing exclusive possessory right and maintaining social stability. This is evident in official reaction to forms of social disruption apparently far-removed from relations of private property: the Vietnam protests of 1968, growing opposition to the policy on Ireland, student unrest, the massive gatherings of the "counter-culture" as at the Isle of Wight pop festival in 1968, and the campaign to stop the 70's Springboks tour; what was involved here was no explicit challenge to the fundamental relations of possession and separation but an expression of other dissatisfactions and conflicts characteristic of a society sliding towards dissensus on a number of different levels.

A. Reproduction²²⁹

Firstly, in the realm of Reproduction, the Society for Conservative Lawyers was concerned in 1970 with the implications for public order of large-scale sit-ins, mass demonstrations and processions and "mass invasions" of property without legal right as had already occurred in

229. As in previous sections, the course and structure of the analysis is determined by the object of investigation: here it is convenient to consider public order as it relates to Reproduction and then to Production. (When examining the economic conditions of the housing crisis in Section IV (infra) the convenient division, similarly determined by the concrete object, will be between Production and Distribution)

the London St. Commune.²³⁰ The particular problems for the greater possessors posed by the crisis in possessory relations (considered in sections I. & II. above) were compounded by the more general problem of order facing the State wherever "private" disputes threatened to spill over into the "public" domain. Apart from the catalogue of public order offences under Common law and Statute already available in 1970 to contain such occurrences - Sedition, Riot, Affray, Unlawful Assembly, Rout, public Nuisance, Obstruction of the highways, breach of the Peace and possession of offensive weapons - the laws relating to Trespass were also mobilized against public disorder from the beginning of the 1970's.

The Common Law and Statutory offences of Forcible Entry and Detainer had, at the time of their inception, always been intended first and foremost to discourage breaches of the peace, but their sudden resurrection at the turn of the decade in cases of squatting²³¹ demonstrated clearly their modern role in connection with specifically private property - whatever the pretext concerning the maintenance of law and order. Indeed the problem for the Law Commission on being instructed to update this area of law in 1972 had been "the difficulty of reconciling two basic approaches....one arguing that the purpose of legislation should be the protection of property rights....and the other arguing that the main concern should be the preservation of public order".²³² The Criminal law Act 1977 in fact resolved this

230. "Public Order", CPC, op. cit. p.4. (supra p.)

231. supra: Sections C. (1) and D. (2).

232. Working Report (op cit) p. 17

dilemma, following the common law trend in *McPhail*²³³, by replacing the old law with provisions in section 6 which both increased the power of the owner of property and encouraged forceful self-help eviction likely to result in breach of the peace, since the offence of "Violence for securing entry" did not apply to the DRO and in any case could not be committed if there was no-one on the premises at the time resisting entry.²³⁴ The subtle shift in emphasis from the preservation of public order at all costs, to its upholding conditional upon the optional exercise of self-help rights by property owners, had been implicit in the new terms of reference supplied to the Law Commission in 1973, which required not only the examination of the law of Forcible Entry and Detainer but the consideration of the "circumstances in which entering and/or remaining on property should constitute a criminal offence".

Another significant development in relation to public order in the period was the link established between Trespass and Conspiracy. When in 1971 a number of students occupied the Sierra Leone Embassy in London to protest at their Government's treatment of dissidents, the newly appointed Attorney-General, Sir Peter Rawlinson, seized the opportunity to extend the role of the Criminal Law in Trespass in line with the Selsdon Park resolutions by charging them with Conspiracy to

233. *supra*: Section D.

234. *supra*: Section D. (3) of course this does not not imply that the act, by increasing self-help rights of property owners, thereby increased public disorder; Its overall effect has been a significant contribution to the maintenance of social order. But the contradictions in legal reasoning are revealed clearly in the working report and the justification for section 6, which also illustrate the relation between private property and public order in modern Capitalist Society.

Trespass.²³⁵ This must have seemed an easier option than the task he had been set by the then Shadow Cabinet back in February 1970: "to frame new Trespass legislation to combat the excesses of demonstrators".²³⁶ Whilst the demonstration had involved no actual violence it was considered symptomatic of a breakdown in traditional values, threatening the very fabric of Society, which necessitated the introduction of new criminal sanctions. In reviewing the condition of Society in March 1973, Lord Hailsham saw such activity as "standing on the same slippery slope" as a number of other contemporary manifestations of the crisis:

"The war in Bangladesh, Cyprus, The Middle East, Black September, Black Power, the Angry Brigade, the Kennedy murders, Northern Ireland, bombs in Whitehall and the Old Bailey, the Welsh language society, the massacre in the Sudan, muggings in the tube, the gas strikes, hospital strikes, go-slows, sit-ins and the Icelandic cod war".²³⁷

If the law of Trespass could be interpreted as having a criminal application in this case, then it would be fully justified in being so developed. Lord Hailsham's view was that the charge was appropriate wherever the unlawful activity involved some "sufficient additional factor", as for example the "infliction of more than purely nominal damage" or "the invasion of the domain of the public".²³⁸ Judicial reasoning along similar lines enabled Conspiracy to be active in other areas of Society in redefining the boundaries of a new moral order: the editors of International Times were charged with "Conspiracy to outrage public decency" and the editors of OZ with "Conspiracy to corrupt public morals", whilst a private prosecution was undertaken against Peter Hain and others for "Conspiracy to hinder and disrupt" the South African Rugby team tour; and Conspiracy charges were added

235. see supra: Kamara v. DPP (op cit)

236. reported in the Sunday Times : 1.2.70

237. Macleod Memorial lecture, Young Conservatives Conference, 10.3.73.

238. see Final Report no. 76 p. 51

in the trials of the Angry Brigade, the Aldershot Bombers, and the Welsh language society protesters, all during 1971.²³⁹ An adequate conception of "Public Order" in the 1970's must hence be broad enough to encompass moral and other subtle forms of social disruption, as well as the more familiar overt violence and public unrest on the streets and around the workplace.

The value of the Conspiracy charge for the prosecution lay in its catch-all flexibility, enabling the apprehension and long term containment of offenders whose separate actions might be unlawful but not illegal. The limiting condition of its use was that the case must have "public implications", whether involving violence, obstruction, interference, indecency, or the corruption of morals. Lord Cross's test for the appropriateness of the "conspiracy to trespass" charge in *Kamara* was even wider than that of Lord Hailsham, with whom Lords Morris and Simon had agreed: otherwise tortious acts could become Criminal "if the public had a sufficient interest, that is to say, if the execution of the agreement would have consequences sufficiently harmful to call for penal sanctions".²⁴⁰ The principle that the Criminal law could be directly involved in the protection of exclusive property right, maintaining existing relations of possession and separation, wherever the "public domain" was invaded could have resulted in conspiracy charges in a variety of circumstances previously confined to the tort of trespass: the occupation of public buildings, squatting where large numbers were involved, demonstrations on either private or "public" property, as well as trespasses on Foreign Missions. Indeed, only in a small proportion of trespasses would it have been possible to maintain that the "public domain" was not some-

239. see Hall et. al. (op cit) p. 311; and on Conspiracy : Robertson (1974) Spicer (1976)

240. Final Report no. 76 (op cit) p. 51

how "invaded",²⁴¹ however, the Criminal Law Act intervened to restrict the use of Conspiracy charges to agreements to commit a crime, abolishing "Conspiracy to Trespass" and repealing the closely associated "public order" provisions of Forcible Entry and Detainer.²⁴²

Although the Law Reform and procedure committee of the senate of the Inns of Court and Bar presented the Law Commission with arguments in favour of a "remaining-on" offence wherever certain categories of premises were involved - hospitals, airport buildings, railway stations and Embassies - the Final Report considered that existing public order laws were sufficient in these cases and that the new legislation should apply only to Foreign Missions. These recommendations are embodied in S.9. of the Act, and Trespass is now a criminal offence however small or peaceful the protest on premises defined in S.9. (2).²⁴³

The mass occupation of University premises by students throughout the 1970's may also be considered as having fallen, in a limited sense, within the "public domain", because of the prominence of the Universities as semi-public institutions and the frequently political nature of the campaigns waged by students over such issues as teacher unemployment and public expenditure cuts. The Labour Secretary for Education told the House of Commons in 1969 that the LSE sit-in was being perpetrated by "a handful of Brand X revolutionaries - the thugs

241. such "invasion" occurs when the State considers any activity as posing a "danger" to Society; The "domain of the public" is a conceptual field, interference within whose boundaries constitutes "invasion". The definition of "invasion" is thus entirely circular: the public authority defines certain activities as invasions of the public domain, those activities once thus considered by the State so publicly important must constitute such invasion.

242. supra: Section D. (3)

243. see Appendix F; of course Conspiracy can be added as a separate charge in a section 9. indictment.

of the academic world",²⁴⁴ and this occupation, together with those at Keele, Warwick and Essex, and then the Cambridge "Garden House" affair,²⁴⁵ were later to be considered by Lord Hailsham as well down the "slippery slope" to the breakdown of law and order in his lecture to the Young Conservatives conference in 1973.²⁴⁶ However, because of the peculiarities of the student situation and the semi-independent status of the Universities, with their internal policing and disciplinary procedures, the State never became directly involved in disturbances occurring on academic property by pressing conspiracy or other Criminal charges.²⁴⁷ Instead, the Civil law took its course here as in other areas of Society where licensees exceeded the conditions of their licence and hence became trespassers; the exclusive right of the University authority was realized in the Action for Recovery, and process of re-possession greatly expedited by the introduction of RSC 113 in 1970. In Warwick University v. de Graaf, Lord Denning allowed an appeal by the University against the High Court dismissal of its application for an originating summons in respect of the occupied senate and telephone exchange, taken over by students protesting over rent-increases and alleged victimisation; the authorities had taken "reasonable steps" as required by the Order even though no serious attempt had been made to identify more than five of the 100 demonstrators, and in any case "Irregularities no longer nullify the proceedings.....People who defy the law cannot be

244. see Hall et. al. (op cit) p. 251.

245. (protesting students interrupted a private dinner celebrating the victory of the Greek Colonols in 1970).

246. op. cit, quoted supra. (it is difficult to see, from Hailsham's catalogue of modern evils, what kind of demonstration, protest or movement for reform would not be considered as having a place on this "slippery slope").

247. Such charges were brought in the "Garden House" case, but here the protest did not take place on University premises.

allowed to avoid it by putting up technical objections".²⁴⁸ And in University of Essex v. Djemal²⁴⁹ it was held that an order for possession under Order 113. applied to the entire premises, not just the part that was originally shown by the facts to have been in adverse possession. As to the Criminal law, whilst charges related to Trespass were not tested in the courts prior to the abolition of Conspiracy to Trespass and Forcible Entry and Detainer in 1977, trespassing students may now be charged with offences under sections 6,8 and 10 of the 1977 Act, which are open to the same wide interpretation and potential abuses here as in the domestic and industrial contexts.

Wherever acts of Trespass could be brought by legal interpretation within the "public domain", the State therefore proclaimed its right of intervention to preserve public order. What was paramount here was not so much exclusive possessory right as the maintenance of certain norms and standards of behaviour, the preservation of "constitutional" methods of protest and disagreement that were supposed to characterize the stable society of consensus. The State was involved as much during the 1970's in containing public unrest and dissent as in buttressing the institutions of private property, even if these functions were in effect to a great extent synonymous. Hence Trespass played a part in preserving public order in the sphere of Reproduction, and this role lives on, with increased potential, in the Criminal Trespass provisions of the 1977 Act.

248. per Lord Denning (1975) 1. WLR 1128. (Orders 113 and 26 were of course amended in 1977 so that reasonable steps need no longer be taken at all provided the form of originating summons is no. 11A - see supra. Section I.D.)

249. (1980) WLR p. 1303.

B. Production

The Threat to public order was posed still more clearly in the industrial sphere by the development of new forms of direct action, which expressly challenged managerial prerogatives through the involvement of large numbers of workers in militant collective activity at and around the point of production. If factory occupations and mass picketing were an immediate problem for the enterprises concerned, they were also watched uneasily by successive governments, anxious to maintain production and avoid social instability and industrial unrest. Ironically, the worst incidents of industrial disorder during the 1970's occurred in the wake of the inflammatory Industrial Relations Act, which had been directed against more conventional forms of workers' protest in conformity with the 1960's "consensus" on industrial relations embodied in the Donovan Report and Barbara Castle's "In Place of Strife". Thus at the same time that work-ins and sit-ins were becoming widespread in struggles against closures and redundancies, the Heath government was attempting to curtail Union powers by undermining the closed shop, requiring official registration and adjudication before the Industrial Relations Court (IRC), and defining "unfair industrial practices" which severely circumscribed the legality of strikes.

If factory occupations threatened industrial possession and public order, then so did the practices of picketing and blacking which became widespread after 1971. The miners' wage claim at the beginning of 1972 led to a major confrontation with the Heath Government, the success of the strike depending on preventing the movement of supplies at ports, power stations and coal depots. Here the tactic of the "flying picket" was effectively developed to concentrate limited

labour resources at the most vulnerable locations, and such pickets played an important part, with the support of thousands of workers from neighbouring factories, in halting supplies from Saltley coke works in Birmingham on February 10th - which date also marked the governments' concession in the "special case" of the miners.²⁵⁰ The beginning of the year also saw another important confrontation, between the firm of Heaton's Transport and Liverpool dockworkers - who responded to proposals for container rationalization by blacking company lorries. The dockers refused to comply with an order from the new IRC to permit access, and the Union was fined £5000 for contempt raised to £50,000 in April for failure to pay. Container blacking spread to London, where in July the IRC committed five dockers to jail on charges of contempt. After overwhelming Trade Union protest, which stopped production of national newspapers for 6 days, the men were released through the intervention of the official solicitor.²⁵¹ Similar incidents in the period involving militant Trade Union action included the use of flying pickets in the Construction industry dispute, mass picketing in the Grunwick Affair and during the lorry drivers' strike of 1979, and the extensive picketing of private steelworkers by BSC workers during the steel strike early in 1980.

Because picketing and blacking did not occur actually on the premises of the business concerned, the law of Trespass could not provide a suitable basis for legal intervention by either injured possessors or the State. Nevertheless, the law was to develop here along other well-trodden legal paths to ensure industrial order and hence protect the threatened interests of the greater possessors, setting the tone of industrial relations legislation for the 1980's. For if the 1971

250. see Hall et. al. (op cit) p. 295; Morning Star: 10/2/82, describing the "Battle for Saltley Gates" on its 10th anniversary.

251. *ibid.* p. 294.

Act with its special legal machinery had appeared too direct an affront on Trade Union rights, and if Trespass was an inappropriate device for the control of public disorder outside the factory gates, there remained possibilities for the regulation of "extra-possessory" industrial activity in the labour law of the 19th and early 20th Centuries.²⁵² Firstly, the legality of industrial action undertaken by workers "in contemplation or furtherance of a trade dispute", enshrined in section 3 of the Conspiracy and Protection of Property Act 1875 as a result of 100 years of labour opposition to successive Combination Acts, was compromised in 1974 by the Court of Appeal decision that "flying pickets" involved in the building workers' strike of the previous year had been guilty of "Conspiracy to intimidate", contrary to section 7 of the Act, merely by virtue of their strength of numbers.²⁵³ Thus a law that had lain dormant for 99 years was reactivated, as were other forms of Conspiracy, in response to new manifestations of social disorder, and at Shrewsbury Crown court one of the six defendants received a sentence of three years imprisonment - 12 times heavier than the maximum for direct intimidation provided by statute. Similarly, in a Lords' decision arising out of the same dispute, a narrow construction was placed on section 134 of the Industrial Relations Act (now part of TULRA) which had made a pickets' attendance on the highway legal for the purpose of "obtaining or communicating information or peacefully persuading the driver not to make a delivery"; this section did not imply a right to stop and detain a vehicle on the highway, even if no violence was used or threatened, and the accused was therefore guilty as charged of

252. These will be considered here only briefly, because of the tangential relation to Trespass and related laws. Such developments are worthy, however, of detailed attention (see discussion of possibilities for further research, *infra*. Ch. 8).

253. R v. Jones (1974) ICR 310. ; see Robertson (*op cit*), Spicer (*op cit*).

obstructing the highway contrary to S.121 of the Highways Act
1959.254

The second "traditional" form of industrial legal regulation outside
Trespass law concerns the lawfulness of picketing and related
practices - the immunities from Civil actions in Tort afforded
individuals and Trade Unions under the Trade Disputes Act 1906, re-
affirmed and extended in S.13. of TULRA 1974 and in the Labour
Relations (Amendment) Act 1976, but now limited by the Employment Act
1980 and the Tebbit Bill of 1982. The effect of the new provisions is
to narrow the scope of "lawful" industrial action, excluding forms of
"secondary" picketing, blacking and "political" strikes from this
definition and thus making Trade Unions and individuals liable to
civil actions in damages.²⁵⁵

From this brief review it is evident that, in the sphere of Produc-
tion, the State has not attempted to contain public disorder arising
from conflict over the fundamental relations of possession and separa-
tion by means of Trespass law, even where such charges, for example of
Forcible Detainer or Conspiracy to Trespass, have been technically
possible. Whilst sections 6, 8 and 10 of the Criminal law Act 1977
could conceivably be adapted by the State to the purpose of maintain-

254. Broome v. DPP (1974) 1 All ER 314. ; Applied in Kavanagh v. Hiscock (1974) QB 600 DC. The main thrust of the new Tory industrial relations legislation has been in the area of Civil law (infra); Jim Prior's "codes on picketing" of 1980 are the furthest the government has advanced towards restricting the legality of industrial practices outside the workplace.

255. Secondary action in the form of picketing is dealt with in S.16. of the 1980 Act, other secondary action ("blacking" etc) in S.17. The impetus for these developments was provided by two major Lords decisions regarded by the government as interpreting "immunity" under the 1974 Act too widely: see Express Newspapers Ltd v. Mcshane (1980) ICR 42; Duport Steels Ltd v. Sirs (1980) 1 WLR 142. Obviously the law in this area, and the nature and development of the category of "immunity", require rigorous analysis, beyond the scope of the present research.

ing industrial order, most public labour disruption is likely to fall outside the province of Trespass, and hence be subject to alternative forms of legal and State intervention. This should serve as a warning against exaggerating the direct significance of developments in Trespass law for industrial practices during the 1970's.

IV Economic conditions of the crisis in relations of possession

Three cycles of explanation have now been provisionally completed, each following a trajectory from phenomenal to more essential aspects of its particular object before returning again to the level of Appearances and situating legal developments in their broader context. The order of appearance of the different cycles within the analysis was given most importantly by the relative predominance in popular ideology of their various referents. Hence:-

Cycle (1): The threat to Domestic possession (the central interpellation around which the legitimation of legal change was organised); the squatting phenomenon and the difference between this real threat and its re-presentation; the housing shortage and the housing crisis ; the crisis in domestic relations of possession; and the tendential resolution of this crisis through development of Civil and Criminal aspects of Trespass to the advantage of greater possessory interests at the expense of the categories of lesser possessor.

Cycle (2): The threat to Industrial possession (less prominent as a justification for changes in Trespass law); the phenomenon of factory occupation; its conditions in closures and redundancies; the crisis in industrial relations of possession; and the tendential resolution of this crisis through changes in the Civil and Criminal aspects of Trespass and related law.

Cycle (3): The threat to Public and moral order (the most general articulation of the law and order theme but here considered last because of the precedence of Trespass as the particular object of study); the phenomenon of public unrest both within and outside Production; the general crisis in social relations; and the contribution of Trespass and related law in maintaining order in the "domain of the public".

The result of these explanatory cycles has been the concrete location of the "equal right to exclude" (a phenomenon of modern Capitalism) within a particular historical conjuncture, in the process of its development as a specific legal interpolation continually adapting to changing economic and social conditions, and having to secure ever-anew basic relations of possession and separation. Yet the explanation of the development of Trespass and related law during the 1970's is still far from complete, for whilst its conditions have been given in squatting and other forms of occupation, and their conditions have in turn been given in the housing crisis and factory closure and redundancy, it remains to be specified why, in this particular historical period, these developments themselves should have taken place.

A. Domestic possession and the Housing crisis

The explanation for the continuing failure of both private and public enterprise to satisfy basic housing needs, despite the fact that there

were supposedly already more homes than households by 1965,²⁵⁶ must be sought firstly in the conditions of production of this vital resource, and secondly in the structure of its distribution.²⁵⁷

(1) Production

Housing, like health and education, is a fundamental material requirement of modern Society, providing for the continual renewal and reproduction of labour power. House-building during the 1970's accounted for between 25% and 30% of the total output of the construction industry, a proportion which is likely to remain stable despite the overall decline in building activity. The production of housing has been attended historically by certain specific conditions:

(i) Despite continuing improvements since 1945 in materials, off-site prefabrication and mechanization, the building industry has failed to introduce fundamental changes into the construction process, and remains heavily dependent on casual unskilled and semi-skilled labour. Its rate of growth of productivity has consistently lagged behind that of the manufacturing sector, such increases as have occurred being largely attributable to changed techniques in the prior production of construction materials - such as bricks, plasterboard, glass, windowframes, stairways, piping and wiring.²⁵⁸ The precise reasons why industrialized building methods have not been developed on-site are subject to conjecture; the physical problem of temporary and shifting locations does not fully explain why the production process should remain so backward, and the forces of production so

256. *supra*, section I. C. (2)

257. This division is convenient in elucidating the economic conditions of the housing crisis (see note 229. *supra*) ; as will become evident, the aspects are closely related.

258. see Ball, M. "British Housing Policy and the Housebuilding Industry", in *Capital and Class* 4. Spring (1978) p. 82. More comprehensive analyses of various aspects of the Housing Question may be found in "Political Economy and the Housing Question" (1975) eds : CSE.

under-developed in this particular field.²⁵⁹

(ii) One of the consequences of this low organic composition of capital is the high value of housing as a commodity, requiring the transfer of a considerable proportion of the household's income in rent and mortgage payments, and representing therefore a large part of the cost to Capital of the reproduction of labour-power. Working-class demands for better housing tendentially involve a greater financial burden for Capital-in-general, restricting the rate of growth of capital accumulation and ensuring that housing policy will form a central terrain of struggle between Capital and Labour. On the other hand, the inability to reduce the value of housing is not necessarily detrimental to particular capitals operating in the building industry, which will continue to earn the average rate of profit by quantitative expansion of the labour-force and the increased extraction of surplus-value from it, and by land and property speculation.²⁶⁰

(iii) Within these basic constraints, the building industry is structured by the contracting system, private firms undertaking to build at a particular price and themselves sub-contracting work at various stages of the project to specialist firms of plumbers, electricians, carpenters, glaziers and plasterers. Both principal contractor and sub-contractors depend for their profits on minimising labour-costs, building-workers being casually employed as required on "lump" and bonus payments. The constantly changing composition of the work force on-site militates against improvements in production skills and methods, and ensures a relatively low wage through the difficulties of union organization. Further effects of this system of produc-

259. Ball (op cit) p. 84 ; in his article the author emphasizes the dominance of relations over forces of production.

260. *ibid.* pp. 79-80; Cowley, J. "Housing for people or profit?" (1979) Ch. 3. pp. 65-80.

tion are a disregard for elementary health and safety precautions,²⁶¹ and what is now becoming increasingly recognized as the frequently poor quality of the finished product; Local authorities face bills running into millions of pounds for repair of hospitals and schools, whilst hundreds of thousands of dwellings are afflicted by dampness and mould growth, rain penetration, defective windows and poorly installed a grossly expensive heating systems.²⁶²

(iv) Although Local Authority programmes for building, repair and maintenance account for over a third of total construction output, the greater proportion of this work is tendered to private contractors, whilst the labour force employed directly by Councils is left mainly the minor renovations and unprofitable jobs of little interest to private firms.²⁶³ Direct labour does not play a significant part in housing provision, and its potential advantages have remained largely unexplored.

(v) The evidence suggests that for every three dwellings produced on Council initiative since the War, four have been built privately, either to contract or speculatively by firms in partnership with property companies.²⁶⁴ In either case, the high cost of production ensures that building projects must be financed through the banks, building societies, insurance companies or pension funds, whose investments or loans yield a profit for the financial institutions in the form of interest.

The production of housing is thus distinguished from the other major

261. In 1975 40% of all industrial deaths were in Construction, and 181 building workers lost lives, most accidents being "reasonably foreseeable" according to an official report; see Ball (op cit) p. 73.

262. *ibid.* p. 75

263. In 1974 only 5% of new local authority housing was built by direct labour. (*ibid.*) Even small maintenance jobs, after measures implemented by the Environment Secretary in 1982, will have to be put out to competitive tender with private firms from April: see Guardian Report "Threat to direct labour schemes", 16/3/82.

264. see Ball (op cit) p. 74

sites of the reproduction of labour-power, health and education, by having been excluded from the field of responsibility publicly undertaken in the creation of the post-1945 Welfare State. The extent and quality of housebuilding has been predominantly influenced by the calculations of private investors and contractors whose principal motivation is the realization of profit rather than the satisfaction of need, despite the attempted planned interventions of Local Authorities. The most important determining factor in housing provision remains the willingness of private loan capital to invest, since even central government, which funds Council house building through the Public Works Loan Board, is subject to conditions and rates of interest imposed by the financial institutions. The specific characteristics of the building industry have tended to further frustrate adequate housing provision, and the State has failed to resolve or even recognize fundamental problems of organization rooted at the level of production. The basic contradiction remains between, on the one hand, industrial and related capitals attempting to minimise the production cost of this essential commodity and thus reduce the value of labour-power, and on the other, those fractions of capital in Finance and Construction attempting to maximise such costs and hence increase profits for themselves.

The phenomenal symptoms of the housing crisis documented in Section I.C. - fewer new starts, fewer renovations and repairs, less private and government spending and the increase in homeless - are the result of a failure to co-ordinate construction, finance and investment at the point of production in a building programme planned according to social need. That this fundamental inadequacy in the modern organization of housing provision should have begun to become manifest only

from the late 1960's cannot fully be explained without reference to the broader economic developments considered below²⁶⁵; at this stage, however, some of the crucial mediations between general economic recession and the housing crisis may briefly be indicated. The crisis, always present to a degree, was exacerbated in the early 1970's by the peculiar conditions of the property boom, which doubled the average price of new homes in three years and sent rents soaring at a time when demand was already greatly outstripping supply. Property companies speculated in luxury homes and lucrative office blocks or bought land merely as an investment with no intention of developing it, private landlords were encouraged to "improve" their properties with government grants which would enable them to charge higher rents to richer tenants, and Local Authorities were squeezed by the rising cost of land acquisition and shrinking budgets. Council houses remained empty for years because of lack of funds for their re-development, entire neighbourhoods and communities were devastated either by accident or intention, and office blocks and second homes stood empty whilst thousands waited for Council accommodation, became homeless or were driven to squatting. The anarchic relation established by the market between Production and Consumption encouraged the speculative over-production of property for which there was insufficient demand, either because of its type or expense,²⁶⁶ whilst the housing stock for which there was real and immediate need gradually deteriorated. More recently, investment in ordinary housebuilding has continued to decline, through a combination of increasingly high interest rates and the existence of alternative and more profitable investment opportuni-

265. see Section IV B. (infra)

266. Cowley (op cit) makes this charge generally of the post-war building boom period (see p. 32); but the tendency was still stronger in the early 70's

ties.²⁶⁷ Building firms have competed for fewer contracts with less adequate financial backing, and unemployment in the industry has reached record levels - an estimated 1¹/₂ million by 1981. With the further stagnation in housing production brought about by the present Government, either directly through its curbs on public spending or indirectly through the high interest rates resulting from its monetarist economic policies, the symptoms of housing crisis can only be expected to get worse in the coming decade.

(2) Distribution

The housing stock is structured by the various categories of tenure and distributed amongst social agents in accordance with their market position.²⁶⁸ The function of the different tenures is the provision of alternative forms through which the high value of housing created in Production can be gradually realized in the sphere of Consumption - the outright purchase of so expensive a commodity being beyond the means of all but a small minority of occupiers. The salient features of the structure of distribution and of State intervention at this level, the inadequacy of which have contributed to the current crisis of housing provision, may briefly be indicated:

(i) The dominant form of tenure today is owner-occupation, accounting for 55% of the total housing stock; a further 30% is publicly owned, the remaining 15% being in the privately rented sector. The decline of the private landlord, enhanced by post-war housing policies, began towards the end of the 19th Century when alternative

267. *ibid.* p. 34; and see (*infra.*) Section IV. C.

268. Of course the production of buildings is itself "distributed" amongst the various branches of society - domestic, industrial, public and commercial - and the nature and extent of production within each sphere is similarly subject to capitalist principles of distribution (see Marx's considerations on the totality: "Production, Distribution, Consumption, Exchange" in the 1857 Introduction (*op cit*) pp. 88-100, discussed *supra.* Ch. 4.)

and more secure forms of investment for small capital became available with the growth of the financial institutions.²⁶⁹

(ii) The Rent control legislation of 1915 marked the beginning of State involvement in housing provision, the decline in private investment and severe housing shortages leading to large-scale municipal intervention in building programmes and central regulation of conditions of occupancy. After the major slum clearances of the 30's and 40's, however, the Labour Party increasingly abandoned the commitment to social provision and ownership which had previously distinguished its housing policy from that of the Conservatives. Anthony Crosland's 1977 Green Paper sought to encourage "the trend towards owner-occupation which gives people the kind of home they want....reducing demands made on the public sector and helping with problems of mobility".²⁷⁰ The Government was "not opposed to the sales of council homes provided that they can be made without impairing an authority's ability to deal with pressing housing needs,"²⁷¹ paving the way for the Tory "right to buy" enshrined in the 1980 Housing Act.

(iii) The object of the private landlord had been to appropriate surplus-value in the form of profit from capital invested in housing by charging rent. Both Local Authority housing and owner-occupation also enable the appropriation of surplus-value, in this instance by loan capital in the form of interest. State housing subsidies - tax relief on mortgages and rent subsidisation - do not therefore so much reduce the high cost of housing which results from its high production value, as lower the high cost of finance imposed by the

269. see Ball (op cit) p. 91

270. "Housing Policy : A consultative Document"; CMND 6841 p.45.

271. *ibid.* p.49

building societies, banks and insurance companies.²⁷² Because of the scale of their operations, Local Authorities face a particularly heavy burden of loan charges (68% of their housing costs being payment of interest by the mid-1970's²⁷³) leading to pressures for the reduction of State responsibility in the provision of housing and demands for decreases in subsidies through the raising of rents.

Whilst the State could never have fully resolved a housing problem rooted at the level of Production by intervening merely in the conditions of its realisation and distribution, the post-war provision of council housing with rents determined by "pooled historic cost"²⁷⁴ rather than by the cost of new building did to an extent satisfy working class needs, and enable some measure of control over housing production. With the retreat of the State in the late 60's and early 70's and the recently further enhanced role of the market, however, the housing prospects for poorer members of Society have deteriorated: prices continue to rise because they are related to "market values" and the ever-increasing cost of new houses; the "exchange-professionals" - estate agents, solicitors and surveyors - command a growing share of surplus-value thus tending to inflate prices²⁷⁵; increasingly high interest rates must be borne solely by the individual in mortgage repayment; and speculative house-building for the upper end of the market has replaced the programmes of the 30's, 40's and 50's planned according to social need. Such problems have now been exacerbated in the 1980's by the privatisation of public housing through the "right to buy" contained in the Tenants charter, and the further contraction of the already shrinking State sector. Yet the resort to

272. see Ball (op cit) p. 94

273. *ibid.* p. 93 ; see Cowley (op cit) p.38

274. see Ball (op cit) p. 94

275. see "Profits against Houses : An alternative guide to housing finance" CDP (1976) pp. 45-56

owner-occupation has proved precisely the means by which the State has been able, at least temporarily, to resolve the contradictions of housing provision to the satisfaction of industrial and financial fractions of capital. The increasing burden of loan repayment has been shifted from the State to the individual, at the same time that the continuing deterioration in the quality and extent of the housing stock has tended to further reduce the value of labour and therefore the cost of its reproduction to capital-in-general. The victims of this uneasy equilibrium are currently those fractions of capital in the construction industry that cannot secure building contracts, and the poorest individuals living in worsening housing conditions with little foreseeable chance of their improvement. The "housing crisis" documented in Section I. is therefore the result of the peculiarity of the totality of Production and Distribution that comprises housing provision, as this has developed nevertheless in accordance with broader economic determinations considered in the following section.

This then was the background against which changes in the law securing domestic possession during the 1970's took place. The crisis of capital accumulation was partly resolved by the abandonment of State responsibility for housing, but this strategy was inevitably socially disruptive in its effects,²⁷⁶ and was not of itself sufficient to contain the threat to dominant exclusive interests posed materially by smaller possessors seeking to maintain their own positions, and ideologically by the violation of property rights, whether real or wholly imaginary. The law consequently developed in such a manner that existing relations of domestic possession and distribution were protected, and the weakest members of society prevented from securing

276.because of the declining housing standards society was being asked to accept, and the reluctance of significantly large minorities to be so complaisant.

an advantage to themselves "without colour of right" at the expense of their particular greater possessors. But the role of law as buttress of private property relations was always more than merely defensive, involving beneath its appearance as protector of property against the squatting menace an actual attack on the security of tenure and living conditions of all smaller possessors, whether squatters, ex-licensees, licensees, sub-tenants or even tenants, whose economic and legal positions were undermined in common by Civil and Criminal changes in Trespass and related laws. The housing shortage and the economic climate at the beginning of the 1970's created conditions in which private landlords, speculators, property companies and Local Authorities all stood to "gain" from a relaxation in the legal protection afforded squatters or other lesser possessors occupying property in which they (the greater possessors) had a larger interest enabling a re-distribution of economic assets to their own advantage: developers could more easily proceed with their lucrative and grandiose schemes, speculators re-develop property for the luxury market, landlords take advantage of rising rents, and local authorities resolve their immediate housing problems.²⁷⁷ It is in this context that the summary procedures for re-possession under Orders 26 and 113 became available against sub-tenants and licensees as well as squatters, and that the "licence" as a form of tenure escaping the restrictions of the Rent Acts became popularized not only by private landlords, with their shams and "holiday lets", but by local authori-

277. This conception of "gain" or "maximisation" of position in relation to the greater possessors is discussed more fully (infra) in Section IV.

ties in their creation of the "licensed squatting" phenomenon.²⁷⁸

From the preceding analysis it is now possible to see that the re-presented "threat to possession", which interpellated owners and tenants alike as "possessors" liable to invasion by squatters, and provided the ideological legitimation of the 1977 Act in particular, bears a significant relation to the ideology of owner-occupation and to the increasing dominance of this form of tenure. For this is the highest form of possessory right available to the individual in the domestic sphere and the one most appealing to "instincts" of exclusive right: The larger the proportion of the housing stock under owner-occupation, the greater the social commitment to the institution of private property and the "right to exclude". Most significantly, however, since over 80% of "owner-occupied" property is mortgaged to banks, life-insurance companies and building societies,²⁷⁹ these financial institutions - the "greatest possessors" of all - are ready to step in and repossess on default of interest repayment.

B. Industrial possession, redundancies and factory closures

278. Here legal intervention, housing crisis, and crisis of capital accumulation may be observed in close inter-relation: both aspects of the crisis are contained through the legal form of the licence, which at once absolves the local authority of responsibility of providing housing of a given standard (individuals are permitted to make the best of their circumstances through their own self-help), and co-opts the most militant of the lesser possessors (the squatters) in a corporative solution to the housing crisis, thus neutralizing the threat to dominant property values.

279. see Cowley (op cit) p. 37

The post-war decrease in housing production²⁸⁰ - the pre-condition of the crisis in domestic relations of possession - is merely one particular instance of a more general economic decline, expressed since the late 1960's in the increasing number of factory closures and redundancies - the pre-condition of the crisis in industrial relations of possession. Because there are no statistics relating directly to this growing phenomenon, its existence must, like factory occupations themselves, be inferred from other sources: notably the news media, which carry reports of redundancies and closures with increasing frequency, and other economic data, which might reasonably be expected to bear a close relation to the object under consideration. Most important in this latter respect are statistics recording the decline in industrial production during the period and the increase in unemployment²⁸¹:

(i) If industrial production for the UK over the last ten years is measured in relation to a baseline of 100 for 1975²⁸², then the following pattern may be discerned: after a period of stagnation (recorded as 96) from the late 1960's until 1971, a peak (108) was reached in 1973 followed by a decline to the base-rate of 100 in 1975; after which an up-turn (to 115 in 1979) is followed again by a steady decline into a period of stagnation from 1980 until the time of writing. Mandel documents a fall in production 10.1% of between the peak of the "mini-boom" in 1973 and the low-point of the recession

280. see Section I.C. (2) supra ; Appendix C. : Table 2. & Fig.2.

281. The following is a necessarily extremely brief account of the most important economic indicators; the connections with law will be drawn in greater detail in Chapter 7 (order of Presentation) infra.

282.the procedure adopted in the reports of the National Institute for Economic Review, from which the figures are taken; see Gamble, A. : "Britain in Decline" (1981) p. 23

beginning in 1974²⁸³, and a similar such development occurred during 1980, when the economic policies of the new Tory administration were beginning to take effect.²⁸⁴

(ii) Unemployment, having affected only about 1% of the working population and less than 500,000 people between 1945 and 1968, has increased throughout the period, with dramatic rises to over 1,000,000 in 1975, 1¹/₂, 000,000 in 1980, and now 3,000,000 in 1982 - about 11% of the total work-force.²⁸⁵

Other important indices of poor economic performance include the following, which show Britain's decline relative to other Nation-States in the world market:

(iii) The annual rate of growth of Gross Domestic Product (GDP) in Britain between 1962 and 1972 was only 2.2% compared with 3.0% in the U.S., 9.2% in Japan, 3.9% in Italy, 3.6% in West Germany, and 4.7% in France.²⁸⁶

(iv) Similarly, the rate of growth of productivity (GDP per man-hour) in Britain between 1950 and 1976 was only 2.8%, compared with 7.5% in Japan, 5.3% in Italy, 5.8% in West Germany, and 4.9% in

283. in "The second Slump: A Marxist analysis of recession in the 1970's" (1978) p. 14

284. Despite repeated claims that the recession is "bottoming out" in 1982, the most recent CBI report remains pessimistic: 56% of firms had cut their labour forces in the first 4 months of 1982; 45% expected to make further cuts in the next four months; 91% expected a shortage of orders; 77% were working below capacity ; and investment was expected to fall by 5% during the year. (reported in the Morning Star : 6.5.82)

285. see Gamble (op cit) p. 22; Sinfield & Showler: in "The Workless State" (1980) pp.1-4; and Mandel (op cit) esp. on the relation between falling GNP and unemployment, p. 15

286. Gamble (op cit) p. 19. The figures for GDP per capita are similar. Despite the world recession after 1974, Britain has maintained her position of relative inferiority (ibid).

France.²⁸⁷

(v) Britain's share in world manufacturing output fell from 9.6% in 1960 to 5.8% in 1975; and similarly her share in the value of world exports of manufactures fell between 1960 and 1979 from 16.5% to 9.7%,²⁸⁸ whilst Japan, Germany, France and the U.S were all increasing their shares.

The recession of 1974, which affected the entire world economy, but from which Britain was slowest and least effectively to recover of the advanced capitalist countries, marked dramatically the economic decline that had begun to become apparent in the late 1960's. The global interruption of the process of growth and of capital accumulation was expressed in and constituted by a multitude of capitalist calculations instituting "rationalisation" programmes, redundancies and factory closures, in shipbuilding, iron and steel, vehicle manufacture, machine tools, engineering, and other industries at the heart of the British economy. This economic crisis became a crisis in the industrial relations of possession at the moment the Labour movement began seriously to challenge managerial prerogatives by occupying factories or other work-places in protest against closure and redundancy plans. The precise reasons why occupations took place, successfully or otherwise, in some industries and locations rather than others cannot be considered here in detail; but they must include the relative strength of union organization in various fields, the size and importance of the industry within the economy as a whole, the support forthcoming from other areas of the labour movement, the geographical location and not least the material nature of the industry concerned. The production of housing and other building declined throughout the 1970's, dropping sharply after 1979, and an

287. *ibid.* p. 20

288. *ibid.* p. 21

estimated 12 million workers are unemployed in the industry at the time of writing in 1982; but site occupations in this case would be of dubious strategic value because of the very nature of the production process, quite apart from the problems of organizing any collective action amongst the continually shifting and changing workforce.²⁸⁹

It remains, finally, to be shown how the crises of capitalist production in general, and of the production of housing in particular, are related to their most fundamental conditions in the economic decline of post-war Britain.

C. The Economic Crisis

The confident assertions of Paul Samuelson, winner of the Nobel prize for Economics, that "the National Bureau of Economic research has worked itself out of one of its first jobs, namely business cycles", and that "the mixed-enterprise system can avoid the excesses of boom and slump by means of monetary and fiscal policies and can look forward to healthy progressive growth"²⁹⁰ now appear, in the light of the generalized world recession of 1974/75, excessively optimistic. Since the end of the War there had been a series of over-production crises,²⁹¹ but their effect was limited by the lack of synchronization of national industrial cycles and hence the ability of countries affected by the crisis to expand exports to those that had escaped

289. on these points see (supra) Section IV A. (1)

290. statements made in 1970 and 1958 respectively ; quoted in Mandel (op cit) p. 9

291. in 1949, 1953, 1958, 1961, 1970, aswell as 1974-75: see Mandel (op cit) p. 34

it.²⁹² This option was not available in the 1974/75 recession, because all the major capitalist powers suffered economic downturn simultaneously : whereas between 1963 and 1972 the volume of exports in the Capitalist countries had risen 111%, a massive contraction, estimated by the OECD as 7% for world trade as a whole, occurred in 1975 for the first time since the beginning of the long phase of post-war economic expansion.²⁹³ Britain's particular economic crisis must be seen against the background of this global recession, and her post-war decline considered in the circumstances of its aggravation by the contraction of the world economy, which exacerbated the national situation by making relative decline more absolute.

It was precisely the enormous expansion of the world economy in the aftermath of the war that enabled Britain to prosper despite the neglect of fundamental problems that from the 1960's were to ensure increasingly an economic performance relatively poor compared to those of Japan, West Germany, The U.S., and even France and Italy. The beginning of this new phase in Britain's "hundred years decline"²⁹⁴ saw the final crumbling of the Empire and the ceding of the position of world dominance to the U.S., now financially supreme and world leader in industrial productivity. In order to have retained her relative economic strength in the ensuing decades even in part, Britain would have had to have recognized the urgent need for radical reorganization of her industrial base, development of new manufacturing and service industries, attraction of investment from the new multi-nationals, and extensive intervention in the economy - not just in the "fine-tuning" of aggregate demand, but in major policy

292. *ibid.* p. 10

293. *ibid.* p. 19

294. Gamble (*op cit*) dates the "decline" from the 1870's and 1880's: see pp. 52-63. The present account concentrates on the post-war period.

decisions concerning investment, prices and output²⁹⁵; no such commitments were undertaken by either party in power in the immediate post-war years.

Yet despite this failure, Britain was about to experience a period of unprecedented economic growth and prosperity. The recovery was made possible by a number of factors: The State, through public spending and control of the money supply and private credit, was able to compensate for the worst effects of the trade cycle and thus provide the conditions for sustained economic growth; The re-organization of the international monetary system in the Bretton-Woods agreement of 1944, establishing the gold-exchange standard and ensuring the hegemony of the dollar, enabled the U.S. to run enormous balance of payments deficits and hence fuel the world boom through extensive loans, aid and credit; and most important of all, investment and capital accumulation became profitable again, with the growth in investment outlets (construction, the automobile industry, armaments), the cheapening of inputs (labour costs, energy, raw materials), the introduction of new technology, the increasing concentration and centralization of production, the expansion of the world market, and the great increase in productivity resulting from the combination of all these factors.

What was involved in this return to profitability was a sharp rise in the rate of extraction of relative surplus-value from living labour, leading to a rise also in the rate of profit, creating the conditions

295. Britain's "Keynesian Revolution" was thus fully in accord with liberal principles of non-intervention in these fundamental areas; *ibid.* p. 116.

for further and increasing accumulation.²⁹⁶

Although Britain still accounted for 25% of exports of world manufactures in 1951²⁹⁷, and the new high technology, mass production industries of electrical engineering, vehicle manufacture and chemicals appeared to be thriving, there were by this time already symptoms of fundamental economic problems that in retrospect can be seen to have hastened Britain's relative decline. One of the conditions of U.S. aid in the reconstruction of Britain after 1946²⁹⁸ had been the continuance of British responsibility in maintaining an allied military force capable of countering the threat felt to be posed by the Eastern bloc and the USSR. Military spending was higher in the 1960's in Britain than in any country of the Western Alliance other than the U.S. itself, averaging 6% of GNP, compared with 4.4% in France, 3.6% in Germany, 3.3% in Italy and 1.1% in Japan²⁹⁹; and overseas military spending had risen from 12,000,000 in 1952 to 313,000,000 by 1966.³⁰⁰ Because of the weakness of Britain's industrial base, which was unable to support such costs, balance of payments deficits became a persistent feature of the post-war period, leading to Sterling crises in 1947, 1949, 1951, 1955, 1957, and between 1963 and 1967. No country apart from the U.S. could afford to run such deficits under the conditions set by the gold-exchange standard, and Sterling crises could be resolved only by raising interest rates, squeezing credit and increasing taxes, thus reducing

296. For the purposes of this necessarily truncated account the Marxist Theory of capital accumulation and of its tendency to crisis must be taken as given. See Mandel (op cit) pp. 165-208, also (1972), (1968) pp 132-181; Gamble & Walton(1976) pp. 111-144; and the accounts provided by the State Derivation school, discussed (supra) Ch. 3. I. in some detail. These basic theoretical premises will not be recounted here, to avoid repetition, but will be incorporated as appropriate in the analysis of Britain's particular economic crisis.

297. Gamble (op cit) p. 106

298. e.g. the Washington Loan Agreement; *ibid.* p. 110

299. *ibid.* p. 113 & 256

300. *ibid.*

demand and leading to "Stop-go" cycles of economic growth. This in turn, however, was to have unfortunate consequences: low and fluctuating growth rates and an erratic level of demand encouraged capital to invest overseas where greater profits were anticipated, further exacerbating domestic problems of inadequate investment and low productivity. Again, crucial decisions that might have prevented profits collapsing and the economy stagnating - concerning the exchange rate, the role of Sterling as an international currency, the scale of British military commitments and the freedom of firms to invest overseas - were not taken. By the late 1950's a specific British problem of low growth and low investment had been identified by both major political parties, and the 1964 election was fought on the issue of "modernisation".

The new Labour government extended State interventions initiated by the Conservatives (through such bodies as the National Economic Development Council and the National Incomes Commission) with a more comprehensive National Economic Plan, a Prices and Incomes Board, the Industrial re-organisation Commission, and two new Ministries: The Department of Economic Affairs and the Ministry of Technology.³⁰¹ But further socio-economic problems, militating against proper reconstruction, were already becoming manifest in the form of a rising rate of inflation on the one hand, and increasing labour militancy on the other. The former was partly the result of a sharp increase in State expenditure which could not be supported by rising productivity in a still largely stagnant economy, but it also reflected the growing crisis in the International monetary system: Kennedy's monetary expansion and huge budget deficits of the 1960's, particularly after the military commitment in Vietnam in 1965, resulted in domestic inflation

301. *ibid.* p. 124

which was transmitted abroad through rising costs and higher interest rates. Meanwhile the concern with shop-floor militancy and the responsibility of the Unions was reflected in the Donovan Commission Inquiry of 1966 and Barbara Castle's White Paper "In Place of Strife" in 1968.³⁰²

The national crisis of capital accumulation and decreasing profitability was exacerbated by the decline in international expansion and the growing problem of world inflation, but its roots lay in the rising organic composition of capital (the increasing proportion of constant to variable capital employed in the production process) brought about by the continuing development and concentration of the productive forces, since only variable capital (that which is expended in the purchase of labour-power) creates surplus-value, and this tends to decline as a proportion of total capital leading to the rising organic composition and the tendency of the rate of profit to fall (TRPF).³⁰³ Whereas during the early stages of post-war recovery this tendency was more than offset by a variety of counter-vailing influences - technological advance lowering the value of fixed capital, low labour costs, cheap raw materials, the global expansion of capital, the rising absolute mass of surplus-value produced and the rising rate of exploitation resulting from vastly increased productivity - these conditions became increasingly hard to secure during the 1950's, when the rise in the organic composition of capital finally began to outstrip the rise in the rate of exploitation. Most

302. The problem with Labour went beyond shop-floor militancy and Union "irresponsibility," however, concerning as it did the strength of the bargaining position that Labour organisations had been able to develop in conditions of full employment (see infra).

303. Marx's hints on a theory of accumulation crisis (see Chs. 16, 20, 21 of Capital Vol. II, Chs. 15 & 30 of Vol. III, and Ch. 17 TSV) are developed by Mandel in his "Marxist Economic Theory" (1978) ; see esp. pp. 162-172. See also Ch. 3. (supra) pp. 9-11.

importantly, Capital was prevented from raising the rate of relative surplus-value by the strong bargaining position over wages and conditions achieved by labour after a prolonged period of full employment.

The "Barber boom" of 1972 - made possible by increased public spending, extensive intervention in industry and a substantial increase in the money supply - depended for its long-term success on curtailing inflation, controlling prices and incomes, and achieving a high rate of economic growth: only thus could the ill-effects of the rising organic composition of capital be contained. Disaster ensued, however, on all fronts. The apparently impressive growth rate of 5% in 1973, equivalent to that of West Germany, was reversed by the world recession in 1974; the statutory Prices and Incomes policy, which had initially looked like succeeding, collapsed in 1973 with the miners' strike and opposition to the Industrial Relations Act; and inflation increased rapidly with the loss of control of the money supply and the final crisis of the gold-exchange standard, whose abandonment in favour of floating exchange rates in 1972 had given all countries the freedom previously enjoyed only by the U.S. to expand domestic money supply without correcting deficits.³⁰⁴

The crucial problem facing the new Wilson administration in 1974 was the depth of the world recession. In such conditions of economic stagnation, inter-imperialist competition ensured that the gains of one country were now likely to be increasingly at the absolute, rather than merely relative, expense of others, and Britain was particularly vulnerable of the advanced capitalist nations on account of her failure to restructure basic industry in the post-war period. In 1975,

304. see Gamble and Walton (op cit) pp 157, 170

Britain's exports were 20% lower than those of Japan, having been the same in 1970,³⁰⁵ and bankruptcies rose by 60%.³⁰⁶ Moreover, an inflation rate at this time of 22.1%, compared to 17% in Italy, 11.9% in Japan, 11.7% in France, 7.8% in the U.S. and 6.1% in West Germany,³⁰⁷ discouraged the government from resorting to the inflationary "pump-priming" policies that in the majority of these other countries led to a modest, if only temporary, recovery. With the identification of inflation as the primary economic evil, the commitment to full employment was abandoned and a severely deflationary monetarist package introduced, involving strict cash limits and monetary targets, public spending cuts, high interest rates, rising unemployment, and a drastic reduction in public borrowing.³⁰⁸ Even in those countries where sustained reflationary measures had been adopted, the unevenness of the recovery by country and sector prevented any cumulative and synchronized effect leading to a further phase of world expansion, with the result that the volume of international trade began contracting once again in 1977, foreclosing the possibility for Britain of an export led recovery during a period of rising World demand.³⁰⁹

Britain's crisis of capital accumulation in the 1970's consisted, like those of other Nation-States, in an over-production of exchange-values, in automobiles, construction, electrical appliances, textiles, steel, engineering, shipbuilding, aeronautics and many other

305. Mandel (1978) p. 49. For details of Britain's decline in output and deteriorating position in the World economy see (supra) Section IV. B.

306. *ibid.* p. 71

307. *ibid.* p. 28

308. One consequence of this policy was that the volume of domestic consumption in Britain was lower in 1976 than it had been in 1973. See *ibid.* p. 97.

309. *ibid.* p. 104

ancillary industries.³¹⁰ Not only was there a decline in the rate of relative surplus-value and hence of profit, but it became increasingly impossible as the post-war recovery advanced to sell commodities at prices guaranteeing the average rate of profit; the problem was one both of the production of surplus-value and its realization in circulation.³¹¹ Under such conditions of over-accumulation of capital in an unproductive form the cycle $M > C > M'$ stagnates³¹²: rather than convert money-capital into productive capital by investing in production, the capitalist hoards it, invests it overseas or speculates in government stock or other property, because the normally anticipated conditions of profitability do not obtain. There exists an over-abundance of capital, but this remains unvalorized; excess capacity increases in the fundamental sectors of the economy, and closure, redundancy and bankruptcy inexorably follow. The function of the 1973-74 recession, like any other over-production crisis, was the restoration of profitability through unemployment, rationalization and the massive de-valorization of capital, so that a new phase of recovery and capital accumulation might begin on the expectation of

310. Mandel (op cit) pp. 51-60; the automobile and construction industries, which had led the post-war recovery, were also the "detonators" of the 1974-75 recession: *ibid.* p. 51

311. Mandel (op cit. pp. 165, 179) and Gamble & Walton (op cit) p.112) are quite correct in rejecting Baran & Sweezy's contention (in *Monopoly Capital*, 1965) that there are two theories of crisis in Marx, one stressing the TRPF and over-accumulation (argued to be "irrelevant" under conditions of Monopoly capitalism because of the success of the counter-vailing tendencies in holding down the rise in organic composition), and the other emphasizing the tendency of the surplus to rise and the under-consumption of the masses. Mandel and Gamble & Walton see the totality "production-realization" as embraced in a single, unifying theory, grounded in the crisis of capital accumulation and the TRPF.

312. "No matter how much surplus value can be produced in the first phase [$M > C$ (constant + variable capital)] it will be of no consequence to capital unless it can be realised [$C > C_m$ (commodities) $> M'$] in the sale of the finished goods": Gamble & Walton (op cit) p. 136.

increases in the rates of exploitation and of profit.³¹³ However, and despite the upturn of 1976/77, no such recovery occurred, the reasons for this being that (apart from the continuing ill-effects of the world recession and the unevenness of recovery by country and sector) the domestic rate of surplus-value did not increase sufficiently so as to produce the expected increase in the rate of profit, due at least in part to the refusal of the organized working-class to accept declining living standards.³¹⁴ According to Mandel:

"It is clear that a struggle for a sharp and substantial increase in the rate of exploitation of the working class will occur in the late 70's and 80's just as it did in the late 20's and 30's. The fundamental difference between the present situation and that of 1929-32 (is that) the working class enters this period of sharpened class struggle with forces and weapons vastly superior to those of 50 years ago. (But) in all the imperialist countriesthe decisive tests of strength lie ahead of us and not behind us".³¹⁵

The correctness of this analysis is evident in recent economic and political development in Britain. The Thatcher government has finally abandoned the social-democratic camouflage of the last years of the Callaghan administration, and openly embraced Monetarism in its commitment to reduce public expenditure and curb the power of the

313. "The objective function of the crisis is to constitute a mechanism through which the law of value asserts itself:" per Mandel (op cit) p. 170

314. Other factors included the lack of decline in raw material prices (the continuing high price of oil continued to be a problem, but it should be clear that the OPEC rises of 1972 were not a fundamental "cause" of the recession, which would have occurred sooner or later anyway); the slackening of the effects of technology in reducing the value of fixed capital, despite the micro-chip revolution; and the insufficiency of the devalorization, or "pruning", of capital during the recession. see Mandel (op cit) pp. 78-84.

315. op cit. p. 84; Many of Mandel's prognostications of "Late Capitalism" (1972), derided by the post-Althusserians (not always unjustly) as "economistic" and "reductionist", have been borne out by developments in the late 70's and early 80's.

Unions.³¹⁶ The price to pay in the struggle to restore profitability and reduce inflation is unemployment³¹⁷, and this has become an inevitable adjunct of government policy. However, although inflation was finally brought within single figures by May 1982, the long-awaited industrial revival has not happened, and an estimated 77% of firms are still working below capacity according to the most recent CBI survey³¹⁸; manufacturing output dropped 0.5% in the first quarter of 1982, standing at 14% below the level achieved in the same period of 1974 when the miners' strike had the country on a three day week.³¹⁹ Moreover, there is no sign of the significant decline in the rate of increase in unemployment (already over 3,000,000) which might be expected to accompany the beginnings of recovery. Neither does it appear that the vast revenues of money-capital held by the major banks and multi-national corporations are being invested productively in domestic industry. On the contrary, especially since the complete abolition of exchange controls in 1980, the evidence suggests that British investment has been concentrated increasingly overseas in the Far East, East and South East Asia, where labour costs and organic composition of capital are low, and higher rates of profit

316. Economic and Trade Union reform go together according to this doctrine, since economic recovery can be prejudiced by Union resistance to "market forces". The instrument of "Trade Union reform" since 1980 has been the law concerning immunities from actions in Tort (supra. Section III). In a letter to the Times (13.6.80) Friedrich von Hayek had argued for a National referendum on the proposed abolition of all Trade Union immunities granted since 1906 (see Gamble op cit. p. 211).

317. The leading Swiss monetarist, Professor Karl Brunner, has stated: "If we want to eliminate inflation there will be a price to pay, and that price is unemployment. Unemployment is therefore the social cost of putting an end to inflation. And don't come and tell me there's another way out, because it's not true": quoted in Mandel (op cit) p. 87. Of course, in the Marxist perspective, "the real problem is not inflation but slump and depression. Inflation is a means of postponing or avoiding the arrival of the actual crisis. In doing so it makes the crisis potentially more severe": per Gamble & Walton (op cit) p. 170.

318. Reported in the Morning Star: 6.5.82.

319. Reported in the Guardian: 19.5.82.

accrue³²⁰; and even where domestic investment has occurred, it has tended to be speculative rather than directed towards reconstruction of the industrial infrastructure.

The implications of this analysis for the particular object under consideration may now briefly be indicated:³²¹

(1) Distinguishing, first of all, production in general from the production of the particular commodity, housing, it is evident how the economic crisis was expressed during the period in bankruptcies, closures and redundancies on an increasing scale. The complex network of exchange transactions, constituting the market and governed by value-calculations, was absolutely determined in its overall effect by external economic constraints which required that, since the rate of surplus-value was falling and such surplus as had been produced could not be realized profitably in circulation, production must be curtailed, and closure and redundancy plans initiated.³²² This outcome was inevitable because, although it may be recognized in financial circles that reducing investment during the crisis accentuates the slump and the decline in profits, unfortunately for Capital "What is rational from the stand-point of the system as a whole is not ration-

320. Mandel (op cit) pp. 107-109.

321. What follows is the barest account of the crisis of factory closure and housing provision, sufficient for present purposes, but merely highlighting the most important facets of an obviously complex subject.

322. This "law" asserted itself unevenly in the different industrial sectors and amongst the various enterprises. The most technologically advanced firms, and those with the greatest amount of operating capital, were and still are in certain sectors able to postpone the "moment of truth", maintaining the old rate of profit, or even super-profits, whilst less viable concerns went under as a result of sharpened competition. See Mandel (op cit) p. 173.

al from the stand point of each great firm taken separately".³²³

Neither did the Nationalized industries escape this necessity by virtue of their "public" ownership; on the contrary, they remained just as subject to capitalist criteria of economic calculation as enterprises in the "private" sector, as the rationalisations of British Steel, British Shipbuilding, The National Coal Board and British Leyland throughout the 1970's amply illustrate.

Capital was therefore compelled to restructure production in the attempt to raise the rate of profit, by eliminating or absorbing less profitable firms or reducing their activity, introducing more productive techniques, altering the nature of commodities produced to suit new markets, rationalizing expenditure on fixed capital by saving on raw materials, increasing the rate of circulation of circulating capital, and intensifying the labour process - slowing the fall in the rate of exploitation with the co-operation of the demoralised and complaisant work-force.³²⁴ Most of these "rationalizations" required at least redundancy if not absolute closure, and resulted in Union opposition, as already documented, in a variety of industries throughout the period: in shipbuilding (UCS in 1971 and Robb Caledon in 1982), steel (River Don Steelworks in 1971), electrical appliances (Fisher-Bendix in 1972), vehicle manufacture (Leyland Speke in 1980 and Bathgate in 1981; DeLorean Belfast in 1982), electronics components (Plessey's Bathgate in 1982), engineering (Laurence Scott's in Manchester in 1981), and clothing manufacture (Lee Jeans at Greenock in 1981), to mention only the most prominent. The money-capital withheld from continued productive investment, or the proceeds of sale or liquidation in the event of closure, might then be re-deployed in more profitable locations either domestically or, more likely, overseas, as

323. *ibid.* p. 178 (emphasis supplied).

324. *ibid.* p. 129.

in the removal of washing-machine production by Fisher-Bendix to Spain in 1972; or the capital might be deposited in banks or invested speculatively. In either case, it was necessary that enterprises have the absolute right and capacity to realize their economic interests in accordance with capitalist rationality, without hindrance from organised labour attempting to impose alternative criteria of socio-economic calculation.³²⁵ It is ultimately in this context that the crisis in industrial relations of possession resulting from factory occupations must be understood.

(2) The housing shortage, which began to become apparent from the end of the 1960's, provides one particular instance of the over-production crisis: over-production, that is to say, not of the use-value shelter, since the continuing need for this was and still is plain enough, but of its exchange-value as a commodity - whose value could not be realized in circulation at the anticipated rate of profit, and whose production was therefore curtailed.³²⁶ By July 1981, the London Brick Company had amassed a stock-pile of 490,000,000 bricks, enough to build 50,000 new houses or a new city the size of Derby, the surplus in Britain as a whole being a post-war record; the cement mountain consisted of 1,000,000 unwanted tons, and similar levels of over-production were to be found in other construction -

325.like for example those contained in the IWC "Social Audit" of U.C.S in 1971, examining the socio-economic costs of turning the Clyde into a more acutely depressed area than it already was: see Coates (op cit) pp. 83-100. Of course narrow capitalist rationality could be transcended in isolated cases, as indeed is was at UCS, but for Capital such instances must remain exceptional, otherwise the fundamental character of the mode of production is itself threatened.

326. This remains true at the general theoretical level, despite the complex character of modern housing provision and the significant role of the State.

materials industries.³²⁷ As in other sectors of industry, private investors were unwilling to commit money-capital to housing construction because of low expected returns and the existence of other more profitable investment outlets both at home and overseas.³²⁸ The major cause of the decrease in housing production, however, has been the sharp decline in government investment, from £7,154,000,000 in 1974/75 to an estimated £2,790,000,000 in 1983/84, housing as a whole bearing three-quarters of the burden of public-expenditure cuts in the first four years of Tory office; housing has thus been a prime victim of "deflationary" economic measures - increasingly strict cash limits and high interest rates - since the move towards monetarism in the early years of the second Wilson administration, and such policies have had other repercussions in further discouraging private investment.

But the roots of the housing crisis go back far beyond the late 1960's, lying in the backwardness of the productive forces in the construction industry, the low organic composition of capital therein, and the extremely high value and therefore cost of housing which inevitably results; and in the failure of successive governments to tackle the fundamental problems of housing production, hampered by the conservatism of a construction industry which remains predominantly in private ^hlands. The housing situation is worsening because the State is no longer prepared to subsidise so extensively the high cost of housing to capital-in-general by socializing production costs; and since Labour is not able to assume this responsibility, and Capital remains naturally unwilling (because of the increase in value

327. Observer report, 12.7.81.

328. This reluctance may seem paradoxical given the property boom of the 1970's; but extremely high prices were of little use to the property developer or speculator if demand was insufficient at those prices to return the anticipated rate of profit.

of labour-power that would result), the impasse is increasingly "resolved" by a progressive deterioration in the housing conditions of the working-class. Like the Nationalised industries, Local Authorities are restricted in their ability to fulfil "social" objectives by their subservience to capitalist rationality, in this instance in the form of constraints imposed by Finance capital through high interest rates. Meanwhile private landlords can be relied upon to optimize their economic positions to whatever extent the market and the law permit. Homeless people during the period could not be permitted to seriously challenge the existing conditions of housing provision, whether "public" or "private", however great their social need.³²⁹ This is the context in which the crisis in domestic relations of possession resulting from squatting must be understood.

329. This is obvious in relation to private ownership, and was confirmed in the sphere of public provision in the defeat of the defence of "necessity" in Southwark LBC v. Williams (op cit. & supra)

Ch.7. The Concrete Totality (2): Order of Presentation

If the previous chapter, with its three cycles of explanation encompassing Domestic possession, Industrial possession and Public Order, appeared somewhat formal in composition, this was an inevitable consequence of its underpinning by a definite method of inquiry, whose purpose it has been "to appropriate the material in detail, to analyze its different forms of development and to track down their inner connection".¹ What follows is the order of presentation of the results of that method of investigation, partly a summary and conclusion, but more importantly a re-articulation of the central themes of analysis in a form that will allow the consideration of certain theoretical issues which may further enhance the understanding of the object of study.² If it should occasionally appear in the course of this exposition that "we have before us a mere a priori construction",³ nothing could in fact be further from the case; even the most abstract categories that emerge during the discussion have some foundation in the laborious method of investigation, and cannot therefore be considered the product of the kind of rationalist theoretical enterprise dismissed in Chapter 3. and 4.

Whereas during the early Medieval period a diversity of kinds of right and juridical subject characterized the conditions of land occupation, the expanding capitalist mode of production increasingly imposed a uniform and universal conception by means of the vehicle of Trespass.

1. see Marx: Postface to 2nd edition of Capital Volume I. (op. cit.) p. 102.

2. The dimension of Public order is not included in this presentation, because of the necessary focus on the particular relation of Trespass to Domestic and Industrial possession; for this reason also, the examination of the broadest theoretical issues concerning the role of the State in the conjuncture is reserved for the concluding Chapter.

3. see Marx: (op. cit.)

The "right to exclude", as an equal exclusive private property right, was the legal form securing the economic conditions of capitalist development: The simplification of fundamental rights in land, the creation of the basically equal subject, and the dominance of the modern category of "possession" ensured the ultimate demise of the feudal conception of "Seisin", with its fragmentation of rights and subjects, and helped lay the foundations of the new economic order. Private exclusive rights in land and buildings increasingly replaced customary common rights not to be excluded from revenues and use-values, and the conception of "inclusive" right embodied in the Assize of Novel Disseisin was ruthlessly subjugated by the onward march of Trespass. The "right to exclude" was interpolated within the structure of Society in accordance with its determination by a specific historical stage of development and combination of the forces and relations of production; its function was initially to secure the conditions of exclusive land occupation and control that would facilitate primitive accumulation, and then to enable, through its legitimation of enclosure, the separation of labour from the means of subsistence necessary for generalized commodity production.

The "right of exclude" is fundamentally imbricated within the structure of modern soci-economic organization; it defines and is therefore constitutive of economic powers of exclusion and control, its representation at this level having a definite material effectivity⁴ : The company faced with factory occupation, the private landlord or local authority confronted by squatters, and the ordinary occupier perceiving intruders on his or her land - all have a more or

4. This is not of course to deny that the "right" in its strictly legal sense remains quite distinct from of its re-presentation (as part of an ideological process interpellating individuals as subjects) in social life.

less clear idea of their entitlement to exclude, and this idea itself is the historical product of the thorough dissemination of a basically legal conception within every pore of society. This has become still more evident in recent years, which have seen a tendency for even the "smallest" possessors to specifically "know their rights": there can be few squatters who have not benefitted at sometime or another from the legal advice of squatters organizations and have no understanding of their legal position; most occupiers will be aware that if they return from holiday to find their homes taken over by squatters they may use "reasonable force" in eviction and enlist the help of the police; private landlords know increasingly how to create "licences" and "holiday lets" rather than tenancies, thus maximizing their exclusive control; and the "larger" subjects such as Corporations and Local Authorities, with their law departments and access to specialized legal services, will be still better informed on exactly how far they can go in the exercise of their exclusive powers. But even in the most ignorant of individuals, with least express interest in the law, the instinctual reaction: "Hey, you there, get off my land" is informed in a basic sense by the idea of exclusive right developed over hundreds of years through the law of Trespass.

Legal "right" is not confined, therefore, wholly within specifically legal practice (although it has a definite existence there), neither does it "come alive" only in the circumstances of its resort in the course of legal disputes; on the contrary, it is constantly present, in re-presented form, as an integral element within the structure of Society in socially constituted practice: hence the point of departure in the concrete particular, the simplest and most irreducible expression of concrete social practice within the particular object of study - the right to exclude the world from interference with the

possession of land. The representation of the "right" within the very fabric of society is the key to the understanding of its function and effectivity within the social whole.

The capitalist mode of production is characterized fundamentally by its economic organization through value-calculations. Generalized commodity production cannot take place, and exchange-values be produced, unless Labour is first separated from its means of subsistence, and then excluded from control of the conditions of production. The capitalist enterprise must have the exclusive economic power to direct production according to principles of capital accumulation and profit maximization, the "right to exclude" labour being the ultimate foundation of that power - to freely regulate expenditure on constant and variable capital, to hire and fire according to necessity, and to "rationalize" production with disregard to criteria of socio-economic calculation other than those dictated by the law of value. The continuing importance of the historically established connection between value-calculations and exclusive right is evident in recent developments within Trespass and related law during the conjuncture.

The crisis of capital accumulation which became acute in the early 1970's was a classic over-production crisis, consisting in the rising organic composition of capital, the tendency of the rate of profit to fall and the failure of the counter-vailing tendencies, and the inability of enterprises to realize such surplus as had been produced at the anticipated rate of profit. Because the crisis was too deep, as a result of the synchronized world recession, to be contained by monetary reflation, even in those countries where such policies had not been already discounted as excessively inflationary, it could be

resolved only through massive economic contraction involving closures, redundancies and rising unemployment. To this end Capital's ultimate right of exclusion - to expel labour completely from the point of production - was called upon to legitimate and enable the implementation of capitalist rationalization. Similarly in respect of the housing situation in particular, government monetary policy ensured that the crisis of over-production of exchange-values could not be cushioned by State expenditure, but must endure until such time as profitability in this sector could be restored. Given the involvement of private concerns and public authorities alike in value-considerations, imposed in the latter case by the policies of central government and the financial institutions, the housing crisis required for its resolution to the satisfaction of the "greater possessors" the maintenance or re-distribution of economic assets to their own advantage and hence the necessary deterioration in the living conditions of a large number of "smaller" possessors. And again, the right to exclude was called upon to justify and implement such economic changes as had to be made. The objective function of the crisis, both in the industrial and domestic spheres, was to constitute a mechanism through which the law of value could assert itself,⁵ the success of this attempt to restore the conditions of profitability depending ultimately upon the effectiveness of exclusive right in securing fundamental economic rationalizations.

However, the greater possessors in both domestic and industrial spheres were increasingly confronted, from the beginning of the 1970's, by organized resistance to the plans they had been impelled to formulate to minimize the ill-effects of the economic crisis. Moreover, the law in its existing form was apparently incapable of

5. see Mandel (op cit) (1977) p. 170.

performing its historical function of securing economic changes deemed necessary by capitalist rationality, because the lesser possessors were able with increasing success to challenge the nature and extent of exclusive right itself. The key to this success was the physical occupation of the land or premises concerned, such that the greater possessors were compelled to resort to the ultimate right of exclusion, and the law of Trespass became a terrain of struggle between the parties and social forces in dispute.⁶ The legal framework that had during the period of post-war economic expansion been adequate to contain conflict over land possession suddenly began to fissure under the weight of new kinds of social and industrial unrest: squatters in particular were able to exploit the "weaknesses" in the old Action for Recovery by "playing musical chairs" with private landlords and local authorities, and such obstructive tactics could also be used by factory and other domestic occupiers. The result was that, in a proportion of cases relatively small given the total number of re-possession and "dispossessions" taking place at this time, certain greater possessory interests in both domestic and industrial sectors were unable to fulfil their economic objectives: squatting again provides an obvious example, since significantly valuable assets in land and buildings were being tied up increasingly during the early 70's, preventing private landlords and local authorities alike from executing optimization plans; but enterprises were also frustrated in a number of instances by the uselessness or irrelevance of the law in releasing valuable plant, stock and capital equipment immobilized by occupying workers.

Four basic aspects of Trespass and its recent development may now

6. The implications of this for theorizing the State, the law and the "political" are more fully explored in the concluding Chapter, which will also provide the final insights into developments in Trespass during the conjuncture.

briefly be considered by way of conclusion: What was the nature of the changes that took place in the "right to exclude"; why did they occur; how were they effected; and why did they follow the direction they did?

Firstly, it has become significantly easier for all greater possessors in whatever sector to recover land or buildings from un-cooperative occupiers. In this respect the importance of the summary procedures (Orders 26 and 113) introduced in 1970 cannot be over-emphasized. Together with their judicial interpretation and the amendments ratifying these Court decisions in 1977, they constitute a fundamental strengthening of exclusive right that cannot be dismissed as a merely "procedural" change in the Action for Recovery; the Civil law structure of rights and duties defining the relative positions of greater and lesser possessors has altered significantly to the advantage of the larger interests. At the same time in respect of the Criminal law, the replacement of Forcible Entry and Conspiracy to Trespass by the 1977 Act has both increased the exclusive rights of greater possessors by enabling police intervention and the imposition of State sanctions in certain conditions of trespassory occupation, and reduced the protection against violent self-help eviction and harassment previously enjoyed by all lesser possessors under Forcible Entry and other areas of law; exclusive right has thus been further buttressed by developments in the Criminal law to the benefit of greater possessory interests.⁷

Secondly, the conclusion is inescapable that these changes occurred because they were necessary - in ideological and directly instru-

7. Consideration of the full significance of the categories "lesser possessors - greater possessors" for legal and political theory is again reserved for the concluding Chapter, *infra*.

mental senses yet to be specified - to facilitate the process of capital restructuring required by the economic crisis, given the breakdown in the prevailing legal framework securing existing relations of possession. The social effect of the change in the structure of Trespass and related law, of the re-furbishing of exclusive right, was necessarily a deterioration in the socio-economic position of the lesser possessors, as a direct consequence of their declining legal status - such deterioration consisting not solely in those cases where the law has actually been implemented and jobs lost or occupiers evicted, but in the potential for such occurrences contained in the strengthening of exclusive private property right, and in the accompanying de-legitimation of attempts to resist the restructuring of capital, this global undermining of the position of the lesser possessors being an essential pre-condition for the restoration of the conditions of profitable accumulation.

The changes in Trespass and related law have therefore had the indisputable effect of facilitating capitalist objectives: factory occupiers, squatters, and any other type of lesser possessor such as ex-licensee or subtenant who could be brought within the central category of "trespass", have all suffered under the summary re-possession procedures, whereas previously they might have been able to avoid eviction almost indefinitely; the Judicial Statistics show how during the period the greater possessors have turned increasingly, in both domestic and industrial spheres, to the new Action for Recovery as an indispensable means of realizing their re-structuring plans. And police interventions and convictions for Forcible Entry and Detainer and Conspiracy to Trespass, and now under Part II. of the Criminal Law Act 1977, are similarly evidence of the direct material effectivity

of conjunctural legal developments. But the socio-economic import of the change in the "right to exclude" cannot be reduced merely to those instances of its mobilization in the recourse to law, since its extensive imbrication within the fabric of Society ensures that it maintains a constantly material effectivity regardless of whether conflicts are formulated as legal cases and brought before the Courts. Because exclusive right is constitutive and definitive of economic powers of exclusion, it becomes increasingly a vital consideration in the calculations of all social subjects likely to be affected by it: private Landlords and Public Authorities understand perfectly well that their economic strength, their ability to carry out their desired objectives, resides in the final analysis in the definition by law of their exclusive powers; the modern squatting movement is equally aware, before a suit is even begun, what the state of the law is, what the possibilities are of exploiting legal loopholes, and how likely it is that an action will be undertaken or will succeed in the specific circumstances; enterprises must also take account of the legal situation in calculating the options available to them in the event of industrial dispute; and the TUC is constantly monitoring legal changes and publicizing its views on the possible uses and abuses of particular laws in the industrial context. That changes in Trespass law and the "right to exclude" have been materially effective in influencing the calculations of subjects is evident in the comprehensive advice offered by squatters' organizations to potential unlawful occupiers on their new legal position since the 1977 Act, and in the detailed instructions of the TUC to its members also concerning the possible operation of the new Criminal law.

These observations suggest that the reasons why Trespass law developed as it did during the period were as much concerned with its general

ideological role in buttressing the institution of private property as with its directly instrumental value to particular greater possessors in their struggle to maximize their economic positions; either way the effects were complementary : Capital was more easily able to carry through its rationalization programmes in a general ideological climate celebrating the virtues of private property and at the same time redefining the extent and legitimacy of exclusive economic powers. But the material effectivity of the ideological, as opposed to the directly instrumental, aspect cannot be "measured" in terms of the resort to law through the courts; it is a matter of speculation whether, for example, the decline in squatting recorded for 1978 was due to the deterrent ideological effect of the (incorrect) initial belief amongst potential unlawful occupiers that the "Criminal Trespass" Act had made the activity absolutely illegal. In any case, the sanctity of private property and the need for its protection were definitely pushed to the forefront of popular consciousness in the extensive media campaign of the mid-1970's, which had its own effectivity in preparing the ideological ground for legal change by representing the existing "right to exclude" as inadequate to its current historical task.

Thirdly, the related question of how the changes were effected and legitimated must be considered. It has been shown how the crisis in economic relations of possession and separation, in both domestic and industrial spheres, was also a crisis in the legal structure defining and governing those relations; and how these crises formed part of a more general social malaise, expressed in public disorder and other forms of moral and social instability. But the changes that occurred in Trespass and related law during the 1970's were never announced as

remedies for such symptoms of social disintegration. Instead they purported to be directed against a quite specific threat, that posed by the invasive squatter endangering present possession, queue-jumping, freeloading and scrounging, and indulging in wanton destruction of domestic private property. Thus the new summary actions for re-possession under Orders 26 and 113 were initially presented as purely "squatters procedures", and part II. of the Criminal Law Act was similarly portrayed as an exclusively "squatters" measure, neither claim revealing that a "squatter" is merely one kind of Trespasser, and this category potentially extends to workers in the industrial context and to licensees, sub-tenants and even tenants in the domestic sphere; this centrality of Trespass and the "right to exclude", at the very heart of capitalist relations of possession and separation, enabled it ultimately to perform satisfactory the function of containing the socio-economic and legal crisis. But the possibility that Trespass might really be the basis of the legal regulation of relations between greater and lesser possessors in the domestic sphere, and still more importantly that it might provide the fundamental legal conditions for the separation of Labour from the means of production in the industrial sphere, could not be allowed to appear in the debate on legal change without undermining the legitimacy of the economic system, hence the specific focus on the squatting phenomenon at the level of reproduction, and most revealingly its complete misrepresentation in the moral panic that accompanied squatting mythology in the mid-1970's. The legal terrain of struggle was occupied pre-dominantly during this period by the debate over the adequacy of exclusive right in the face of supposedly growing threats to it. The strengthening of the "right to exclude" was legitimated by reference to a quite inaccurate squatting representation, which enabled the marshalling of popular support behind the movement for

legal reform because everyone had some form of domestic possession that might be subject to intrusion. Thus the squatting scape-goat successfully articulated a field of potent values and images relating to private property, whose ultimate effect was the collusion by the lesser possessors in the weakening of their own legal and hence socio-economic positions.

Finally, it remains to be considered why the changes in Trespass took the particular direction they did, and what this reveals about the contradictory operation of law during a period of economic crisis. Trespass became a specific legal terrain of struggle during the 1970's because of the increasing resistance of lesser possessors in both domestic and industrial spheres to economic restructuring, by means of the physical occupation of land and buildings from which they were required by the logic of capitalist calculation to be excluded; and because they were prepared to contest not just the economic claims of the greater possessors, but their legal basis through the Courts. The particular developments which then took place within Trespass were the result of a variety of struggles in this field of law,⁸ but the possible avenues of further change were always already determined to a degree: the existing legal structure at any given time would only allow of a limited range of consistent interpretation,⁹ and any fundamental change in the legal structure itself had to follow one of a number of strictly defined possibilities. The crisis in legal relations of possession and separation that erupted during the 1970's consisted in that points were continually being reached at which the

8. The broadest political aspects of these struggles will also be considered in Chapter 8., which develops the conception of law as a terrain of struggle.

9. as will be demonstrated, contradictions arose in legal reasoning during the period wherever these limits of consistent interpretation were exceeded.

existing law became unable to fulfil its economic function of facilitating the process of restructuring, because the possibilities for its development in the direction required by capitalist interests were being exhausted or frustrated. When such a barrier had been reached, when not even the most ingenious judicial "interpretation" could enable the law to "function properly", some more fundamental change in the legal structure would ensue - through the introduction of new procedures, judicial law-making or parliamentary legislation - to resolve what by this time had been defined as a "problem of reform".

The fundamental structural changes in Trespass during the period followed obvious courses in Civil and Criminal areas of the law. The summary procedures for re-possession introduced in 1970 provided a recovery action quite distinct from those previously available, yet the change apparently involved no radical departure from existing law, and could be justified as merely a "procedural" modification. The introduction of the Conspiracy to Trespass charge in 1973 was the most direct means by which trespass could in effect be made a Criminal offence, enabling police intervention and the imposition of State sanctions, a development considered necessary because of the supposed inadequacy of the Civil law and always likely to occur given the previously successful use of the charge in 1946. And the "Criminal Trespass" Act of 1977 was the next logical step for a legislature still dissatisfied with the Civil protection afforded private property, once the inadequacies of the old law of Forcible Entry and Conspiracy to Trespass had become apparent. Some such major reforming measure had become necessary by the middle of the decade because of the progressive inability of the legal framework to function without revealing contradictions in its structure and throwing the law into a state of confusion. The most obvious example of this occurred in

1973, when the enthusiasm of Lord Denning to weaken the legal position of squatters resulted in a decision that plainly could not be supported by existing law: squatters did not have "possession" (contrary to the belief of the legal commentators) and were not therefore entitled to protection from the law of Forcible Entry, since the lawful owner could not commit the offence against premises in his own possession - the effect of this reasoning being to undermine the primary function of Forcible Entry in preserving public order at all costs. This fissuring of the legal framework, perceived by the Law Commission in terms of a "problem of reform", was repaired by an Act whose significance lay not just in its criminalization of certain acts of Trespass, but in the reduction it effected in the protection afforded unlawful occupiers under the Criminal law from violent self-help eviction and harrassment. The legal direction taken in McPhail was confirmed in the new law, which suffered from none of the weaknesses and contradictions that had characterized the strained interpretation of Forcible Entry, and another ideological affirmation provided of the sanctity of private property in the renewed self-help right of individuals to defend it. Meanwhile, outside the strictly defined field of Trespass, another foreseeable consequence of the economic crisis was the "recruitment" of increasing numbers of lesser possessors in the domestic sphere into the category of "licensee", escaping the protection of the Rent Acts and therefore exposing those concerned to the increased possibility of the exercise of the re-furbished exclusive right.

The conditions of the development of Trespass law in the 1970's are

represented in the accompanying diagramme.¹⁰ The movement from the Economic crisis, at the bottom, to the changes in the central category of Trespass, at the top, is merely the order of presentation of a method of inquiry which progressed in precisely the opposite direction, beginning with the most phenomenal Appearances constituting the object of study, and revealing increasingly their determining conditions and real relations. Two related preliminary points may be made concerning the figure, before considering its content in more detail: first, it retains some value as an expository device only so long as it is remembered that it is merely a figurative resumé of the most important results of the analysis, neither to be read mechanistically in abstraction from the method of inquiry, nor to be imputed with the status of "final judgment and ultimate truth of" Trespass and its conjunctural development; and secondly, it represents the quite specific determinations within a very particular field of law, laid bare as the result of a definite method of investigation and not produced as the mere exemplification of a pre-conceived "general" theory of law and the State. The following notes of clarification may help in its comprehension:

(1) Although it would not be logically incorrect, given a certain highly abstract level of analysis, to say that the law of Trespass was "determined" during the period by the "law" of value, this bare claim would be so devoid of theoretical and concrete content as to be virtually meaningless. Nevertheless, it remains quite legitimate to speculate that Trespass would not have developed in the manner it did had it not been for the accentuated deterioration of British economic performance in the context of the world recession. The fundamental question of "economic determination" - banished to the sidelines of

10. See Appendix G. (infra.)

respectable academic debate during the period of post-war expansion in which Keynesian demand management really did seem to have finally resolved the problem of cyclical recession - has increasingly since the mid-70's been on the agenda again, now more than ever requiring to be adequately formulated and addressed. There remain, of course, many problems in Marxist economic theory, concerning the transformation of value into price, the present role of the rising organic composition of capital, the nature of the "tendency" of the rate of profit to fall, and its relation to the "tendency" for the rate of surplus to rise; but however the crisis is precisely conceived, whether as one of production of surplus-value or of its realization, one primarily of over-production of producer goods or of under-consumption by the masses, it does now appear, given the increasing redundancy of Keynesian and monetarist explanations, that Marxism can provide some of the best analytical concepts for its explanation. The diagramme attempts to express the mediated nature of the determination of Trespass by economic developments.

(2) The crisis of capital accumulation is manifested in the over-production of exchange-values and hence in excess-capacity in the economy. The Redundancy crisis and the Housing crisis are the specific outcomes of capitalist calculation - by both private concerns and the State - when confronted with these symptoms of economic decline. The State is not absolutely compelled to collude in the process of redundancy and closure, or to cut public spending on amenities such as housing : indeed its post-war role as guardian of the long-term interests of Capital has consisted, until recently, precisely in its resistance to such tendencies through interventionist policies; private capitals, on the other hand, however large, are ineluctably impelled during a period of recession to restore the con-

ditions of profitability through extensive "pruning" and rationalization, the decline in private housing investment being merely one example. The problem of housing is exacerbated by the peculiar nature of the construction industry and the particular conditions attendant upon the production of so expensive a commodity.

(3) Programmes for re-structuring production during the 1970's might have been realized without effective opposition, but such a "normal" course of events, involving an automatic in the living conditions of lesser possessors in both domestic and industrial spheres, was not universally accomplished - resistance taking the form most importantly of the physical occupation of economic assets of increasingly vital importance to greater possessory interests. The class struggles involved in Squatting and Factory occupations, questioning capitalist principles of housing allocation and control of production, compounded the economic crisis and constituted law as a terrain of struggle - giving rise to crises in specific areas of law securing domestic and industrial possession.

(4) The outcome of these struggles was the extensive buttressing of exclusive right through transformations effected within the central category of Trespass, either by stealth, as in the "procedural" modification to the Action for Recovery, or, where legislation was required, under full public view, as in the "Criminal Trespass" provisions; in this case the vehicle of popular legitimation being the re-presentation of the crisis in the form of a historical weakness in private exclusive right, requiring to be remedied because of the "problem of reform" posed by "present-day conditions".

(5) The effect of these transformations was the resolution of certain legal contradictions that had appeared in the fissuring of the framework of Trespass and related law, and the containment of both the crisis in law securing relations of possession in the various sectors and the socio-economic crisis constituted by the challenge to exclusive economic powers. Such "containment", always ultimately material in its effects, was both directly instrumental and ideological, this latter effectivity being given in the extensive imbrication of the right within the very fabric of social life, and hence in the values and symbols of private property mobilized in the processes of negotiation and debate over legal reform; the threat to exclusive rights and powers posed by direct physical occupations always consisted as much in the general ideological implications of the action as in the inconveniencies involved in particular instances of obstruction, and the celebration of the institution of private property and the re-drawing of its boundaries during the 70's must always be considered in this context.

Ch. 8. Method & Theory re-considered; Law as a terrain of struggle

The purpose of this Chapter is to re-consider certain previously discussed questions of Method and Theory in the light of the concrete analysis; to acknowledge and address some of the problems remaining with this analysis; to further elaborate its nascent theoretical concepts; to examine its contribution to the theoretical understanding of the role of the State and the political in the conjuncture; to consider what it may itself gain from the insights provided by existing theoretical approaches; and finally to develop the conception of law as a terrain of struggle.

The strength of the concrete analysis has also been the source of its main weakness. The rigorous application within the field of law of a basically "retroductive" methodological procedure, intended to avoid the rationalist tendencies inherent in the principal theoretical approaches, has inevitably ruled out the incorporation within the analysis of some of the very real advances made at the level of "general" theory. Yet this recognition of deficiency should come as no surprize : the conclusion to the chapter on Method warned specifically against the over-simplification of the argument contained therein:

"(The case against general theory) should not be extended to the complete denial of its achievements; insights into the role and function of the juridico-political in general may be provided only at a high level of abstraction, and could not possibly be 'retroduced' from the

concrete".¹

This acknowledgement was clearly consistent with the fundamental point of the critique, which was, and remains:

"That the limitations of the conception of general Theory, in its methodological basis and its capacity to account fully for the concrete, have not properly been recognized. The belief that research projects can move eventually to lower levels of abstraction through complexification and concretization of abstract determinations provided within one or other of the dominant theoretical positions is a complacent illusion that must be resisted".²

One of the aims of this Chapter will therefore be to relate certain theoretical categories produced in the course of the concrete analysis to corresponding and complementary conceptions resulting from a quite different theoretical and methodological procedure, without merely grafting the latter onto the former. Before this can be attempted, however, it is necessary to resume and develop the theoretical advances already achieved through the concrete analysis, and to emphasize their relation to the methodological conditions of their production.

(1) Marx's Method and the theorisation of Law

The central argument of this Thesis has been that Marx's method of inquiry in Capital - something very different from what has generally been supposed - can successfully be adapted to the purpose of theorising and analyzing law. From the beginning it was emphasized that the discovery of the methodological foundations of Capital did not result in a "general dialectical method" instantly applicable to all social phenomena, rather the particular trajectory of any future analysis would have to respect the specificity of the objective movement under

1. supra. Ch. 4. Section IV.
2. ibid.

consideration: The "spiral" expansion from simple to complex and the "oscillating" movement between the concrete and the abstract could not mechanistically be applied in the field of law, neither could the "conditions" and "mechanisms" characteristic of real relations and their mode of representation in Appearances be expected to be provided here in quite the same manner as in Capital.³ Whilst the concrete totality of Trespass and related law could indeed be analyzed synchronically as an objective structure, following closely Marx's original methodological premises,⁴ the analysis of the Concrete Totality of Trespass and related law in the 1970's had to take particular account of the dynamic character of the conjunctural - what Gramsci termed "the occasional, immediate and ephemeral, almost accidental, rather than structurally long-term and relatively permanent".⁵ So whereas the analysis of the concrete totality began with the "right to exclude", a fundamental characteristic of capitalist society for hundreds of years and the simplest and most irreducible element within a basic structure, the conjunctural analysis began with the particular current re-presentation of that right in its relation to the specific historical (re-presented) squatting phenomenon portrayed as undermining it. The theorisation of law in the two main Chapters has thus depended on the flexible implementation of a nevertheless quite definite methodological approach at the various stages of the analysis. Theoretical categories have continually emerged as the result of scientific abstraction always performed in relation to Appearances - whether these be the phenomenal forms of a basic structure, as apprehended "with a certain validity" in the vulgar formulations of the legal commentaries, or whether they be the constellations

3. supra. Ch. 4. Section V.

4.this task being satisfactorily accomplished in Chapter 5. (supra)

5. Prison Notebooks (1976) pp 177-178; see (supra) Conclusion to Ch.

of representations constitutive of popular ideologies.

One of the first theoretical conceptions to arise in the course of Chapter 5 was that of interpolation, expressing the process of the "insertion" of particular forms of property right within the structure of Society in accordance with their determination by historically specific relations of production: feudal economic and social relations gave rise to the legal category and principles of "Seisin", bourgeois relations to those of "Ownership" and "Possession".⁶ This analytical separation of "economic" from "legal" relations enabled the theorisation of the determination of the latter by the former whilst nevertheless allowing for the definitive role of legal right in constituting economic powers of management and control.⁷ By the end of the Chapter this conception of "interpolation" had been further refined: besides the principal modern subject-category of "possession", which was shown to entail "non-possession" as its necessary corollary, a variety of "associate" or "sub" categories were found to fall into this most basic division, defining the positions of licensee, tenant, sub-tenant and trespasser.⁸ The legal framework, both in respect of Trespass and more generally, is composed of a multitude of such subject-categories, over-lapping and re-inforcing one another, into which social agents are recruited or from which

6. supra. Ch. 5.

7. supra. Ch. 7. The related conception of "imbrication" is considered below.

8. The legal definition of such sub-categories and their membership is not rigidly determined as is the principal subject-category, but open to conjunctural struggles; see Ch. 5. Section (3).

they are dismissed by the process of legal definition.⁹ The pre-condition of the containment of the legal and socio-economic crisis arising during the 1970's was the buttressing of exclusive right through the transformation of certain legal subject-categories and the redistribution of social agents within them: the legal definition of what constituted "possession" changed overnight as a result of the McPhail decision, leaving thousands of squatters bereft of protection against violent self-help eviction by virtue of their inclusion from the principal subject-category of "possession"¹⁰; the criminalization of certain types of trespass, introducing a new element of public obligation into the legal structure, furthered the deterioration in the living conditions of squatters and "non-possessors"; and even where there was no question of trespass, the socio-economic position of lesser possessors was similarly undermined by the restriction of the legal criteria for inclusion within the sub-category of "tenant", and correspondingly by the vast expansion in numbers of residencies falling within the category of "licence" - their occupants thus disqualified from protection under the Rent Acts.¹¹

The effectivity of the framework of subject-categories - constitutive of a variety of "private" and "public" rights and duties - in regulating socio-economic conditions was shown not to depend on the actual resort to law, since the materiality of the right to exclude already and permanently existed in its imbrication within the very

9. *ibid.*

10. *supra.* Ch. 6. Section D. (2)

11. *supra.* Ch. 6. Section D. (1)

fabric of Society¹²: the mere discussion and negotiation of legal reform itself contributed to the buttressing and re-inforcement of exclusive right by virtue of the pervasive ideological presence of this proprietary interpellation at the heart of social life, complementing the directly instrumental function of the right and transformations within the central category of Trespass in enabling greater exclusive control over economic assets in particular instances of trespassory occupation. The re-presented "squatting crisis" of the 1970's was the pretext for the re-affirmation of the institution of private property and the need for its protection, this celebration being as important as the precise nature of the legal changes which ultimately took place: the possessors interpellated through the subject-category "possession" were under threat and its function was being undermined, therefore all possessors were called upon to unite in both recognizing the danger and defending the legitimacy of the principle of exclusive right; thus legal categories are active and come to life in the process of their ideological mobilization. The implications of what has here been theorised as legal "imbrication" have been described by another writer:

"Law is important in that it exhibits a symbolic or ideological dimension. Law mobilizes important ideological symbols. The process of legalisation and legitimation gives both direct advantage and encouragement to some social forces, and the corresponding de-legitimation of criminalisation hampers, penalises or discourages other social forces. For example an understanding of the recent history of abortion law reform can be facilitated by an understanding of the 'victories' and 'defeats' recorded in the various stages of the legislative process".¹³

The process of the criminalization of Trespass, from the initial conception of Conspiracy to the public debate and the final passage of reforming proposals into law, is just such a story of symbolic "victories" and "defeats", of the encouragement of certain social

12. supra. Ch. 7.

13. Alan Hunt : (1981b): "The politics of law and Justice" : p. 4.

forces committed to exclusive property right and the discouragement, obstruction and penalisation of others seen as threatening it. So successful was the ideological re-inforcement of private right during the 1970's, made possible by the fundamental centrality of property law at all levels of society, that instances have been recorded of the police successfully intimidating both squatters and other unlawful occupiers by representing trespass per se to be a crime,¹⁴ and at least one possible explanation for the decline in numbers of squatters after 1977 must concern the deterrent effect of legislation widely believed to make trespass absolutely illegal.¹⁵ The right to exclude, then, over-reaches the boundaries of strictly legal practice and permeates the fundamental structure of socio-economic organization, this theoretical recognition being the basis for the understanding of its function and effectivity in Society.

Another theoretical contribution to emerge in the course of the analysis concerns the immanent tendency of the legal structure to fracturing, contradiction and anachronism. Far from being a perfect or perfectable "seamless web" of rules, the law is fraught with inconsistencies, developing chaotically and unevenly in response to changing socio-economic conditions, and frequently being "caught out" by them. The history of Trespass is punctuated with examples which illustrate not only the inherently tenuous nature of the law but also the considerable ingenuity with which "interpreters" have sought to avoid manifest contradiction. The oldest logical problems spring from the fact that the claim of a property right in the Action for Recovery has historically been cast in the form of the complaint of a wrong - trespassory interference with precisely that "possession" of land

14. see Squatters Handbook (op. cit.) p. 6.; Industrial Relations Bulletin of the TUC; IRB 5. July 1978.

15. Squatters Handbook (op. cit.)

which an owner not in physical occupation does not have. The function increasingly required to be performed by law in the 15th Century was the protection and advancement of private property, all obstacles that might prevent the development of Trespass to this end being swept away because this was the most flexible and efficient means of realizing exclusive interests. Although the dubious fiction of John Doe and Richard Roe has long been abolished, an owner now being able to succeed in an Action for Recovery purely on the grounds of superior Title, the anachronistic requirement of "possession" lingers on in Trespass by Relation and the Action for Mesne profits¹⁶ - the merest step onto land however being sufficient to satisfy the Courts that the owner is also its "possessor".

A number of contradictions within Trespass and between it and other areas of law became manifest during the 1970's - the socio-economic crisis posed by squatting and factory occupations giving rise also to a legal crisis expressed in the fissuring of the framework of law securing relations of possession and separation. Some could be resolved more or less satisfactory by judicial interpretation: the duty of Local Authorities under the National Assistance Act, for example, to provide temporary accommodation for persons in urgent need was held by Lord Denning in 1970 not to compromise the Council's exclusive right to evict homeless persons from property in their possession.¹⁷ Others, however, were more intractable in character, producing a confusion in the law which could be rectified only by legislation after the identification of the "problem of reform": Lord Denning's attempt in *McPhail* to resolve the contradiction between law prohibiting violent entry and law securing the exclusive self-help right of

16. *supra*. Ch. 5. Section (1)

17. see *Southwark LBC v. Williams* (*op. cit.*); *supra* Ch. 6. Section D. (1)

property owners - to the conspicuous advantage of the latter - was too audacious for the majority even of legal commentators, and a new balance, preserving the substance of the judgment, was left to be struck in a "reforming" Act which suffered from none of the inconsistencies of the old law. The law undergoes a process of restructuring, therefore, either when a necessary social function can no longer properly be performed or when (frequently a corollary of the first) its contradictions become manifest, involving the transformation and re-alignment of its subject-categories and re-distribution of social agents between them.¹⁸

The repairs effected in the fissuring legal framework through changes in its fundamental subject-categories could never, however, be more than superficial, and the law securing domestic and industrial relations of possession remains in a state of permanent crisis. But like the tendential "laws of motion" that operate at the economic level, there is nothing apocalyptic in this conception, which recognizes on the contrary the almost limitless resourcefulness of legal practitioners in adapting the law to changing socio-economic conditions; there is no "essential contradiction", such as that often theorised in "capital-logic" approaches to law,¹⁹ threatening to de-legitimate the legal structure by revealing its "real" nature, rather it remains the case that, just as a tendency to crisis is a permanent feature of legal relations, so too is there a tendency for this crisis always to be more or less adequately contained. There is no reason to suppose that Trespass should ever completely fail in its historical function, any more than to suppose that the capitalist economy will necessarily ever collapse completely, these developments being contin-

18. The notion of "re-alignment" is further considered infra.

19. supra. Ch. 3. and Conclusion to Ch. 4.

gent upon class struggle in every region of Society always informed by an adequate theoretical understanding of the current situation. The continuing appearance of legal contradictions in the 1980's provides the valuable opportunity for socialists to exploit weaknesses in the law to their own ideological and political advantage, depending on their proper awareness of the potential of law as a terrain of struggle - to which question we shall return.²⁰ One such fundamental contradiction, which could well prove more disruptive than that involved in the McPhail decision, may briefly be indicated: In deciding early in 1982 that a factory occupation might not be unlawful, despite the obvious trespass committed, by virtue of S.13. of TULRA (which provides Civil immunity from actions in Tort where an industrial practice is "in furtherance of a trade dispute"), the Scottish Court of Session has effectively denied an enterprise its right to exclude. The ideological implications of the judgment are momentous; if it were to be upheld in the House of Lords, the very foundation of Capital's control over premises, plant and final product would be seriously undermined. Pushed to its logical conclusion, the contradiction will allow of only two alternative solutions: either obstructive factory occupations cease to enjoy immunity from Trespass actions, or Capital loses its exclusive power to govern the production process²¹; short of a radical transformation in the mode of production, only the former option can be taken without continuing and further contradiction.

Perhaps the most important theoretical insight to arise from the method of Inquiry, certainly requiring further elaboration, concerns

20. infra. Section (3)

21.logical conclusion, because the struggle would have to be extended much further for the latter solution to be adopted in reality - involving as it does a socialist mode of production; see infra. section (3).

the continuum "greater possessors - lesser possessors", which has implications for the theorisation of the separation of ownership from control accompanying the development of modern Capitalism this century.²² A number of writers have argued that the rise of joint-stock Companies and Equity capital entails a fundamental change in the economic system by virtue of the fact that ownership and control no longer vest in the same wealthy individual, as was typically the case in the 19th Century, but have rather become distinct, the function of management now being performed quite independently of the influence of private investors.²³ A further twist to this line of argument has been provided in both Britain and the United States by those who claim that the rapid growth of Pension Funds has led to "creeping nationalization"²⁴ and an "unseen socialist revolution"²⁵ through the social ownership by workers themselves of the means of production. The Wilson Committee report of 1981 estimated that "Trade Union members now control, or soon will, some 50% of the Equity Capital of the 250 or so biggest industrial companies, through pension fund trustees in the main accountable to them", concluding that the growth of these funds was "probably the biggest social revolution we have had

22. The following discussion merely addresses some of the legal aspects of this vast topic and certainly does not pretend to be exhaustive. Here as elsewhere (see conclusion to section (3) *infra*). there remains much work to be done.

23. see the "managerialist" theses of Berle & Means: "The Modern Corporation and private property", New York (1932) ; R. Dahrendorf: "Class and class conflict in Industrial Society", London (1957). See also R. Minns: "Pension Funds and British Capitalism: The ownership and control of shareholdings", Heinemann (1980) pp. 1-20.

24. Harold Wilson: Chairman of the Committee reviewing the functioning of Financial Institutions, which reported in 1981; see Minns (*op. cit.*) p. 8.

25. see P. Drucker: "The Unseen Revolution", Heinemann (1976), discussed in Minns (*op. cit.*) pp. 1-2.

in this Country".²⁶ The problem with such arguments concerns the relation between the development of new forms of ownership and the fundamental change claimed to have taken place in the economic system; in defining Capitalism according to legal "ownership", commentators have reproduced precisely the fetishized appearances given in this category expressing phenomenal forms on the surface of society, without grasping the need for revealing its real content as "unity of the diverse, concentration of many determinations and relations".²⁷

Writing within a broadly Marxist perspective, C.B. Macpherson is similarly prevented from adequately theorising the nature of the 20th Century transformation in property right²⁸; the return to the conception of property as a right "not to be excluded from" revenues, such as dividends, annuities, pensions, and Welfare and social security services is correctly identified, yet no proper account is provided of the relation between these developments and the institution of private property, with the result that the socialist potential of the new forms of ownership is radically misconceived.²⁹

It was established in Chapter 5 that "Ownership" in respect of land and tenements is better conceived as a right to possess in the economic sense - to occupy and control - either immediately or at some time in the future. To the extent that an ownership interest does not fall within this definition, it cannot concern the fundamental relations of production; a purported "ownership" that does not imply the right to occupy and control may not be so significant as might at first appear. The 20th Century has indeed witnessed the replacement of the small capitalist entrepreneur by the Joint-Stock

26. *ibid.* p. 8.

27. *per Marx* in the 1857 Introduction (*op. cit.*) p. 100; *supra.* Ch. 4. I.

28. see especially: "A political theory of Property", in "Democratic Theory", Oxford U.P. (1973).

29. This is discussed (*infra*) in section (3).

company, but the fact that the owners of shares are no longer controllers of the enterprise is insignificant as regards the nature of the economic system³⁰, since the essence of capitalism is exclusive occupation of production according to principles of capital accumulation and profit maximization, irrespective of who has legal ownership. Correspondingly, all that the Pension Funds have achieved for the members of Trade Unions is a wider dispersal amongst the working class of a form of "ownership" which colludes in the continued exploitation of Labour through its exclusion from control at the point of production. Workers may well have won important "inclusive" rights "not to be excluded from" revenues such as future pensions, but whatever the value of the New Property, it remains confined to the sphere of Distribution and can never be said to have radically compromised the fundamental exclusive property right - the pre-condition of the extraction of surplus-value - constitutive of the basic structure of capitalist Production. But the impotence of Labour is also evident in its inability to "control" in another less radical sense, since Trade Unions have little or no power to administer pension funds, which remain predominantly in the hands of the Banks, Brokers and other financial institutions.³¹ Because the *raison d'etre* of the Fund is to secure the maximum return on the investment of its contributors, its management is caught up in the general crisis of profitability already documented: investment in the domestic capital goods and engineering sector capable of creating jobs has not taken place and instead money-capital has been diverted overseas where the expectation

30. [In any case, recent studies suggest that the extent of owner-control has been underestimated in the "managerialist" argument: see Minns (op cit) p. 148.]

31. This remains so whether the fund is "internally" or "externally" managed; the banks, brokers and others controlled an estimated 67% of all pension fund shareholdings in 1975 - despite the fact that pension funds "owned" 16.8% of company shares and the banks only 0.7%: See Minns (op cit) pp. 146-148.

of the rate of profit is higher, or shares have been purchased within the financial or other unproductive sectors.³² Even if workers were to "own" the vast proportion of Equity capital in Britain, therefore, this would not of itself prevent the mass expulsion of labour from production - legitimated ultimately by the exclusive controlling right of Capital - during periods of economic recession. Here the irony of Labour's "ownership" right is complete-its vacuity evident in the ineffectiveness of workers' opposition to their own unemployment deemed "necessary" for the restoration of conditions of profitability.³³

The continuum "greater possessors - lesser possessors" is thus the theoretical expression of the centrality of the legal category "Possession" within bourgeois relations of production, despite the seductive appearance of private "Ownership" as their most important defining characteristic. When its constitutive determinations and relations are examined, the phenomenal form expressed in the category "ownership" is revealed as composed of exclusive right founded upon exclusive possession.³⁴ This "secret" is given away in the historical development of Trespass, the owner always being required to show interference with exclusive "possession" in order to benefit from Ejectment, but traces of this crucial connection have increasingly been erased with the abolition of the fictitious procedures and the judicial recognition of the importance of Title in the Action for Recovery; the greatest clue of all, however, remains - generally unnoticed - in the vestigial inclusion of the Action for Recovery of land within treatises on the law of Tort.

32. *ibid.* p. 147.

33. Macpherson's vision of the "right to a job" as a form of Property appears delusory indeed in a situation of 3,000,000 unemployed: see (*op. cit.*) pp. 134-135.

34. Here we refer, of course, to "ownership" in respect of lands and tenements, not of revenues.

The theoretical importance of the conception of "greater" and "lesser" possessors consists not so much in the possibility it offers for precisely identifying the hierarchy of social agents concerned, as in its recognition that capitalist domination inheres in a principle of economic organization - which requires only that control of the production process should be exclusive so as to enable the extraction of surplus-value and the continued accumulation of capital according to value-criteria of economic calculation. Nevertheless, the relations of control between institutions and individuals characterizing exclusive possession may briefly be indicated.³⁵ First and foremost, the continuum is concretely expressed in reality as a double structure, the alignment of categories in relation to subjects constituting Domestic possession differing from that characterizing Industrial possession³⁶; in either case there is a definite point at which a fundamental distinction may be made between greater and lesser possessors, whilst on either side of the "great divide" there may continue to be sub-divisions of greater "greater" possessors and lesser "lesser" possessors. As regards Domestic possession, the weakest "possessors" (who do not have legal "possession" at all) are the licensees, ex-licensees, squatters and mere trespassers³⁷, none of whom have exclusive legal and therefore ultimately economic control, which remains with one or other of the greater possessors. Above them

35. This account considers very schematically the legal conditions of "control" (in a variety of senses) in relation to the specific field of Trespass; it does not examine other legal and extra-legal forms of regulation, its purpose being merely to demonstrate the fundamental (not always visible) foundation of capitalist control in exclusive right.

36. The significance of this fundamental incongruity is explained *infra*.

37. Despite the continuing relevance of McPhail, which has made it more difficult for squatters to establish any form of "possession", an irony in the law persists in that whilst licensees are quite unambiguously denied "possession", trespassers may well in certain instances be considered as having such "possession": (*supra*: Ch. 2.)

stand the tenants with legal possession, holding for a determinate period, either weakly, monthly, for life or years, or under shorthold agreement; whilst they may have certain exclusive rights of control, these are generally lesser in quality and extent than those of their greater possessors, the private landlords with freehold or leasehold interest in the property, or the Local Authorities charged with allocation of public resources.³⁸ Then there are the "owner-occupiers", who, whilst they may appear to have the greatest interest in land recognized under English law, are in the vast majority of cases merely mortgagors; a "greater" exclusive controlling right may be exercised by Building Societies and other money-lenders in repossessing and selling property in the event of default on repayments. Similarly, other financial institutions may be able ultimately to recover land and tenements made over as collateral for loans by individuals, landlords or property companies. A similar structure of varying degrees of control characterizes Industrial relations of possession: workers are defined by the subject-category "licensee" and have no legal possession or ultimate exclusive control, whilst factory occupiers, whether ex-licensees or outright trespassers, have an even lesser "possessory" status. Above them stand the management of the enterprise, which has legal possession and hence day-to-day control of the production process, but again, here as in the domestic sphere, the greatest "possessors" of all are likely to be the financial institutions, which may resort to the ultimate right of exclusion in

38. In all these cases the tenant, whilst still tenant, has "possession" and hence the right to exclude even the landlord - a greater possessor - from interference through the Trespass action. Upon proper termination of the tenancy, however, "possession" is vested in the greater possessor, whether private landlord or local authority, who may then exclude the ex-tenant by resort to the Action for Recovery. (Note that the leaseholder may have the Statutory right to purchase the freehold at the end of the term).

the event of bankruptcy or failure of loan re-payment³⁹, and also exert control over Companies through the conditions attached to bank lending or by means of block dealing on the stock exchange.⁴⁰ Corporate capital and the financial institutions have a further long-term control in both spheres through general investment policy and the rate of interest charged on the loan of money-capital.

The suggestion is not that this structure of greater and lesser possession is underpinned solely or even primarily by Trespass law: on the contrary, a complex variety of other legal and non-legal institutions and practices are involved in the regulation of relations of control at and between the different levels of the hierarchy. Yet the right to exclude embodied in Trespass does remain the foundation of the fundamental division between those lesser possessors who have no "possession" and therefore no legal rights of control, and certain classes of greater possessors who have both; and it is precisely this status of "non-possessor" in both domestic and industrial spheres, whether in the form of licensee, ex-licensee, squatter or trespasser, that enables the socio-economic crisis to be resolved to the advantage of the greater possessors and against the interests of the weakest members of society: thus during the 1970's would-be tenants found it increasingly difficult to secure accommodation protected by the Rent Acts or saw their conditions of occupation suddenly undermined by their inclusion within the category "licensee", and workers discover-

39. Company liquidations and bankruptcies reached record levels in the first six months of 1982; total liquidations in England and Wales for this period were 5,550 - a 21% increase on the first half of 1981 but a 75% rise compared with 1980: Dun and Bradstreet survey, reported in Financial Guardian: 6/7/82. Of course, creditors seldom have need to resort to the Recovery Action, because it is not the practice of managements of enterprises to resist the process of liquidation; but the possibility of its use always remains. (Enterprises themselves never had to resort to actions for re-possession until factory occupations forced their hand, revealing the ultimate foundation of exclusive control in Trespass).

40. see Minns (op. cit.) p. 148.

ed to their cost the ease with which they could be made redundant. But it took the phenomena of Squatting and Factory occupations, compelling landlords and enterprises alike to seek redress and legitimacy through the Courts, to expose the centrality of exclusive right within bourgeois relations of production and distribution as the last resort of the greater possessors when their fundamental economic powers of control were seriously threatened. All "non-possessors" in both domestic and industrial spheres may presently be said, therefore, to be at the "sharp end" of the crisis in relations of possession, being required to bear its brunt precisely by virtue of the inferior legal status embodied in the principal subject-category of "non-possession". This does not imply, however, that the immediate possessors - those with day-to-day control such as tenants, owner-occupiers or the managements of enterprises - have complete control over property in their possession, since they themselves may be subject to the various degrees and kinds of higher influence already described; hence the fate of the "non-possessor" in a period of economic crisis is in the broadest sense determined by government policy and the calculations of Corporate capital and the financial institutions,⁴¹ as their effects filter down to more "micro" levels of the economic system and become part of the economic calculations of the immediate possessors.

It follows from this analysis that neither Nationalisation nor "Pension Fund Socialism" can properly be said to involve "revolutionary" social transformations, since whatever their status as new forms of social ownership, neither fundamentally affect the value-criteria of economic calculation and principles of exclusive control constitutive of Capitalism: The nationalised industries, local authorities and

41. see supra. Ch. 6. Section IV.

pension funds all remain ultimately subservient to the various influences of Finance Capital, and none have succeeded in implementing policies which would radically challenge capitalist principles of production and distribution. This makes it all the more vital for Capital, then, that at the level of Appearances real relations of exploitation should be re-presented as harmonious and co-operative, this ideological purpose being served in three main ways. Firstly, there is a basic incongruity or lack of fit between the two hierarchies of domestic and industrial possession, in that the vast majority of social agents are simultaneously possessors in the domestic sphere and yet non-possessors (mere licensees) in the industrial sphere: one aspect of the principal subject-category (possession) operates to recruit the human individual at one level, whilst at the same time its obverse aspect (non-possession) operates just as effectively to produce the opposite result at the other. Yet the fundamental denial of possession and hence control at the point of production is ameliorated by the existence of precisely this capacity at the level of distribution and circulation; the contradiction is only prevented from becoming manifest because it is this latter realm - "of Freedom, Equality, Property and Bentham, the very Eden of the innate rights of man"⁴² - that constitutes the "spontaneous consciousness" of social agents through the appearance of its phenomenal forms. Secondly, not only are the majority of individuals accorded a "possession" in the domestic sphere entirely absent from the industrial, but this possession is increasingly taking the form of owner-occupation, allowing the occupier a far wider degree of control over decoration, alteration, long-term improvement, alienation and testation than is enjoyed by tenants in either the private or the public sector, and giving him or her a stake in the institution of private property of

42. Marx: Capital Vol. I. (op. cit.) p. 280.

obvious ideological significance for the legitimation of an economic system based on private exclusive control. Thirdly, because of the co-existence of control in one sphere with its absence in the other - a contradictory state of affairs always threatening to become manifest - the attempt is constantly being made to enlist the willing participation of Labour in the conditions of its own exploitation through the permission of a form of "social ownership" in Nationalisation and the Pension Funds which, although different from private ownership as traditionally conceived, nevertheless leaves intact the institution of exclusive right and control essentially definitive of the capitalist mode of production.⁴³

Whilst in the domestic sphere, therefore, "ownership" in a significant sense (involving private exclusive control) really is being progressively extended, in the industrial sphere a form of "ownership" spurious by comparison is being loudly and deceitfully proclaimed. The possible contradiction between the different "ownerships" is neutralized by their basic unity of purpose in the preservation of exclusive as opposed to common property right in respect of the fundamental means of production and distribution. One of the ideological effects of the re-presentation of the crisis in relations of possession during the 1970's was the buttressing of exclusive right at every social level, despite the fact that the threat to this right was represented as being posed principally in the domestic sphere.

43. "The only requirement of the CMP is that land should not be common property, that it should confront the working class as a condition of production not belonging to it, and the purpose is completely fulfilled if it becomes State property": Marx : TSV part 2. p. 44. Thus the "radical" bourgeois objective could be adequately fulfilled if all land was Nationalised, so long as it became State and not Common property. On the other hand, to undermine private ownership of land might also be to de-legitimize the relation of exploitation in the private ownership of surplus-value and control of labour-power: therefore the ideological importance of private ownership of the means of production remains (ibid. pp. 44-45).

Here it was that individuals were addressed and required to lend support to the proposition that "possession" is exclusive in nature and must be protected against trespassory violation, yet the resulting celebration of private property was of far greater significance for the crisis in industrial relations, legitimating as it did the exclusive powers of enterprises and stigmatizing the unlawful activities of factory occupiers. This ideological trend was affirmed and given new direction by the Tory government elected in 1979, in its encouragement of wholly "private" as opposed to "public" exclusive property right in the process of extensive de-nationalisation and the off-loading of Welfare State functions onto the private sector - privatisation being rendered consistent with working class interests through the ideology attaching to the category of "Ownership": "The interests of the workers are no longer in conflict with those of the manager and owner. Half the shares in the private sector are owned by workers' pension funds. So whom do the workers injure when they strike?"⁴⁴ Yet the contradiction persists in uneasy tension: The workers have "ownership" but no "possession" that would prevent them being excluded from what they "own". Far from being superseded in the last quarter of the 20th Century, private property - in its most fundamental sense of exclusive possession and control of the means of production - is enjoying a period of extensive consolidation. The transformation of the institution of property in the direction of "inclusive" rights "not to be excluded from" revenues must be regarded as ultimately insignificant to the extent that it leaves intact Capital's ability to control production exclusively according to value-criteria of economic calcula-

44. Sir Keith Joseph: "Luddism poisoning the economy": Financial Times [31/7/79]. Pension Fund "socialism" is a more ideologically satisfactory form of "social ownership" from the point of view of Capital than is State Nationalisation on account of its preservation of "private", as opposed to "public", exclusive right (see n. 43 supra.)

tion.

(2) The legal aspect of the State and the "politician" tradition

Insights have arisen in the course of the concrete analysis into the functioning of the State, particularly in its legal aspect, during the conjuncture; this was inevitable, since one of the concrete phenomena to be explained was the "criminalization" of Trespass - the direct involvement of the State in a legal field that had remained the preserve of private law for 600 years. It has already been established that the Law is a framework securing socio-economic relations, consisting of a variety of structures of subject-categories recruiting individuals as subjects of rights and duties, in a state of permanent crisis expressed in its fissuring and subsequent internal contradictions, and imbricated within the very fabric of socio-economic organization; and that its constitutive categories undergo re-alignment and transformation in the process of the repairing of fractures and resolution of contradictions, this buttressing of core legal institutions contributing to the containment of the socio-economic crisis through an effectivity both ideological and directly instrumental. But why did the change take the particular fundamental form it did in Kamara and the Criminal Law Act of 1977?

These developments added to the structure of rights and duties constitutive of Trespass a new dimension in their imposition - upon all individuals falling within the basic subject-category of "non-possession" - of an obligation, owing directly to the State, not to violate its now "public" norms securing relations of possession of and separation from land. The immediate consequence of making certain kinds of trespassory occupation illegal, whereas previously they had been merely

unlawful, was that the police could now maintain through their direct intervention exclusive conditions of domestic and industrial possession, whilst the State stood behind the new powers of arrest, entry and search with its ultimate sanctions of fine and imprisonment.⁴⁵ The conclusion is therefore inescapable that the State, during a period of economic crisis which has given rise to struggles over the distribution of housing and the conditions of the separation of labour from control at the point of production, has sought to contain the generalized crisis in relations of possession by means of a greater resort to the use or threat of force. However, this recognition of the increasingly repressive character of the State apparatus, in its particular relation to the legal institutions of exclusive property right, does not imply any corresponding reduction in the ideological collusion of the working class in the conditions of its own domination. On the contrary, the concrete analysis of Trespass shows how the mobilization of the State in ever more authoritarian forms may actually be accompanied by widespread celebration and mass popular support, on the part of precisely those categories of lesser possessor most likely to be deleteriously affected by the changes. Neither is it possible, correspondingly, to equate "private" law in the sphere of "civil society" with "consent" in the process of class domination, and "public" law in the domain of the "State" with "coercion"⁴⁶; the "Private" and the "Public" are merely legal categories designating as "separate" certain institutions and practices, always ultimately of a

45. See the discussion of the Huntley St. eviction of 1978, *supra*. Ch. 6. Section I.D.

46. Hunt (1981 a) emphasizes the weaknesses of the dichotomisation of Law in terms of "Consent - Coercion"; but it is difficult to see how what are agreed to be two fundamental aspects of modern bourgeois legal domination could otherwise be conceived at this abstract and general level. Again (see *supra*. Conclusion to Ch. 4.), the problem may lie not in the inadequate development of general theory, but in the (rationalist) expectation that concepts generated at an abstract and general level may adequately inform concrete analysis.

more or less repressive character, which remain united in their basic function of securing exclusive relations of possession and separation. On the other hand, the re-categorisation of trespassory occupation as a "public" offence aswell as a "private" wrong was an event of enormous importance, because it constituted the powerfully symbolic means by which Society could re-affirm its belief in private property, legitimating the structures of exclusive control and discouraging and penalising social forces that appeared to threaten them - this re-drawing of the boundaries of property right having, as has consistently been maintained, an ideological as much as a directly instrumental effectivity.

The buttressing of exclusive right with a specifically Criminal dimension was therefore just one expression of a complex process of restructuring necessitated by the prevailing crisis in domestic and industrial relations of possession; it cannot properly be subsumed within a general theoretical concept, as merely an instance of "Authoritarian Statism"⁴⁷, "Authoritarian Populism"⁴⁸, the "Exceptional State"⁴⁹, or the drift from "Consent" to "Coercion"⁵⁰ or from "ideological" to "repressive" domination⁵¹, nor can it satisfactorily be considered the expression of a fundamental contradiction, as supposed to exist between "form" and "content" or between

47. see Poulantzas : *supra*. Ch. 3.

48. see Hall et al : *supra*. Ch. 3.

49. Poulantzas : *ibid*.

50. Hall et al : *ibid*.

51. see A Hunt: "The Sociological movement in Law" (1978) ; for a self-criticism see (1981 a) pp. 64-65 (see n. 46. *supra*.)

"generality" and "specificity".⁵² Yet despite the general redundancy of both principal theoretical approaches in explaining the nature and development of the legal aspect of the State in the conjuncture, the value of certain abstract concepts produced within the "politico-cist" tradition is evident in the further light they bring to bear on the present object of study.

The Law in modern society forms a terrain upon which social forces organize and confront one another; more than this, it is a medium of the political and economic domination of Labour by Capital, providing certain of the fundamental conditions of possibility of generalized commodity production and exchange. Building on the basis of phenomenal forms of Appearance, which constitute the foundation of the spontaneous and ideological consciousness of the masses, the law in the various aspects of its concrete mobilization is able to function as the factor of cohesion of a social totality rent by crisis and internal contradiction - a role always more or less "consensual" and "ideological", just as it is always more or less "repressive" and instrumental in character. Through its fundamental legal institutions and their constant re-appraisal the State becomes a hegemonic force, providing a leadership at once educative, moral and directive

53: social agents have learnt over a period of hundreds of years how to accept their separation from control of production, the same basic lesson being repeated and re-inforced throughout the 1970's; the indispensable precondition of this education has been historically and remains today the mobilization of core legal categories such as "possession" and "ownership", inculcating the virtues of private prop-

52. see discussion of the "State Derivation" school, especially Hirsch and Holloway & Picciotto (supra) Chapters 3. and 4.

53. The basic conception of Hegemony is Gramsci's (see e.g. Prison Notebooks op. cit. pp. 55-60, 104-106), utilised here as it has influenced the "Gramscian" current of Hall et al and to an extent Poulantzas (supra Ch. 3. p. 24 et sequ.)

erty and exclusive right. By these means social agents are able to "live" a relation to their real conditions of exploitation characterized by "freedom" and "equality": The category of "Possession" has simultaneously isolated subjects in Production and unified them in Distribution increasingly since the 15th Century, from which time an identical domestic right of exclusion began to become general, whilst today it is the rhetoric surrounding the category of "Ownership", in both domestic and industrial spheres, that is providing the "cement" which shores up the cracks in the ideological structure.

The law is involved in the conjunctural "juridico-political" function of management, regulation and containment of the crisis to the extent that its terrain is colonised by the various State apparatuses in their efforts to attain certain political and economic objectives: it is the basis of the realization of dominant class interests in that it provides the framework of institutions, practices, values and symbols through which the capitalist mode of production can be further organized and legitimated. The limits of State activity in this respect lie in that the possible fields of adaptation of the legal structure of rights and duties are always circumscribed to a degree, the law existing at any particular time allowing only of a limited range of consistent interpretation.⁵⁴ Whether a transformation the legal structure in accordance with the requirements of socio-economic developments can successfully be accomplished depends on the ability of dominant class interests to win the struggle on the legal terrain by both justifying the need for reforms and achieving the realignment of subject-categories without manifest contradiction. Thus the Judges in interpreting case law, the

54. see supra. Ch. 7. ; hence also the limits to its legitimate application and implementation.

Judicial Committees in ordering "procedural" changes, the various legal functionaries in deciding whether and for what to prosecute, the Law Commission in identifying "problems of reform" and proposing the means of their resolution, and the parliamentary draughtsmen in formulating new legislation - all such representatives of the State apparatus are united in their adoption of law, and of particular fields within it such as Trespass, as a means of social regulation, and all remain constrained to a degree by its previous historical development. The law is a point of focus of the political power of dominant class interests, in this instance by virtue of its embodiment of the institutions of private property and exclusive right, yet it has a specific effectivity in the maintenance of the socio-economic conditions of exclusive control and value-calculation quite independent of the social forces attempting to influence it; it is not open to direct or unlimited "manipulation" by individuals or groups of social agents, as might be supposed in a Voluntarist, Instrumental or Conspiratorial conception of the State.⁵⁵

Once the rights and duties constitutive of the various subject-categories have been determined at any given time, and social agents have been distributed amongst the latter in accordance with the process of legal definition, the effectivity of the legal framework in fulfilling its social function will depend both on the depth of penetration of its ideological interpellations within the fabric of socio-economic organization, and on the implementation of its provisions by "private" subjects or the "public" institutions of the State apparatus. Both aspects are crucial for the continuing

55. [This is not to deny that there have been certain key personalities responsible for initiating fundamental changes during the period; notably Sir Hugh Stable (who upheld the original charge of Conspiracy to Trespass in 1946 and agitated for its reintroduction from 1969), Sir Peter Rawlinson, Lord Hailsham and Lord Denning (see supra. Chs. 5 & 6).]

"education" of social agents, and neither can be reduced to a single facet of domination such as "consent" or "coercion". Consider the following situations: factory workers accept redundancy notices without a struggle; squatters vacate premises after being discovered by the owner or chargee; workers resist the prospect of closure by occupying their factory but concede defeat on the arrival of a Court Order; squatters defy such an order and are evicted by court bailiffs executing process for possession; workers give up their occupation on being warned by the police that a "Criminal Trespass" offence is being committed; squatters defending unlawfully occupied premises with barricades are arrested, fined and imprisoned under the Criminal Law Act; squatting and factory occupations cease to take place because of the demoralisation of the movements by the harsh economic climate or increasing police interventions. In all these instances elements both of "consent" and "coercion" are present, whether the law is invoked in its "private" or "public" aspect or not invoked at all; and in all such cases the State is permanently present, whether in the background as ultimate guarantor of exclusive powers of economic control, or to the fore in breaking occupations through its police force or imposing judgments and sanctions through the Courts. The boundary between overt and covert State activity in maintaining relations of possession and separation is defined according to the legal categories distinguishing "private" from "public" wrong: hence it comes as no surprise that the direct involvement of the State in Trespass law, initially through the conspiracy charge upheld in 1974, should have been justified on the grounds of the "invasion of the domain of the

public".⁵⁶ Wherever acts of Trespass could be brought by legal interpretation within the "public domain", the State proclaimed its right to intervene directly through its Criminal and Public law in the interests of the preservation of public order.

It would appear, therefore, that the conceptual divisions: Public/Private, Criminal/Civil, Coercion/Consent and State/Civil Society are themselves of little value in analyzing the conjunctural development of Trespass, the first two pairs reflecting merely phenomenal legal distinctions and the latter two failing to grasp the complexity and inter-dependence of functions and institutions within the particular object of study. Scientific practice can only ever begin at the level of Appearances, constructing theoretical categories through abstraction which respects the specificity of the concrete social practice under investigation, and ultimately explaining why phenomenal developments take the form they do. The "criminalization" of Trespass in 1974 and 1977 was at once both more and less significant than the crude transition "Civil/Private/Consent" to "Criminal/Public/Coercion" might at first suggest; less so, in that the repressive State apparatus with its Criminal powers and sanctions was already deeply involved in maintaining the exclusive conditions of land possession and separation necessary to the functioning of the capitalist mode of production, and more so in that the introduction of an element of public obligation into the legal structure of exclusive right was an important component in the buttressing of private property during a period when this was under attack in a number of spheres and at a number of different levels, both ideological and immediately practical. The global restructuring of legal relations of possession and separation during the 1970's must, then, be considered in the context

56. see supra. Ch. 6. Section III: "Public order and the domain of the public"; and Section I. D (2) (b).

of the above all hegemonic role of the modern State in securing the continuing domination of Labour by Capital, an important and fundamental contribution within this role being provided specifically by the institutions of Trespass and related law and their conjunctural transformation.

(3) Law as a terrain of struggle

Because capitalist domination is inscribed in the very structure of law, in its institutions and practices maintaining exclusive property right, the greater possessors have a natural advantage in the class struggles waged on its terrain, being able to build on the spontaneous consciousness already given in legal phenomenal forms and their corresponding categories. All the more important, therefore, that scientific practice should de-mystify surface Appearances and reveal the real nature and function - the essential relations, conditions and mechanisms - of categories such as "possession", "ownership" and "exclusive right". This theorisation of law must take place in relation to the concrete socio-economic and legal practices constitutive of the conjuncture, the aim always being to explain why particular phenomena and their development take the form and direction they do. The rejection of abstract and general approaches to theorising law and the State, which inevitably incorporate a reductionism to either the Political or the Economic, does not imply a descent into pragmatism, relativism or voluntarism, rather abstraction is thereby freed from its rationalist enslavement and enabled to produce concrete analyses capable of informing a coherent socialist political practice.

The concrete analysis of Trespass has shown how law is a terrain of struggle upon which socialists can and must organize, both in defence of existing rights and in support of progressive reforms in a more frontal "war of manoeuvre".⁵⁷ It has given rise to a greater understanding of the real nature of law securing relations of possession and separation and provided explanations for its transformation in the 1970's through the notions of relations of possession (legal and socio-economic); legal framework; Interpolation; subject-categories (principal and associate); recruitment and dismissal of social agents; Imbrication; fissuring, contradiction and anachronism; permanent crisis (of the legal framework); buttressing and containment; transformation and re-alignment of subject-categories; ideological and directly instrumental effectivity; ideological celebration and re-affirmation; greater possessors and lesser possessors; the legal aspect of the State; and the hegemonic role of law in political leadership and education. It should now clearly be understood how the economic crisis is reflected specifically in a crisis of legal relations, what the implications of direct action involving trespassory occupation are for control, and why the right to exclude has been buttressed in the manner it has; and more generally, how the undermining of the legal and socio-economic position of the lesser possessors forms part of a broader material and ideological campaign, built on the categories of "ownership" and "exclusive right", to strengthen the institutions of private property and exclusive control. In other words, the theoretical basis for resisting further procedural changes in the Civil law, further Criminalization and continued recruitment of social agents into the subject-category "Licensee", should now be apparent.

57. This and the corresponding conception "war of position" again derive from Gramsci (op. cit.) esp. pp. 108-10, 229-39.

At the same time, the precise knowledge of how and why the law functions as it does in a particular field should enable specific interventions at points of fissuring in the legal framework, such that contradictions are highlighted or neutralized to the benefit of the smaller possessors. In none of the recent cases in which exclusive right has been manifestly in contradiction with some other right - to a certain standard of housing⁵⁸, to protection from violent eviction in the interests of public order,⁵⁹ or to take industrial action in furtherance of a trade dispute⁶⁰ - has the opportunity to make use of the law as a terrain of struggle properly been exploited by the left. Moreover, the objective of interventions in such cases should be not merely to expose contradictions in the legal structure, since this may lead directly to their resolution through the identification of the "problem of reform" and the subsequent introduction of legislation which suffers from none of the weaknesses of the old law, but to constantly challenge the legitimacy of exclusive right and propagandize alternative forms of property and socio-economic organization: the war of position must always simultaneously be a war of manoeuvre.⁶¹ The recent Bathgate decision, for example, should be not merely celebrated as a victory for the workers whose jobs were saved by factory occupation and defiance of the Court injunction, but recognized as an opportunity for reversing the 1970's trend towards the increasingly successful use of the right to exclude against workers at the point of production. What

58. Southwark LBC v. Williams (op. cit.) supra.

59. McPhail v. Persons Unknown (op. cit.) supra.

60. The Bathgate case, discussed supra. & infra. (See Appendix H.)

61.This reflection casting doubt on the usefulness, other than at a very descriptive level, of the conception of struggle on the legal terrain in terms of war of position and manoeuvre. Whilst Capitalism exists, there must remain for socialists both defensive and progressive aspects of legal struggle, but these must be conceived in a relation of interdependence, and not separated according to the strategic judgment that "one or other" is exclusively appropriate in the particular circumstances.

must be fought for here, on a variety of ideological and political levels, is the "inclusive" right of Labour, enshrined in Public statute, not to be excluded from industrial premises when the occupation is in furtherance of a trade dispute, as against the "exclusive" right of Capital, given under Private law, to sack workers and re-deploy capital assets without hindrance from trespassers. The immediate practical implications of successfully establishing this principle may be slight, workers merely having a greater say in the timing or extent of redundancies rather than being able to prevent closures completely, but its greater long-term significance lies in its compromising of Capital's absolute power of exclusive control by means of the qualification of exclusive right. Similarly, the re-newed campaign by ramblers for access to the "means of recreation" should be seen in the broader context of the progressive movement away from private exclusive rights towards common "inclusive" rights "not to be excluded from" lands, revenues and amenities.

The proper assessment of the strategic potential of Trespass and related law, as a terrain of struggle upon which socialist objectives may be effectively advanced, should take account of the following considerations:

(1) Fundamental legal relations are ultimately determined by socio-economic relations. The interpolation of subject-categories within the structure of Society in accordance with such determination means that the scope of effective transformation in the legal framework is limited by the character and level of development of socio-economic

relations.⁶²

(2) Nevertheless, the law has a specific effectivity in defining and thus constituting socio-economic relations, the space therefore being open for its involvement in the process of social transformation.

Property, as a framework of legal institutions governing relations between subjects, will, by virtue of the extensive social imbrication of its constituent rights and duties, continue to play a crucial part in socialist socio-economic organization.⁶³

(3) Given the existence of extensive industrialization and the continued need for production of use-values for circulation rather than immediate consumption, there can be no question of a complete return to the conception of "rights to revenues" directly in respect of land; the physical separation of labour from the fundamental means of production must be accepted as an historical fact. The "New Property" may be expected in the main to take the form of rights not to be excluded from control over decision-making processes, as these concern individuals and groups of social agents in the spheres both of Production and Reproduction.⁶⁴

(4) The New Property might be expected to define and constitute the democratic powers of participation of social agents in the various fields and localities of decision-making, with respect to production, investment, employment, new technology and work-practices, working

62. Failure to appreciate this rudimentary premise of Historical Materialism led Pashukanis to the voluntaristic error of attempting to dismantle legal institutions by fiat and replace them with "economic planning" in the USSR in the 1920's.

63. Thus not only are rights important now (see Hunt (1981 b) pp. 14-17), but they may be expected to remain so in the future, contrary to the idealist position which might, for example, see the "withering away" of law and State accompanying the liberation from class domination.

64. Such rights would take their place amongst other "inclusive" rights "not to be excluded from", e.g., a share in the total resources of society determined according to need, or the means of exercise and re-creation (see Macpherson, op. cit. pp. 133-140, many of whose insights remain valid despite the overall weaknesses in his thesis already discussed).

conditions and hours, and the extent and quality of community services and amenities. The various economic and social criteria of decision-making would transcend the narrowness of value-calculations expressing the operation of hidden market forces.

(5) The success of the New Property in securing these democratic conditions would obviously depend on the suppression of exclusive property right, whether "private" or "public", and correspondingly on the abolition of exclusive forms of economic control - the foundation of the relation of exploitation and the domination of one class by another. Local democracy in the full socialist sense could only be realized in the context of a form of national economic organization oriented towards the production of use-values rather than exchange-values - for the satisfaction of social need rather than for profit.⁶⁵ Investment policy would have to be determined according to the rational calculation of local and national requirements, the financial institutions being under public and common control like the other fundamental means of production and distribution.

(6) In the sphere of Production, therefore, the law of Trespass, with its exclusive right and recovery action, would be redundant, since social ownership and control would be based upon the membership of social agents of a subject-category conferring upon them all both legal possession and the inclusive right not to be excluded from control over the production process. Only in this manner could Macpherson's "right to a job..... to a share in the control of the mass of production resources....to the means of a full human life....

65. Of course the relation between local democracy and national planning, and the democratic institutions that would constitute this relation, remain problematic, and cannot be considered here.

and to a set of social relations and a kind of society"⁶⁶ truly be realized. This does not imply that legal forms of regulation and discipline involving some element of "exclusion" would cease to exist⁶⁷ ; but these would be defined according to Public statute and be of an entirely different character to the exclusive institutions of Trespass and private property right.

(7) In the sphere Reproduction, on the other hand, given the existence of the nuclear family as a continuing aspect of Western European culture, and assuming therefore that common property in the sense of communal organization and control of domestic life is not a strong possibility, the right of exclusion in respect of Land enshrined in Trespass may be expected to survive, as an element within the more general law preserving freedom from interference and protecting the legitimate sphere of immediate exclusive control considered necessary for individual self-development.⁶⁸

These highly abstract and schematic notes should be interpreted with the greatest of caution; they remain useful insofar as they advance the understanding of the present function of Trespass and generate ideas for its appropriation as a progressive terrain of struggle, but do not constitute a "blueprint" for law securing relations of possession and control in an "ideal" socialist society. The strategic ideological potential of Trespass and property law for current socialist struggles lies, paradoxically, in that same quality of imbrica-

66. op. cit. pp. 136-138.

67. Even the inclusive feudal rights to revenues had an "exclusive" aspect, for example in relation to the lord or the Manor attempting to enclose for Common and the Waste, who would be met with an action claiming "novel disseisin". (see supra).

68. In this respect we welcome Macpherson's general argument for the "Maximization" of Democracy, involving the corresponding maximization of "Negative" and "Positive" freedoms; the rights to privacy and control over domestic environment and information about oneself should not be confused with the right of Capital to exclude Labour from control of production: see (op. cit.) Essays I & V., pp. 3-24 and 95-120.

tion which enables these institutions to perform so satisfactorily for Capital the function of socio-economic regulation. When contradictions expressing the fissuring of the legal framework become manifest, and as other opportunities present themselves, the aim of socialist interventions should always be to reveal more clearly the fundamental contradiction between the Domestic and Industrial spheres in their incongruous alignment of subject-categories with social agents: the controlling right to exclude is popularly recognized as an obvious component of an individual's powers at the level of Reproduction, yet the only significant right enjoyed by that same individual at the level of Production is the right to sell labour-power as a commodity in return for a wage. The individual is possessor and controller of his/her immediate conditions of existence in the domestic sphere, and yet simultaneously denied these basic dimensions of self-direction, which remain the property of Capital, in the industrial sphere. Similarly, rights of ownership "obviously" connote control at the level of reproduction, yet mysteriously involve no fundamental control whatsoever over the production process when proclaimed at this level. The Capitalist State depends for its hegemonic domination - for its intellectual, educational and moral leadership - on the continuing effectivity of phenomenal appearances in persuading social agents that the "Freedom, Equality and Property" they are supposed increasingly to enjoy in the domestic sphere is constitutive of their entire social existence. But there is no ultimate reason, other than that provided by the existence of Capitalism itself, why social agents should not be possessors and controllers in every aspect of their lives. This is the ideological foundation upon which the struggle for the New Property must be built.

The economic crisis, and forms of direct action developed in response to efforts to resolve it, laid bare for a brief moment during the 1970's the foundations of Capitalist control in the exclusive right enshrined in Trespass law. But as the crisis in legal and socio-economic relations of possession has for the moment more or less satisfactorily been contained, the focus of attention has turned in the 1980's to the industrial sphere, where a new "problem of reform" has been defined as the "anachronistic" immunity enjoyed by Trade Unions and workers from Civil actions in Tort. The struggle to defend fundamental Trade Union rights in the current situation dictates the need here for a concrete analysis capable of informing a coherent socialist political practice. Yet the vast subject of the theoretical relation between, on the one hand, the "right to exclude" contained in Trespass, and on the other, the similarly "exclusive" right claimed by Capital under private law to protect the "ordinary course" of capital accumulation against tortious "interference" by organized labour, remains largely unexplored. This serves as a salutary reminder that the foregoing concrete analysis of Trespass is but a first step, albeit a crucial one, towards the broader understanding of the nature and function of the Totality of law in the conjuncture, and that the proper use by socialists of law as a terrain of struggle must depend upon the further production of other such theoretically informed analyses.⁶⁹

69. The resulting "Alternative legal Strategy" would then be a central component of the "Alternative Economic and Political Strategy" currently under discussion on the left.

Concluding Remarks

The centrality of law in modern social relations requires increasingly the theoretical explanation of its complex nature and function, such that political and socio-legal interventions may be properly informed. Yet Marxists have been unable to participate effectively in current debates and struggles in the field of law, because they have remained mesmerised by a rationalist conception of Theory and its relation to the concrete which has inhibited the concrete analysis of specific legal phenomena. The solution to the present impasse is not, however, the abandonment of Historical Materialism, but the re-establishment of Marxism as a scientific Method of Investigation, capable of explaining the diversity of social phenomena whilst always respecting the specificity of the concrete object under consideration. The present examination of the contemporary institutions and practices of Trespass and related law is an initial contribution within what remains an as yet largely unfulfilled project. Whether the potential of this initiative is to be fully realized depends on the willingness of Marxists with detailed knowledge of the law to undertake concrete research in the variety of legal fields that constitute the focii of current struggles.

APPENDICES

- Appendix A** The Making of Marx's Capital : Changes in the Plan
- Appendix B** Figurative representation of Marx's Method
- Appendix C** Details relating to the Squatting Phenomenon
- Appendix D** Summary proceedings for possession of Land (Order 113) with Forms
- Appendix E** Actions for Recovery and Order 26. in the County Courts
- Appendix F** Criminal Law Act 1977, Part II : Offences Relating to Entering and remaining on Property
- Appendix G** Conditions of the Development of Trespass Law in the 1970's
- Appendix H** When is a Trespass not a Trespass? A Legal Paradox for the 1980's.

THE MAKING OF MARX'S CAPITAL : CHANGES IN THE PLAN.

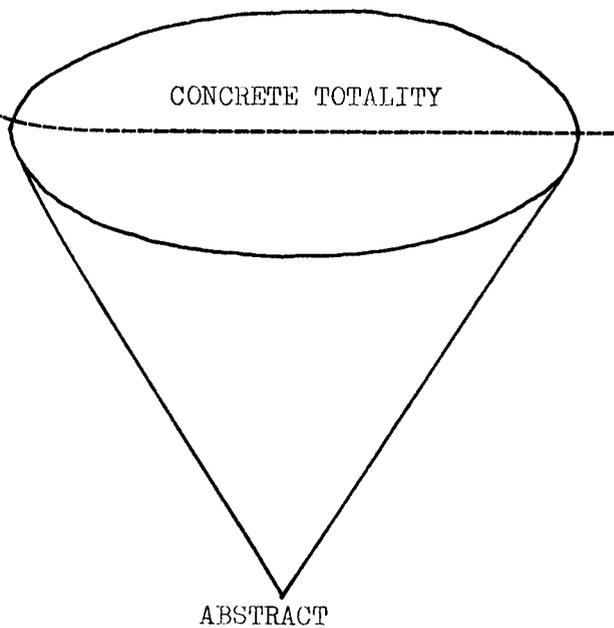
56 • *The Making of Marx's 'Capital'*

THE ORIGINAL PLAN (6 Books)	THE CHANGED PLAN
I. ON CAPITAL	'CAPITAL' (3 Volumes):
a) Capital in general	
1) Production process	I. Production process of capital (Sections):
	1) Commodity and money
	2) Transformation of money into capital
	3-5) Absolute and relative surplus-value
2) Circulation process	6) Wage
3) Profit and interest	7) Accumulation process
b) Competition	II. Circulation process of capital
c) Credit system	III. Process of capitalist production as a whole.
d) Share-Capital	1-3) Profit and profit rate
II. ON LANDED PROPERTY	4) Merchant capital
	5) Interest and credit
III. ON WAGE LABOUR	6) Ground-Rent
	7) Revenues.
IV. STATE	
V. FOREIGN TRADE	
VI. WORLD MARKET	

Unbroken lines : changes within the first three books
Dotted line : changes within the *Book on Capital*.

FIGURATIVE REPRESENTATION OF MARX'S METHOD.

Fig.1.



SOCIAL PRACTICE.

APPEARANCES/PHENOMENAL FORMS.

Concentration of many determinations and relations, unity of the diverse.

Sphere of CIRCULATION/EXCHANGE.

Bourgeois IDEOLOGY/spontaneous consciousness

SCIENTIFIC PRACTICE/
SCIENTIFIC ABSTRACTION.

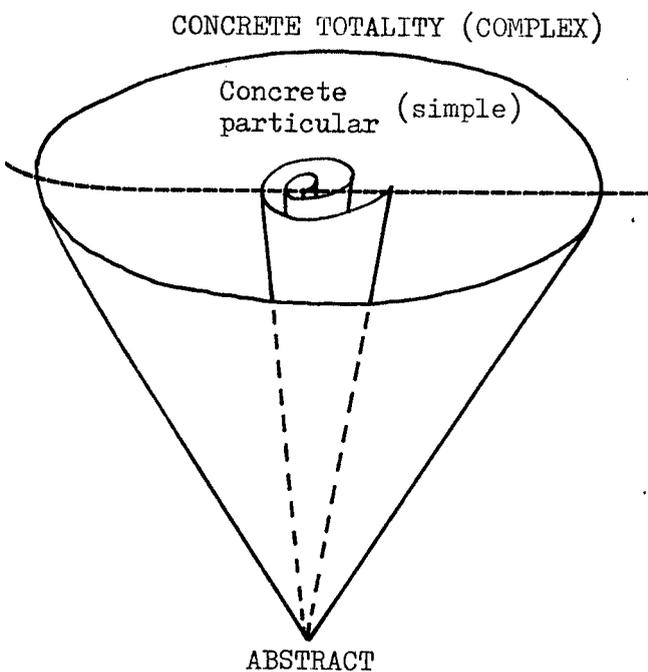
ESSENCES/REAL RELATIONS, DETERMINATIONS.

Mechanisms and Conditions of Forms/
Appearances.

Sphere of PRODUCTION.

Marxist SCIENCE.

Fig.2.

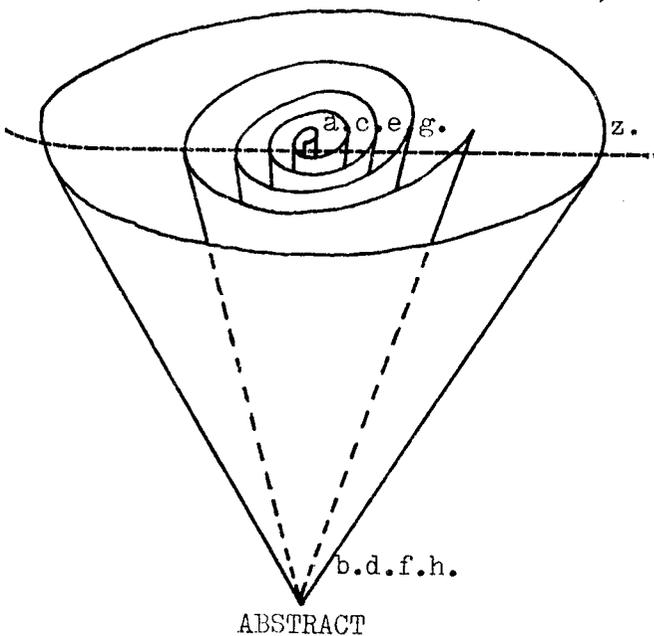


Point of departure in
Simple concrete particular ;

- (1) Spiral movement outwards encompasses
Complex concrete totality ; through :
- (2) ABSTRACTION (analysis and synthesis),
 Reformulation of categories, constant
 Oscillation between abstract and
 concrete (priority to the former).

Fig.3. Illustration of Capital I. Ch. I.

CONCRETE TOTALITY (COMPLEX)



(z. = Concrete Totality of social practice)

a. = Concrete Particular, the simplest form of social practice : the commodity given as the initial object of scientific practice by this criterion.

c. Exchange-value given as an object of analysis through results of abstraction

e. Exchange-value further examined as an object in more complex forms.

g. Explanation of Simple, General, Expanded and Money forms of exchange-value ; totality of exchange-value ; why and how real relations assume such forms. (Submission of Analysis to the Concrete in section 4.)

b. Analysis of the Commodity through Abstraction (scientific practice) : Use-value and Exchange-value (Value).

d. Analysis of Exchange-value as Form of appearance of Value : the commensuration of commodities and concrete labours, the determination by abstract labour-time.

f. Analysis of the more complex forms, return to the concrete.

h. The Fetishism of Commodities ; the double concealment of Value by the Money-form of Exchange-value ; return to the Concrete with explanation of bourgeois Ideology and spontaneous consciousness.

DETAILS RELATING TO THE SQUATTING PHENOMENON.

TABLE 1. D. of E. Survey.

Table	
Major repairs by squatters	
Work carried out on squats (DOE survey) ^a	
	Percentage
Wiring	35
Plumbing/gas	32
Roofing	15
Replacing windows	38
Replacing floorboards	12
Repairing ceilings	8
Redecoration	55
Removing rubbish	25
Plastering	13
Other	1
None	23

Many squatters had undertaken more than one of these repairs.

Fig. 1. From Wares et al. p. 230. Source: FSAS; ASE; SHHRL.

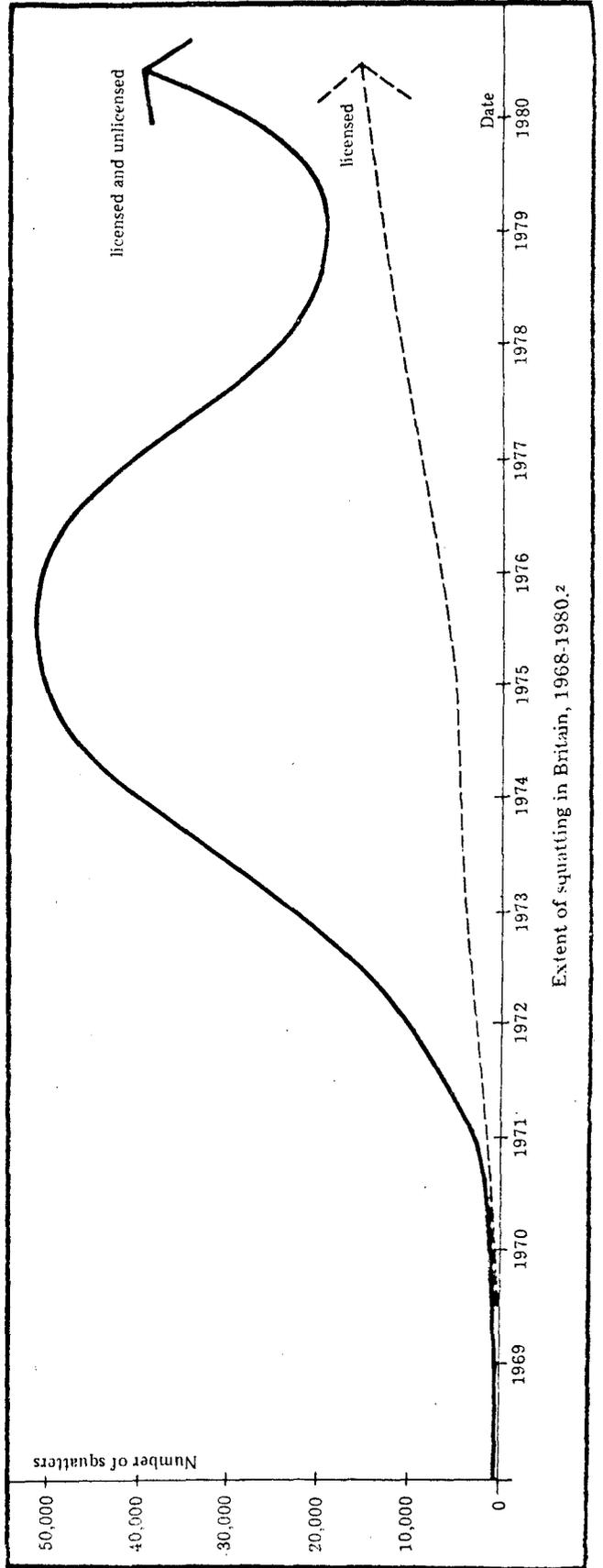


TABLE 2.

Table
Housing starts 1945-1980 in Great Britain
(1,000s)

	Council*	Private	Total
1951	192	27	219
1955	185	128	313
1960	126	183	309
1965	181	211	392
1970	154	165	319
1975	174	149	323
1976	171	155	325
1977	132	135	267
1978	107	157	265
1979	80	140	220
1980 (prediction)	50	110	160

(Source: *Housing Statistics, Housing and Construction Statistics*, DOE)
* including housing associations

Fig. 2. Source : The Guardian ; 5.2.82.

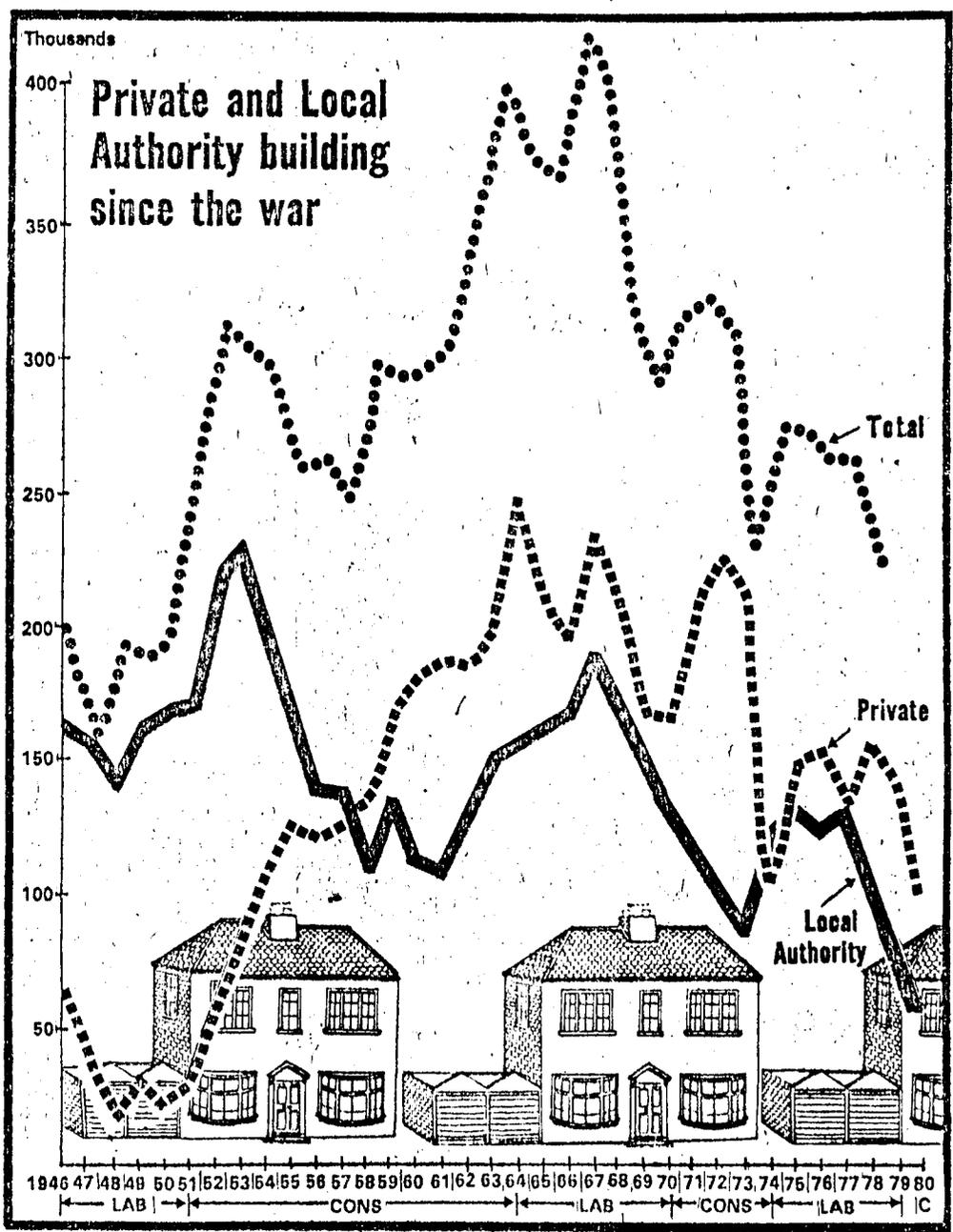


TABLE 3.

Table Renovations with the aid of a grant or subsidy in England (both public and private) (thousands)	
1974	270
1975	126
1976	121
1977	113
1978	134
1979	160

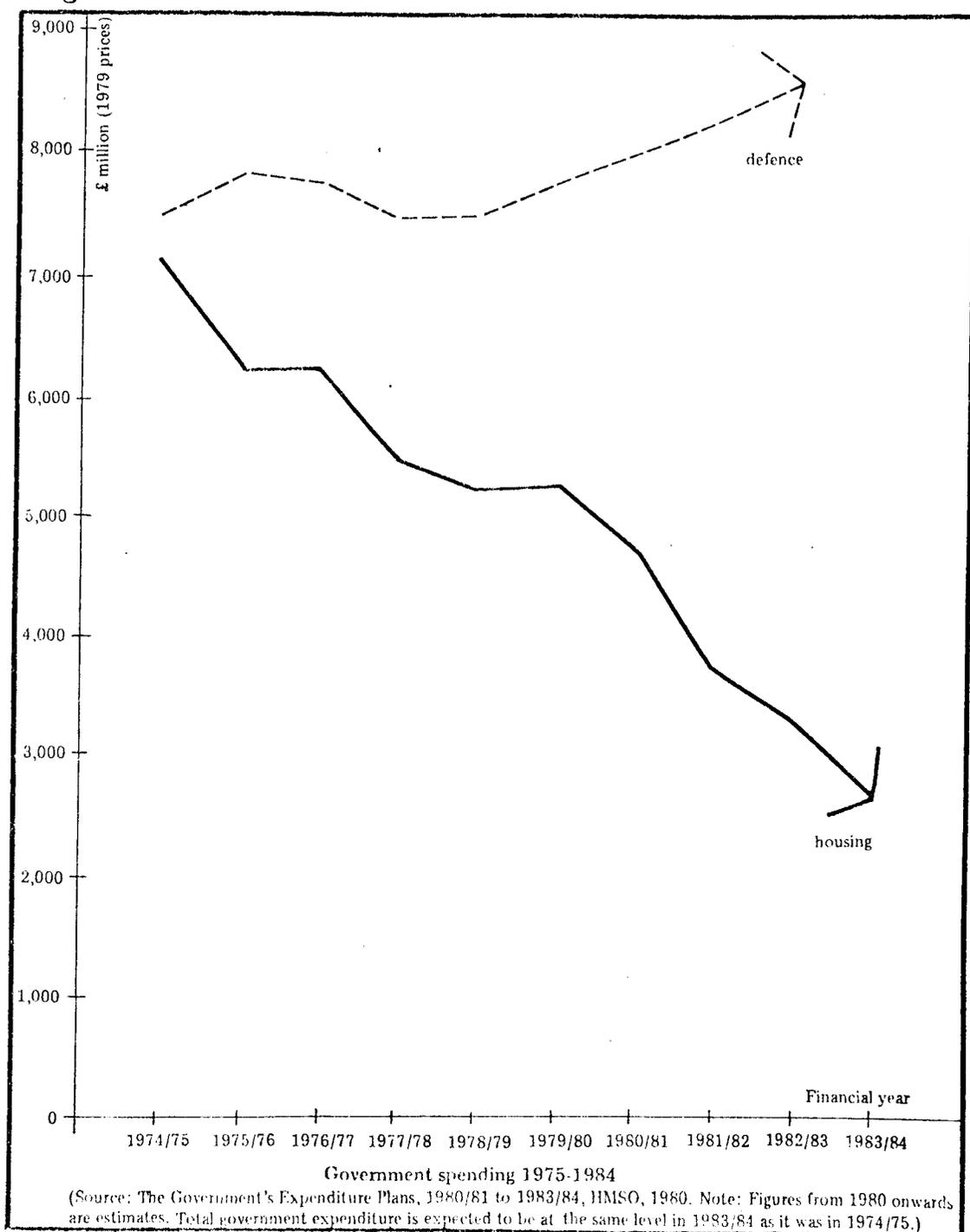
(Source: *Housing and Construction Statistics* DOE)

TABLE 4.

Table Number of homeless households accepted by councils (England)	
1976	33,720
1977	31,810
1978	53,110
1979	56,020

(Source: *Housing and Construction Statistics* DOE)

Fig. 3.



SUMMARY PROCEEDINGS FOR POSSESSION OF LAND (ORDER 113) WITH FORMS.

ORDER 113

(Added by R. S. C. (Amendment No. 2) 1970 (S. I. 1970 No. 944).)

SUMMARY PROCEEDINGS FOR POSSESSION OF LAND

Proceedings to be brought by originating summons (O. 113, r. 1)

113/1

1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

Forms of originating summons (O. 113, r. 2)

113/2

2.—(1) Subject to paragraph (2), the originating summons shall be in Form No. 10 in Appendix A.

(2) Where the person claiming possession does not know the name of every person occupying the land for the purpose of making him a defendant, the originating summons shall be in Form No. 11A in Appendix A.

(3) No appearance need be entered to the originating summons.

Para. (2) was substituted by R.S.C. (Amendment No. 2) 1977 (S.I. 1977 No. 960).

Affidavit in support (O. 113, r. 3)

113/3

3. The plaintiff shall file in support of the originating summons an affidavit stating—

- (a) his interest in the land;
- (b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
- (c) where the summons is in Form No. 11A, that he does not know the name of any person occupying the land who is not named in the summons.

Amended by R.S.C. (Amendment No. 2) 1977 (S.I. 1977 No. 960).

Service of originating summons (O. 113, r. 4)

113/4

4.—(1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him—

- (a) in accordance with Order 10, rule 5; or
- (b) by leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or
- (c) in such other manner as the Court may direct.

(2) A summons in Form No. 11A shall, in addition to being served on the named defendants (if any) in accordance with paragraph (1), be served, unless the Court otherwise directs, by—

- (a) affixing a copy of the summons to the main door or other conspicuous part of the premises; and
- (b) if practicable, inserting through the letter-box at the premises

[O. 113, rr. 4-8

SUMMARY PROCEEDINGS FOR POSSESSION OF LAND

a copy of the summons enclosed in a sealed envelope addressed to "the occupiers."

(3) Order 28, rule 3 shall not apply to proceedings under this order.

Amended by R.S.C. (Amendment No. 2) 1977 (S.I. 1977 No. 960).

Application by occupier to be made a party (O. 113, r. 5)

5. Without prejudice to Order 15, rules 6 and 10, any person not named as a defendant who is in occupation of the land and wishes to be heard on the question whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant. 113/5

Order for possession (O. 113, r. 6)

6.—(1) A final order shall not be made on the originating summons except by a judge in person and shall, except in case of urgency and by leave of the Court, not be made less than 5 clear days after the date of service. 113/6

(2) An order for possession in proceedings under this Order shall be in Form No. 42A.

Amended by R.S.C. (Amendment No. 2) 1977 (S.I. 1977 No. 960).

Writ for possession (O. 113, r. 7)

7.—(1) Order 45, rule 3 (2), shall not apply in relation to an order for possession under this Order but no writ of possession to enforce such an order shall be issued after the expiry of three months from the date of the order without the leave of the Court. 113/7

An application for leave may be made *ex parte* unless the Court otherwise directs.

(2) The writ of possession shall be in Form No. 66A.

Amended by R.S.C. (Amendment No. 2) 1977 (S.I. 1977 No. 960).

Setting aside order (O. 113, r. 8)

8. The judge may, on such terms as he thinks just, set aside or vary any order made in proceedings under this Order. 113/8

ACTIONS FOR RECOVERY AND ORDER 26 IN THE COUNTY COURTS.

Table 5 : Actions for Recovery in the County Courts

	Date:	Filed:	Orders made:
	1967	38,275	25,430
	68	40,337	26,721
	69	44,062	28,721
	70	46,782	31,724
	71	54,588	36,852
	72	63,408	42,295
	73	77,376	53,938
	74	90,413	65,588
	75	108,773	71,781
	76	119,500	80,730
	77	126,723	84,560
	78	111,026	72,523
	79	111,328	71,423
	80	117,230	78,803

	Residential		Non-Residential	
	Filed:	Orders made:	Filed:	Orders made:
1978	109,208	71,000+ *	1,818	1,261
79	109,578	70,000+	1,749	1,409
80	115,710	77,000+	1,520	2,180

* See Table 7. 1978-80

Table 6 : Use of Order 26. in the County Courts.

	1973	776	605
	74	1,620	1,328
	75	3,689	3,096
	76	4,756	4,186
	77	4,454	3,838

	Residential		Non-Residential	
	1978	3,736	3,467	177
79	4,511	3,965	226	214
80	5,683	4,759	289	258

Source : Judicial Statistics.

TABLE 7. Judicial Statistics - County Court. (E) xii.

(xxii) Actions for Recovery of Land*

	Number	
	1968	1967
Actions entered	40,337	38,275
Determined after trial	8,875	9,661
Disposed of by consent or on admission or in default of appearance or defence	18,183	16,879
Orders for possession made	26,721	25,430
Orders for possession refused	515	534

	Number	
	1969	1968
Actions entered	44,062	40,337
Determined after trial	8,441	8,875
Disposed of by consent or on admission or in default of appearance or defence	22,648	18,183
Orders for possession made	28,768	26,721
Orders for possession refused	509	515
Struck out, withdrawn or otherwise disposed of	11,389	---

Nature of Proceedings	Number	
	1970	1969
Actions entered	46,782	44,062
Determined after trial	9,850	8,441
Disposed of by consent or on admission or in default of appearance or defence	24,003	22,648
Orders for possession made	31,724	28,768
Orders for possession refused	644	509
Struck out, withdrawn or otherwise disposed of	11,211	11,389

Nature of Proceedings	Number	
	1971	1970
Actions entered	54,588	46,782
Determined after trial	11,011	9,850
Disposed of by consent or on admission or in default of appearance or defence	28,922	24,003
Orders for possession made	36,852	31,724
Orders for possession refused	446	644
Struck out, withdrawn or otherwise disposed of	11,474	11,211

Nature of Proceedings	Number	
	1972	1971
Actions entered	63,408	54,588
Determined after trial	12,815	11,011
Disposed of by consent or on admission or in default of appearance or defence	32,034	28,922
Orders for possession made	42,295	36,852
Orders for possession refused	780	446
Struck out, withdrawn or otherwise disposed of	13,293	11,474

Nature of Proceedings	Number	
	1973	1972
Actions entered	77,376	63,408
Determined after trial	13,517	12,815
Disposed of by consent or on admission or in default of appearance or defence	44,328	32,034
Orders for possession made	53,938	42,295
Orders for possession refused	688	780
Struck out, withdrawn or otherwise disposed of	17,170	13,293

Nature of proceedings	Number	
	1974	1973
Actions entered ¹	90,413	77,376
Determined after trial ²	14,950	13,517
Disposed of by consent or on admission or in default of appearance or defence ²	51,931	44,328
Orders for possession made	65,588	53,938
Orders for possession refused	1,242	688
Struck out, withdrawn or otherwise disposed of	18,825	17,170

Nature of proceedings	Number	
	1975	1974
Actions entered ⁽¹⁾	108,773	90,413
Determined after trial ⁽²⁾	17,446	14,950
Disposed of by consent or on admission or in default of appearance or defence ⁽²⁾	55,306	51,931
Orders for possession made	71,781	65,588
Orders for possession refused	971	1,242
Struck out, withdrawn or otherwise disposed of	26,236	18,825

Nature of proceedings	Number	
	1976	1975
Actions entered	119,500	109,113
Determined after trial	19,930	17,446
Disposed of by consent or on admission or in default of appearance or defence	63,184	55,306
Orders for possession made	80,730	72,049
Orders for possession refused	975	971
Struck out, withdrawn or otherwise disposed of	31,835	26,308

Nature of proceedings	Number	
	1977	1976
Actions entered	126,727	119,500
Determined after trial	19,930
Disposed of by consent or on admission or in default of appearance or defence	63,184
Orders for possession made	84,560	80,730
Orders for possession refused	930	975
Struck out, withdrawn or otherwise disposed of	31,172	31,835

Distinguishing Residential from other Premises.

Nature of proceedings	Number	
	1979	1978
Actions entered	111,328	111,026
Orders for possession made	71,423	72,523
Orders for possession refused	953	897
Actions for possession of residential premises:		
Entered during year	109,579	109,208
Orders for possession made—suspended for 3 months or less	64,818	67,979
Orders for possession made—suspended for more than 3 months	5,196	3,283
Orders for possession refused	920	855
Actions for possession of other premises:		
Entered during year	1,749	1,818
Orders for possession made	1,409	1,261
Orders for possession refused	33	42

Nature of proceedings	Number	
	1980	1979
Actions entered	117,230	111,328
Orders for possession made	78,803	71,423
Orders for possession refused	1,123	953
Actions for possession of residential premises:		
Entered during year	115,710	109,579
Orders for possession made—suspended for 3 months or less	69,887	64,818
Orders for possession made—suspended for more than 3 months	6,736	5,196
Orders for possession refused	1,016	920
Actions for possession of other premises:		
Entered during year	1,520	1,749
Orders for possession made	2,180	1,409
Orders for possession refused	107	33

TABLE 8. Judicial Statistics - County Court.

TABLE B.21(vi). Proceedings under Order 26, County Court Rules. Numbers of proceedings commenced during 1973 and 1974; the number disposed of and in what manner, showing the results

Part I.—Proceedings for the recovery of possession of land occupied by trespassers.

Nature of proceedings	1974	1973
Number of applications filed ^{1 2 3}	1,620	776
Number determined after trial ^{1 2 4}	604	361
Number disposed of by consent, by admission or in default of appearance or defence ^{1 2 4}	737	290
Number of orders for possession made ^{1 2}	1,328	605
Number of orders for possession refused ^{1 2}	37	14

Nature of proceedings	1975	1974
Number of applications filed ⁽¹⁾⁽²⁾⁽³⁾	3,689	1,620
Number determined after trial ⁽¹⁾⁽²⁾⁽⁴⁾	1,527	604
Number disposed of by consent, by admission or in default of appearance or defence ⁽¹⁾⁽²⁾⁽⁴⁾	1,618	737
Number of orders for possession made ⁽¹⁾⁽²⁾	3,096	1,328
Number of orders for possession refused ⁽¹⁾⁽²⁾	49	37

Nature of proceedings	1976	1975
Number of applications filed	4,756	3,689
Number determined after trial	2,124	1,527
Number disposed of by consent, by admission or in default of appearance or defence	2,142	1,618
Number of orders for possession made	4,186	3,096
Number of orders for possession refused	80	49

Nature of proceedings	1977	1976
Number of applications filed	4,454	4,756
Number determined after trial	2,124
Number disposed of by consent, by admission or in default of appearance or defence	2,142
Number of orders for possession made	3,838	4,186
Number of orders for possession refused	66	80

Distinguishing Residential from other Premises.

Nature of proceedings	1978	1977
Residential Premises		
Number of applications filed	3,736	4,259
Number of orders for possession made	3,467	3,467
Number of orders for possession refused	78	60
Other Premises		
Number of applications filed	177	195
Number of orders for possession made	162	159
Number of orders for possession refused	9	6

Nature of proceedings	1979	1978
Residential Premises		
Number of applications filed	4,511	3,736
Number of orders for possession made	3,965	3,467
Number of orders for possession refused	85	78
Other Premises		
Number of applications filed	226	177
Number of orders for possession made	214	162
Number of orders for possession refused	7	9

Nature of proceedings	1980	1979
Residential Premises:		
Number of applications filed	5,683	4,511
Number of orders for possession made	4,759	3,965
Number of orders for possession refused	139	85
Other Premises:		
Number of applications filed	289	226
Number of orders for possession made	358	214
Number of orders for possession refused	6	7

CRIMINAL LAW ACT 1977, PART II : OFFENCES
RELATING TO ENTERING AND REMAINING ON PROPERTY.



Criminal Law: 6

Statutes in Force

Official Revised Edition

Criminal Law Act 1977

CHAPTER 45

Ss. 6-13, 65(1) (3) (7)-(10), Sch. 14 para. 5

Revised to 1st June 1978

BY AUTHORITY

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CRIMINAL LAW ACT 1977 (c. 45)

Part II, s.6

An Act to amend the law of England and Wales with respect to criminal conspiracy; to make new provision in that law, in place of the provisions of the common law and the Statutes of Forcible Entry, for restricting the use or threat of violence for securing entry into any premises and for penalising unauthorised entry or remaining on premises in certain circumstances; otherwise to amend the criminal law, including the law with respect to the administration of criminal justice; to provide for the alteration of certain pecuniary and other limits; to amend section 9(4) of the Administration of Justice Act 1973, the Legal Aid Act 1974, the Rabies Act 1974 and the Diseases of Animals (Northern Ireland) Order 1975 and the law about juries and coroners' inquests; and for connected purposes. [29th July 1977]

PART II

OFFENCES RELATING TO ENTERING AND REMAINING ON
PROPERTY

6.—(1) Subject to the following provisions of this section, any person who, without lawful authority, uses or threatens violence for the purpose of securing entry into any premises for himself or for any other person is guilty of an offence, provided that—

Violence for
securing entry.

(a) there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure; and

(b) the person using or threatening the violence knows that that is the case.

(2) The fact that a person has any interest in or right to possession or occupation of any premises shall not for the purposes of subsection (1) above constitute lawful authority for the use or threat of violence by him or anyone else for the purpose of securing his entry into those premises.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove—

(a) that at the time of the alleged offence he or any other person on whose behalf he was acting was a displaced residential occupier of the premises in question; or

CRIMINAL LAW ACT 1977 (c. 45)**Part II, ss.6, 7**

(b) that part of the premises in question constitutes premises of which he or any other person on whose behalf he was acting was a displaced residential occupier and that the part of the premises to which he was seeking to secure entry constitutes an access of which he or, as the case may be, that other person is also a displaced residential occupier.

(4) It is immaterial for the purposes of this section—

(a) whether the violence in question is directed against the person or against property; and

(b) whether the entry which the violence is intended to secure is for the purpose of acquiring possession of the premises in question or for any other purpose.

(5) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both.

(6) A constable in uniform may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of an offence under this section.

(7) Section 12 below contains provisions which apply for determining when any person is to be regarded for the purposes of this Part of this Act as a displaced residential occupier of any premises or of any access to any premises.

Adverse
occupation of
residential
premises.

7.—(1) Subject to the following provisions of this section, any person who is on any premises as a trespasser after having entered as such is guilty of an offence if he fails to leave those premises on being required to do so by or on behalf of—

(a) a displaced residential occupier of the premises; or

(b) an individual who is a protected intending occupier of the premises by virtue of subsection (2) or subsection (4) below.

(2) For the purposes of this section an individual is a protected intending occupier of any premises at any time if at that time—

(a) he has in those premises a freehold interest or a leasehold interest with not less than 21 years still to run and he acquired that interest as a purchaser for money or money's worth; and

(b) he requires the premises for his own occupation as a residence; and

(c) he is excluded from occupation of the premises by a person who entered them, or any access to them, as a trespasser; and

(d) he or a person acting on his behalf holds a written statement—

CRIMINAL LAW ACT 1977 (c. 45)

Part II, s.7

- (i) which specifies his interest in the premises; and
- (ii) which states that he requires the premises for occupation as a residence for himself; and
- (iii) with respect to which the requirements in subsection (3) below are fulfilled.

(3) The requirements referred to in subsection (2)(d)(iii) above are—

- (a) that the statement is signed by the person whose interest is specified in it in the presence of a justice of the peace or commissioner for oaths; and
- (b) that the justice of the peace or commissioner for oaths has subscribed his name as a witness to the signature;

and a person is guilty of an offence if he makes a statement for the purposes of subsection (2)(d) above which he knows to be false in a material particular or if he recklessly makes such a statement which is false in a material particular.

(4) For the purposes of this section an individual is also a protected intending occupier of any premises at any time if at that time—

- (a) he has been authorised to occupy the premises as a residence by an authority to which this subsection applies; and
- (b) he is excluded from occupation of the premises by a person who entered the premises, or any access to them, as a trespasser; and
- (c) there has been issued to him by or on behalf of the authority referred to in paragraph (a) above a certificate stating that the authority is one to which this subsection applies, being of a description specified in the certificate, and that he has been authorised by the authority to occupy the premises concerned as a residence.

(5) Subsection (4) above applies to the following authorities:—

- (a) any body mentioned in section 14 of the Rent Act 1977 1977 c. 42. (landlord's interest belonging to local authority etc.);
- (b) the Housing Corporation; and
- (c) a housing association, within the meaning of section 189(1) of the Housing Act 1957, which is for the time being either 1957 c. 56. registered in the register of housing associations established under section 13 of the Housing Act 1974 or specified in an 1974 c. 44. order made by the Secretary of State under paragraph 23 of Schedule 1 to the Housing Rents and Subsidies Act 1975. 1975 c. 6.

(6) In any proceedings for an offence under subsection (1) above it shall be a defence for the accused to prove that he believed that the

CRIMINAL LAW ACT 1977 (c. 45)**Part II, ss.7, 8**

person requiring him to leave the premises was not a displaced residential occupier or protected intending occupier of the premises or a person acting on behalf of a displaced residential occupier or protected intending occupier.

(7) In any proceedings for an offence under subsection (1) above it shall be a defence for the accused to prove—

- (a) that the premises in question are or form part of premises used mainly for non-residential purposes; and
- (b) that he was not on any part of the premises used wholly or mainly for residential purposes.

(8) In any proceedings for an offence under subsection (1) above where the accused was requested to leave the premises by a person claiming to be or to act on behalf of a protected intending occupier of the premises—

- (a) it shall be defence for the accused to prove that, although asked to do so by the accused at the time the accused was requested to leave, that person failed at that time to produce to the accused such a statement as is referred to in subsection (2)(d) above or such a certificate as is referred to in subsection (4)(c) above; and
- (b) any document purporting to be a certificate under subsection (4)(c) above shall be received in evidence and, unless the contrary is proved, shall be deemed to have been issued by or on behalf of the authority stated in the certificate.

(9) Any reference in the preceding provisions of this section other than subsections (2) to (4) above, to any premises includes a reference to any access to them, whether or not any such access itself constitutes premises, within the meaning of this Part of this Act; and a person who is a protected intending occupier of any premises shall be regarded for the purposes of this section as a protected intending occupier also of any access to those premises.

(10) A person guilty of an offence under subsection (1) or (3) above shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both.

(11) A constable in uniform may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of an offence under subsection (1) above.

Trespassing
with a weapon
of offence.

8.—(1) A person who is on any premises as a trespasser, after having entered as such, is guilty of an offence if, without lawful authority or reasonable excuse, he has with him on the premises any weapon of offence.

CRIMINAL LAW ACT 1977 (c. 45)

Part II, ss.8, 9

(2) In subsection (1) above "weapon of offence" means any article made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use.

(3) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £1,000 or to both.

(4) A constable in uniform may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an offence under this section.

9.—(1) Subject to subsection (3) below, a person who enters or is on any premises to which this section applies as a trespasser is guilty of an offence. Trespassing on premises of foreign missions, etc.

(2) This section applies to any premises which are or form part of—

(a) the premises of a diplomatic mission within the meaning of the definition in Article 1(i) of the Vienna Convention on Diplomatic Relations signed in 1961 as that Article has effect in the United Kingdom by virtue of section 2 of and Schedule 1 to the Diplomatic Privileges Act 1964; 1964 c. 81.

(b) consular premises within the meaning of the definition in paragraph 1(j) of Article 1 of the Vienna Convention on Consular Relations signed in 1963 as that Article has effect in the United Kingdom by virtue of section 1 of and Schedule 1 to the Consular Relations Act 1968; 1968 c. 18.

(c) any other premises in respect of which any organisation or body is entitled to inviolability by or under any enactment; and

(d) any premises which are the private residence of a diplomatic agent (within the meaning of Article 1(e) of the Convention mentioned in paragraph (a) above) or of any other person who is entitled to inviolability of residence by or under any enactment.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he believed that the premises in question were not premises to which this section applies.

(4) In any proceedings for an offence under this section a certificate issued by or under the authority of the Secretary of State stating that any premises were or formed part of premises of any description mentioned in paragraphs (a) to (d) of subsection (2) above at the time of the alleged offence shall be conclusive evidence that the premises were or formed part of premises of that description at that time.

(5) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both.

CRIMINAL LAW ACT 1977 (c. 45)**Part II, ss.9-11**

(6) Proceedings for an offence under this section shall not be instituted against any person except by or with the consent of the Attorney General.

(7) A constable in uniform may arrest without warrant any one who is, or whom he, with reasonable cause, suspects to be, in the act of committing an offence under this section.

Obstruction of
court officers
executing
process for
possession
against
unauthorised
occupiers.
1887 c. 55.

10.—(1) Without prejudice to section 8(2) of the Sheriffs Act 1887 but subject to the following provisions of this section, a person is guilty of an offence if he resists or intentionally obstructs any person who is in fact an officer of a court engaged in executing any process issued by the High Court or by any county court for the purpose of enforcing any judgment or order for the recovery of any premises or for the delivery of possession of any premises.

(2) Subsection (1) above does not apply unless the judgment or order in question was given or made in proceedings brought under any provisions of rules of court applicable only in circumstances where the person claiming possession of any premises alleges that the premises in question are occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation of the premises without the licence or consent of the person claiming possession or any predecessor in title of his.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he believed that the person he was resisting or obstructing was not an officer of a court.

(4) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both.

(5) A constable in uniform or any officer of a court may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, guilty of an offence under this section.

(6) In this section "officer of a court" means—

(a) any sheriff, under sheriff, deputy sheriff, bailiff or officer of a sheriff; and

(b) any bailiff or other person who is an officer of a county court within the meaning of the County Courts Act 1959.

1959 c. 22.

Power of entry
for the purposes
of this Part of
this Act.

11. For the purpose of arresting a person under any power conferred by any provision of this Part of this Act other than section 9(7) above a constable in uniform may enter (if need be, by force) and search any premises where that person is or where the constable, with reasonable cause, suspects him to be.

CRIMINAL LAW ACT 1977 (c. 45)

Part II, s.12

12.—(1) In this Part of this Act—

Supplementary provisions.

(a) “premises” means any building, any part of a building under separate occupation, any land ancillary to a building, the site comprising any building or buildings together with any land ancillary thereto, and (for the purposes only of sections 10 and 11 above) any other place; and

(b) “access” means, in relation to any premises, any part of any site or building within which those premises are situated which constitutes an ordinary means of access to those premises (whether or not that is its sole or primary use).

(2) References in this section to a building shall apply also to any structure other than a movable one, and to any movable structure, vehicle or vessel designed or adapted for use for residential purposes; and for the purposes of subsection (1) above—

(a) part of a building is under separate occupation if anyone is in occupation or entitled to occupation of that part as distinct from the whole; and

(b) land is ancillary to a building if it is adjacent to it and used (or intended for use) in connection with the occupation of that building or any part of it.

(3) Subject to subsection (4) below, any person who was occupying any premises as a residence immediately before being excluded from occupation by anyone who entered those premises, or any access to those premises, as a trespasser is a displaced residential occupier of the premises for the purposes of this Part of this Act so long as he continues to be excluded from occupation of the premises by the original trespasser or by any subsequent trespasser.

(4) A person who was himself occupying the premises in question as a trespasser immediately before being excluded from occupation shall not by virtue of subsection (3) above be a displaced residential occupier of the premises for the purposes of this Part of this Act.

(5) A person who by virtue of subsection (3) above is a displaced residential occupier of any premises shall be regarded for the purposes of this Part of this Act as a displaced residential occupier also of any access to those premises.

(6) Anyone who enters or is on or in occupation of any premises by virtue of—

(a) any title derived from a trespasser; or

(b) any licence or consent given by a trespasser or by a person deriving title from a trespasser,

shall himself be treated as a trespasser for the purposes of this Part of this Act (without prejudice to whether or not he would be a trespasser

CRIMINAL LAW ACT 1977 (c. 45)

Part II, ss.12, 13

Part VI, s.65

apart from this provision); and references in this Part of this Act to a person's entering or being on or occupying any premises as a trespasser shall be construed accordingly.

(7) Anyone who is on any premises as a trespasser shall not cease to be a trespasser for the purposes of this Part of this Act by virtue of being allowed time to leave the premises, nor shall anyone cease to be a displaced residential occupier of any premises by virtue of any such allowance of time to a trespasser.

(8) No rule of law ousting the jurisdiction of magistrates' courts to try offences where a dispute of title to property is involved shall preclude magistrates' courts from trying offences under this Part of this Act.

Abolitions and
repeals.

13.—(1) The offence of forcible entry and any offence of forcible detainer at common law are hereby abolished for all purposes not relating to offences committed before the coming into force of this Part of this Act.

(2) The following enactments shall cease to have effect—

1381 c. 7.

(a) the Forcible Entry Act 1381;

(b) chapter 2 of 15 Ric. 2 (1391);

1429 c. 9.

(c) the Forcible Entry Act 1429;

1588 c. 11.

(d) the Forcible Entry Act 1588; and

1623 c. 15.

(e) the Forcible Entry Act 1623.

PART VI**SUPPLEMENTARY**

Citation, etc.

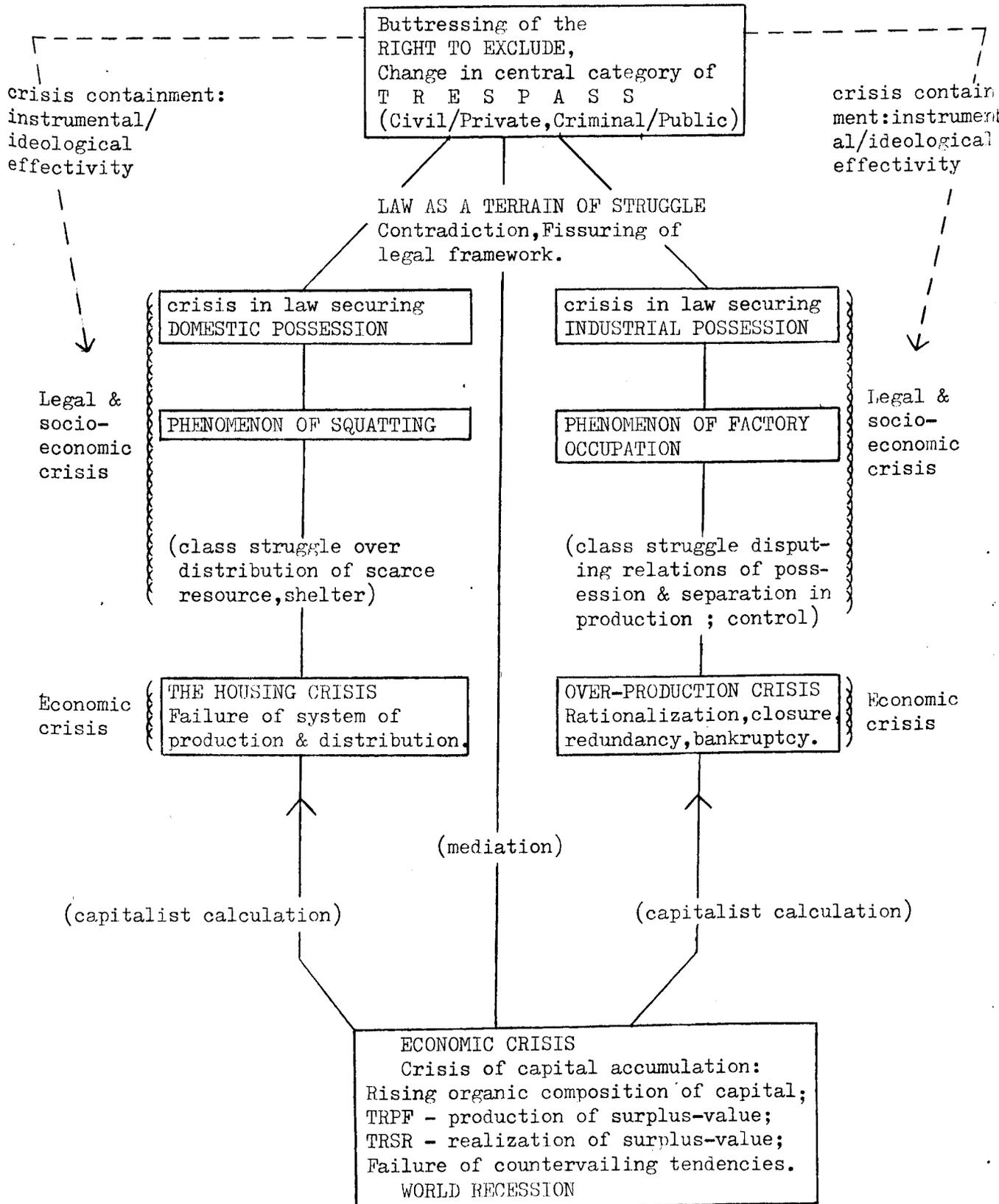
65.—(1) This Act may be cited as the Criminal Law Act 1977.

(7) This Act shall come into force on such day as the Secretary of State may appoint by order made by statutory instrument, and different days may be so appointed for different purposes.

(8) Without prejudice to any other transitional provision contained in this Act, the transitional provisions contained in Schedule 14 to this Act shall have effect.

(9) Without prejudice to Schedule 14 or any other transitional provision contained in this Act, an order under subsection (7) above may make such transitional provision as appears to the Secretary of State to be necessary or expedient in connection with the provisions thereby brought into force.

APPENDIX G



WHEN IS A TRESPASS NOT A TRESPASS ?
 A LEGAL PARADOX FOR THE 1980's.

FOCUS

Marxism Today May 1982

WHEN IS A TRESPASS NOT A TRESPASS?

Lord Kincaig's decision at Edinburgh's Court of Session on 26 February to withdraw an interim interdict (injunction) granted earlier that month restraining the occupation of Plessey's electronics components factory in Bathgate, West Lothian, not only raises an interesting legal question — namely when is a trespass not unlawful? — but also carries important implications for industrial practices on both sides of the border. James Gould, chairman of the CBI in Scotland, immediately pointed out that denying Scottish employers recourse to the law in cases of factory occupations could set an example for the rest of Britain; local Labour MP Tom Dalyell jubilantly claimed that 'Boardrooms throughout the City of London will have to take cognisance of this decision'; while the *Morning Star* saw the judge's comments as 'of significance for the whole trade union movement'. What was all the fuss about?

Plessey's is a profitable British-based multinational company specialising in the booming electronics industry. Despite profits of £84 million in the first three quarters of 1981 and order books standing at £1,150 million, a decision was taken in January of this year to stop the manufacture of capacitors at the Bathgate plant, which uses some of the most advanced machinery in the world, and transfer production to Italy with the loss of 330 jobs. The proposed closure would continue the programme of 'rationalisation' — running down production in

Britain and re-investing capital in more profitable locations — pursued by Plessey's throughout the 1970s, the workforce having been reduced in the UK from 68,000 to 38,000 over the past four years.

On 25 January, however, 200 workers at the plant voted to oppose the closure and begin sitting-in, following the famous Scottish examples of UCS and Plesseys (Alexandria) in the 70s and more recently the successful Lee Jeans occupation at Greenock. The company responded by applying for an interim interdict, claiming infringement of its property rights, which was granted by Lord Kincaig on 4 February. The unanimous vote to maintain the sit-in despite this ruling then brought another Order from the Court of Session requiring the 117 women and 10 men named in the original action to appear before the court and explain their non-compliance. So it was that on 26 February Lord Kincaig reversed his previous decision, recalling the interdict on the grounds that, since the occupation was 'in furtherance of a trade dispute' as laid down in Section 13 of the 1974 Trade Union and Labour Relations Act, and Parliament's intention in drafting this legislation had been to keep such matters out of the courts, the defendants might have legal immunity from the employers' action. He added: 'It may be that sit-ins have been legalised by that section. I would myself doubt it, but I cannot at this stage affirm that it does not.' Plessey's appeal against this ruling was postponed three times, pending the outcome of negotiations taking place through ACAS, where 80 jobs were in fact saved.

What is at stake here, however, is manage-



Plessey workers meet during their occupation of the Bathgate factory

ment's ability to manage the production process, to direct labour and allocate other resources in accordance with its profit calculations, regardless of broader social issues or the particular needs of local communities. This ability ultimately depends, in Scottish and in English law, on the private property right of the enterprise to *exclude* labour from the point of production — workers having the status of mere licensees and thus becoming *trespassers* on exceeding the conditions of their licence or its withdrawal. Thus events at Plessey's might have been expected to take a course similar to that at the nearby Leyland truck plant, where Lord Mayfield's interim interdict of 30 January was quite unequivocal and a sit-in protesting at the loss of 1300 jobs was ended after a week, enabling BL to proceed with redeployment of plant and machinery; or to that at Laurence Scott's engineering works in Manchester, where a 17 week sit-in was ended in September 1981, after the defendants' refusal to obey a court order, by bailiffs wielding sledgehammers and pick axe handles. Employers have successfully resorted to trespass and related law throughout the 1970s to regain possession from protesting occupiers, as have other private property interests in removing squatters and student demonstrators, so why this apparent perverse decision in 1982, and what are its legal and social implications?

The law has been embarrassed in this case because of the inability of the court to reconcile two different areas of law brought clearly into conflict by the Bathgate occupation, involving on the one hand the enterprise's right of exclusive management and control, and on the other the workers' right, enshrined in public statute, of immunity

from private actions in tort where the industrial practice is 'in furtherance of a trade dispute'. This legal contradiction has always been likely to become manifest since the appearance of mass protests involving trespass at the beginning of the 1970s, and has emerged as such now in the context of a worsening economic situation which has forced more closures, redundancies and increasing unemployment and resulted in a greater determination of workers in certain areas to fight closure plans and defy the due process of law. Whereas previously the 'trade dispute', whether strike, work-to-rule or overtime ban, had left management's fundamental right of exclusion unaffected, the new forms of industrial protest take the struggle firmly onto the premises of the enterprise and involve a challenge to management's *ultimate* right to sack workers, cease production, withdraw investment and dispose of valuable plant and capital equipment. The suggestion that factory occupations might be 'lawful', despite the obvious trespass committed, is anathema to company managements constantly seeking further rationalisation. Well might the chairman of the Scottish CBI lament: 'It is a strange situation where the court denies a firm access to its own premises and goods.'

In March the appellate judges in the Scottish Court of Session confirmed Lord Kincaid's decision. It could be reversed at a later date, but meanwhile a glimpse has been caught of the contradictory operation of the law in a period of economic recession; and isolated victories may be expected to continue against closure decisions outside the courts through the sheer determination and defiance of the occupiers.

Peter Vincent-Jones

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