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Age, Delinquent Responsibility and Moral Judgment

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Age, Delinquent Responsibility and Moral Judgment*

Gisèle CÔTÉ-HARPER **

I – THE JUVENILE COURT PHILOSOPHY

The status of delinquency evolved from appreciation of the danger that the juvenile may become an adult criminal if no deterrent or rehabilitative influence were exercised upon him. On account of his age, special protection was granted by the creation of the Juvenile Court and juvenile delinquent laws.[1] The protective and rehabilitative role of the Juvenile Court is explicitely mentioned in the preamble of the Juvenile Delinquents Act of 1908[2] in Canada and is the constitutional basis of the juvenile court in the United States.[3] This protective intent is expressed in the *Déclaration des droits de l'enfant,*[4] stating that the

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1 Ill. Laws, ch. 23, sec. 2 (1899) created the first Juvenile Court, where this protective philosophy was asserted. In Canada, the first *Juvenile Delinquents Act* became law on July 20, 1908 (c. 40). See also, R. CALDWELL, "The Juvenile Court: Its Development and Some Major Problems," (1961) 51 *J. Crim. L.C. & P.S.* 493–511; P. TAPPAN, *Juvenile Delinquency,* 1949, 3–13; G. E. PARKER, "Some Historical Observations on the Juvenile Court", (1967) 9 *Crim. L. Q.* 467–502.

2 *Juvenile Delinquents Act,* S.C. 1907-1908, ch. 40; S.C. 1929, ch. 46; R.S.C. 1952, ch. 160.
The preamble:
"Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strenghten their better instincts [...]."

3 *Commonwealth* v. *Fisher,* (1905) 213 Pa. 48, 62 Atl. 198.

4 *Déclaration des droits de l'enfant,* Assemblée générale des Nations-Unies (20 nov. 1959):
Considérant que l'enfant, en raison de son manque de maturité physique et intellectuelle, a besoin d'une protection spéciale et de soins spéciaux notamment d'une protection juridique appropriée, avant comme après la naissance.

child requires special protection and care, namely an appropriate judicial protection due to the juvenile's lack of physical and intellectual maturity.

a) Parens Patriae

In order to fulfill this ideal objective, the Juvenile Court has adopted the principle of *parens patriae* or "father of the country" and this principle was fully established in *Eyre* v. *Shaftsbury.*[5] In *Richard* v. *Browing,* the court ruled that the " [...] physical or moral welfare of the child is involved, and the government has intervened, as *parens patriae,* to secure such physical or moral well-being."[6] As Judge Julian MACK sets forth:

"(A) child that broke the law is to be dealt with by the state as a wise parent would deal with a wayward child."[7] In Canada, the child should " [...] be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."[8]

Therefore, this philosophy was responsible for a new approach towards the assessment of juvenile delinquency as "something less than a crime."[9]

b) The Nature of "Delinquency"

In the United States, this approach to delinquency led to the consideration of the proceedings as non adversery, denying to the child procedural rights. Therefore, proceedings considered "civil in nature and not criminal" usually resulted in the absence of procedural rules based upon constitutional principles.[10] However, in *Kent* v. *United States,* the exercise of the power conferred by the *parens patriae* philosophy was stated as not unlimited, whereby "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."[11] *Re the Application of Gault* held that " [...] due pro-

5 (1772) 2 P. Wms. 103, 24 E.R. 659; it is equity jurisdiction representing the King as *parens patriae* in regard to an obligation to oversee the welfare of the children in the Kingdom. In the U.S., the state and the federal government is the "Father of the Country." In *Queen* v. *Gyngall,* (1893) 2 Q.B. at 248, the court ruled that "[...] the jurisdiction is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child." For further comments on the philosophy of the court, see G. PARKER, *op. cit. supra,* note 1.

6 (1927) 18 F, (2d) 1008 at 1012 (D.C. Cir.); in *Kent* v. *United States,* (1966) 383 U.S. 541, at 555, Mr. Justice Fortas stated that "(T)he State is *parens patriae* rather than prosecuting attorney and judge."

7 J. J. MACK, "The Juvenile Court," (1909) 23 *Harv. L. Rev.* 106-107.

8 *Juvenile Delinquents Act,* R.S.C. 1952, ch. 160, sec. 38; *R.* v. *Manning,* (1946) 3 W.W.R. 74, 2 C.R. 406 (S.C.B.C.).

9 P. TAPPAN, *Comparative Survey of Juvenile Delinquency,* United Nations Department of Economics and Social Affairs, 1958, (Part I, North America) 14.

10 *Kent* v. *United States,* (1966) 383 U.S. 541 (U.S.S.C.).

11 *Id.,* at 555. The Supreme Court ruled that the juvenile is entitled to a hearing, to the assistance of a counsel, to access to social records and to a statement of the judge's decision to waive its jurisdiction.

cess of law is the primary and indispensable foundation to individual freedom''; [12] therefore some elements of the adversary system are introduced in the contested cases and due process requirements are considered, in some instances, to secure ''more order and regularity to juvenile court proceedings.'' [13]

Since the *Gault* Case, the Supreme Court has extended the concept of ''due process and fair treatment'' for juveniles, mainly to the right to jury trial [14] and to the quantum of proof. [15]

In the recent case, *In the Matter of Samuel Winship,* the United States Supreme Court has held that when a child under the Juvenile Court jurisdiction is charged with a criminal law violation, the quantum of proof that is necessary is not the preponderance of evidence, but a proof beyond reasonable doubt. Mr. Justice HARLAN insists on the fact that it should not '' [...] jeopardize the essential elements of the state's purpose in creating juvenile courts ... [nor does it] ... interfere with the worthy goal of rehabilitating the juvenile.'' [16]

Even though the philosophy of *parens patriae* exists in Canada,

> **"Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision." [17]**

the Act is regarded as creating the ''offence of delinquency'', '' [...] for the attainment of an end, a purpose or object which, in its true nature and character, identifies this Act as being genuine legislation in relation to Criminal Law.'' [18] The English juvenile court considers the welfare of the child even though the court is a Magistrates' Court, trying offences and that the '' [...] procedure is a modified form of ordinary criminal procedure and that, with a few special provisions it is governed by the law of evidence in criminal cases.'' [19]

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12 (1967) 384 U.S. 997 (U.S.S.C.).

13 *Ibid.* The Supreme Court held that when the juvenile court is in the process of adjudicating a juvenile as delinquent where commitment to a state institution may follow, due process requires that adequate notice be given, that the child be entitled to the right to counsel, to the constitutional priviledge against self-encrimination, to the rights of confrontation and sworn testimony of witnesses available for cross-examination.

14 *Duncan* v. *Louisiana,* (1968) 391 U.S. 145 (U.S.S.C.). The Supreme Court held that the states are bound by the sixth amendment to provide the right to jury trial when the child is charged with serious criminal offenses.

15 *In the Matter of Samuel Winship,* (1970) 38 L.W. 4253.

16 *Ibid.*

17 *Juvenile Delinquents Act,* R.S.C. 1952, ch. 160, sec. 3 (2).

18 *Attorney General for British Columbia* v. *Smith,* [1967] S.C.R. 702, 2 C.R.N.S. 277, 61 W.W.R. 236, 65 D.L.R. (2d) 82, 88:
"The Act deals with "juvenile delinquency" in its relation to crime and crime prevention... inthe constituent elements, alleviation and solution of which jurisdictional distinctions of constitutional order are obviously and genuinely deemed by Parliament to be of no moment." For a comment supporting the "provincial position", see C. H. MCNAIR, "Constitutional Law-Juvenile Delinquents Act characterized as Criminal Law Legislation," (1968) 46 *Can. Bar. Rev.* 473-482.

19 *Report of the Committee on Children and Young Persons,* (The Ingleby Report) (1960) *Cmnd. 1191* at 24.

c) Divergence of Approaches

Even though the philosophy of *parens patriae* in its original sense is being weakened, the protective and rehabilitative role of the Juvenile Court is reiterated. However, a growing concern welcomes the divergence of approaches to fulfilling this role.[20] It is obvious in the recommendations of the *Kilbrandon Report* in Scotland, the *Ingleby Report* in England[21] and the *Report of the Prévost Commission* in the Province of Quebec[22] which placed stronger emphasis on social welfare suggesting to apply the *parens patriae* philosophy more thoroughly. In contrast, the *Canadian Committee*[23] and the recent decisions of the United States Supreme Court[24] emphasize procedural protection through a more legalistic approach.

II – CHRONOLOGICAL AGE AND LEGAL RESPONSIBILITY

"(T)he goal of the Juvenile Court Act [still is to achieve] what is best for the child, as long as he continues *chronologically* to be a child."[25] The distinction between criminal and non-criminal behavior is related to the chronological age of the individual: the latter being the criterion of delinquency. Most statutes refer to chronological age, not "mental age". In *State* v. *Schilling,* the court has ruled that "the presumption of the lack of power of thought and capacity of a child is due more to the number of years he has lived than to the character of the development of his mind."[26] However, the *Task Force Report* in the United States acknowledged the fact that "(A)ny age limit for Juvenile Court jurisdiction has to be arbitrary because maturation is an uneven process, and varies from individual to individual."[27]

a) Chronological Age and Arbitrariness

It is arbitrary to such an extent that the Juvenile Court laws differ widely regarding the age at which the court has jurisdiction over the child, whether it be the "age limits" minimum and maximum, the

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20 For further comments, see G. PARKER, *op. cit. supra,* note 1, 467, 470–476.

21 *Report on Children & Young Persons, Scotland,* (The Kilbrandon Report) (1964) *Edinburgh H.M.S.O.*
Report of the Committee on Children and Young Persons, (The Ingleby Report) (1960) *Cmnd. 1191* at 24.

22 COMMISSION D'ENQUÊTE SUR L'ADMINISTRATION DE LA JUSTICE EN MATIÈRE CRIMINELLE ET PÉNALE AU QUÉBEC, *La société face au crime,* Québec, gouvernement du Québec, 1970, vol. 4, t. 1 at 105–125.

23 THE DEPARTMENT OF JUSTICE COMMITTEE ON JUVENILE DELINQUENCY, *Juvenile Delinquency in Canada,* Ottawa, The Queen's Printer, 1965.

24 *Kent* v. *United States,* (1966) 383 U.S. 541; *Re the Application of Gault,* (1967) 384 U.S. 997; *Duncan* v. *Louisiana,* (1968) 391 U.S. 145; *In the Matter of Samuel Winship,* (1970) 38 L.W. 4253.

25 *Pee et al.* v. *U.S.,* (June 1959) United States Court of Appeals District of Columbia, N^{os}. 14425–14428.

26 *State* v. *Schilling,* (1920) 95 N.J.L. 145, 148; 112 Atl. 400, 402.

establishment of concurrent jurisdiction dealing with the so-called "youthful offenders", the age at which the waiver or transfer of juvenile cases to adult courts is set or the jurisdiction over children who have passed the "age limit" for indictment of offences committed as juveniles.

In the eyes of the law, the problems of jurisdiction and age are met to some extent with the establishment of concurrent jurisdiction, which means that offences committed between a certain age can be dealt with either by the Juvenile Court or the adult court. It deals with an age bracket which according to statistics contains the majority of offences. In thirty-two states of the United States the upper age limit for the Juvenile Court jurisdiction is 18 years of age. In seven states, there is a concurrent jurisdiction until 21, and in eleven states the jurisdiction is partly or entirely that of the Juvenile Court for the 16 year old group. E. Eldefonso has reported that the state of Mississippi established a concurrent jurisdiction at the age of 13.[28]

Another remedy the law has found to face the reality of youth in front of maturation is the transfer to the adult court, or waiver by the Juvenile Court because chronological age is "inevitably arbitrary and fails to take into account the differences in maturity, past and present behavior." One third of the 40 states who use this procedure authorize it for any offence provided the child is over 13; in one fifth, it depends on the offence without regard for age, or providing the child is 14 if the offence is a felony; in Minnesota it is 12 and in Mississippi it is 13. In Canada, the child has to be 14, the act must be an act in violation of the Criminal Code, or when the child is incorrigible. This procedure must be done for the welfare of the child and in the interest of society.[29]

In reference to the "age limit" for indictment of offences committed as juveniles in Canada:

> "Save as provided in section 9, the Juvenile Court has exclusive jurisdiction in cases of delinquency including cases where, after the

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27 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *Task Force Report: Juvenile Delinquency and Youth Crime*, Washington, U.S.G.P.O. 1967, 100 (hereinafter cited as the *Task Force Report: Juvenile Delinquency and Youth Crime*).

28 *Id.*, at 4, 25.

29 *Juvenile Delinquents Act*, R.S.C. 1952, ch. 160, sec. 9. See *Task Force Report: Juvenile Delinquency and Youth Crime, op. cit. supra*, note 27, at 4, 100. Until the *Kent* Case, procedural protections were not attached to the waiver in the United States. However, written criteria for non-mandatory transfer to the criminal court in order to guide the judge in deciding whether to waive or not is rare. "Some determinative factors" have been suggested by a council of judges in the United States; see ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, "Tranfer of Cases between Juveniles and Criminal Courts", (1968) 8 *Crime and Delinquency* 3, 5; *Kent* v. *U.S.*, (1966) 383 U.S. 566-567 (appendix to the opinion of the court: Policy memorandum N°. 7, Nov. 1959). In Canada, the different legal approach to this question is well expressed in the British Columbia Supreme Court cases of *R.* v. *Beeman*, (1969) 69 W.W.R. 624 (B.C.S.C.) aff'd (1970), 71 W.W.R. 543 (B.C.C.A.); *R.* v. *Proctor*, (1969) 69 W.W.R. 754 (B.C.S.C.); for further comments, see G. PARKER, "Juvenile Delinquency Transfer of Juvenile Cases to Adult Courts — Factors to be considered under the Juvenile Delinquents Act," (1970) 48 *Can. Bar. Rev.* 336.

> committing of the delinquency, the child has passed the age limit... [of a minimum of 16 and a maximum of 18 depending on the province]. [30]

However, in *Ex Parte Lewis,* the Supreme Court of the state of Oklahoma has ruled that it is not the age at which the act was committed that determines the court jurisdiction, but the "age at which the accused is brought before the court". The *Standard Juvenile Court Act,* suggested that the court jurisdiction should be determined according to the age of the individual at the time of the commission of the offence. [31]

b) Legislation Regarding the Lower Age Limit

Perhaps the basic question in reference to the role of the Juvenile Court and its philosophy is the minimum "age limit" at which it has jurisdiction to fulfill its goal of protection, prevention and rehabilitation. States and countries have adopted various "lower age limits" and the authors claim that they cannot find " [...] any trend of logic through these ages." [32]

In the United States, the laws of most states do not specify any lower age limit, and the jurisdiction is set below a specific age ranging from 16 to 21, merely providing that children under a certain age are subject to the jurisdiction of the juvenile court. [33] In two-thirds of the states the upper age limit is 18. [34]

There does, however, exist a lower age limit in some of the states as in Europe. The lower age limit exhibits the same variability; for example in England it is 10 years of age, in France and Poland 13, in Germany, Austria, Czechoslovakia and Norway 14, Denmark and Sweden 15. [35] Children under that lower age limit cannot be held criminally responsible nor adjudicated delinquent. [36] For example in the United States, the age floor is 7 in New York, 8 in Wyoming, 10 in Texas and Mississippi, 12 in Hawaii. [37] In Canada, the prescribed limits vary from

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30 *Juvenile Delinquents Act,* R.S.C. 1952, ch. 160, sec. 4; *R.* v. *Cook,* (1958) 26 W.W.R. 213; 29 C.R. 87; 122 C.C.C. 109 (B.C.S.C.).

31 EX PARTE LEWIS, (1947) 85 Okla. Crim. 322, 188 F. (2d) 367. "The Standard Juvenile Court Act," (1959) 5 *Nat'l Prob. and Parole Ass'n J.,* sec. 9, 323-391.

32 J. WESTBROOK, "Mens Rea in the Juvenile Court", (1965) 5 *J. Fam. L.* 121, 125.

33 R. CALDWELL, "The Juvenile Court: Its Development and Some Major Problems", (1961) 51 *J. Crim. L.C. & P.S.* 493-511; see also *The Task Force Report, op. cit. supra,* note 27.

34 P. TAPPAN, *Juvenile Delinquency,* 1949, 3-13; SUSSMAN, *Law of Juvenile Delinquency,* 1959, 15-16. In 32 states, the upper age limit is 18 years of age. Otherwise, it is 16 to 21 depending on the state or the country and then, the offender is referred to the criminal court as an adult. All the states impose an upper age limit.

35 *The Children and Young Persons Act,* 1963, ch. 37 s. 16; *The Penal Code of Sweden,* 1960, ch. 33 sec. 1. M. GRUNHUT, "The Juvenile Court: Its Competence and Constitution," in *Lawless Youth, A Challenge to the New Europe,* 1947.

36 DALLOZ, "Codes d'Audience", C. Pen., art. 66 (1934). P. STRUNK, "Article 3 of the Juvenile Court Law and the Psychiatric Expert," (1963) 48 (5) *Monatschift für Kriminologie und Strafrachts reform,* 217-224.

37 *N.Y. Family Ct. Act,* 712 (1963); *Tex. Penal Code,* (Ann.), sec. 30; E. ELDEFONSO, *Law Enforcement and the Youthful Offender: Juvenile Procedures,* 1967, 313.

province to province. It includes "any boy or girl apparently or actually under the age of 18"; 18 for Quebec, Manitoba and British Columbia, 16 for boys and 18 for girls in Alberta, and 16 in the other provinces. In Newfoundland, the Act is not in force; the provincial legislation has set the age at 17. [38]

c) Criminal and Delinquent Responsibility

Since "any discussion of age limits of jurisdiction must return to the question of the age at which responsibility for criminal actions can be assumed," [39] we will firstly look at the legislation for criminal and delinquent responsibility.

(1) Criminal Responsibility

Legislation relating to children's "criminal responsibility" can be traced back to the Roman Law, namely in the *Institutes of Emperor Justinien.* [40] There appears for the first time the presumptions of non-responsibility in the case of children, which principle was adopted by the common law. The creation of juvenile courts have enhanced this topic of children's responsibility with reference to age groups.

The use of chronological maturity as a basis to discriminate between criminal and non-criminal has evolved into modern statutory law. Historically, the age floor limit for criminal responsibility has been based on a physical fact. In the 5th Century A.D., Justinien ruled that between infancy and puberty the child "is liable only in case he is near puberty, and for that reason, knows that he is doing wrong." [41] Puberty was established at 14 for boys and 12 for girls. Those near infancy were considered irresponsible the same as infants. [42] The rule of absolute irresponsibility as well as the determination of the age of puberty became part of the common law. [43] However, before the appearance of public birth registrations, chronological age was mitigated by other considerations, and maturity was evaluated by "physical inspection" as well as evidence of "malice". [44] Later, with the appearance of parish registrations in the 16th Century, chronological age was the sole criterion of responsibility. [45] Around the 17th Century, a second criterion was added taking into consideration an individual factor, "the conscience

38 *Juvenile Delinquents Act,* R.S.C. 1952, ch. 160, sec. 2 (2) (a); THE DEPARTMENT OF JUSTICE COMMITTEE ON JUVENILE DELINQUENCY, *Juvenile Delinquency in Canada,* Ottawa, the Queen's Printer, 1965, 54.

39 *Op. cit. supra,* note 27.

40 *Inst.* 4, 1, 18.

41 *Ibid.*

42 *Id.,* at 3, 19, 10.

43 KEAN, "The History of Criminal Liability of Children," [1937] *L. Q. Rev.* 364; see also J. WOODBRIDGE, "Physical and Mental Infancy in the Criminal Law" (1939) 37 *U. of Pa. L. Rev.* 426.

44 F. LUDWIG, "History of Significance of Immaturity for Responsibility," in *Youth and the Law,* 1955, 12-19.

45 *Id.,* at 16.

of wrong'' as a responsibility test.[46] This is now part of the common law and the penal law.

There is an absolute immunity from the law below the age of seven as the child is then presumed conclusively to be incapable of committing crime because of his immaturity. This is referred to as the *doli incapax.* On the other hand, children between seven and fourteen are presumed incapable of understanding the nature and consequences of their conduct; this presumption is rebuttable and the state can prove that the child is *doli capax.*[47] As of 1957, the common law rule was still the law in regard to the criminal responsibility of children in most jurisdictions in the United States.[48] In order to determine responsibility between 7 and 14, other considerations were brought forward. ''(T)hese have variously been the physical fact of puberty, capacity to make moral judgments evidenced by criminal behavior and severity of punishment attending it.''[49] In Canada, the presumption of irresponsibility exists in sections 12 and 13 of the *Criminal Code.* There is absolute criminal irresponsibility for children under seven[50] and a presumption *juris tantum* of non responsibility for children between 7 and 14 years of age.[51] It must be proved that the child '' [...] was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.''[52] The mere evidence that he did the act is not sufficient, the knowledge and appreciation of the wrongful behavior by the child must be proved.[53] In order to prove that the child judges that what he is doing is wrong, the family atmosphere and all the circumstances surrounding the event must be proved, even though it may reveal facts that could greatly be prejudiciable.[54] The Canadian and English jurisprudence defines ''wrong'' either as an act or an omission morally wrong[55] or contrary to law.[56]

Russell on crime states the following:

> "In deciding upon the child's responsibility the test of moral discretion was adopted, and has remained to the present day, although as time went on increasing reference is made to "understanding and judgment"."[57]

However, the adoption of juvenile delinquency laws and the establishment of juvenile courts have to some extent made the question of responsibility based on age of less importance than it was during the last

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46 BLACKSTONE, *Commentaries,* vol. 4, ch. 2 (12th ed.).
47 *Ibid.* See also S. RUBIN, *Crime and Juvenile Delinquency,* (2d ed.), 1961, 95.
48 *Model Penal Code,* 1957, sec. 4, 10 (Tent. Draft No. 7).
49 S. RUBIN, *op. cit. supra,* note 47.
50 *Canadian Criminal Code,* S.C. 1953-54, ch. 51, sec. 12-13.
51 *Id.,* at 13.
52 *Ibid.*
53 *R.* v. *Vampley,* (1862) 3 F. & F. 520; *R.* v. *Kershaw,* (1902) 18 T.L.R. 357.
54 *R.* v. *Padwick,* [1959] Cr. L. R. 439.
55 *R.* v. *Harrop,* (1940) 74 C.C.C. 228 (Man. C.A.);
R. v. *Jeannotte,* (1932) 2 W.W.R. 283 (Sask. C.A.);
R. v. *Cracknell,* (1931) 56 C.C.C. 190 (Ont. C.A.).
56 *R.* v. *Windle,* (1952) 36 Cr. App. R. 85; *R.* v. *Cardinal,* (1953) 17 C.R. 373; *R.* v. *Holmes,* (1953) 37 Cr. App. R. 61; *R.* v. *Mathews,* (1953) 17 C.R. 241 (B.C.C.A.).
57 C. TURNER, *Russel on Crime,* 12th ed., London, Stevens & Sons, 1964, 99.

century, and "it appears that the modern law is in much the same confusion with reference to the ages of responsibility of children as was the old law." [58]

The question of applying *mens rea* in juvenile court proceedings is not mentioned in the juvenile delinquent acts in the United States, and in Canada, the courts rely on the common law and section 12 and 13 of the *Criminal Code*. However in England, in *B.* v. *R.*, the judge stated in his judgment that the proof put before him was sufficient to rebut the presumption of innocence in the case of a 9 year old boy and to establish him *mens rea in the Juvenile Court.* [59]

(2) Delinquent Responsibility

The *mens rea* in the Juvenile Court is rarely discussed as such and is mainly referred to as the "knowledge of wrong" when it is taken into consideration. [60] In the Juvenile Courts of the United States the reason for setting no lower age limit has been expressed on the ground of protection. So, because "the interest and needs of the child — not criminal guilt for a particular offence — are the focal considerations of the juvenile court program, children excluded on the basis of a lower age limit cannot be the recipient of a helpful system." [61] Was it intended in absence of lower age limit that a child should be adjudicated delinquent regardless of age, or that the common law immunity should apply? Nothing has been written in the statues on this subject; however, for a child to be found criminally responsible, the age was raised to a minimum of 16 by the Juvenile Court Laws.

Judge Ketcham felt that "(A)n assessment of respondent's mental state as of the time of the alleged delinquency [...] appears to involve serious misconception of the philosophy of the court [...]. Free will, evil intent, moral responsibility and proof of guilt beyond a reasonable doubt are the language of the criminal code, [62] and when protection and not punishment is at stake, "innocence or guilt are not in issue." [63] In Oregon, the Supreme Court has recently balanced the *due process* concept and its legal protection against the *parens patriae* concept. The court ruled that: " [...] the fundamental fact is that we are dealing with children and not with adults, the ultimate question in a juvenile proceeding is not one of *"guilt"* or *"innocence"* but rather one of determining what is in the best interest of the child." [64]

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58 J. WOODBRIDGE, *op. cit. supra,* note 43, at 438.

59 *B.* v. *R.*, (1958) 44 Cr. App. 1 (Q.B. Div. Crt.). (Italics added by the author).

60 J. WESTBROOK, *op. cit. supra,* note 32, at 124. The penal law provides that children under 10 or 12 cannot be convicted of crimes, but it does not mention delinquency; see also S. RUBIN, *op. cit. supra,* note 47, at 53.

61 *Task Force Report: Juvenile Delinquency and Youth Crime, op. cit. supra,* note 27, at 100.

62 *In re Matter of Betty Jean Williams,* (1959) Juvenile Court for D.C., Dockett N°. 27-200-J.

63 J. WESTBROOK, *op. cit. supra,* note 32.

64 *State* v. *Turner,* (1969) 88 Or. Adv. Sh. 363. In a dissenting opinion, it was stated that the *Gault* Case had put forward the fact that "guilt" or "innocence" is the ultimate question where the juvenile is subjected to the risk of the penalty of incarceration.

However, *In the Matter of Samuel Winship,* the United States Supreme Court requested proof beyond a reasonable doubt when a child is charged with violating a criminal law, and this means that "(T)he standard is an encompassment of the presumption of innocence." [65]

This standard is even more important if we consider that without proof of guilt, children have been committed to institutions for the period of their minority, or sentenced to a fine or put on probation. In the United States in 1964, 44,100 children were committed to public training schools for an average length of 9.3 months and 26 to 48 percent are confined without having been found "guilty". [66]

Furthermore, if we refer to statutory provisions, the "juvenile delinquent" means a child who violates "any federal state or local law or municipal ordinance" in the United States [67] as well as " [...] any provision of the *Criminal Code* or any dominion or provincial statute, or of any by-law or ordinance of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or Provincial statute" [68] in Canada. In many instances, there is no violation if there is no *mens rea.* GLANVILLE WILLIAMS refers to the legal *mens rea* as " [...] the mental element necessary for the particular crime, and this mental element may be either intention to do the immediate act or bring about the consequences or (in some crimes) recklessness as to such act or consequence." [69]

It is to be expected that the juvenile courts in the United States will adopt certain factors to determine the child's responsibility and guilt. Will it be sufficient that the act be contrary to law or will there be a requirement of proof as to the child's knowledge of his act as morally wrong. Whatever the interpretation of the courts, the rehabilitative, preventive and protective role of the Juvenile Court is to be retained in the U.S. [70] In Canada, it was reiterated in *Smith* where judge Fauteux stated that the provisions in the juvenile delinquents act " [...] are intended to prevent juveniles from becoming prospective criminals and to assist them to be law-abiding citizens." [71]

III – THE "LOWER AGE LIMIT" IN RELATION TO THE DEVELOPMENT OF MORAL JUDGMENT

In the light of the role of the Juvenile Court and considering on one hand the absence in most states of any lower age limit for adjudica-

65 (1970) 38 L.W. 4253.

66 CHILDREN'S BUREAU, *Statistics on Public Institutions for Delinquent Children,* Washington, U.S.G.P.O. 1964.

67 "The Standard Juvenile Court Act", *op. cit. supra,* note 31, at sec. 8.1.

68 *Juvenile Delinquents Act,* R.S.C. 1952, ch. 160, sec. 2 (1) (h).

69 Glainville WILLIAMS, *Criminal Law* (The General Part), 2d ed., 1961, 31.

70 *In the Matter of Samuel Winship,* (1970) 38 L.W. 4253; see Mr. Justice HARLAN'S concurring opinion.

71 *Attorney General for British Columbia* v. *Smith,* [1967] S.C.R. 702, 2 C.R.N.S. 277, 61 W.W.R. 236, 65 D.L.R. (2d) 82, 88.

tion of delinquency and on the other the arbitrary and various chronological limit set forth in the provinces, states and countries which have a specified age floor, the need and beneficial effect of a standardized legislation is studied therein. Various recommendations relating to the Juvenile Court either do not mention a lower age limit or vary in their suggestions. For instance, the *Task Force Report,*[72] which favors *inter alia* early diversion from the court, enrichment of alternatives, a transfer to the adult court for juveniles over (perhaps) 16, and jurisdiction over "youthful offenders", does not discuss the minimum age limit. Neither is this discussed in the *Report of the Canadian Committee on Corrections*[73] which suggests to raise the age of transferral to the adult court from 14 to 16 and to adopt an upper age limit defining the young adult group between 18 to 21. On the other hand, the *Ingleby Report*[74] recommends a raise of the minimum age from 10 to 12 and the *Report of the Prévost Commission*[75] in Québec suggests that a Court of First Instance has jurisdiction over juveniles between 15 to 18 and over youthful offenders of 18 to 21. The *Report of the Prévost Commission* as well as the *Canadian Committee* reported that the presumption of *doli incapax* for children between 7 and 14 years of age was not familiar to Juvenile Court judges who presumed the criminal responsibility of this age group.

The Canadian Report on Juvenile Delinquency[76] recommends that the minimum age be set to 10 years of age without excluding the possibility of a minimum age which could vary (at a maximum of 12). The maximum age would be set at 16 inclusively. The criterion adopted in the *Canadian Report*[77] in order to determine the age limits for the

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[72] *Task Force Report: Juvenile Delinquency and Youth Crime, op. cit. supra,* note 27, at 12–27.

[73] *Report of the Canadian Committee on Corrections,* Ottawa, The Queen's Printer, 1969, 383.

[74] *Report of the Committee on Children & Young Persons* (The Ingleby Report), 1960, *Cmnd. 1191.*

[75] COMMISSION D'ENQUÊTE SUR L'ADMINISTRATION DE LA JUSTICE EN MATIÈRE CRIMINELLE ET PÉNALE AU QUÉBEC, *La Société face au crime,* Québec, gouvernement du Québec, 1970, vol. 4, t. 1, 106–109. This section of the report is a thorough study of juvenile delinquency in the Province of Quebec. In "La Cour de Bien-être social", the Commission's first recommendation is to interpret section 13 of the *Criminal Code* more liberally. If the Juvenile Court judges interpreted section 13 of the *Criminal Code* as it reads, they would have to presume non-responsibility unless the child knows "the nature and consequences of his conduct and [...] appreciate that it was wrong." Like the *Task Force Report, op. cit. supra,* note 27, the Commission suggests an early diversion from the court; it recommends *inter alia* a raise for criminal responsibility to a minimum of 15 years of age and gives jurisdiction to a Court of First Instance over juveniles between 15 and 21. Furthermore, it recommends to enrich the alternatives to the court such as citizens' committees under sections 27 and 28 of the Juvenile Delinquents Act and an administrative agreement prior to court handling referred to, by the *Task Force Report,* as the "consent decree". (Recommendations 1, 2, 3, 6 pp. 107-108). Volume IV, tome II is a comparative study of the handling of juveniles in Great Britain, France and Sweden. Volume IV, tome III is a comparative study on the Juvenile Courts in the Province of Quebec.

[76] THE DEPARTMENT OF JUSTICE COMMITTEE ON JUVENILE DELINQUENCY, *Delinquency in Canada,* Ottawa, The Queen's Printer, 1965.

[77] *Ibid.*

court jurisdiction was the efficiency of criminal law to control the deviant behavior of individuals belonging to different age groups. The current tendency is towards a raise for recognizing the juvenile's responsibility in the Juvenile Court. A completely different alternative has been mentioned, whereby a lowering of the age limit would ensure the true philosophy of the court; "such a system would enable the court to retain social policy and to resist attempts to apply penal policies to its dispositions." [78]

In a study to which the author contributed, suggestions relating to a minimum and maximum age limits were made taking into consideration both criteria to wit the psychological evaluation of the capacity of children of various ages to distinguish between right and wrong, and the efficiency of the criminal law as a means to control deviant behavior. [79] Blackstone wrote that " [...] the capacity of doing ill or contracting guilt, is not so much measured by years and days as by strength of the delinquent's understanding and judgment." [80]

In this section, will be discussed the minimum age for Juvenile Court jurisdiction in regard to the moral development of the child in its capacity to distinguish right and wrong and to control his behavior accordingly. In that respect we shall have to look at the stages of the development of conscience, sense of justice and responsibility, the intensity of guilt and moral anxiety caused by internalized standards of moral values versus the cognitive knowledge of right and wrong, and finally the role of the family and the cultural "milieu" on the moral development of delinquent and non-delinquent children.

Professors Piaget and Kohlberg share the view that there exists a fixed number as well as an order of potential stages in the development of conscience; moral development is a progression "[...] towards basing moral judgments on concepts for justice." [81] As the sense of justice grows, so does the respect for authority and for the rules of adult society. [82] Moral judgments in this context are judgments about the right and the wrong of action.

a) Stages in the Development of Moral Judgment and a Sense of Justice

Although the changes cannot be said to appear at a specific chronological point, there is a definite chronological pattern in the development of a sense of justice. Professor Piaget describes this in terms of

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78 G. PARKER, "The Century of the Child", (1967) 45 *Can Bar. Rev.* 741, 762.

79 L'ASSOCIATION DU BARREAU DE MONTRÉAL, Etude de l'avant-projet de la loi concernant les enfants et les adolescents, Montréal (16 août 1968) 8. The author acknowledges the collaboration of M[r]. Jacques Lamarche, LL.L., M.A., and M[lle] Cécile Bertrand, M.A.

80 BLACKSTONE, vol. 4, *Commentaries*, 23.

81 L. KOHLBERG, "Moral Development of the Child", (1968) 10 *International Encyclopedia of Social Sciences* 483, 490.

82 *Id.*, at 489.

three periods. In the normal child, there is "one period lasting up to the age of 7-8, during which justice is subordinated to adult authority; a period contained approximately between 8–11, and which is that of progressive equalitarianism; and finally a period which sets in towards 11-12, and during which purely equalitarian justice is tempered by considerations of equity. [83]

Researchers such as Lerner, MacRae and Strauss have reapeated these investigations and supported Piaget's hypothesis regarding age changes in moral judgments. The older children evaluate the morality of the act considering the specific situation and the intention of the actor. [84] Moreover, it has been assumed that there is a "culturally universal age development of a sense of justice with progressive concern for others and elaborated concepts of reciprocity and equality. [85]

According to Piaget, up to around the age of 7 or 8, the child's behavior is governed by what he believes his parents will approve or disapprove. It seems as if "law" and "morality" existed outside himself. He has a "morality of constraint [which] is that of duty pure and simple and of heteronomy." [86] It is a period of blind obedience. He will perceive punishment as attached to a greater extent to consequences that to intentions. Punishment usually follows as retributive justice. Responsibility is objective and the intention plays a very small part. [87] The second period is defined as "progressive development of autonomy and the priority of equality over authority." [88] This autonomous morality would develop in children of about 8 to 11. The feeling of responsibility appears progressively. Responsibility, previously inculcated by the family and milieu becomes more individualized. His judgment becomes based on "autonomy of conscience, on intentionality, and consequently on subjective responsibility." [89] The last period described by

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83 J. PIAGET, *The Moral Judgment of the Child*, 3rd ed., 1960 (hereafter cited as Piaget). Piaget gave marbles to children and he watched them play, noting their reactions and studying their awareness and observance to the rules. It included as well questioning them on moral issues in stories.

84 E. LERNER, (1937) *The Problem of Perspective in Moral Reasoning*, 43 *Amer. J. Sociol.* 249–269; D. MACRAE, "A Test of Piaget's Theories of Moral Development", (1954) 49 *J. Abnorm. Soc. Psyc.* 14–18; A. L. STRAUSS, (1954), "The Development of Conception of Rules in Children", 25 *Child Development* 193–208.

85 L. KOHLBERG, *op. cit. supra*, note 81, at 489.

86 For society as well, punishment often seems to be perceived as being attached to harmful consequences independently of intentions. Justice applied to intention is not a characteristic of a culture who feels that the important thing is "to make it, no matter how" (la fin justifie les moyens).

87 J. ARONFREED, *Conduct and Conscience*, 1968, 270 (hereinafter cited as Aronfreed). At this stage, children refer to immanent justice. In the study of Piaget, more than ¾ of the children under 8 years of age believed that justice was automatic and emanated from inanimate objects and physical nature. See also PIAGET, *op. cit. supra*, note 83, at 314;

"(R)ight is what conforms with these commands, wrong is what fails to do so, and punishment follows as retributive justice."

88 *Id.*, at 315.

89 *Id.*, at 335. Piaget has included a shift from obedience to authority to obedience to peer loyalty as part of the moral development; however, Kohlberg's research does not substantiate this.

Piaget is set around 11-12 where considerations of equity, conceptions of offence and punishment evolve at the same time as those of duty, of right and wrong and of distributive justice.

Conformity to moral rules and laws have increased over the 5 to 12 year old period, while attitudes of rigidity towards game rules have declined during that same period.[90] This would confirm what Piaget had attempted to demonstrate: "that the young child's attitude toward rules is one of unilateral sacredness by observations of children's behavior and beliefs about the rules [...]"[91] These progressions or stages imply something more than age trends. There is an invariant sequence by which a child goes from a learned and rigid notion of right and wrong to considerations of equity in moral judgments applied to a specific situation.

There are, however, wide individual differences between children in reference to the age at which they attain the specific stages as well as the extent to which they are attained.[92]

Il is also possible that he becomes fixated at any level of the development,[93] but if he continues his process later on, he follows the same pattern.[94] Kohlberg has studied the development of children's capacity to judge an act as good or bad "by asking them to evaluate deviant acts which they are told were followed by reward, and conforming acts which they were told were followed by punishment." From this study, 6 developmental types appeared which the author grouped in the following moral levels:

1 – The "premoral" level whereby the child's evaluative judgment was oriented toward the sanctions and consequences of the act; whether the act was punished or rewarded.

2 – The "morality of conventional rule-conformity" where the child was guided in his evaluation of the act by what he considered was conform to social acceptance or relying on the rule of the authority.

3 – The "morality of self-accepted moral principles" where he considered morality as a contractual obligation or, finally as considering the intrinsic rightness or wrongness of the act. "Desinterested" moral judgments were made by a majority of children at the last moral level. Although Kohlberg agrees with the view of a continuous moral development, he disagrees with Piaget in reference to the age span at which the stages of the development occur. His research manifested a sequence in the development, but there was considerable overlap at various ages.

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90 *Id.*, at 316–319. Then, the child no longer thinks of a law as identical for all, but he takes into account the personal circumstances of each. A systematic research was carried out on American children from age 5 to 12 by KOHLBERG.

91 J. PIAGET, *op. it. supra,* note 83, at 334.

92 J. ARONFREED, *op. cit. supra,* note 51, at 260.

93 PIAGET feels that the child can be fixated by "unusual coerciveness of parents or cultures or by deprivation of experiences of peer cooperation."

94 L. KOHLBERG, (1963) "The Development of Children's Orientations toward a Moral Order: 1. Sequence in the Development of Moral Thought", 6 *Vita Humana* 11–33. The longitudinal study of American boys of age 10, 13, 16, and 19 suggests that this is the case.

b) Development of Internal Standards of Judgment and the Sense of Guilt

Psychologists use moral development in reference to the formation of internal standards that control behavior.[95] Professor Kohlberg suggested that "the development of conscious internal standards of judgment and of empathic and role-taking capacities seem to be the major factor in the genesis of guilt."[96] The child experiences guilt when he anticipates reprisal from his own conscience for violation of a standard he has set for himself, rather than of one he believes other people have set for him.

No clear age trends were found in projective measures of intensity of guilt and moral anxiety except for the knowledge of the definition of moral anxiety in terms of a reaction to moral internalized judgment rather than external events. This cognitive knowledge was found in the 8 to 12 age group, showing that trends of development exist for the moral judgment, but no clear age trend was found in favor of a greater occurence of honesty as a result to "experimental measures or resistance to temptation." The author agreed with the findings of Hartshorne and May suggesting that "the variables leading to resistance of temptation arises primarily from the situation rather than from fixed habits, character traits like honesty, or permanent superego dispositions to feel guilt" and concluded, in view of actual research, that there is "considerable correspondence between maturity of moral values (the possession of rational and internal reasons for moral actions) and maturity of action in moral-conflict situations."[97]

Interestingly enough, pathologically delinquent children have significantly less feelings of guilt and are less developed in their moral judgment than neurotic or normal children.[98] The description of delinquent boys' rationales by Kohlberg is a striking example of an external orientation in the evaluations of their conduct. It also suggests that their evaluation of conduct, in comparison to the more internalized orientation of non-delinquent, sometimes do not appear "less broadly structured and terminal [...]"[99] Another observation very relevant to the analysis

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95 L. KOHLBERG, *op. cit. supra,* note 81, at 49.

96 L. KOHLBERG, "Development of Moral Character and Moral Ideology", (1964) 1 *Review of Child Development Research* 383–431.

97 KOHLBERG agreed with the findings of Hartshorne and May after his recent research evidence. It suggests that "resistance to cheating does become a more mature alternative at older ages or higher levels of development than those involved in the Hartshorne and May study". KOHLBERG, *op. cit. supra,* note 81, at 485; H. HARTSHORNE and M. MAY, "Studies in the Nature of Character", (1928) 1 *Studies in Deceit.*

98 L. KOHLBERG, *op. cit. supra,* note 96. Marc LEBLANC, "Inventaire de la recherche criminologique au Québec: 1949–1969", (1970) 3 *Acta Criminologica* 171, 176, reported a study done by the Département de Criminologie de l'Université de Montréal on "Moral Values and Juvenile Delinquency". The author reported that the moral judgments were more varied and allowed the delinquents to be isolated to a greater extent. However, few typical delinquent values were found. In terms of social norms, the delinquents do not differ much from the non-delinquents.

99 J. ARONFREED, *op. cit. supra,* note 87, at 262.

of the court system is the fact that the studies did not seem to show "a direct relationship between the amount of punishment and the amount of guilt." [100]

c) The Role of Family and Culture in Moral Development

The development of a set of values is partly the result of cognitive maturation and there is no doubt that they do arise as well from the influence of the family and society. These standards of internalized values will determine the individual's behavior in his future life. For this reason, some authors have claimed that the primary cause of delinquency is the failure of the parents to guide their child in the development of their character and sense of values. [101] The Gluecks, by their description of the family of the delinquent, support that theory. [102]

The families of delinquent children in the same underprivileged areas, matched with respect to age, ethnico-racial background and comparative intelligence with non-delinquent children, showed a significant difference in reference to the unfitness of the parents. [103] They could not develop the character and sense of values (the ego and superego) allowing the child to cope with, and teaching him to respect authority and the rights of others. [104] The parents were more often unmarried,

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100 L. KOHLBERG, *op. cit. supra,* note 81, at 493.

101 R. DEISHER, *Juvenile Delinquency in Ambulatory Pediatrics,* M. Green and R. Haggerty, ed., 1968, 273.

102 S. GLUECK and E. GLUECK, *Unrevealing Juvenile Delinquency,* 1950. The authors designed an investigation where were compared 500 "persistently" delinquent boys ranging in age from 11 to 17, with 500 "truly non-delinquent" boys. There were associated by age, ethnic (racial) derivation, general intelligence and residence in underprivileged urban neighborhoods.

103 S. GLUECK and E. GLUECK, *Delinquents and Non-delinquents in Perspective,* 1968 (hereinafter cited as Glueck). In their latest study the authors suggested that the cause of delinquency cannot be attributed significantly to residence in urban slum areas, age differences, ethnico-racial variations or significant variations in general intelligence. The most striking differences were found in terms of:

mental backwardness:
¼ in the delinquent maternal families;
1/7 in the non-delinquent maternal families.

severe emotional abnormality:
¼ in the delinquent paternal families;
⅙ in the non-delinquent paternal families;
3½ in the delinquent maternal families;
2 in the non-delinquent maternal families.

drunkenness:
37 % in the delinquent paternal families;
31.4% in the non-delinquent paternal families;
35.4% in the non-delinquent maternal families;
46.6% in the delinquent maternal families.

104 L. KOLB, *Noyes' Modern Clinical Psychiatry,* 7th ed., 1968, 36-40: *"Ego* development takes place through the series of transactions between the growing infant and child and his parents and others who influence his growth."

On the other hand, "in its comparing and evaluating function the *superego* sustains the internalized moral and social values." The end result is that "the type and degree of personality development depends on the stability of the family and on the dynamics of the relationships which exist in it. All too often emotional disturbances in the family are perpetuated from generation to generation, thus becoming familial rather than hereditary in nature." See also DEISHER, *op. cit. supra,* note 101, at 273.

separated or divorced. Standards of conduct were generally lower.[105] The significance of "family tradition" and the effect of the example given behavior of children have been brought up by diverse studies, mainly that on twins by Strumpfl.[106] Although the importance of the parent in the moral development is suggested by many researchers, they do not support the notion that "conscience is a unique product of parent identification."[107]

Cultural factors do not seem to cause the age trends that have been observed, but do seem to be able to influence the development, either to enhance or to retard the process. In three divergent cultures, the orientation of conscience was found to be more internalized in the middle-class children than among the lower-class children. It seems that it is because they move faster and farther although both groups "seemed to move through the same pattern."[109] The surveys reported by Aronfreed indicate that the process of a more "internalized orientation of conscience" appears at a later age and more slowly in the latter group.[110] It does appear that an association exists between the subculture of social class and the speed and extent of moral development. Culture plays a large role in the origin of moral values and most recent studies see it as a "cultural problem."[111] The population is very uneasy when the culture does not promote what should be done by its members. Individuals react differently depending on their social milieu but the effect of culture is to be the considered both in regard to the origin and essence of juvenile violence and society's perception and handling of that violence.[112]

Conclusion

Even though the juvenile courts all over the world have an identical goal of protection and rehabilitation with chronological age as their criterion, there is a great variability in the various age groups for the court's jurisdiction, ranging from no lower age limit to 15 years old in European and North American countries. Since there is a culturally

105 S. GLUECK, *op. cit. supra,* note 103.

106 F. STUMPFL, *The Origin of Crime, Demonstrated in the Life History of Twins,* 1936; Stumpfl could trace the environmental factors down to "an evil family tradition" where it was normal for the members of the family to participate in anti-social behavior.

107 L. KOHLBERG, *op. cit. supra,* note 94, at 60.

108 J. PIAGET, *op. cit. supra,* note 83, at 195-196.

109 This observation was made after studies matching middle-class children with lower-class children. The results did not occur because the lower-class children were favoring a type of thought prevailing in the middle-class pattern but because of the speed at which they attained it. These studies were done by KOHLBERG, *op. cit. supra,* note 82, at 491.

110 J. ARONFREED, *op. cit. supra,* note 87, at 261-262, citing Kohlberg, "Stage and Sequence: The Developmental Approach to Moralization" (tentative title) 1969 (in preparation); E. LERNER, (1937) *Constraint Areas and the Moral Judgment of Children.*

111 L. KOHLBERG, *op. cit. supra,* note 82, at 485-486.

112 J. SCHARR, "Violence in Juvenile Gangs," (1963) 33 (1) *American Journal of Orthopsychiatry* 29, 37.

universal age development of the sense of justice, there should be a standardized age limit for the responsibility of children and no room should be allowed for an arbitrary attitude. Moreover, since the Court's role is one of rehabilitation, deterrence and respect for the moral values of society, its purpose can best be achieved by fixing a minimum age for the Juvenile Court jurisdiction in accord with the child's capacity to make moral judgments. It would be believed that the state of mind, the moral appreciation of the behavior, and the intent of the child are even more relevant for an immature individual who is undergoing complex moral, physical and emotional development. Even though the Juvenile Court Laws do not use words such as moral judgment, as crime and punishment, it is essential to be aware of the state of the juvenile's mind when he committed the act for which he is brought to court. Not to do so is to ignore the principle of individualization.

Moreover, to confront him with his responsibility can be helpful in treating him, and a very interesting theory has been developed and applied to juvenile offenders by which they are confronted with the responsibility for their behavior. "Reality therapy" [113] focuses on the juvenile and young offender's actions and emphasizes his individual responsibility. Dr. W. GLASSER does not consider that the confrontation with the individual's wrongdoing is a punishment. It is important for him to see that we think he can do better. "Reality therapy" treats the youngster as a potentially responsible adult rather than as an unfortunate child. This therapy can be used by the judge, the probation or parole officer, the psychiatrist and all the personnel in correctional schools. Dr. Glasser says that the young delinquents do want mature, responsible treatment. "Reality therapy" should be given as soon as the juvenile is arrested and handled by the Court; an opportunity must be given to him to compare his own set of values to his behavior because "ultimately the strength of this comparison will determine his future."

Around 12 years of age, a juvenile should have reached a sufficient degree of maturation when he is able to assume the consequences of his acts. He has then reached a subjective responsibility and acquired considerations of equity, internalized orientation of right and wrong as well as distributive justice. The child younger than 12 years of age should not be presumed to possess a moral development sufficient to be considered as legally responsible. Although many Juvenile Court Laws did not set a minimum age for the Court's jurisdiction so that no child be excluded and be incapable to benefit from the system, one of the findings by Clifford Shaw makes one question seriously court handlings at a too early age. "(T)he earlier he (the delinquent) is arrested and brought to court, the more likely he is to have a criminal career as an adult." [114] The careers of adult offenders showed the importance of delinquency "as a forerunner of crime." The effects of court appearance and handling by the system have been studied and brought the following conclusions:

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113 W. GLASSER, "Reality Therapy, A Realistic Approach to the Young Offender", Western University Reserve. (Unpublished paper).

114 C. SHAW, *The Natural History of Delinquent Careers*, 1931.

1. The earlier the juvenile is arrested and appears in court, the more likely he is to indulge in criminal life as an adult.
2. The more serious the first offence for which he is brought to court, the more likely he appears to continue the commission of serious crimes, especially in reference to property crimes.
3. The more frequently and thoroughly he is handled by "court, police, correctional system, the more likely he is to be charged, convicted, imprisoned as an adult." [115]

Moreover, although the Court's goal is one of rehabilitation and not punishment, Professor Hart wrote that "the court intervention by itself is an element of punishment since it involves firstly the condemnation of antisocial conduct by the community and secondly the imposition of consequences by the political authority." [116]

In the light of the principle of early diversion from the Court due to its non conclusive deterring effect on juveniles, and considering the psychological criterion of the development of moral judgments as applied to delinquent responsibility, any child below the age of twelve should not be adjudicated a delinquent. [117]

In order to secure the rehabilitative and protective role of the Court and the efficiency of the law over juveniles, to avoid the stigma of deliquency and the ignorance to their responsibility, the youth who committed a "childhood offence" such as truancy, the child beyond the control of his parents or guardians, incorrigible or unmanageable is to be considered as "in need of supervision", or as a "minor otherwise in need of protection." [118]

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115 These studies were mentioned in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *Task Force Report, Crime and its — An Assessment*, Washington, U.S.G.P.O. 1967, 79-80; C. SHAW, *The Natural History of a Delinquent Career*, 1931; H. FRUM, "Adult Criminal Offense Trends Following Juvenile Delinquency", (1958) 49 *J. Crim. L.C. & P.S.* 29–49; H. MCKAY, "Subsequent Arrests, Convictions and Commitments among Former Juvenile Delinquents", *President's Commission on Law Enforcement and Administration of Justice, Selected Consultants' Papers*, Washington, U.S.G.P.O. 1967.

116 H. L. A. HART, "The Aims of the Criminal Law", (1958) 28 *Law and Contemp. Prob.* 401.

117 Children under 12 years of age would rather be handled by agencies or youth services as in need of care, protection and supervision. The Court should intervene only when the rights of the child or the parents are at stake, such as loss of liberty for the child and diminution of parental rights.

118 These classification have been adopted under the N.Y. Family Ct. Act., 1963, sec. 712 (b) and the Ill. Juvenile Ct. Act, 1966, sec. 702-703. The Youth Protection Act (Québec), S.R.Q. 1964, c. 220, sec. 15 has made that distinction for children *inter alia* who are "[...] particularly exposed to delinquency by their environment, unmanageable children generally showing pre-delinquency traits, as well as those exhibiting serious character disturbances [...]". However, the Juvenile Delinquents Act, R.S.C. 1952, ch. 160, sec. 2 (1) (h) includes in its definition of juvenile delinquency the one "[...] who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute [...]". The *Report on the Prévost Commission, op. cit. supra*, note 75, at 106, noticed that there is a higher incidence of juveniles dealt with under the Juvenile Delinquents Act than under the Youth Protection Act. Moreover, there is a considerable fluctuation from one court to the other in the proportion of juveniles handled

Taking into account the fact that the moral development is an uneven process depending on the individual and his environment, it is further to be considered whether certain children of twelve or even higher age should not be handled by the agencies rather than being sent to court. Even though the use of maturation scales, such as those developed by Kohlberg, would not be feasible for the moment, there is no excuse for not establishing standardized legal limits based on the current knowledge of the development of moral responsibility. The ideal approach would undoubtedly be to consider the maturity reached in terms of moral development, i.e. to learn the law-abiding pattern of behavior, since the law seems to be failing in controlling behavior when there is no internalized standards of moral judgment and no sense of guilt.

Finally, adopting the principle of enriching the alternatives of the Court, the following mechanisms could be of avail. Prior to filing the petition of delinquency for offences in violation of the *Criminal Code,* any Dominion or provincial statute, or of any by-law or ordinance of any municipality, there would be a voluntary informal handling where disputes could be resolved without adjudication of delinquency; this measure would avoid overloading the court with minor offences and allow more time to more serious delinquent acts. This voluntary informal handling should take place in the presence of lawyers, whenever possible, so that the rights of the accused and those of the victim or the state would be clearly defined and protected.

RÉSUMÉ

Le statut du délinquant est basé sur l'âge chronologique. En effet, c'est le critère sur lequel repose la juridiction de la cour juvénile, distinguant la conduite criminelle du comportement délinquant. Ce statut s'est développé par suite de l'appréciation du danger que l'enfant ne devienne un criminel si aucune influence réhabilitante et préventive n'était exercée, et ce dans le climat protecteur de la cour juvénile. La philosophie sur laquelle furent élaborées "les lois concernant les enfants et les adolescents" se retrouve aussi bien au Canada qu'en Grande-Bretagne et aux Etats-Unis.

Cependant la mise en application du rôle de la cour juvénile varie d'état en état, de pays en pays; elle diffère soit par une approche plus juridique afin d'assurer la protection des enfants par des procédures légales, soit par une approche plus sociale afin de se rapprocher davantage de la philosophie de *parens patriae.* Ces divergences sont manifestes dans les diverses recommandations faites par les commissions d'étude au

through "a penal law than a protection law". (Translation by the author). Such a situation would be avoided by adopting the classification of "childhood offences" exclusively under the Youth Protection Act in Quebec, restricting the Juvenile Court Jurisdiction to "[...] any provision of the *Criminal Code* or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality."

Canada et au Québec, en Grande-Bretagne, en Ecosse et aux Etats-Unis, de même que par les récentes décisions des Cours suprêmes du Canada et des Etats-Unis. De plus, tout limite d'âge relative à la juridiction de la cour est arbitraire et varie considérablement quant à l'"âge minimum" et "maximum" délimitant la juridiction de la cour, l'existence d'une juridiction concurrente et d'une juridiction pour "jeunes adultes", de même que l'âge fixé pour le transfert de l'enfant devant les tribunaux criminels.

La question primordiale est celle de savoir à quel "âge minimum" doit être fixée la juridiction de la cour juvénile afin de remplir son rôle de prévention, de protection et de réhabilitation. Les limites d'âge varient de 15 ans, en Suède et au Danemark, à 7 ans au Canada avec présomption *juris tantum* d'irresponsabilité pour les enfants de 7 à 14 ans. Dans les deux tiers des états américains, il n'y a aucun "âge minimum" de spécifié. Bien que les lois sur la délinquance juvénile aux Etats-Unis ne réfèrent pas à la responsabilité des enfants et que le Canada et la Grande-Bretagne traitent le délinquant "[...] non comme un criminel, mais comme un enfant mal dirigé ayant besoin d'aide, d'encouragement et de secours", toute discussion relative à l'âge délimitant la juridiction de la cour doit se rapporter à celui auquel on assume la responsabilité criminelle et pénale des enfants.

Etant donné la diversité de l'"âge minimum" adopté à travers le monde, cet article étudie un critère psychologique pour la responsabilité des enfants, à savoir le développement des jugements moraux assurant la capacité de juger le bien et le mal. Le développement moral est étudié en tant que progression, en basant les jugements moraux sur des concepts de justice. Les professeurs Kohlberg et Piaget réfèrent à la formation de normes intérieures qui contrôlent le comportement. Ce critère psychologique met en lumière l'efficacité des lois à contrôler le comportement "délinquant" des jeunes si l'on considère qu'il existe un nombre fixe d'étapes qui progressent, dans un ordre défini, vers le développement de la conscience.

A la lueur de ce critère et considérant que la loi n'est pas efficace à contrôler le comportement des individus quand il n'y a pas de normes intériorisées du jugement moral, il est suggéré d'établir ce critère pour uniformiser l'"âge minimum" délimitant la juridiction de la cour juvénile. De plus, la responsabilité légale de l'enfant ne devrait, en aucune manière, être fixée à un âge inférieur à douze ans et il importe de pourvoir la cour juvénile d'alternatives antérieures à la pétition.