

INTRODUCTION
LIMITING AND DEVELOPING
INDIVIDUAL CONSENT
CHILDREN AND ANGLO-AMERICAN
REVOLUTIONARY IDEOLOGY

*“Men are as Fearfull to be under the imputation
of a reformer of the Law, as they would [to] be of the
name of knave or fool, or hypocrite.”*

*Sir Matthew Hale, “Considerations touching the
Amendment or Alteration of Lawes” (ca. 1660–1664)*

*“Pur ceo que cest prescription est encounter reason
ceo est voyd [Littleton]. This containes one of the Maximes
of the Common Law, viz. that all customes and prescriptions
that be against reason, are voyd.”*

*Sir Edward Coke, The First Part of the Institutes of
the Laws of England (Coke upon Littleton) (1629)*



In sixteenth-century England, children over age seven were of “ripe age” to marry (under seven they could contract only “espousals,” or betrothals). Four-year-olds could make wills to give away their goods and chattels. Children of any age could bind themselves into apprenticeships. Eight-year-olds could be hanged for arson or any other felony. Teenagers were routinely elected to Parliament. Children who owned sufficient property could vote. And custody as we know it did not exist. These norms applied not only in England but in Virginia as it was founded during the seventeenth century. Although modified by Massachusetts and Pennsylvania at their founding, those norms changed even more in England over the next two centuries, a change accelerated in America by the Revolution. Still, laws that accepted children’s consent, and even in some cases their broader authority, had not changed completely in England or its former colonies by the early nineteenth century. In Pennsylvania in 1811, two-year-old Phoebe Stuart still placed her mark at the bottom of an apprenticeship contract, indicating that she consented to her indenture.

But in the seventeenth and eighteenth centuries a fundamental shift occurred in the legal assumptions about childhood, adulthood, and respon-

sibility. This book tells that story. It explains why children consented then and what that consent meant, but mostly it explains why that consent began to seem absurd. This is not a story of consensus; it is a story of struggle. Political theorists, ministers, judges, legislators and lawyers, ordinary men and women, and even children themselves fought over the meaning of consent. They did so because major questions of political power and the fundamental ordering of society hinged on the meaning of consent. The competing meanings of consent could rebalance the scales of justice.

Questions about children and authority permeated the political and religious debates of early modern Britain and its colonies. During the late sixteenth century, children became a metaphor for obedience and submission to church and kingdom, wherein subjects were commanded to obey their religious and temporal superiors just as children should obey their parents. On some level this image transcended metaphor, became, in its pervasiveness, a structure through which many people understood their world. This equation was enforced through catechisms, almost universally taught to all Christian children. In this vision of the world, children should revere and obey not only their parents but all social superiors, as a duty enjoined by God. In this vision, likewise, most adults also had the status of perpetual children, at least in their relations with those above them in the hierarchy. Children as such were thus not clearly distinguished from most adults. They owed obedience, not to all adults, but to their parents and to social superiors regardless of age.¹

This ideology grew in strength as a consequence of the Reformation, yet the Reformation also set in motion the forces that would undermine it. The reformers' challenge would become sharpest (in the Anglo-American world, at least) in the religious and political ferment of seventeenth-century Britain. Instead of accepting that most subjects were political children, many political reformers of seventeenth-century England distinguished children's political identities from adults', emphasizing experience and reason as requirements for the exercise of political power. Their distinctions grew out of attempts to justify a form of government based on consent. But who should consent to a government, and under what circumstances? Children became the main example of the group for whom consent should not apply. The separate space allocated to children—indeed, the extension of that space—reveals the ten-

1. England was not unique among European countries in the centrality of this imagery about children, yet the focus here on England reflects the degree to which it directly influenced its colonies. Other, non-English scholars will be cited and discussed as they were by contemporaries—as they shaped England and its colonies, both their laws and ideas.

sions within modern political theory. To explore this theoretical space is to encounter the underlying inequalities within a theory of equality.

Children and childhood held a central place in seventeenth- and eighteenth-century political thought. The word itself, in its various forms (child, children, infant), was omnipresent in the political debates, as other names differentiated from “men” were not (such as women, blacks and Indians, slaves and servants). This word was so critical because the debates over authority had deep roots in the Reformation. One side invoked biblical injunctions about children’s obligation to parents to justify monarchical authority. The other side did not challenge this obligation, but emphasized that it ended when a child became an adult: adults could reason and consent to authority, whereas children could not. Adult subjects, therefore, should be able to consent to their government. The seventeenth-century political theorists writing about consent who were most influential on the radicals and reformers of the next century—James Harrington, Algernon Sidney, and John Locke—argued that all humans possessed the capacity to reason, which could enable them to make responsible political decisions. They differed over whether reason needed to be cultivated in order to grow well (that is, whether formal education was necessary) and over how easily it could be corrupted. For most political theorists of these two centuries, the character of the government each advocated rested heavily on his or her assumptions about who could exercise reason. Those lacking reason, like children, became unable to consent. They became unable to make most legal decisions that affected themselves or others.

Other scholars have recognized that children were important to the political debates leading up to the American Revolution, but they have usually treated the place of children as only a metaphor. (They have seen these debates as not really about children themselves, but only about authority.) A few have explored the meaning of this debate for real children but have dealt only with the positive aspects of children’s position after the Revolution: sons were free from their father’s authority after they became adults, and education encouraged that eventual liberty and independence. Other studies have argued that children, like white males, gained liberty as a result of a new leniency by parents and their own rebellions. But did the ideology of the Revolution bring freedom to children in the same way it brought freedom to men?²

2. On children as metaphor: see Gordon S. Wood, *The Radicalism of the American Revolution* (New York, 1992), 146–168; Jay Fliegelman, *Prodigals and Pilgrims: The American Revolution against Patriarchal Authority* (Cambridge, 1982); Melvin Yazawa, *From Colonies to Commonwealth: Familial Ideology and the Beginnings of the American Republic*

I argue that children—as children—were explicitly excluded from equality in Revolutionary reforms and the ideology underpinning them. Their exclusion from the right to choose is explicit in early-nineteenth-century custody law, which built on John Locke’s theory of human development. His emphasis on human understanding, broadly associated with the eighteenth-century Enlightenment, denies the authority of the young to make decisions, even over their own lives, until they have attained full use of their reason. They need to learn to reason to obtain training for future consent. However, they cannot actually consent.

This emphasis on an age of reason was new. Under patriarchal political theory, obligations did not end or begin at a particular age: obligations depended upon status relationships, upon one’s rank in society. Although rank could be partly shaped by youth, it was not the primary determinant. The primary determinant was birthright. In the emerging consent-based political ideology, age played the role that birth status had formerly played in power allocation: the new political theory by definition disqualified those under specific ages from exercising public and even private consent. Only in opposition to patriarchal theory did this age-circumscribed, yet more complete kind of dependence for children take form. Those who opposed patriarchal arguments for absolute monarchy acknowledged the necessity of obedience, but said it applied to children only during their “minority.” Adult males, in particular, should have equality, freedom, and the ability to consent to their government; children in their “minority” should not. By creating these distinctions, they set the stage for modern distinctions between public and private (or family) law.³

(Baltimore, 1985); Winthrop D. Jordan, “Familial Politics: Thomas Paine and the Killing of the King, 1776,” *Journal of American History*, LX (1973–1974), 294–308; Jack P. Greene, “An Uneasy Connection: An Analysis of the Preconditions of the American Revolution,” in Stephen G. Kurtz and James H. Hutson, eds., *Essays on the American Revolution* (Chapel Hill, N.C., 1973), 32–80; Edwin G. Burrows and Michael Wallace, “The American Revolution: The Ideology and Psychology of National Liberation,” *Perspectives in American History*, VI (1972), 167–306. Nathan Tarcov, *Locke’s Education for Liberty* (Chicago, 1984), focuses more narrowly on John Locke’s political philosophy and the role of education in creating the citizen who can participate in government. On gaining liberty, see Robert Bremner, ed., *Children and Youth in America: A Documentary History*, I, 1600–1865 (Cambridge, Mass., 1970), part 2, esp. 131–132.

3. The best book on patriarchalism is Gordon J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes, Especially in Seventeenth-Century England* (Oxford, 1975). Wood, in *Radicalism of the American Revolution*, uses the term “patriarchal absolutism” (147), but I prefer “patriarchalism,” because patriarchal theory was not always absolute. Also see J. P. Sommerville, *Politics and*

Political theory connected closely with legal practice. In English society from the sixteenth through the eighteenth centuries, children of high status often held positions of political and legal power. In American society after the Revolution, to the extent that the Revolutionaries consciously adopted what they would call republican or whig political ideas, children became the group most clearly excluded from both political and personal power. (In continuing slavery, a birth status, the Revolutionaries either did not apply the new principles or twisted them, as I discuss in the conclusion.) This paradigm shift, from authority based on birthright to authority based on reasoned consent, reconstituted the nature and legitimacy of power. The implications of this reconfiguration of power can be fully understood only by focusing on the child whose status drew so much attention.

When ten-year-old William York murdered his five-year-old fellow apprentice (because she “foul[ed]” the bed they shared) in 1748, he caused a furor. By English law, he should have been executed, even “though the taking away the Life of a Boy of Ten Years old may savour of Cruelty.” But, fortunately for him, his case occurred at a crossroads in the history of justice. His execution was delayed at every court session for nine years (while he was held in jail). Finally, the king pardoned him on condition that he join the navy. The continual delays in his execution reveal a profound underlying shift. His case helped to define a transition in standards for authority and responsibility, standards that applied not simply to children but to all members of society.⁴

Status to Contract: From Primogeniture to Consent

The prominence of children in the political debates of these two centuries illuminates the struggle over the basis of political authority: inherited right versus the consent of the people. At the beginning of the seventeenth century, primogeniture—whereby land and power usually descended from father to eldest son—was the primary basis for authority in England. By the end of the eighteenth century, differing methods for the transfer of power hung in a precarious balance in England but had tilted in favor of consent as a conse-

Ideology in England, 1603–1640 (London, 1986), chap. 1; J. P. Allen, *A History of Political Thought in the Sixteenth Century* (London, 1928), 135; Susan Dwyer Amussen, *An Ordered Society: Gender and Class in Early Modern England* (Oxford, 1988), chap. 2. “Patriarchalism” also has a different and more specific meaning than the broad term “patriarchy.” “Patriarchy,” as used by Gerda Lerner, for example, refers to men’s power over women, a system of organizing society that has dominated Western consciousness for the last several millennia (*The Creation of Patriarchy* [New York, 1986], 8–9, 238–239).

4. Sir Michael Foster, *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery . . .* (Oxford, 1762), 70–73.

quence of the Revolution in England's renegade colonies. Legal scholars, beginning with Sir Henry Maine in 1861, have characterized this transition from "status to contract" as central to the way the law defined individual relations. "The rights and duties, capacities and incapacities of the individual are no longer being fixed by law as a consequence of his membership of a class; but those former incidents of status are coming more and more to depend for their nature and existence upon the will of the parties affected by them." In English medieval law, "What a man had largely determined what he was." By the late eighteenth century, however, English and, particularly, American law began to emphasize contractual relations instead of status. Contractual relations, including consent to government, rose to a prominence in determining the basis of both political authority and legal relations between adults. A hierarchical system based on status, where people have "grades of legal capacity," began to give way to one where all people were legal equals, free to define their relations with others by means of contracts.⁵

J. R. Pole and Gordon S. Wood see this legal transition from status to contract as the core of the political transition introduced by the American Revolution. Pole argues that after the Revolution this transition was striking, "Status was formally abolished, and contract installed as a governing principle in the Constitution itself." Wood shows how the emphasis on political contracts affected status-based authority by decreasing the deference toward public officials and by increasing the use of contracts to specify legal relations. Both see this shift as creating a society that promised legal equality to all and granted it to many via the gradual expansion of the suffrage and a decline in deference.⁶

Did this transformation in political ideology and legal practice create such a society? Not for everyone. Children were excluded, along with other groups who would be compared to them. Maine himself, along with most commentators on his legal theory since, acknowledged that elements of status remained within the common law and that some members of the community were not legal equals. In the early nineteenth century, the legally unequal

5. R. H. Graveson, *Status in the Common Law* (London, 1953), 7, 34; Manfred Rehbinder, "Status, Contract, and the Welfare State," *Stanford Law Review*, XXIII (1970–1971), 951. Sir Henry Sumner Maine saw this transformation as relatively complete in mid-nineteenth-century Britain: *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1861), new ed. (London, 1930), 180–181. P. S. Atiyah, in *The Rise and Fall of Freedom of Contract* (Oxford, 1979), has expanded on this argument about contractual relations. Also see Bruce H. Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill, N.C., 1987).

6. J. R. Pole, *The Pursuit of Equality in American History*, rev. ed. (Berkeley, Calif., 1993), xiv; Wood, *Radicalism of the American Revolution*, esp. 162–166.

included married women, slaves, and laborers. But children were the only group completely excluded from equality.

The apparent exceptions [to the shift from status to contract] are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their capacities and incapacities regulated by the Law of Persons. But why? The reason is differently expressed in the conventional language of different systems, but in substance it is stated to the same effect by all. The great majority of Jurists are constant to the principle that the classes of persons just mentioned *are subject to extrinsic control* on the single ground that they *do not possess the faculty of forming a judgment* on their own interests; in other words, that they are wanting in the first essential of an engagement by Contract.⁷

Maine excluded children from this broad shift from status to contract with an argument similar to John Locke's: children cannot make contracts, because they lack the ability to form their own judgments; therefore, they cannot be included as equals. He implied that the distinct legal status of childhood was one of the few remnants of the older system.⁸

However, the exclusion of children on the basis of their inability to form judgments was not a residue of a past order. Children remained, as it were, born to a particular status—but a very different one. Their status was determined by their age, which rendered them unable to form contracts, not by their place in the social order or their inheritance of property and title. The legal incapacities of children as a distinct category can be traced to the seventeenth and eighteenth centuries. Although it is undeniable that very young

7. Maine, *Ancient Law*, 181 (my emphasis). On slavery, see, particularly, Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705–1865* (Baton Rouge, La., 1988). On the legal status of women, see Carole Pateman, *The Sexual Contract* (Stanford, Calif., 1988); Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Cambridge, Mass., 1990); Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill, N.C., 1986); Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill, N.C., 1998); Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (New York, 1998). On laborers, see Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge, 1991); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge, 1993), 244–246.

8. Martha Minow, in a thought-provoking analysis of this legal transition, has pointed out that, however this shift happened, it left in its wake “a residual category of legal statuses where the shift had failed to occur.” *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, N.Y., 1990), 126.

children, especially, did have some limits on their legal abilities before the seventeenth century, childhood itself was redefined as a consequence of the shift in political legitimacy during the seventeenth and eighteenth centuries. This shift began during the Reformation but became more focused in England during its two revolutions in the seventeenth century. Changes were gradually implemented by common lawyers influenced by these revolutions and by the Enlightenment and were taken even further in North America as a consequence of the American Revolution.

The roots of change lie in the struggle for political authority in seventeenth-century England, a struggle intertwined with religious authority. Birth into a certain church, a certain status, or a certain religious and political hierarchy was contrasted to choosing a church, to choosing a king or a country. One should not inherit the obligation of obedience, whether to minister, lord, or king. Privileging choice, however, required answers to other questions: Who can choose, and under what circumstances? If everyone, even a one-year-old, then is consent rendered meaningless? Implicit in consent was the ability to dissent, but when? If consent is presumed at birth or soon after, such as with an infant baptized into church membership or the child born a subject of a kingdom, can that person change her or his mind after attaining an age of reason and understanding? Be charged with heresy or treason for trying? Thus the political debate was framed by the questions raised by the Reformation: of who has authority and on what basis, about how truth can be known and who knows it.

The concept of an “age of reason” became critical for determining who could give meaningful consent. Although classical authors such as Aristotle and earlier Christian authors such as Thomas Aquinas had referred to an “age of reason,” seventeenth-century Continental Protestant natural law theorists such as Hugo Grotius and Samuel von Pufendorf as well as English Dissenting thinkers developed this concept, granting it much greater weight: they defined it, puzzled over its meaning, marked its boundaries, made the concept of reason itself central to their emerging religious and legal systems of thought. The changing status of childhood was a consequence of this emphasis on an age of reason, which arose as part of the new basis for political legitimacy. In turn, this stress on an age of reason created a limit to consent, shaping the application of these new political ideas to the larger society. This limitation on consent became a powerful weapon in the hands of those who sought to limit the radical implications of equality within the new ideology, either to maintain older exclusions or to create new ones.

I began this study with a question about how policy toward children changed as a result of the American Revolution: did a new ideology affect the legal

status of children? I examined laws and local court records in three representative counties for the 1750s, 1780s, and 1810s: Plymouth, Massachusetts; Frederick, Virginia; and Chester, Pennsylvania. But I became increasingly frustrated trying to understand the full meaning and context of the fragments of cases I was seeing. Broadening my scope and poring over legal guides and laws, I realized that the dramatic changes did not encompass solely the Revolution: they had started earlier and followed a surprisingly clear pattern. The resulting research comprehends court cases and records from as early as the 1560s and as late as the mid-nineteenth century, from English assize courts through Coke's reports and the Virginia superior courts, from debates about baptism through children's literature and high political theory.

One of the issues with which I struggled hardest was moderating and refining my conclusions to fit my evidence. I could have made my conclusions more speculative, but I chose instead to do more research and compile more evidence to figure out whether the changes that the legal guides and laws indicated had a basis in fact. If both legal guidelines and practice supported each other in the earlier period—guidelines that are now completely outside the bounds of acceptability—that would establish the change in norms. I have made the guides to the law central to my analysis, focusing on where and how they were used, and backed them up with examples of practice. Practice was difficult to track for the earlier period. The problem is self-defined: Because children were not as clearly distinguished from adults and age was not as important, children and age were only rarely mentioned in the court cases. Thus the cases were difficult to find. Despite this difficulty, I have now put together a comprehensive map of change.

Although I do not have the whole of the change delimited, I am able to show a real shift in the boundaries of acceptability. To give only a few examples: We would not now elect a thirteen-year-old to the House of Representatives (and certainly not have him give a keynote speech on an important bill at fourteen). We would not accept a will signed by a four-year-old. We would not permit a fourteen-year-old, regardless of wealth, to judge (as a juror) someone's guilt or innocence. We would not hang an eight-year-old for arson. We would not permit an eight-year-old to legally marry. We would not allow a five-year-old to bind himself to labor—and force him to abide by his agreement until he reached twenty-four. Yet the laws and legal guides and judges found these practices acceptable in sixteenth- and seventeenth-century England and Virginia. My study does not show prevalence, which is nearly impossible to discern, or the details of struggles over these questions in every decade or every county or every colony. Instead, it sketches the big picture—establishing that assumptions were very different from our own and that

we, whether social or political historians, should not take our own norms for granted.

British colonial judges all referred extensively to English legal treatises and English court cases in reaching their own decisions, and they continued to do so after the Revolution. While in Massachusetts colony they did so less and in Virginia more, all three colonies had judges who made frequent references to English decisions and English legal treatises—so much so that this study has had to address broad changes in English law. Thus most chapters trace legal developments within both English law and treatises in parallel with developments in the colonies. English practice sometimes provided the only unifying ground between the colonies even after they became states. Simply put, with regard to the law, the colonial and even new Republic sources constantly interacted with the English ones.⁹ This acknowledgment of the constant interaction with English law even after the American Revolution does not deny that colonies developed their own legal traditions. The various interpretations that each colony placed on the common law, or what each chose to adopt or reject, provided the fodder for disagreements in the early decades of the nineteenth century, even as federal statutes and courts sought to exert a unifying influence.¹⁰

This reliance on English common law—on precedent—is complicated by the critical fact that many collections of the common law were written by men who actually sought to shape the common law, who were active re-

9. This general observation is not new. See, particularly, David H. Flaherty, “An Introduction to Early American Legal History,” in Flaherty, ed., *Essays in the History of Early American Law* (Chapel Hill, N.C., 1969), 3–40; William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass., 1975), 8–10.

10. For a complete discussion of the legal treatises most commonly used and available in these three colonies/states, see the Appendix. I have generally adopted the notation used by English and American lawyers when referring to collections of printed reports of cases and of English laws. These notations are much more condensed than the normal citations that historians use. When referring to groups of cases, they are almost indispensable. An English law such as 5 Eliz. I, c. 4, for example, would mean that the law was passed in the fifth year of the reign of Elizabeth I (1562 or 1563) and was the fourth law passed. If an “s” follows, it refers to the section, or paragraph, from which a particular cite derives. Collected reports of decisions on cases are usually cited under the name of the author of the report, though, after the Revolution, sometimes by state or federal government. A typical cite might be 10 U.S. 226, meaning that this case appears in volume X of the records of the United States Supreme Court, page 226. Many earlier (and non-U.S.) references are more difficult to decipher; *A Uniform System of Citation* is the place to start. Guidelines for legal citations are outlined in *The Chicago Manual of Style*.

formers. Thus each treatise and court decision provides not only a glimpse into the past but also might well have been shaping that past. Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone, the three most frequently cited legal compilers of the seventeenth and eighteenth centuries, all actively molded the common law: partly to make it conform to reason and partly to turn it into a coherent system. Their compilations of the common law would be taken by most later scholars as precedent. In incorporating some of the epistemological changes of the seventeenth and eighteenth centuries into the common law, these men helped to create the common law as we know it today.

American judges and lawyers did not accept these compilations blindly. The story, like real history and real life, is neither a simple one-way street nor a straight one. Instead, we have many routes, often curvy and with hills and sea voyages, whereby influence traveled in both directions. That acknowledged, the law itself did traverse some distance, not only physically but ideologically, in content and shape. Some would call this distance simply a refinement of the law of contract. Others might call it the road from feudalism to enlightenment. Both explanations oversimplify the actual course. To understand the course, we must first understand the lay of the land; we must acknowledge the mapmakers and their ideological setting. The three revolutions in England and America profoundly affected the common law even, and especially, as it fissured into slightly different courses in the wake of the American Revolution.

The organization of the material in this study seeks to balance chronology with analysis. It begins with the centrality of real children to political power in the seventeenth century, explaining how children's status entered the debates over the basis of authority. Chapter 2 discusses the debates themselves and how they grew out of the Reformation, with its contrary emphases on free consent and the authority of parents. Infant baptism serves as a window into the debates about political consent as they were forming in the seventeenth century. Chapter 3 pursues the dispute between inherited right and government based on consent, with children as the focus, into political theory more explicitly, explaining the conceptual and actual links between the earlier religious discussions and democratic-republican political theory.

The remainder of the book focuses on practical questions of children's legal identity and how children's status was responding to the religious and political debates. It examines every way in which a person had to consent or give voice, whether children could participate and at what ages, and how the rules were changing. Chapter 4 traces these debates to the legal status of children vis-à-vis citizenship, jury service, and militia service. Chapter 5 addresses their changing ability to be witnesses in courts and the consequences

of their legal silencing. It also examines legal reform and legal reformers within the common law and how these reforms were linked to the shifts in ideology sketched earlier. Chapter 6 examines children's liability for crime, focusing on intent, which is closely linked to consent. Chapter 7 takes on the paired issues of children's ability to form legal contracts and the rise of parental custody. Chapter 8 carries through the discussion of custody and consent revealed in changing norms for children's consent to marriage.

The conclusion examines how historians have often tried to explain away the evidence that children had legal identities before the eighteenth century. These norms are so different from our own that we tend to assume, especially when faced with only a small piece of the puzzle, that it must be an error in the record. It then addresses questions about the connections between social history and legal history to argue that social history, using legal records, cannot be done reliably without an understanding of the law itself. It finally examines the implications of this study for understanding democratic-republican theory and for the ways that inequality and exclusion could be—and were—justified within it.

By naturalizing the position of children, we not only distort the past but make it impossible to understand the debates over authority during this period and the transformations in social order and ideology for all of society. Unless we pay attention to those who are unequal in this theory of equality, to those who cannot consent in this theory of consent, we cannot see what the theory really meant, in the abstract and as it shaped the logic of the laws. We cannot understand how people could manipulate this theory to create a new structure of privilege, one that could be twisted to justify even slavery. The construction of consent, grounded in an ideology of reason, deeply affected norms in a supposedly unchanging legal system. With its abstract principles, it projected an ahistorical system of values that cover and obscure historical struggles over power. If we cannot see these connections, we lose the ability to justify or understand many modern norms.

What this book now does is connect religious and political ideology—via legal manuals and judges' decisions—to practice. It takes abstract ideas about justice and authority and shows how they shaped the lives of real people, especially children. It makes their dilemmas come to life. It has relevance to many questions that are hotly debated today. Its most significant contribution is to trace how the concept of meaningful consent became central to the law and to what we would call democracy. Without meaningful consent, that is, consent that is neither forced nor overtly influenced, democracy has nothing to stand on. In order for democracy to exist in any form, meaningful consent had to become central to the law. What this meant, however, was far from

clear. It had to be hammered out and was often disputed. What this meant is what this book is all about.

A Note on Terminology

Terms such as “puritan,” “democratic,” “patriarchal,” and “republican” had various frangible meanings in their own times and still do in ours. In many ways such terms are defined not only by the people included in each group but also by which characteristics we emphasize in describing them. Such terms are tools of analysis, and were even in their own time. Their meanings are, not innate, but contingent on who is using them, for what purpose, and in what context. While other authors clearly may describe the characteristics of these groups somewhat differently, I have defined these words in order to recapture how contemporaries would have used them and to better delineate the major political and intellectual alignments of these two centuries.

Both “republican” and “democratic” are terms that can describe that body of political writers in seventeenth-century England who sought to justify authority based on consent and opposed authority based on inherited right. Both, however, are problematic in various ways, partly because they have been given somewhat different meanings by historians: “republican,” for example, has usually been defined as those who support a mixed form of government (or a distribution of power) between king, aristocracy, and commons (monarchy, oligarchy, democracy). But to associate “republican” only with those who supported balance of power is too narrow. Those thinkers from the seventeenth century who became so popular in America before and during the Revolution did not all support distribution of power (at least not as the main point of their works). To the extent that any of them supported monarchy, it had to be based upon the consent of the people, not inherited right (for example, a limited monarch whose power is circumscribed by his covenant with the people). Their main point was less about the form of government than the justification for authority itself.

The word “democratic” (or “democraticall,” as they would say) also carries modern connotations (it can be confused with today’s ideas about democracy or even Democrats). Yet it seems to have been the more popular term in the seventeenth century. John Aubrey, whose *Brief Lives* described so many of the major seventeenth-century figures and who knew, among others, James Harrington personally, began his description of him as follows: “His genius lay chiefly towards the politiques and democraticall government.” Sidney made clear throughout his magnum opus that he supported “democracy.” Many of these thinkers who favored consent and opposed inherited right spoke positively about the term in the seventeenth century and allied it closely—in-

deed, intertwined it—with the “consent” of the people. The term “democracy” could have a much narrower meaning (it could deny all representative authority, so people had to consent directly to all laws), at least as some Puritans used it. Still, it seems a more appropriate term to describe those who favored government based on consent, since it was associated closely with ideas about contract. Indeed, although “republican” became a more common term during the American Revolution (and “democratic” more likely to be seen in a negative light), it continued to be associated with the consent of the people.¹¹

Although the term “republican” was more popular with the leaders of the American Revolution, the larger point is that there are strong continuities in ideas between the “democraticall” thinkers of the seventeenth century and “republican” revolutionaries. (“Republican,” in the eighteenth century, was often used to mean simply a government based upon the consent of the people.) Throughout, as I use these terms, they mean all of those thinkers who were arrayed on one side during this period so as to capture the main issue they had in common: their contention that authority should originate in reason and consent.

In suggesting that historians have defined these terms too narrowly and in refocusing on the issue of consent, I create different alignments. Historians have used the term “republican”—particularly “classical republican”—to describe one strand of revisionist thought that they distinguish from “liberalism” and from which they exclude Locke. Although this may reflect late-eighteenth-century (or nineteenth- or twentieth-century) debates, singling out Locke as not “republican” is ahistorical for the seventeenth and most of the eighteenth centuries. Locke’s, Sidney’s, and Harrington’s arguments about political legitimacy shared much more with each other than they did with patriarchal theorists. They not only shared their ideas but acted on them together. Sidney and Locke probably were involved in the Rye House Plot of 1683 to assassinate Charles II and his brother, the future James II. John Trenchard (who wrote *Cato’s Letters* with Thomas Gordon) was involved in the same plot. (Trenchard was arrested but freed for lack of evidence, Sidney was found guilty of treason and had his head chopped off, and Locke fled to Holland, where he stayed until the Glorious Revolution, six years later.) Gordon and Trenchard cite “the eminent Locke” repeatedly. Harrington, Sidney, and Anthony Ashley Cooper (later the first earl of Shaftesbury and Locke’s patron) were on Interregnum committees together. Indeed, had Harrington still been alive, he might have participated in the Rye House Plot as well.

11. John Aubrey, *Brief Lives*, ed. Oliver Lawson Dick (Ann Arbor, Mich., 1957), 124; B. Katharine Brown, “A Note on the Puritan Concept of Democracy and Aristocracy,” *Mississippi Valley Historical Review*, XLI (1954–1955), 105–112.

The aging Sidney certainly seems an unlikely revolutionary. Neither Bernard Bailyn nor Gordon Wood, who have considered republican ideology, leaves out Locke. The seventeenth century witnessed a fundamental argument between two camps, and the artificial exclusion of Locke draws attention away from this real division.¹²

While issues such as balance of power and the use of history (upon which other studies have focused) were being debated, they did not demarcate the main political divisions of that century. Harrington, Sidney, Locke, and, later, Gordon and Trenchard substantially agreed in their cause: they were fighting on a common front against patriarchal and absolutist ideology. This study focuses on that battle. The differences between Locke and Harrington pale next to their similarities when seen in light of the alternative justifications of power. They were not arguing with each other—they were arguing against those they would have called papists or absolutists (those who justify inherited authority, obedience without question). Defining these groups as “liberal” and “republican” in the seventeenth century creates a schism that, simply put, was not there. Only when their ideas were predominant—in the last decade of the eighteenth century—would these divisions emerge.¹³

12. J. G. A. Pocock, especially, has claimed that a dichotomy exists between Algernon Sidney and James Harrington, on the one hand, and John Locke, on the other, and he describes the “founding fathers” in America as torn between two opposing schools of thought, “Lockean Liberalism” and “Classical Republicanism.” This difference, however, has been drawn too rigidly, because it rests partly on an overemphasis on the place of “liberty” in Locke’s thought and a corresponding underemphasis on the place of liberty, equality, and consent in “Classical Republican” thought. See *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, N.J., 1975); *Three British Revolutions: 1641, 1688, 1776* (Princeton, N.J., 1980). Many scholars have pointed out that Locke’s thought is not as distinct from that of classical republicanism as it has sometimes been portrayed and that classical republicanism itself has been so attractive because it was so protean. For an overview of the literature, see Daniel T. Rodgers, “Republicanism: The Career of a Concept,” *JAH*, LXXIX (1992–1993), 11–38; Alan Craig Houston, *Algernon Sidney and the Republican Heritage in England and America* (Princeton, N.J., 1991), 8, 225. See also Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* (Ithaca, N.Y., 1990); Shelley Burtt, *Virtue Transformed: Political Argument in England, 1688–1740* (Cambridge, 1992); Joyce Appleby’s essays in *Liberalism and Republicanism in the Historical Imagination* (Cambridge, Mass., 1992). Bernard Bailyn, although credited with being one of the authors of the republican synthesis, did not separate Locke’s thought as different from the other authors’. See Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967).

13. Differences between Harrington, Gordon and Trenchard, Sidney, and Locke undoubtedly exist, particularly on the issue of public virtue. Although Harrington and

Many of the same issues that surround the term “republican” or “democratic” also surround the terms “patriarchal.” When used here to describe political thinkers, three elements must characterize their vision of political authority: they compare the power of a king to that of a father; they at least implicitly reject consent as a basis for authority; and they support the hereditary authority of the king. That said, not all political thinkers in the seventeenth century fall neatly into these two categories. Many thinkers, including lawyers and judges, straddled both ideologies: many Puritans, in particular, retained important strands of patriarchal thought.

Supporting consent, however, did not necessarily equate with how we think of government based on consent—without coercion. The most important exceptions to the somewhat artificial way I have drawn the lines here are Thomas Hobbes and, to varying degrees, earlier natural law theorists such as Hugo Grotius and Francisco Suárez: they agreed that government should be based on consent. But they held force and influence to be allowable elements of that consent. In other words: if you say yes because I force you to, you still consent. Your consent (even superficial), your mark or seal on the paper, your agreement, was what mattered.¹⁴

The group of writers that I cluster into the democratic-republican camp was reacting not only against patriarchalism but against the authoritarian definition of consent that permitted force. Crafting a new meaning for consent—and the ways that this meaning for consent became fundamental to the law—is what this book is about. Only by writing force and influence out of the equation could they create the basis for a different political order.

Gordon and Trenchard put more value on it, Locke had more to say about virtue and restraint than most scholars acknowledge. It is critical not to neglect those facets of Locke’s thinking (he was not advocating unrestrained liberty). If we shift the debate away from public virtue (or *virtù*) versus rights and focus on their use of consent, the common ground for this body of thinkers becomes much more obvious. Their differences become magnified over time, when their body of ideas came to dominate.

14. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge, 1996), chap. 14; Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), 3, 56–57, 71–73. On Hobbes, see also Chapter 3, below.