The Use of Chronological Age in the Development of Legislation Affecting Young People in Canada, 1799-1985

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Submitted to the Department of Criminology, University of Ottawa, in partial fulfillment of the requirements for the degree of Master of Arts

1987

ISBN 0-315-40730-1

Acknowledgements

I am deeply indebted to my advisor C.K. Talbot for his patient guidance and criticism in the preparation of this thesis. I also wish to thank my family and friends for their support and sense of humor and lastly to Norma for her expert typing and help.

Abstract

The purpose of the present study was to examine the development of Canadian legislation affecting young people, focusing particularly on how age has been used in that legislation as a criterion for defining such concepts as diminished accountability, or immunity from criminal prosecution. It was hypothesized that the changes in the use of such age lines may be related to broader social pressures and changes in the society, and the study attempts to link such social changes to the changing age lines in the developing legislation.

The study uses the historical method to gather evidence of the development of such Canadian legislation from 1799 to 1985 and attempts to link this to the broader social changes and pressures which appeared to affect this development.

It was found that the changes in the use of age over time may be related to broader social changes and pressures in that society, however such factors seem to have indirectly affected the choice of such age lines, whereas shifting philosophical assumptions reflected in the changing legislation, as well as the complex political process involved in such changes may have directly affected the choice of the particular age lines used. It is proposed that we should consider both the factors that may have affected the philosophical assumptions of such legislation and the factors that may may directly affected the choice of the age lines used in such legislation when attempting to understand how and why particular age lines were chosen in the development of our legislation affecting young people.

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CHAPTER 1

INTRODUCTION

The main objective of this thesis is to examine the development of Canadian legislation affecting young people, focusing particularly on how age lines have been used in defining when an individual should be considered an adult or child under such legislation. Age lines, as such, are chronological cut off points that use the age of the individual as a criterion for defining if firstly, he or she should be considered capable of committing a crime, or secondly whether malice has to be proven to convict that individual, or thirdly (because of the individual's age) if he or she should be automatically treated as an adult.

To place such a study in perspective it is useful to look back over time to differing societies to see how they have treated and viewed their children. This it is hoped will allow us to see how le,islation affecting children has developed and how such concepts as absolute immunity and conditional responsibility have developed for differing age groups of individuals. By examining the past it is also hoped that a broader understanding may be obtained of how young people have been treated in early societies and how early legislation in these societies affected children, as well as what factors affected the development of such legislation. By gaining an understanding of the very early legislation that affected young people it is also hoped that the groundwork for understanding subsequent changes in the legislation may also be obtained.

The methods used and framework for understanding how children have been treated and viewed over time may lead to differing conclusions. For example Lloyd De Mause (1974) in his book, The History of Childhood, presents what is claimed to be a comprehensive examination of how childhood has evolved. To do this he has documented from relevant source materials numerous incidents of violence against children, such as abandonment, sexual abuse, disfigurement and infanticide, over time. He points out negatively that "[t]he history of childhood is a nightmare from which we have only recently begun to awaken" (De Mause, 1974, p. 1).

He places the evolution of parent-child relations into a series of six stages or "modes" which are supposed to represent a continuous sequence of closer approaches between parents and children as generation after generation of parents slowly overcome their anxieties and begin to develop a capacity to identify and satisfy the needs of their children (De Mause, 1974, pp. 1-2). The first mode which he terms as the "infanticidal mode", stretches from antiquity to around the fourth century A.D. and the remaining five modes bring us closer in segments of time up to the twentieth century, which he refers to as the "helping mode" (ibid., pp. 51-53). Overall, De Mause feels that "[t]he further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized and sexually abused" (ibid., p. 1).

De Mause however provides his evidence outside any context of cultural values, which obviously have emerged over time. By presenting cases without expanding on the wider social atmosphere in which they occured, it seems that children were the only victims and it was their treatment that has changed, not the treatment of all people. There is no doubt that incidents of the maltreatment of children were plentiful in ancient times, as they are today, but it remains to be seen if these actions were directed only towards children and not towards adults of the day as well.

A more important issue that has to be considered in order to understand how children were seen by society over time is whether or not child abuse was as notable in ancient times, as today in terms of violations against the prevailing notions of the child. This involves a careful study of beliefs about children and child laws over time, rather than simply looking at the actions of the past towards children in present-day terms, and condeming them as being brutal and viewing them with alarm.

De Mause's particular view of how children have been treated over time, it would seem is mostly due to his methodology which attempted to link the historical evolution of the child with a psychological theory. His work was an effort to come up with a "psychogenic theory of history", that proposed the central force for change in history is neither technology nor economics, but the psychogenic changes in personality occuring because of successive generations of parent-child interactions (De Mause, 1974, p. 3).

However, the focus of this thesis is not based on such a psychological theory, so this chapter will examine how Western civilization appears to have viewed and treated its children from the time of the Code of Hammurabi, around 1750 B.C. to the 1700s in England focusing more on individual societies and how they treated their children. It does not pretend to present a complete picture but rather attempts to present an overview. There will be particular attention paid to two areas. The first being an examination of the society of the time and how it viewed and treated its children and the second area will be the legislation in these societies affecting children. Here the focus will be particularly on how the laws have changed pertaining to parental authority, the rights of the child, and the legal definitions of what constitutes a child or adult. By gaining an understanding of a society and its social conditions it is hoped that a useful framework will be provided for understanding the laws and ways children have been treated in that society.

Children in Pre-Greek and Greek Civilizations

French (1977) who looked at the evidence of the child's influence on others provides us with a very useful documentary of the child in early civilizations, concentrating on ancient Mediterranean civilizations, starting at the base of

Mesopotamian, Analotian, Egyptian and Hebrew cultures.

She points out that inquiry into the history of these ancient people has many problems, ranging from exotic languages to the sparce archival and artifact evidence that remains. The investigation of the young is especially difficult since there are apparently so few references to them that exist in the literature of the time. There is, however, a source which may provide information from this time and it is through the study of art, especially Egyptian art. But French (1977) suggests that the historian can only draw the sketchiest picture of childhood in this period from such evidence.

Some pre-Greek societies, contrary to the evidence by De Mause, saw children as an important part of their community and in particular the Carthaginian society attached special importance to children. They were apparently valued as precious possessions so much so that they were ironically even sacrificed to the gods as a sign of respect (French, 1977, pp. 3-4).

Some of the earliest laws made by pre-Greek and Greek societies have reference to children and as far back as around 1750 B.C. in Hammurabi's Code children were viewed as an important part of the community. In this law code the purpose of a dowry in the Babylonian society is clearly laid out according to French (1977). The dowry was to ensure that the children would receive a proper upbringing and if the mother of the children died, then the dowry belonged to the children and not to the father (French, 1977, p. 7). The Code also had provisions for the protection of adopted children, and prevented the natural parents from reclaiming children. It also prevented the adoptive parents from disinheriting their adopted children if they had children of their own (French, 1977, p. 8).

Therefore it would seem that the Babylonians viewed the child as an important part of their community, judging from the laws of their society which provided for their maintenance. Yet not all societies in this very early time period seemed to have been so concerned with their children. French (1977, p. 8) points out that the cultures of the Assyrians, Hittites and early Hebrews allowed fathers to deal with their children as chattels or slaves, for they had nearly complete control of their children. They could be sold, used as a form of security deposit for debts, disinherited at the father's will, or even killed outright without societal sanctions.

The Ancient Greek society was according to French (1977) every bit as concerned about its children as the older cultures, in fact as early as Homeric times, around 1000-750 B.C., it was felt that a family without children was incomplete. Children were seen as the future bearers of their society and significant attention was given to their education and training. They were the Greeks' link to the future but were also valued as family members just for themselves (French, 1977, p. 8).

Parental power in the Greek society is rather difficult to evaluate due to the limited amount of evidence available. However Jones (1956) in a review of early Greek laws holds that,

> If, as is probable, Greek fathers at some time possessed a power of life and death over their children, it disappeared when Solon had made it illegal for a father to sell a daughter, except when she was found to be unchaste (Jones, 1956, p. 287).

Infanticide was, however, practiced in Greek society and was both legally and culturally approved. There is evidence though that there was considerable unease about such actions and there was compassion towards abandoned newborns. Despite the legal and cultural approval, many Greeks engaged in rescue efforts and adopted children. These children, once accepted into the family, were secure and the child was seen as a source of pleasure as well as something important and loved, according to French.

The Greeks had a clear conception of children being different from adults but further than this, they also saw differences in children according to their level of development. The works of both Aristotle and Plato in proposing stages of development for children brings out this point.

Plato felt that from birth to two years the child should be swaddled - that is wrapped up in a cloth to restrict movement of the limbs and then between the age of two and three years it should be carried by a nurse. It is at this stage that he felt the whole character of the child is determined. From three to six years, the child should be allowed to play games with other children and mild discipline should be used in its direction. From the sixth year to puberty, children should be treated differently according to their sex, sending the boys to school and teaching the girls gymnastics. Plato also comments on the need for protection from pain, fear, grief, and corruption of young children; and in his "Laws" he recommends that rigorous training should not start until puberty (French, 1974, p. 17).

Aristotle in his series, "Politics", felt that from birth to weaning the development of the body was the most important factor. At the age of two the training of the body could begin, and this should start before any training of the mind. He suggested that the limbs should be as free as possible and the child should be given plenty of milk but no wine and made accustomed to enduring the cold. From two to five years of age, the child should be given plenty of bodily exercise allowing it to play in preparation for adult activities, yet it should also be protected from base influences at this stage. He suggested that between five and seven the child should be protected from indecent talk, pictures and statues and should not attend lampoons and comedies. From seven to puberty the child should start school, avoiding a hard diet, and severe exercise which can start from puberty to twenty-one (French, 1977, pp. 17-18).

Aristotle seems to have been attuned to the needs for adapting child training to the particular nature of the young, and he noted that there were differences among children of the same age and background. He suggested that a study of the individual differences and characteristics would be the best way of making education perfect, so each child would have a better chance of receiving the education that suited him (French, 1974, p. 18).

The main differences between the Greek and pre-Greek societies seem to have been firstly that the Greeks began the education of their children at an earlier age and they stressed the need for training at this early stage. The Greeks also showed a much greater awareness of age and developmental differences than the pre-Greek societies studied by French. They both, however, recognized the child's enduring qualities and its importance in completing the family as a unit, as well as the fact that it was an important symbol of the society's hopes for the future.

Children in Roman Civilizations

Since Rome assimilated much of the Greek literature, philosophy, art and science, it is not surprising that their conceptions of childhood are very similar to the Greeks. But there are two aspects which differed considerably from the

Greeks; firstly, the absolute power and control of the Roman father over his family and children; and secondly, the continual struggle of the Roman society to replenish its self over time (French, 1974, p. 23).

Parental authority in Rome around the time of Romulus (753-716 B.C.) was very strong. It can be seen from the work of Johnson et al. (1964) who completed an extensive translation of the ancient Roman Statutes, that the father had absolute power over his son throughout his lifetime.

> ...whether for imprisonment, for flogging, for keeping in bonds for labour in the fields, or for putting to death (Johnson et al., 1961, p. 3).

Yet at the same time Romulus compelled all the citizens of Rome to rear every male child, and the first-born of the females. If a child was to be put to death under the age of three he provided that it had to be displayed to the five nearest neighbors and they had to approve of this action. This according to Johnson et al. (1961) was apparently to make sure that only crippled or deformed children were killed.

Later Roman laws, particularly the <u>Twelve Tables</u> (451-449 B.C.) also make reference to children. This set of laws was extremely important in Rome and according to Johnson et al., the <u>Twelve Tables</u> really represents the foundation of the whole of Roman law. It was apparently composed by a commission of men around 451-450 B.C. and was ratified by the Centuriate Assembly in 449 B.C. The laws were engraved on twelve tablets contained in the Forum of Rome (Johnson et al., 1961, p. 9).

Table IV of the Twelve Tables, as translated by Johnson et al. (1961), refers to paternal power. Here it is noted that a deformed child should be killed immediately and that a father has the power of life and death over his son. The father may also sell his son, however, if he is sold more than three times the son shall be freed from his father (Johnston et al., 1961, p. 10).

This power is also described by Watson (1970) who wrote on the ancient Romans.

> Children born to parents validly married at civil law come under the power of the father, or under that of the father's father if he were still alive...The father had complete power of life and death over his children (Watson, 1970, p. 38).

So it would seem that the oldest male in a family had this complete power, but this also extended into the private rights of the child. Jolowicz points out that the oldest living male ancestor was the only one who had any rights in private law (Jolowicz, 1967, p. 118).

The Romans were just as concerned as the Greeks about educating their children and this role was usually left up to the father. Around the second century B.C., however, fathers seemed to have turned more to professional tutors and schoolmasters to have their children educated. The Romans, like the Greeks also seemed to have had a good understanding of the developmental differences in children, and the stages of development within childhood can be traced through the writings of a number of Roman philosophers. One of these was Macrobius, who writing early in the fifth century A.D., suggested that from the seventh hour after birth, those infants that survived that far were likely to live. After the seventh day the infant loses its umbilical cord and around the fourteenth day the eyes respond to light. After the seventh week the eyes start to follow moving objects and teeth begin to appear around the seventh month. The fourteenth month marks the beginning where the child can sit up without fear of falling and the child should start to talk around the twenty-first month. Permanent teeth and clear speech are the marks of the seventh year and from fourteen years of age puberty is expected.

Macrobius' work was an attempt to place the maturation process of the child in perspective. He worked around the number seven and multiples of it as differentiating the physiological growth and development of the child. His work and the work of others such as St. Augustine and Quintiloian show that there are roughly three stages of development for the child: infancy, young childhood and adolescence (French, 1974, p. 27).

Overall it may be said that very early societies had a relatively good conception of the young. These societies saw the child as an important link to the future and it was the Romans and Greeks who began to set out developmental stages through which all children pass. The Greeks seemed to show the greatest recognition of the child's needs for guidance, with the need for control, to direct the child. None of these early societies romanticized the child; the idea of an innocent child of inherent goodness in opposition to a corrupt society never seems to have occured to them, according to French (1974, p. 28).

In law, the Romans had been making exceptions for children as far back as 451 B.C. in the Twelve Tables. There, in Table VIII, Section 9, it is pointed out that,

> If anyone pastures or cuts by night another's crops obtained by cultivation the penalty for an adult shall be capital punishment and, after being hung up, death as a sacrifice to Ceres...A person below the age of puberty at the praetor's decision shall be scourged and shall be judged as a person either to be surrendered to the plaintiff for damage done or to pay double damages (Johnson et al., 1961, p. 11).

They also had what was called an "infantia" rule, which at first refered to children who were incapable of speech, but by 407 A.D. or a little later according to Kean (1937) under the rule of Justinian this was set at seven years of age. Under this rule the child was seen to have a lack of understanding which made the child incapable of consciously committing any crime, the child's mental incapacity was considered much the same as that of an insane person.

Children in Medieval Times

A predominent and widely noted writer on medieval childhood is the historian Philippe Aries (1962), who wrote an extensive socio/historical account of French family life. By exploring the art and literature that had been left behind by earlier generations he was able to come to the conclusion that:

> In medieval society the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken, or despised. The idea of childhood is not to be confused with affection for children; it corresponds to an awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult, even the young adult. In medieval society this awareness was lacking. That is why, as soon as the child could live without the constant solicitude of his mother, his nanny, or his cradle-rocker, he belonged to adult society (Aries, 1962, p. 128).

To back up his reasoning Aries (1962) points out that medieval art until around the twelfth century did not seem to portray the image of childhood at all. The art of this time instead included children as small scale adults. They were painted like little men and women who came up to about waist heigth on the adults. The features of these small scale people appeared to be those of adults, in that they did not have the characteristics that are normally associated with children, such as round faces and larger heads. Aries suggests that this method of portraying children is to be found in most ancient western civilizations. He believes that the lack of differentiation between children and adults in the art, from ancient civilizations to medieval times was not because the artists of the time could not paint children, but because there was no significance placed on childhood as a specific stage of development at the time.

He also suggests that the dress of children in the early art shows an absence of the childhood stage. As soon as the child was removed from its swaddling clothes it was dressed just like another man or woman would. There was a strong emphasis placed on dressing according to class and this distinction was much more evident in the art than any age distinction. Only scale could be seen to distinguish the child from the adult until around the seventeenth century according to Aries.

Aries (1962) also looked at the games and pastimes that were common in early society to see if there were any that were particular to children. He found that there were no specific games for children beyond the age of three or four prior to the sixteen hundreds. Children before this date were expected to play the same games as adults and this also is used to back up his thesis that there was not a clear conception of childhood in medieval times.

There are a number of problems one faces when attempting historical research about childhood, the first being that the responsibility for the care of children in nearly all societies has been left up to the woman. Yet the majority of surviving evidence that is used to describe childhood comes from men, such as literary and artistic works, to even the majority of toys and household equipment. So much of the remaining sources of information comes from only one sex of the population, and it is not even the sex that was responsible for bringing up children. Obviously the sources have to be seen in this light and any inferences made from them should note this problem (French, 1974, p. 4).

Aries' extensive use of art, although very complete in his work, lacks reservations about what conclusions can be drawn from such an approach. Why it may be asked should pictures of children at a specific time period be seen as an accurate representation of society's feelings towards children at that time? Just because artists did not concentrate on the specific features of children in a particular period of history does not mean that the whole society, in that period, did not concentrate on them either. Nor does it mean that society did not necessarily ~~understand~~ nor have a clear conception of childhood just because the artists of the period drew them according to a certain style.

French (1974) points out that the majority of Egyptian artists drew faces in profile with only one eye visible. This does not mean that the Egyptians had no concept of what the whole face looks like, nor does the fact that before perspective was learned by artists, society had no concept of distance. The obvious point here being that just because a particular style or method was used at one time to portray children does not necessarily reflect the whole society's attitudes or feelings towards children. This is also true of clothing, and to infer attitudes from styles of clothing is a rather suspect source of information especially if the clothes had been specifically selected, as may have been the case for portraits.

Aries (1962) suggests that since he could not find any evidence of children's games above the age of three or four, until around the 1600s, that none existed and that children above this age had to play the same games as adults. His reasoning however may be suspect, just because evidence is not found does not mean it does not exist. Nor should one necessarily infer from a lack of evidence further support for a particular position, such as no concept of childhood.

Aries (1962) felt that morality was another area in which early society had a very different view of the role of children. He points out that it is an unwritten law of our present society to avoid reference, especially humorous reference to sexual matters in front of children. This orientation, he points out, however, did not exist in medieval society. He uses the diary of Heroard, Louis XIII's physician to show how the young king was raised. The diary contains descriptions of behaviour that would be considered as immoral in today's terms, as the young king was treated much as an adult would, inspite of his age.

The example is used to demonstrate that children were exposed to coarse jokes and indecent gestures and this is generalized to all children in that society. It is however obvious that a young king is not a good example from which to generalize to the majority of children and one would expect a king to be treated differently than the average child. To use the way King Louis XIII was brought up at this time does not really give the reader a good impression of the majority of children's upbringing, nor can we assume that the type of morality he was exposed to would be similar to the average child's.

Borstelmann (1983) in an extensive review of the literature on medieval children points out that this was a time of much change. There were the invasions of the barbarian tribes which caused much turmoil, yet in the same time period there was also the growth of Christianity and the growth of knowledge in monasteries which were considered the cradles of learning. It was felt that children did have souls, and were important to God, further their education was important and they should not be abused. He uses a quotation from John Chrysostom to bring out this point that children were in their formative period of life and needed a balanced upbringing.

> If good precepts are impressed on the soul while it is yet tender, no man will be able to destroy them when they have set firm, even as does a waxen seal. The child is still trembling and fearful and afraid in look and speech and all else. Make use of the beginning of his life as thou shouldest (in Borstelmann, 1983, p. 8).

Borstelman suggests that it was Augustine who crystallized the Christian attitude about the infant child when he suggested that they were under God's special protection and shows how the medieval church had an awareness of the special nature of childhood. This is demonstrated in the monastic rules of the time which include special provisions for resident children in the daily duties at the monastary (Borstelmann, 1983, p. 9).

The Church at this time, however, did have some differing feelings about children. They were described as sweet, pure, innocent and the symbol of God's wonder; yet, at the same time the child was brought into the world with Original Sin (Borstelman, 1983, p. 9). No matter which particular view is taken it is obvious that at this time the child was seen as special and different, and there was some conception of childhood (Ibid.).

Borstelmann suggests more evidence about children of this time can be obtained from medical records and shows that these records were very complete and used empirical methods to describe the subjects. The records show that children were seen as vulnerable and fragile and there were descriptions of how to overcome the early child's-weakness through such methods as swaddling. The number of such records increase into the middle ages and one of the most influential of these was compiled by Batholomew of England around 1230. He described the physical make up of the child, their emotions and habits. Early childhood was seen as a carefree, playful time for young boys who needed careful discipline and teaching, while little girls were considered more disciplined, careful and timid (Borstelman, 1983, p. 9).

Overall, Borstelmann (1983) describes the changes in ideas towards children through the medieval period as movement towards increasing attention to the role of the mother as the nurturant parent with natural expectations of tender care. This is linked, he claims, to the increasing portrayal of the mother and child in Christian paintings. The Church also was active in fostering more humane ideas towards children, where the child was seen as an object of importance and a possible soul to be saved for God. It was a service to God to care for the child's welfare and develop their moral character. It is also noted, however, that there were no descriptions of actual family life that can be used to give a more precise account of the daily concerns of the family. Accounts of childhood that remain are those of adult men who reflected on their early experiences in life. Borstelmann states:

> The onset and flowering of Christianity did not save the children from the grim and brutal lives of the times, no more than it did the adults. Children shared the lives, deaths and night terrors of their elders. They remained the possessions and property of the parent, especially the father, and then subject to the particular kinship networks, values, characters, and pesonal dispositions of their elders. There was little note of children as such aside from religious, medical and legal consideration (Borstelmann, 1983, p. 10).

Renaissance-Tudor Children

From the fourteenth to the seventeenth centuries, as pointed out by Borstelmann (1983), in Western Europe there were many major political and economic changes. These changes obviously had a powerful effect on the social structure and family structures of the time. In England for example the economy had been agriculturally based on a feudal social order, where a few wealthy land owners ruled over the majority of peasant farmers. However, after 1300 the economy started to turn to livestock raising, such as sheep, due in part to a strong demand from Continental Europe for English wool. The effect was felt dramatically by landowners as they closed off their fields, so they could raise more sheep. The peasants were driven off the land and went into the towns. This caused a major change for families at this time and aided by the wool trade there grew a whole merchant class as well as a new displaced poor class in the towns.

In England, according to Houlbrooke (1984), who studied the history of English family life from 1450 to 1700, this period saw parental love as the most deeply rooted of all human instincts; yet at the same time it was recognized it was pointless to mourn an infant's death since the mortality rate was so high for them. The Christian mother was expected to be glad that God had taken the child (Houlbrooke, 1984, p. 155).

Houlbrooke points out some of the important changes that occured over this period with regard to children which include the protestant reformers' emphasis on original sin. This meant according to him that the parent's responsibility was to correct the child through early religious education. Houlbrooke suggests the humanists, on the other hand, are portrayed as believing in the child's capacity for good, so they attempted to protect the innocence of the child rather than correct him. The sixteenth century on marked a fusion of these two ideas and encouraged an upbringing that was between the two extremes of the protestants and humanists. He does point out, however, that there was much variation, and that the views towards children may have been in contrast to these ideals (Houlbrooke, 1984, p. 156).

Houlbrooke's work, although very modern, lacks specificity in that he takes the works of many other historians who have written on this period and seems to just give an overview of their work. Consequently, he avoids taking any strong positions on how children were treated but when this is added to the fact that he avoids giving reference to specific time periods, it makes his work difficult for the reader to draw any firm conclusions.

The work of Aries (1962) and Stone (1977) are more definitive regarding the state of childhood. Stone (1977) in his work, The Family, Sex and Marriage in England, 1500-1800, argues that attachments to the family and community dwindle during the sixteenth century, and there is a growth towards larger institutions such as the church and state. These institutions reinforce the idea of the society being organized with a leading aristocracy. The state intentionally weakened family ties in favour of the nation and also began to institutionalize some of the family functions. This he felt isolated the child in the family placing more importance on ties between family members.

Tucker (1974) notes that children of this time period were generally deemed to be unimportant. Their birth was not even recorded until a much later time in history and children were seen as lacking in strength and intelligence. They were also at this time put to work as soon as they were capable of simple tasks. The richer families sending their sons at around age 7 to serve in households of their friends, and peasant children were put to work in the fields or put out to apprenticeship.

According to Tucker an increasing interest, however, was shown towards children during the sixteenth century and points out that Thomas Phayre published his first volume of pediatrics in 1545. The child was obviously important enough to write about, and there was an awareness that very careful attention had to be paid to the infant if it was to survive.

Education during this period also changed somewhat. There were more grammar schools established in the sixteenth century as there was an increasing demand for learning. One of the major effects this had was to extend the period that children were removed from the adult world, it also strengthened the idea that childhood was a formative period of life. Even though, as Tucker (1974) points out, the teaching style remained oppressive and the object was to train for respect, he suggests it set the ground for future reformers such as John Locke and Sir Thomas More who were both very interested in childhood and would have a strong effect on how children were both treated and viewed by society.

English Legal Views of Children from the 1300s to 1700s

English paternal power around the seventh century according to Pollock and Maitland (1962) allowed a father to sell his son into slavery if it was necessary for the survival of the rest of his family, as long as the son was under seven years of age. However they point out that it is not clear from the available evidence extant, that there is any certainty as to whether or not a father in the English society had complete control over his children around this time (Pollock and Maitland, 1962, p. 437). Certainly by the thirteenth century it is pointed out that the legal capacity of the infant is "...if at all, affected by the life or death of his father, and the man or woman who is of full age is of no sort subject to paternal power" (Ibid.).

The level of paternal power available in differing societies at differing times does show quite a considerable amount of variation. Not only did the level of paternal power available differ, but the rights of the child in differing societies was also affected very directly. From the most extreme example being the Roman law where according to Jolowicz (1967, p. 118) only the eldest male ancestor in any family had rights in private law, to English law around the thirteenth century which, according to Pollock and Maitland (1968, p. 439), gave all infants rights, without regard to their specific place in the family. The child in this society, therefore, was protected and his rights and interests were looked after by the state.

Not only have the laws affecting children shown variation, but the actual definition of when a child is to be considered a child or adult, or when it should be held responsible for its actions, has also changed.

Early English common law, around 1300, held that infancy in itself was not a defense.

> In the [English] common law authority is scanty: so far as general propositions go in the books, the age of the defendant is immaterial. 'The law knows of no distinction between infants of tender and of mature years' (Buckland and McNair, 1952, pp. 46-47).

Even though the evidence appears to be quite scant, it was usual for a child at that time to be tried and if found guilty, to almost automatically receive a pardon from the King. This fact is brought out in the Eyre of Kent from 1343, where it was said "an infant under the age of seven years, though he be convicted of felony, shall go free of judgement because he knoweth not of good and evil" (Kean, 1937, p. 364).

The reason for trying the child was based on the legal procedure of the day which appears to have been focused on the principle of vengeance.

> It can not go behind the visible fact. Harm is harm and should be paid for. On the other hand, where there is no harm done, no crime is committed; an attempt to commit a crime is no crime (Pollock and Maitland, 1968, p. 475).

If a child did something illegal at this time, the law of the day would require he be tried, as it was supposed to support the vengeance principle of community retribution, yet once tried would be given a pardon. This perhaps was the first stage in the long development of ensuring absolute immunity for the child.

Kean suggests that even though pardons remained in evidence, it was not long after the Eyre of Kent 1313, that judges, "seeing a child was too young for punishment, dismissed the case before the trial had gone very far (Kean, 1937, p. 366). This age line, below which the child was immune from the sentence of the court, had its basis in early Roman law. Of course this is not to infer that the Romans initiated this procedure, which probably in practice goes back to prehistory.

It is not all that clear whether the English common law age line of seven years was a direct response to the Roman law ruling of Justinian, or whether,

> Its earliest widespread acceptance as a single criterion of absolute immunity was facilitated by the infrequency of criminal behaviour below seven (Ludwig, 1955, p. 433).

It is probable that the Roman law ruling and the sheer infrequency of criminal acts below this age of seven combined to make this age line of absolute immunity generally accepted at an early stage.

A question still remained, which was, what age line should be used to define when a child should be considered an adult? Seven years of age was the line of absolute immunity, but as

Kean (1937) points out, there was a period between this age and puberty, that it was believed that the child should be punished only if malice could be proved. This period became known as the period of conditional responsibility (Kean, 1937, p. 368). According to Ludwig (1955), the judge in each case would have to decide if the child was to be held responsible for the act. This was based on a number of factors, firstly the proximity of the child to puberty, which was ascertained primarily by physical examination. It was decided children who had reached puberty could be held responsible, but for those who had not, more factors were taken into account. The second was the possible severity of punishment for the crime itself. More serious crimes would obviously be dealt with in a more serious manner, the Judges taking less account of other mitigating factors. The third factor was the child's capacity to understand right from wrong - which it was believed could be assessed during the trial by questioning. Fourthly any evidence of malice or cunning in the behaviour of the child was taken into account. A good example of this is brought out in a case tried in 1488 where a child of nine killed another child of nine and had confessed to the murder. It was found that when he had killed him, he had concealed the body and said the blood that was on him came from his nose. The child was later hung because the concealment indicated apparent cunning (Kean, 1937, p. 367).

The responsibility of the child was thus determined by the judge in each case, depending on the above mentioned facts of the case. An age line was not used to separate the age of conditional responsibility and full responsibility (being adulthood), but rather the physical fact of puberty was used. However, attempts were made to use an age line for the division between conditional responsibility and adulthood. The ages that were proposed mostly focused on either twelve or fourteen as being the age line, according to Kean (1937). However, it appears that it was Sir Edward Coke, writing in 1700 in his Institutes on the legal decisions of the Middle Ages, that settled the matter. His opinion that fourteen was to be the age line that was to be used to divide adulthood from the age of conditional responsibility was accepted and others such as Sir Mathew Hale also accepted Coke's word when writing on the subject (Kean, 1937, pp. 369-370).

It is perhaps difficult to understand why it took so long for this age line to actually appear. Perhaps the difficulty in proving the age of the individual due to the absence of birth records could have been a significant factor. Kean (1937) notes that the parish registers for the registration of baptism did not begin until the reign of Henry XIII and were only regulated by a canon in 1603. So it would perhaps have been difficult to find confirmation of an individual's actual age before this time, and trying to find this through the parents may have been somewhat risky as they probably would have had an interest in the child's fate.

For over four hundred years then, from about the time of the Eyre of Kent in 1303 to the writings of Coke and Hale in the 1700s, maturity or responsibility under the law was generally decided by the physical fact of puberty. The responsibility of children over seven years of age and under puberty was decided basically, by the seriousness of the crime, the child's capacity to understand right from wrong and the amount of malice that appeared to the Judges to be present in the evidence. Fixing a chronological age line at fourteen, however, removed much of the possible variation between children of differing ages, and made maturity more of a chronological fact than a question of physical or mental maturity. These then seem to be the founding parameters that allowed British Courts to see how to define when a child should be considered, firstly an adult, secondly, when he or she should be held conditionally responsible, and thirdly, when a child is considered to be incapable of wrong, or malice.

Conclusion

As pointed out in this chapter, the way children have been treated over time and in different cultures has varied. Our conception of childhood and the child have also changed but our notions have not changed independently of social change in general. The work of DeMause (1974) illustrates this. He looked at the way children were treated over time and in different cultures, but he did not put these cultures into their particular context. This left the reader with the impression that the way society has viewed children has gone through a great many changes from barbaric acts to what we now consider more "normal" behaviour of the later societies. It is however vital to understand the society as a whole when talking about attitudes and behaviours towards children. If society was particularly barbaric at one time, it probably was barbaric to everyone, not just children. Also if it seemed particularly humane at another period this too can be linked to the society as a whole.

There seems to be an essential link between broader social change and the changing concepts of the child. How we view children is not independent of the social context, it has to be linked with the society of the time to understand it. As Stone (1977) points out, the history of childhood, or of women for that matter is necessarily the history of the family. To look at trends through time without taking into consideration family patterns and the larger context of particular societies at given times is like engaging in empty polemics.

Ogbu (1982) also emphasizes the importance of linking the child to the broader social context. He calls for a cultural ecological framework for studying both childbearing and children. This approach he suggests links the broader society to the subject showing:

> ...the linkage between adult adaptions to ecological pressures, personality characteristics and behaviours resulting from such adaptions, and their relationship to childbearing practices. Cultural ecological framework

> also will enable us both to examine the present interrelationships among phenomena and to probe their origin's persistence and change (Ogbu, 1982, p. 262).

Broader studies of the family have also shown this need to understand the larger social context when trying to explain the family, its roles and fucntions. Hareven (1984) has shown that historical research which has attempted to understand the role of the family and its internal dynamics has gradually moved from a concentration on the family as an isolated unit to more of an exploration of its interactions with other social processes and institutions (Hareven, 1984, p. 138).

Even child psychology is linked to the society and the forces of the times, as Kessen (1981) points out:

> For not only are American children shaped and marked by the larger cultural forces of political maneuverings, practical economics, and implicit ideological commitments...child psychology is itself a peculiar cultural invention that moves with the tidal sweeps of the larger culture in ways that we understand at best dimly and often ignore (Kessen, 1981, p. 262).

Therefore, in this thesis there will be a broader examination of the social conditions and changes that may have occured, in an attempt to understand how age lines have been used and changed in the development of the legislation and what factors may be identified in this process of change. Certainly by using chronological age lines that have been established, it is possible to compare how we have defined in the legislation who the young and irresponsible are. This allows us to compare our laws and legal views of youth, as they are categorized into different age groups. The way children are defined by the law after the 1700s in England using age lines, removes the variation in the application of the law that probably took place prior to this date. It also gives us a reasonable starting point for the comparison over time, using age line categories, of the changing view of the child and childhood as reflected in the legislation. It is proposed that if we wish to understand the changes that have taken place with respect to age lines, we should not look independently at these changes, but rather consider them in a broader context, taking into account the differing and changing society and pressures which may have affected change. As such the general hypothesis that may be used to guide such research may be based on the proposition that if the changes in the legislative age lines are related to broader social changes and pressures in that society, then the changes in the laws that affect children will correspond, and may be linked to broader social change and pressures in that society.

The hypothesis gives us room to examine what changes took place in the legislation affecting young people with respect to age over time. It also allows for an examination of what factors seemed to have affected these changes, possibly leading to a broader understanding of how we have used age lines over time in the Canadian legislation affecting children from the 1800's to the 1980's. The subsequent chapters will therefore be attempting to explain changes in the legislative age lines affecting young people in Canada by including a broader examination of social change and other possible influences that may have affected these age lines and the individual laws for children and young people.

CHAPTER II

METHODOLOGY

The previous chapter suggests that there have been many changes in the way we have treated children, both over time and in differing cultures. It is suggested that these changes have not taken place independently of broader social change but rather should be understood in the specific time and culture in which they took place. If we wish to understand the changes that have occurred with respect to the treatment of children over time we should not look independently at the changes themselves, but consider them in a broader context taking into account the differing and changing society and its particular pressures that may have affected change. If we look at the treatment of children in a society as reflected in the legislation directly affecting them, we should also therefore do so considering the broader changes which may have affected such legislation. It is hypothesized in the previous chapter that if changes in the legislative age lines dividing adults from children are related to broader social change and pressures in that society, then the changes in these age lines contained such legislation will correspond and may be linked to broader social changes and pressures in that society.

To test this hypothesis and allow for an examination of what changes have taken place with respect to the law and age lines affecting young people in Canada from the 1800s to 1985 as well as allowing for an examination of what factors seemed to affect these changes, it is proposed that an historical analysis may be used.

An historical analysis enables us to test the hypothesis by examining the actual development of the legislation affecting young people and the changes in the age lines contained in such legislation on one hand, and to link and compare this with the social changes and pressures that may have affected the development of such legislation. It is further proposed that by using an historical analysis we may gain a more broad understanding of how we have used age lines in the development of legislation affecting young people in Canada.

The Use of Historical Research

A.B. Laver (1973) suggested that the goal of the historian is to search out the truth about the past, to enquire why things happened the way they did and with what consequences. He felt that "[h]istory is profoundly useful when it clarifies the context within which contemporary problems exist" (Laver, 1973, p. 345). By studying history, he adds, we are able to gain another dimension, one that cannot be gained by simply looking at what's going on in the present.

> It is simply not true...that, because the past is beyond our interference, the most painstaking examination of the records can only lead to retelling an old tale....Historians record and explain the past, and thus make the present intelligible, by showing how and why it came to be (ibid., p. 346).

The term history may be understood in a number of ways such as meaning the events of the past, or actual happenings or as a record or account of the past. It also however may be understood as a discipline or field of study which has developed a set of methods by which historians collect evidence of the past, evaluate it and present it in a meaningful way (Garraghan, 1957, p. 18). This is the meaning of history that will be used for this study of the development of legislation affecting young people.

There are also a number of types of historical literature, examples of which include the narrative type, which places emphasis on presenting a story and may involve deep analysis of groups of events and topics rather than paying attention to individual occurances. The narrative historical account also often focuses on events of great human interest and individual heroism rather than strict historical occurances. The historical biography is another type of historical literature, whichinvolves concentrating on one or more interesting individuals through time. This type of literature does however pose problems as it may be too sympathetic to its subject and so lead to a distortion of the overall perspective (Shafer, 1980). A third type of historical literature is the strict analytical type and is usually associated with scholarly endeavours. This type of literature usually places emphasis on an exhaustive treatment of a fairly narrow subjet. It often also involves detailed research into source materials or evidence, and presents more of an accurate picture than an interesting or readable one.

Questions Concerning Historical Research

When considering historical literature it is important to understand some of the problems that may be in evidence in the process of historical research. Shafer (1980) points out a number of these which include the values of the author or historian. The historian's own personal philosophies and values do affect his or her research. It effects the search for evidence, the interpretation of that evidence and this point is brought out in the example of why some historians find the history of their country mainly one of consensus, while others find it to be a story of violence and repression.

It is also important to understand the relationship between the individual and the society in which he lives, as well as the institutions in that society. Shafer describes all three as interacting with the powers of the individual being very much a function of the society and its organizations. As such, we should not try to understand institutions and individuals outside their broader culture. That is they are products of their own times and should be understood in relation to their specific time.

> What are sometimes called "social forces" are the outcomes of persons acting for change in the context of existing customs and forcing others to do the same (Shafer, 1980, p. 22).

Another point that is worth mentioning is that of the use of generalizations and laws in history. We may see things as repeating or occurring in a somewhat orderly manner, however, history deals with so many independent variables that it lacks an element of predictability. As such we should be cautious when trying to make any generalizations and should not look for laws in history. There may be patterns in history but as Shafer warns we should not outrun the evidence.

Causation is an important factor to be considered in historical work, yet it is one that should be considered with great care. Shafer suggests we should look towards many factors behind historical events, even a chain of factors may be considered, however we should understand that we cannot hope to find all the factors that may have led to a complex event. Nor can we demonstrate that relationship between given data in the past is a causal explanation of that event. The point being, that because something happened after something else does not infer it was caused by it. To determine if a factor caused something to happen, then a logical dependence should be proved between the two and this involves distinguishing between true and spurious causes.

> The problem of causation, the most vexatious facing the historian, is beyond complete "solution" - that is, to the permanent satisfaction of all manners of men (ibid., p. 29).

It should be understood in historical studies that there is probably no "absolute" way of determining cause, but understanding this does not mean we should not look for causes, rather we do so but with an appreciation for the conceptual and technical problems that are involved in such work.

Motivation is also another area that poses problems for historical research. Since much of the evidence involved in gaining an understanding of the motivation for certain actions is based on our inference from the act and circumstances, it tends, again, to be suspect. It should be understood that the attribution of motives, like causation, should be seen as hazardous business and as a result our confidence should be weak.

> No single fact in history is completely isolated from other facts. Any single event owes its existence to other events which preceded it, and in turn, is followed by other events which owe their existence to it. Moreover, conditions, as distinct from causes, are at hand which make an event a possibility, and hence call for consideration (Garraghan, 1957, p. 346).

The fact that accidents play a role in history should make us even more aware of the complex nature of the subject, since it deals with so many independent chains of cause and effect. In fact, as pointed out by Garraghan, chance or "contingency" has even been proposed as a sort of fundamental law of history, because of its role in so many historic outcomes.

The Historical Method

According to Shafer (1980) there are three well agreed upon elements of method investigators must learn if they are to function effectively. Firstly they must understand the differing categories of evidence, then collect and record what evidence is appropriate for their study and thirdly communicate that evidence in a meaningful way.

The categories of evidence involves discerning the differing forms that historical evidence takes as well as its quality and credibility. There is firstly the distinction between evidence that is produced by a witness or participant in the events and that produced by others.

> Primary evidence records the actual words of someone who participated in or witnessed the events described. These can be newspaper accounts, diaries, notebooks, letters, minutes, interviews, and any works written (or otherwise recorded, as in photographs) by persons who claim firsthand knowledge of an event. Another primary source is official statements by established organizations or significant personages - royal decrees, church edicts, political party platforms, laws, and speeches (Benjamin, 1977, p. 8).

Secondary evidence on the other hand is evidence that is obtained from a source that did not observe the event but may have investigated primary evidence to gain an understanding.

Evidence may also be categorized into the form of document or "other" according to Shafer. Documents being further categorized by the time of composition in relation to the time of observation of the matter being reported, the audience for which it was written and the intent of the writer. Here it may be noted that government documents may sometimes be quite misleading and shaped by politics involving propaganda or concealment, and we should not assume that such documents are especially entitled to uncritical acceptance (Shafer, 1980, p. 85).

"Other" evidence refers to any other form of evidence that is available and may include such things and physical remains which are the subjects of study for anthropologists and archeologists, to orally transmitted evidence in the form of tape recordings.

Using this evidence, which involves collecting and recording what is thought most appropriate requires a knowledge of:

> ...(1) external criticism, which determines the authenticity of evidence; (2) internal criticism, which determines the credibility of evidence; (3) the grouping of evidence in relationships of various sorts; (4) the interpretation of evidence in the light of many factors and the absence of others; and (5) exposition or communication of evidence to others (Shafer, 1980, p. 127).

External criticism essentially prepares us for internal criticism by authenticating the evidence we wish to use. It saves us from using false evidence and deals with the intentional and accidental errors in texts. The methods used in external criticism according to Shafer, are briefly, content analysis, comparison of the content with other evidence and tests of the physical properties of the evidence.

Internal criticism on the other hand considers evidence that is authentic, yet may lie or mislead either intentionally or unintentionally. Here according to Shafer, the task is to determine the credibility of evidence dealing with statements about specific things, ideas or customs. One rule that is often used is that of the "rule of context" where ideas and statements should not be used outside the context in which they were written. When examining for internal criticisms we should look to see if the real meaning is different from the literal meaning, as in ironic statements. Also, how well the author could observe the event as well as any contradictions in the report. We should also consider if any part of the evidence seems inherently improbable or contrary to what we know, or does the evidence leave you confident enough so as not to require some form of corroboration? (Shafer, p. 166).

Checking the reliability of the evidence may be aided by corroboration or contradiction, where the evidence is compared to other available sources of evidence to see if it contradicts or corroborates it. If several sources point to the same set of conclusions, your confidence in them might reasonably increase. Accounting for individual biases may also be considered by taking into account the individual biases when weighing the reliability of the evidence (Benjamin, 1977, p. 8), as well as trying to obtain data from differing sources, representing differing points of view.

When analyzing the evidence, the historian must find a way of presenting and organizing his data to allow for a clear understanding of it. The analysis should be "...a systematic attempt to learn about a subject or problem by looking at its elements, breaking it into components" (Shafer, 1980, p. 172). This analysis however can be guided by the hypothesis yet we should keep in mind our own subjectivity which may affect the analysis in terms of our own personal values. If one is satisfied that the research has uncovered sufficient evidence to support the particular conclusion, then it is up to the researcher to display that evidence in a manner that will clearly show that conclusion. If any evidence leads to other conclusions it is also the responsibility of the researcher to include it (Benjamin, 1977, p. 10).

Method of Collection, Data and Time Frame

The primary evidence that will be used in this study will include the legislation affecting children in Canada, in the form of Canadian statutes from 1799 to 1985. Official Canadian government documents such as reports, Royal Commission reports, House of Commons debates, Government Committee reports, Statistics Canada information and Journals of Canada reports will also be used as sources of primary evidence.

The secondary evidence will include an examination of what other writers and researchers have drawn from their own analysis of the development of the legislation affecting young people in Canada. Examples of the secondary sources that will be used range from the research of A. Platt, who wrote on the "Childsaving Movement", to A. Kean who completed research on the history of the criminal liability of children. Such secondary sources of data will be used in conjunction with the primary data in an attempt to draw as accurate a picture as possible of the use of age lines in the development of legislation affecting children in Canada.

Both the primary and secondary sources of data were drawn from library sources. The legislation may be found in the "Statutes of Canada", 1840-1985, and in the "Revised Statutes of Upper Canada", 1792-1840. Ontario provincial legislation may also be found in the "Statutes of Ontario, Canada", 1932-1985. The House Debates and all official government documents used were found in the Government Publications section of the National Library of Canada, Ottawa. These documents are in the form of published volumes however some of the earlier documents such as the "Journals of Canada", 1849, are on microfilm. The secondary sources were obtained firstly through a computer search using subjects and titles and further through the use of bibliographic references contained in relevant sources, which were followed up to widen the source of secondary data.

The time frame that this study concentrates on is from 1799 to 1985 and focus is primarily on federal legislation as opposed to provincial legislation. Provincial legislation will however be included if it is thought to have had a role in the development of the federal legislation.

The study will examine the actual changes that have occurred in the legislation affecting young people in Canada, focusing particularly on the changing age lines and definitions of what constitutes a child or adult over time. This will be linked and compared to an examination of official reports, committee reports and investigations which may have affected the development of the legislation and which may shed light on the particular conditions of the time and possible pressures and reasons for change. As well, previous studies that have been undertaken examining the development of legislation affecting young people will be explored in an attempt to shed light on the process involved in the development and change of such legislation. Further, consideration of other interested parties and their possible effect on the development of the legislation as well as any corresponding changes in the age lines and legislation in other countries, that may have influenced change will be taken into account. By this method it is hoped that a more complete understanding may be obtained of how chronological age has been used in the development of legislation affecting young people and how broader changes and pressures may have affected such a development.

CHAPTER III

CHILDREN AND THE LAW 1779-1908

This chapter will focus on the development of legislation in Canada affecting young people, up to the enactment of the Juvenile Delinquent Act of 1908 (7-8, Edw. VII c 40 (Can)). It will focus particularly on how the legislation developed and what forces affected this development. The chapter will also pay particular attention to how the use of age lines developed over the same time period in the Canadian legislation and will attempt to link the use of these age lines to the social conditions, pressures and reformers of the time. The chapter will attempt to explain what changes in the legislation took place and by linking these changes to the broader changes which appeared to be occuring in the society, attempt to show why they took place.

<u>Canadian Legislation Affecting Children Prior to 1850</u>

Upper and Lower Canada prior to 1850 was very much a frontier land apart from a few towns like Kingston, Toronto and Montreal, and much of Canada West had only emerged from the pioneer era. In these early years, it is pointed out by Splane (1965) who studied the development of social welfare in Ontario from 1791 to 1893, that children shared with their parents many of the common pioneer hardships such as poverty, isolation and neglect. Yet at the same time these people were not in the midst of an economic revolution of the scale that was taking place in many parts of Europe during the eighteenth and early nineteenth century. The Industrial Revolution which obliged so many adults and children to work in poor conditions in the mines and factories, had not as yet hit Canada by 1850. However, none the less, there was a concern for welfare, especially for children, and this concern can be seen in some of the legislation that was passed in Canada prior to 1850.

In 1799, "An Act to Provide for the Education and Support of Orphan Children" was passed (1799, 39 Geo. III, c. 3 (U.C.)). This Act was to provide for the care and protection of orphans and children who had been deserted by their parents. The method used to provide for these children was however to bind them out as apprentices. If two Justices of the Court of Quarter Sessions of the Peace approved, it was up to the town warden to see to the apprenticeship of these children. Mothers of children who had been abandoned by their fathers could also bind their children out as apprentices. The Act however could not be used if there were any relatives who were willing and able to support the child or children. Also if the child was over fourteen years of age, his consent was required (Sec. 3).

Even though the Act of 1799 did have a number of drawbacks, such as not requiring the home where the apprenticed child was to be sent, to provide for the proper care and development of that child, and a lack of any sort of provisions for children who could not be placed as apprentices, it did act as the first stage in admitting public responsibility for the protection of such children (Splane, 1965, p. 215).

The war of 1812 left a number of families fatherless and the Orphans Act of 1799 was not suitable for providing for such families, so in 1813, "An Act to provide for the Maintenance of Persons Disabled and the Widows and Children of such persons as may be killed in His Majesty's Services" was passed (53 Geo. III, c. 4 (U.C.)). It was partly to provide support for the children of such families and even though it gave a fixed amount to each individual family, regardless of the number of dependents, it was another step in recognizing the public responsibility for the support of children.

The Act was later aided by the passing of "An Act respecting the appointment of Guardians" (1827, 8 Geo. IV, c. 6 (U.C.)). This allowed for the appointment of guardians for children to look after them and take care of their estates, until the child was twenty one or the guardianship was ended by a court. It also allowed the child to be bound out as an apprentice by the guardian with the consent of two Justices of the Peace and the child. It was again an attempt to make some provisions for children who were fatherless.

Later legislation extended provisions for children left fatherless under differing circumstances than through war. "An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of illegitimate children liable for their support" (1837, 7 Wm. IV, c. 8 (U.C.)) was such a measure. It gave the parents of an unmarried mother who had been seduced, the right to take action against the father of the illegitimate child and the same right to anyone who was providing food, clothing or other necessities to the child born out of wedlock. The father would be liable for the maintenance of such a child, but as pointed out by Splane (1965, p. 219) the Act failed to indicate that the unmarried mother herself had any right of action against the father and given the limited law enforcement machinery of the time it probably would have been difficult to secure the financial aid from a father in the majority of cases.

In 1847 there was "An Act for compensating Families of Persons killed by Accident, and for other purposes therein mentioned" passed (10 and 11 Vict, c. 6 (U.C.)). This Act allowed the families of pesons killed to claim damages for the benefit of the family, to support them. The damages however were to be claimed from the person causing death, whether it was intentional or not. These damages were to be assessed by a jury and the family would be awarded damages according to the amount of "injury resulting from such death to the [family]" (1847, 10 and 11, Vict. c. 6, Sec. II (U.C.)). The legislation did provide some support that could be claimed, but it did not go as far as giving the family the right to make a claim from the state.

It can be seen from this legislation prior to 1850 that the state was at least interested in the welfare of the child. It was willing to offer partial support for children in certain circumstances, and was in the first stages of protecting children as a specific group. However action was to be spurred on by a number of factors during the last decades prior to 1850.

The most obvious factor that brought attention to the plight of the young was the strong increase in immigration, especially Irish famine victims, who emigrated to Canada, landless and poor. They were mostly young as the census of Upper Canada revealed at the beginning of the union period of a total population of 432,159, 220,022 or 51% were children under the age of sixteen (Censuses of Canada, 1665-1871, Vol. IV, p. 128, Ottawa, 1876). They brought a realization that the urban centres, to which many went, were not capable of handling such vast numbers of poor adults and children. They were seen as a problem, and this is brought out in the "Report of the Commissioners on the Subject of Prisons, Penitentiaries, etc.", by Dr. Charles Duncombe in 1836 who described these children as lacking control and needing placement so they could be better cared for and find employment. There was also a feeling at this time that "ignorance and idleness are in truth the grand causes of crime" (Globe, July 20, 1850 in Houston,1972), and further "that poverty and destitution are the precursors of immorality and crime" (Quoted in Houston, 1972).

Crime, vagrancy, poverty, destitution and ignorance all seemed to link together as a common chord for a social problem and for children, vagrancy, or not attending school was no longer a misfortune, it was an offence (Houston, 1972, p. 261). What was originally a concern for the general welfare of children and the family became more focused on the plight of children involved in crime.

What happened to children who became involved in crime and the Criminal Justice System prior to 1850 was highlighted by the "Report of the Penitentiary Commission" in 1849, which was commissioned after much pressure to examine the conditions in the Kingston penitentiary and the various allegations that had been made towards its administrators ("Journals" Canada, 1848, app. B.B.B.B.B.). In this report - which George Brown, the publisher of the Toronto "Globe" acted as secretary - the condition of the prison system and the treatment of children in the system were exposed. A letter which was used by the commission, written by the Chaplin of the penitentiary in 1844, expresses some of his concerns:

> The boys and youths of a tender age are still subject to the same discipline as the more mature convicts; and the Chaplin would here observe on the extraordinary fact of a convict having lately introduced into the Penitentiary only eight years of age; and further, that at the present moment, three convicts are under twelve and twelve under sixteen ("Journals" Canada, 1849, app. B.B.B.B.B. n.p.).

The Commission reported on a number of children who were in the penitentiary at this time and drew their evidence from the actual prison records. One such case was that of Alexis Lafleur, who was committed 24 July 1842 till 26 July 1845, his age was eleven at the time of committal.

> ...during his first committal he was flogged 38 times with the raw hide and 6 times with the cats....It is horrifying to think of a child of 11 to 14 years of age, being lacerated with the lash before 500 grown men.

Or the case of Antoine Beauche who was committed 7 November 1845 for three years at the age of eight.

> The table shows that this child received the lash within a week of his arrival and that no fewer than 47 corporal punishments in nine months and all for offences of the most childish manner ("Journals", Canada 1849, app. B.B.B.B.B., n.p.).

What was made obvious in this report was the fact that there were gross injustices taking place and the second report of the Commission outlined what should be done to correct the situation for juveniles.

> We recommend to Your Excellency the immediate erection of one or more Houses of Refuge for the reformation of juvenile delinquents ("Journals", Canada 1849, app. B.B.B.B.B., n.p.).

This reformation was supposed to be aided by a system of labor, education and healthful exercise. The commission also however made an important distinction between children who were criminal and children who were vagrant or from poor and improper homes. The two should be separated yet both should be under the supervision of the managers of the institution until their majority, eligible to be apprenticed "to learn such trades or other employment as in their estimation will be most conducive to their reformation and amendment" (Journals, Canada 1849, app. B.B.B.B.B., n.p.).

Even though the prison reformers, such as Brown made clear the distinction between criminal children and children that were neglected, it was not clear to the social reformers. To them both classes needed to be cared for and reformed, and as pointed out by Houston, "[T]he distinction in states between neglected and criminal in effect translated as potentially vs. actually criminal" (Houston, 1972, p. 263).

Before the Commission Report into the state of the penitentiary in 1849 there was no real direct mention of specific age, nor age lines that could be used in the definition of what constituted an adult or child in the legislation drafted in Canada, other than the Act of 1813 affecting orphans (53 Geo. III, c. 4 (U.C.)). In this Act it was stated that the consent of the child had to be obtained if he or she was over fourteen years of age, to be bound out as an apprentice. The use of fourteen years of age as an age line would seem to make sense as children over this age were held responsible for their actions, at this time in the eyes of the law.

The Commission Report of 1849 did mention that children needing to be cared for and reformed should be placed under the supervision of the manager of the institution till their "majority". The report, however, did not define what "majority" was supposed to mean in terms of a specific age and this definition would be left up to those drawing up the legislation that would create such a "House of Refuge", which the Commission recommended as a more appropriate place for the reformation of juveniles, rather than the penitentiary ("Journals", Canada 1849, app. B.B.B.B.B., n.p.).

The age lines that were established under English common law as under seven, when the child could not be found guilty of a crime and between seven and under fourteen years of age when it was necessary to prove that the child was aware of the malice and the nature of the crime, were the lines that were accepted in Canada at this time (Keele, 1843, pp. 129-130). More importantly though, was the fact that there were no real challenges to the use of these age lines in Canada, as the issues prior to 1850 seemed to centre more on general child welfare problems rather than the legal responsibility of children in the courts. The 1849 Commission Report did however bring to the forefront the appalling situation of children in the penitentiary, and opened up the whole issue of children being treated as adult criminals. It exposed the children's maltreatment and the injustice of them being in the penitentiary, but more importantly it brought up the questions of criminality, youth and poverty as issues, issues that would be central in the shaping of future legislation affecting children.

Canadian Legislation Affecting Children Between 1850 and 1908

After the proposals of the 1849 Commission Report into the state of the penitentiary the obvious course to follow was the establishment of a "House of Refuge" for "...the reformation of Juvenile delinquents" (Report of the Penitentiary Commission, 1849). Andrew Dickson, one of the Inspectors of the Provincial Penitentiary, was to become a strong driving force toward this end. He also was to become the first warden in 1858, but his ideas about what such a "House of Refuge" should do were not exactly what the Commission had hoped for. He proposed, in a special report in 1853, that what was needed was a reformatory prison and this should be an institution that would serve all the problem classes.

> To the unprotected and homeless, it would be a place of shelter; to the tempted and friendless, a refuge; to the orphans and wandering a home,...to the guilty and criminal, reformation and to all, a place of industrial and agricultural improvement (Journal of the Legislative Assembly, 1852-1853, app. III).

The hopes of separating the criminal child from the idle and vagrant child were disappearing and instead it would seem that these two types of children were to become as one general group requiring reformation. As Houston points out:

> [the] distinctions between criminal and punishment vs. vagrant and reform were lost in genuine enthusiasm that greeted the establishment of two reformatory prisons (Houston, 1972, p. 268).

The actual establishment of a reformatory prisons was made possible by an "Act for Establishing Prisons for Young Offenders" (1857, 20 Vict. c. 28 (Can)) and it was this Act that would lead the way towards a change in the accepted age lines. The Act's purpose was set out in its preamble:

> Whereas it may be of great public advantage that Prisons be provided, in which young offenders may be detained and corrected, to receive such instructions and be subject to such discipline, as shall appear most conducive to their

> reformation and the repression of crime (1857, 20 Vict., c. 28 (Can)).

and the Act directed courts,

> to sentence any person, male or female, whose age at the time of trial shall not in the opinion of such Court exceed the age of twenty-one years, and who shall have been convicted before such Court of any offence now punishable or which may be made punishable by imprisonment in one of the said reformatory prisons instead thereof (1857, 20 Vict, c. 28, sec. V (Can)).

The sentence for such persons was set out to be not less than six months and no longer than five years in the reformatory prison. Persons under the age of sixteen years convicted of summary offences and sentenced to a common gaol for at least fourteen days could also be sentenced to the reformatory prison for a sentence of not less than six months and no longer than two years (1857, 20 Vict., c. 28, Sec. VI (Can)). The Act also allowed for the governor to remove anyone who appeared to be under twenty-one years of age from the penitentiary and place them in the reformatory prison for the remainder of their sentece.

The "Act for Establishing Prisons for Young Offenders" was the first Canadian Act to use sixteen years of age as an age line. It was followed in the same year by "An Act for the More Speedy Trial and Punishment of Young Offenders" (1857, 20 Vict, c. 29 (Can)), which was designed to "avoid the evils of their long imprisonment previously to trial" by using summary trial procedures for juveniles who were under sixteen and charged with simple larceny offences. The Act could also be used to dismiss the accused if the judge felt the offence was not proven or if punishment would have been inexpedient (1857, 20 Vict, c. 29). Sixteen years of age was to become increasingly popular as an age line where persons under this age were to be treated differently than those individuals older than sixteen. First it was used in the "Act for Establishing Prisons for Young Offenders" to change the type of sentence that would be handed down. It was a movement away from the punishment in a penitentiary to the correction and reformation in the reformatory prison and also to facilitate this reformation the length of the sentence was changed. Secondly in the "Act for the More Speedy Trial and Punishment by Young Offenders" the age line was used to change the way individuals under sixteen were processed by the court system making it less formal and more speedy in handling their case, and also giving them the opportunity of having their case dismissed if punishment was thought inappropriate by the court.

The age line of twenty one was also mentioned in the "Act for Establishing Prisons for Young Offenders", however this age line was not new. Persons twenty-one years of age and older were considered to be of full legal majority, with all the rights and obligations of adulthood under English Common Law. Persons under twenty one years were nonadult and this was an accepted age line in Canada (Keele, 1843, pp. 129-30) at the time.

The case for using sixteen as an age line became increasingly popular and those involved in the reformatories themselves seemed to agree that it was an age line that should define the limits of the reformatory population. This is made evident in the "Annual Report of the Board of Inspectors for the year 1864" where it was stated,

> The Inspectors have repeatedly, in former reports, urged the necessity of certain alterations in the laws relating to Reformatory Prisons...that no convict over 16 years of age should be sent to a reformatory (Sessional Papers, 1865, no. 14, p. 21).

Later Ontario legislation was also to make use of this age line. In the "...Act respecting Industrial Schools" which was passed in 1874, juveniles could be placed in an Industrial school if they were under the age of fourteen for their teaching and training but not to be held beyond the age of sixteen years (1874, 37 Vict., c. 29 (Ont.)).

The legislation affecting juveniles was to continue to change and develop in the coming years, and there were a number of particular forces that have been noted that were behind this evolution (see Parker, 1976, Houston, 1972 and Leon, 1977). One such force was that of a group of social reformers concerned with the interests of children in the community and criminal justice system. These reforms were later to be termed as "child savers" (Platt, 1969) and in Canada the efforts of one such individual has been especially noted that is of J.J. Kelso (see Leon, 1977).

These so called "child savers" became very active in the issues concerning child welfare and in 1887 Kelso became Ontario's first Superintendent of Neglected and Dependent Children. The following year "An Act for the Protection and Reformation of Neglected Children" (1888, 51 Vict, C. 4 (Ont.)) was passed. This legislation allowed for the commital of neglected children to industrial schools and refuges, where they could be kept and cared for (Section 2). The Act also provided for the appointment of commissioners to hear and determine complaints against juvenile offenders who were apparently under sixteen years of age (Section 7). The Act went further by allowing "as far as practicable" for the separate trial of juveniles (Section 8). In 1890 another two Acts were passed in Ontario being "An Act respecting the Custody of Juvenile Offenders" and "An Act respecting the Commitment of Persons of Tender Years" (1890, 53 Vict., c. 75 and c. 76 (Ont.)), which continued the trends for the "child savers" by trying to keep children out of the reformatory prison and rather place them in industrial schools instead. These Acts reflected many of the interests of the "child savers" which were directed more towards what they hoped to be the better treatment of children, who should be "kept, cared for and educated" (Leon, 1977, p. 82). As such, industrial schools and refuges could be seen as more appropriate than a reformatory prison.

The efforts to change the legislation affecting juveniles was further aided by the results of the Commission of Inquiry into the prison and reformatory system of Ontario in 1891 which was chaired by Mr. Langmuir (Langmuir, 1891). The commission recommended a number of changes including the separate trial and detention of juveniles as well as the development of a probation system which allowed children to be placed under the supervision of a probation officer rather than being convicted of an offence and possibly being sent to reformatory prison. It also was in favour of the use of Industrial Schools that could use a cottage system where there was a family environment. The recommendations however did not place a great emphasis on differing age lines and suggested that those under fourteen should be the ones who would be given special protectionary measures, such as avoiding arrest and separate trials (Langmuir, 1891, pp. 214-218). The Report also suggested that indeterminate sentences be used and that the manager of the reformatories and industrial schools should have authority over the child until he or she reaches "majority" which they did not define as being any particular age, rather this was to extend until the child could look after himself or herself properly.

The effect of this commission was made even more powerful when Mr. Kelso and Mr. Langmuir joined together in a public meeting and with other interested people founded the Toronto Children's Aid Society and Fresh Air Fund. Together representing the "child saving" movement and the provincial commission, they were to prove to be an effective lobbying force (Leon, 1977, pp. 86-87).

The first Criminal Code of Canada was enacted in 1892 and had provisions for the separate trial of persons under the age of sixteen years if it was practical to do so. The use of sixteen seems to have come directly from the previous legislation which used this age line (Act for Establishing Prisons...1857, 20 Vict., c. 28 (Can) and An Act for the More Speedy Trial and...1857, 20 Vict, c. 29 (Can)).

Continued pressure from the "child savers" saw the enactment in Ontario of the Child Protection Act (1893) which gave broad powers to apprehend and detain children in need of protectioh (56 Vict, c. 45 (Ont.)) and later "An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders" (1894, 58-59 Vict, c. 58 (Can)) was passed at the federal level. This Act made it mandatory for the separate trial of juveniles under sixteen years of age, and also provided for their separate pre and post-trial custody. By 1903 probation was recognized in Ontario by "An Act to ammend the Children's Protection Act of Ontario" (1903, 3 Edw VII, c 30 (Can)) which also used age sixteen as a specific age line where a child under this age could be placed, by a judge, under the care of a probation officer if accused of a provincial offence, without being convicted of an offence. This was also one of the "child savers" objectives which was mentioned by Kelso to gain "...[t]he appointment of a probation officer to ascertain and submit to the court full particulars of each child brought up for trial and act in a capacity of the child's best friend" (Quoted in Leon, 1977, p. 86).

There was much consultation as noted by Leon between some members of the federal government of the time and some members of the "child saving" movement. In particular the efforts of Kelso and W.L. Scott who was serving as Secretary of State as well as his father Senator R. Scott have been noted by Leon in their efforts to draft up federal legislation. This legislation was to take the form of the Juvenile Delinquents Act which was eventually passed by the House in 1908 (7-8. Edw VII, c. 40 (Can)). The Act allowed for the establishment of Juvenile courts which would have the exclusive jurisdiction over children who were under sixteen years of age and accused of any federal or provincial statute or municipal by-law, or any other Act which allowed for their committal to an industrial school or reformatory (1908, 7-8 Edw. VII, c. 40, sec. 2 (Can)). The court could also transfer the child to be tried as an adult in criminal court if he or she was fourteen years of age or over and charged with an indictable offence (see Crankshaw, 1915, pp. 5 and 11), if the judge felt this would be for the good of the child and in the interest of the community (Sec. 6). Individuals under 14, but at least 7 years of age were to be held conditionally responsible, that is, their ability to form malice and knowledge of wrong had to be proved to convict the child. The trials would be held separately and without publicity in a summary fashion allowing for as much informality as possible, but with a regard for the "proper adminstration of justice" (Sec. 14). The Act's intention to remove children from the adult criminal process was made obvious in its preamble which stated,

> 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 strengthen their better instincts (1908, 7-8 Edw. VII. c. 40 (Can)).

The actual philosophy of the Act was set out as

> This Act shall be liberally construed to the end that its purpose may be carried out, to wit: That the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance (1908, 7-8 Edw. VII, c: 40, sec. 31 (Can)).

Conclusion

The development of the Juvenile Delinquents Act (1908) and the use of new age lines that would be used in the legal definition of a child and adult can be seen to have stemmed from a number of forces. Firstly, the Act developed as a result of social conditions and pressures to deal with children in society at the time. The effects of mass immigration and high levels of poverty as well as a very large portion of the population being young were factors that aroused the public's concern about the welfare of children.

These concerns centred around issues such as their involvement in crime, the level of poverty they were living in, poor parenting, associating with criminals and also how they were being treated in gaols and penitentiaries around this time.

What the Juvenile Delinquent Act (1908) was attempting to achieve may be seen as protecting and reforming as many children as possible. As such, the Juvenile Delinquents Act may be considered as having a basic welfare approach toward the treatment of juveniles. Probably because of this welfare approach, of protection and aid, the Act may have been drafted to include as many individuals that could benefit from such treatment as possible. This reasoning can be used to understand why the Act covered so many possible offences which could be used to adjudicate the child as delinquent. Everything from staying out late at night to committing a criminal offence was included, making the scope of the legislation very wide indeed. More important though, was the effect this welfare approach may have had on the age lines that were previously in effect.

The previously accepted age line, as pointed out was fourteen years of age above which the child would be treated as an adult if he or she committed a crime. Obviously, shifting this age line up would include a larger portion of the population, but how far should this age line should be moved up, was an important concern. This concern, it appears, was addressed by taking into consideration the evolution of the previous Canadian legislation affecting children.

The "Act for Establishing Prisons for Young Offenders" (1857, 20 Vict. c 28 (Can)) was the first Act to make use of the age line of sixteen, giving children under this age the opportunity of being sent to the reformatory instead of a jail or the penitentiary. More importantly though, the managers and inspectors of the newly created reformatories strongly emphasised that children over sixteen years of age should not be in the reformatories, as they were too old to benefit from the reformatories (Board of Inspectors Report, 1864, Sessional Papers 1865, no. 14). Children over this age, therefore, were to be considered more as adults than children. As the future legislation developed, this age line became increasingly popular and accepted, as the point below which children should be given special protection. (The first Criminal Code used it in 1892 giving children under sixteen separate trials where possible, in 1894 it was used in "An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders" and also in 1903 in Ontario in the Child Protection Act). Using it in the Juvenile Delinquents Act (1908), therefore, made sense as it followed what had passed and included a larger group of children that could be protected from the adult criminal system than if fourteen had been used. The age-line also corresponded to that used in the United States especially in Massschusetts (Rosenheim, 1962), and, as pointed out by Leon (1977), a number of members of the "child saving" movement had travelled to the United States to study their Court and Probationary system. So it would seem that their system had an influence in the development of the Canadian Juvenile Delinquents Act (1908).

The change in age lines from fourteen to sixteen years may also be better understood in terms of its basic change in philosophy with the development of the Juvenile Delinquents Act. Prior to 1857, a child over the age of fourteen would have been treated as any other adult in the courts and would also have been subjected to the same consequences. If, however, the child was between seven and fourteen years of age, then malice or knowledge of the wrong of the act would have to be proved to convict the child, otherwise the child would be considered too immature to be held responsible for his or her actions. The court process for such children would have been the same as an adult, insofar as there were no special court procedures or protections for dealing with the young. Children under seven were automatically considered too young and immature to be able to understand the nature and consequences of their actions or the crime they may have been accused of committing, and as such were not subjected to a trial in Court.

The year 1857 saw the "Act for Establishing Prisons for Young Offenders" (20 Vict c 28 (Can)) and the "Act for the More Speedy Trial and Punishment of Young Offenders" (20 Vict c 29 (Can)), being passed. These two Acts it would seem were the first Canadian Federal Acts to change the way children were treated in both the courts and institutions, and were followed by a number of other changes until the Juvenile Delinquents Act was passed in 1908. It assumed, as the previous common law ruling did, that those under seven years of age could not be found guilty of an offence due to their immaturity, and as such would not be tried. Children between the ages of seven and sixteen years were now under the Juvenile Delinquents Act and as such were to be treated not as ordinary criminals, but "...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 strengthen their better instincts" (7-8 Edw. VII, c 40, preamble (Can)). They were considered in a state of delinquency and treated as juvenile delinquents by a special Juvenile Court which was to consider them "...not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance" (Ibid., Sec. 31). The Juvenile Court could, however, transfer a child over the age of fourteen years to adult criminal court if it was "...of the opinion that the good of the child and the interest of the community demanded it" (Ibid., Sec. 7).

It may be said that the Juvenile Delinquents Act (1908) was a major change in philosophy for the treatment of young people in Canada. As such, it was more than a simple shift in the age lines dividing when a child should be considered adult or child, or whether he or she should be treated as too immature and unable to form the necessary malice to prove guilt. It was a change in the whole philosophy of the law relating to young people, and this change in philosophy towards what may be seen as a more welfare approach, both affected the age lines that existed prior to 1908 and more importantly the way young people were to be treated by the Canadian Criminal Justice System after 1908.

CHAPTER IV

CHILDREN AND THE LAW 1908-1985

This chapter will look at the development of Canadian legislation affecting young people over the time period from 1908, when the Juvenile Delinquents Act was passed, to 1985, when the Young Offenders Act came into effect. Particular attention will be paid to how this legislation developed and changed, and how it can be related to the emerging social forces that affected its development. The use of age lines in the development of the legislation over this time period will be the focus of attention, however this development will also be linked to the changing philosophy of the law affecting young people. The chapter will also attempt to take into account broad social changes and political as well as economic factors which may have affected the development of such legislation in Canada.

Establishment and Growth of the Juvenile Delinquents Act 1908-1960

After the Juvenile Delinquents Act was passed in 1908, there followed what seems to be a period of adjustment, where the provinces began to implement the Act by establishing juvenile courts and detention homes that were necessary for the Act to be implemented. This period of adjustment was due to the fact that the Act would be put into effect in a province or part of a province if the provincial legislature passed the necessary legislation to establish the courts and facilities that were requied. The Governor in Council of any city or town could also implement the Juvenile Delinquents Act (1908), if,

> ...satisfied that proper facilities for the due carrying out of the provisions of this Act have been provided in such city, town, or other portion of a province, by the municipal council thereof or otherwise (1908. 7-8 Edw. VII c 40 s 35 (Can)).

There were also a number of amendments made to the Juvenile Delinquents Act (1908) after it was passed. These amendments did not change the Act's philosophy or intention radically, but rather can be seen as following its general philosophy and even expanding the scope of the legislation. For example in 1921 the definition of "child" was extended to mean, any "boy or girl apparently or actually under the age of eighteen years" (1921, 11-12 Geo. V, c. 37 s 2 (Can)). The use of eighteen years was however left up to the discretion of the individual provinces as to whether or not it, or sixteen years of age would be used to define "child".

> This section shall only come into operation in such province or provinces as the Governor in Council may from time to time by proclamation prescribe (1921, 11-12 Geo. V. c 37 s 2 (Can)).

Giving the provinces the option of extending the period of time that an individual could be considered a "child" may be seen as following in the care and treatment aspects of the Act. It was extending the scope of Act, to afford as many individuals as possible this "care" and "treatment" from which they could "benefit" (1908 7-8 Edw. VII c40 Preamble (Can)).

The scope of the Juvenile Delinquents Act (1908) was also extended by altering the definition of "delinquent" in an amendment in 1924.

> "Juvenile delinquent" means any child who violates any provision of the Criminal Code, chapter one hundred and fourty-six of the Revised Statutes, 1906, or of any Dominion or provincial statutes, or any by-law or ordinance of any municipality, for which violation punishment by fine and imprisonment may be awarded, or who is guilty 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 (1924 14-15 Geo V c 53).

This amendment failed to define what "sexual immorality" or "any similar form of vice" was, and by failing to do so it would appear the Juvenile Court was given an even wider scope, as the interpretation would be left up to the individual judges to decide.

In 1928 the whole Juvenile Delinquents Act was revised at the request of the Canadian Council on Child Welfare according to Leon (1977, p. 103). However the revision of the Act was more of a technical revision to aid in its administration and operation, than a revision of its philosophy. This point was brought out by Mr. Lapointe, the Minister of Justice at the time when he spoke of the changes to the Act in the House of Commons.

> The amendments relate largely to procedure and are of a nature to make the Act work more smoothly (Debates, April 29, 1929, p. 2016).

The 1929 Juvenile Delinquent Act saw some changes in the definitions that were previously used, and in particular the Act allowed the age line for either boys or girls to be changed by proclamation of the Governor in Council. This meant that the age line used to define "child" could be different for boys than girls (1929, 19-20 Geo V. c 17 s 2 (Can)). In the House of Commons when this section was being explained, the focus of attention centred more on the use of eighteen years of age as an age line than the possibility of having differing age lines for differing sexes. The use of eighteen years of age as the possible age line to define "child" was explained in the House by Mr. Bennett:

> It was thought desirable by some of the provincial authorities to exercise help and guidance and proper supervision over some children who were older than sixteen years. Hence, sixteen being the standard, it is provided that by proclamation the governor in council may continue these provisions to children of the age of eighteen (Debates, 1929, p. 2569).

There were also a few additions to the Juvenile Delinquent Act in the 1929 version, such as the inclusion of an appeals procedure. In this section the Juvenile court was given its own appeal procedure and any juvenile court decision could be appealed. However the right to appeal was to be determined by the Judge and appeals were to take place only on extraordinary grounds, such as when it was in the public interest and for the due administration of justice (1929, 19-20 Geo V. c 17 s 37 (Can)).

Following the 1929 Juvenile Delinquents Act there seems to have been only relatively minor adjustments made to the Act. In 1932 there was an amendment which specified the deadlines for an application for leave to appeal and in 1935 a new section stated that it was not a valid defence for an adult accused of contributing to a child's becoming a juvenile delinquent to claim that the child was too young to understand or appreciate the nature or effect of the accused's conduct (1932. 22-23 Geo V c 17 (Can). 1935 25-26 Geo V c 41 (Can)).

It would seem then, between the years of the first enactment of the Juvenile Delinquents Act in 1908 to the revision of the Act in 1929 that there was little concern raised about the Juvenile Delinquents Act. Attention rather, seemed to have centred on refining the Act so it would operate more effectively and the legislation passed during this period also appears to have extended the powers of the Act rather than redirecting or changing it. It would appear then, that there was little incentive to change the Juvenile Delinquents Act in any radical way, such as changing its philosophy and this could be related to the fact that there was little common knowledge of how effective or ineffective the Act really was in terms of its ability to deal with delinquents at this time.

In 1938, however, the Report of the Royal Commission to Investigate the Penal System of Canada was released. The commission which was headed by Justice J. Archambault was established to investigate the operation of the Canadian penitentiaries and to report on the problems faced by them. In this Report a number of problems were exposed that were seen to exist in the Juvenile Delinquents Act of 1929, especially the uneven growth of juvenile courts across the country and the large proportion of the population who could not benefit from the hearing of a Juvenile Court because they lived in rural areas where the Act was not proclaimed. The Commission also had strong feelings about the age lines that were being used in the 1929 Act, and it was stated:

> Your Commission are definitely of the opinion that the jurisdiction of the juvenile courts should be limited to children below the age of sixteen years (Archambault, 1938, p. 188).

The justification for using sixteen years of age as the age line between "child" and "adult" was based on the opinion that,

> The problem of detention homes and training schools would be clearly aggrevated, where the age limit has been increased (<u>Ibid.</u>, p. 189).

The Commission did however recommend that there should be an amendment in the criminal code to allow a judge to transfer a youth between sixteen and eighteen years of age to juvenile court, if it was felt that the individual could benefit from juvenile court.

Even though the Commission did call for changes in the Juvenile Delinquents Act to solve these problems, it did not appear to suggest changes that would alter the basic principles of the Act. The Commission did however expose a number of the problems that the Act was experiencing and it would seem, was the first Commission that looked at the problem of the lack of uniformity in administering the Act.

After the Commission report (1938), there were a number of amendments made to the Juvenile Delinquents Act in 1947 and 1951, but these were only minor changes and they did not reflect the changes that the Archambault Commission had called for. The results of the Commission, it would seem were to be largely ignored and issues relating to juveniles and juvenile court were to wait until the 1960s before there was an increased interest in issues relating to juveniles by the Canadian government.

Changing the Strategy for Responding to Juvenile Delinquents, 1960-1985

It appears that what raised this increased interest in issues related to juveniles was the results and recommendations of a correctional planning committee. The Correctional Planning Committee was established to prepare a report for the Minister of Justice on the long range plan for corrections in Canada, with special reference to the penitentiary system (Report of the Correctional Planning Committee of the Department of Justice, 1961). In this Report it was stated that the development of a correctional program would not solve the problem of crime in Canada, but would rather only serve to prevent the problem from becoming more acute. This was felt because the federal correctional system could only be used for people who have already committed at least one offence. The Committee therefore refocused on prevention at an early age as a possible solution for the long term.

> There should, therefore, be an organized, integrated approach in Canada to the problem of juvenile delinquency in order to discover, at an early stage, those children who are in danger of becoming delinquent and to correct their maladjustments at that time (ibid., 1961, pp. 5-6).

This had the effect of passing the responsibility of the long term objectives of "corrections" from the penitentiary system to the juvenile court system. The Committee felt that unless this was done there would be no real hope of stopping the ever increasing number of young adults flowing into the Canadian jails and penitentiaries.

In response to the recommendations made by the Correctional Planning Committee of 1961, the Minister of Justice, Mr. Fulton, established a five-man departmental committee to look into juvenile delinquency on November 6th, 1961. Their purposes were to:

> (a) inquire into and report upon the nature and extent of juvenile delinquency in Canada;
>
> (b) hold discussions with appropriate representatives of provincial governments with the object of finding ways and means of ensuring effective cooperation between federal and provincial governments acting within ~~their~~ respective constitutional jurisdiction, and;
>
> (c) make recommendations concerning steps that might be taken by Parliament and Government of Canada to meet the problem of juvenile delinquency in Canada (Juvenile Delinquency in Canada, 1965, p. 2).

The Committee made its report available in 1965 and it was titled <u>Juvenile Delinquency in Canada</u>. The report included some 100 recommendations to reform the Juvenile Delinquents Act and pointed out that it was known that there was a problem of delinquency in Canada, but the nature and extent of the problem had not yet been explored. Canada was experiencing the effects of the post World War II baby boom which meant that more persons were coming into their teens than any previous period in Canada's history. The Canadian Census was used to demonstrate this by showing that 38% of Canada's population was nineteen years or younger in 1956, yet in 1961, this had risen to 42% of the total population (Juvenile Delinquency in Canada, 1965, p. 2). It it was felt this obviously had implications for planning in corrections and more importantly it made the area of juvenile delinquency an important issue, an issue that was now being addressed.

Contained in the 100 recommendations, were proposed changes in the Juvenile Delinquents Act which would allow for more separations between the social and judicial aspects of treating delinquency. The Commission recommended that juvenile court should deal more with judicial matters and the social aspects should be treated under provincial welfare legislation (ibid., p. 66). There were also broad recommendations that called for equality throughout Canada in services for juveniles and also that the law should operate equally throughout the country. They proposed that the term "Juvenile Delinquent" should be removed from the legislation and it should be replaced by "Young Offender" and "Child Offender", and the new Act should be called the "Child and Young Persons Act" (ibid., p. 283). Children were to be charged only with specific offences under this new Act and it was not to contain any of what they considered "quasi criminal law". Conduct such as incorrigibility and children in moral danger were not to be dealt with under this Act, as they felt provincial legislation would serve such "quasi criminal" behaviour better and that a federal Act should be concerned only with truly criminal behaviour (ibid., p. 283.)

The report Juvenile Delinquency in Canada (1965) also made recommendations that the established age lines should be changed. It was felt that there was a need for uniformity across the country, and that the Juvenile Delinquents Act allowed for provincial differences. The Juvenile Delinquents Act also defined the jurisdiction of the court as being over any child "apparently or actually" under sixteen years of age, which it was felt also left room for variation according to how the definition is interpreted (ibid., pp. 40-41).

The age line that was used to define when a child could be found responsible for his or her actions, being seven, it was felt should be raised. The Commission cited recommendations that were submitted by interested organizations and showed that all these organizations felt that this age line should be raised. There was however disagreement over how far this age line should be raised and the Commission came to the conclusion that it should be raised to at least under 10 years of age but no higher than under 12 years of age.

There were a number of arguments that the Commission used to justify their decision in recommending that this age line should be raised. Firstly it was felt that children under the age of 10 years would not be able to understand or participate in juvenile court procedure and as such it was felt that it was inappropriate for children of such a young age to be in court. The Commission also felt that the procedure in court and the proceedings themselves may confuse the child and suggested that there could also be possible negative labelling effects for such young children. It was also suggested by the Commission that of all the children found delinquent, only 3-4% were under the age of 10. Even if the age was raised to 12, only about 12% of all the juvenile offenders would be affected (ibid., p. 50). The only negative aspects they could propose in raising this age line was the probability of having to extend services under welfare legislation to absorb these young children. In essence then, the Commission proposed that there should be a uniform minimum age line of 10 years of age, or at most 12 years of age.

The Commission also suggested changing the age line that was used to define "child", under the Juvenile Delinquents Act. hence, it was also proposed that the age line of under sixteen was too low and that it should be raised. The main arguments here were firstly:

> The fact that growth into full psychological maturity is delayed for young persons in contemporary society because of the prolonged period of dependency that is required for them (Juvenile Delinquency in Canada, 1965, p. 57).

It was suggested that children may be more physically mature today than their grandparents were, but teenagers do not become adults socially and economically as early as their counterparts did in the 1900s when the Canadian Juvenile Delinquents Act was first passed. To back this argument up, the Commission pointed to school leaving age over time, and demonstrate how it has risen. They also suggested that more teenagers continue their education beyond the school-leaving age, as such the teenage years have become devoted more to academic and vocational preparation, making teenagers more dependent (ibid., pp. 54-57).

The Commission argued that there was also a need for one court to be responsible for teenagers as an identifiable group, with the desire of protecting young people as long as possible from exposure to"...the sometimes hopeless conditions in jails and institutions for adults" (ibid., p. 54). It would seem that they were in favour of extending the benefits of the juvenilie court approach to as wide a group as possible. Yet at the same time they had to place a limit on just how broad they could be. It was decided that the juvenile age line be set at under 17 and that this age line should be uniform across Canada.

It appears under 17 was chosen as the age line dividing adult from child because, firstly, it was an upward revision and secondly it meant less of an administrative change than if 18 years of age had been used. It was also decided that the age at which a waiver of jurisdiction, may occur, to appear in criminal court should remain at 14 years of age.

The responsibility for the consideration and implementation of the Commission's report, Juvenile Delinquency in Canada, was given to the Solicitor General, under the Solicitor General's Act, in 1966. In the spring of 1967, Cabinet authorization was sought and received to prepare a draft revision of the Juvenile Delinquents Act and by September 1967, a discussion draft was prepared. From this discussion draft there followed a federal- provincial conference in January 1968 to discuss the implications of the draft and after this meeting, a draft Bill was prepared by the Department of Justice, which was received by the Solicitor General's Department (Issues and Options, 1985, p. 9).

The draft Bill prepared by the Department of Justice, became the basis for Bill C-192, The Young Offenders Act, and it was introduced into the House of Commons for first reading on November 16th, 1970, by the Liberal government. This it would seem was the first serious attempt to change the basic philosophy of the legislation affecting juveniles in Canada since the enactment of the Juvenile Delinquents Act in 1908.

However Bill C-192, The Young Offenders Act, was not well received in the House of Commons for a number of reasons. Firstly, the terminology used in the Bill resembled what was thought to be "...a new Criminal Code for children", according to critics such as Mr. Williams in the House (Debates, House of Commons, 1971, p. 2374). Its French version was also seen as very unsatisfactory, as it was a poor translation, and more importantly though the Bill did not provide any provisions for financial aid to the provinces for implementing its costly provisions. Mr. Gilbert expressed this feeling of a strong opposition towards the Bill when he stated in the House of Commons,

> Every time I read Bill C-192 I wonder who is responsible for this criminal law monstrosity, this caveman's approach to young people, this bill of legal rights for social wrongs, this Spiro Agnew approach to young people's problems (Debates, House of Commons, 1971, p. 2381).

Even though Bill C-192 was drafted at a time when it was felt there was a perceived need for change, from the recommendation of the report Juvenile Delinquency in Canada, it was not accepted in the House of Commons by its critics. Even the age lines proposed in the Bill came under fire, especially from Mrs. MacInnis:

> We are unhappy about that age range. The bill covers the age from 10 to 17 years. We think the United Kingdom approach, where 17 is specified as the maximum age is better, and we believe that 18 years should be set [in Canada] as the upper limit (Debates, House of Commons, 1971, p. 4497).

Since Bill C-192, The Young Offenders Act received so much criticism in the House of Commons, it was allowed to die on the order paper of the 1970-72 session of Parliament, as the knowledge that the compromises which would have had to be made if the Bill was to pass debate would have defeated the original intent of it.

Following the death of Bill C-192, Cabinet authorized the Department of the Solicitor General to carry out a joint review of the program, services and financial arrangements dealing with young persons, which was to be conducted in consultation with the provinces (Issues and Options, 1985, p. 10). The then Solicitor General, Warren Allmand, also set up a committee in the fall of 1973 to undertake a review of the devleopments that had taken place in the field since the death of Bill C-192. This committee was also to consider the deliberations of the joint review which Cabinet had authorized, and to work with this joint review group in going over the Juvenile Delinquents Act, Bill C-192 and the implications posed by them. The aim of the committee was to eventually draft new proposals for legislation taking into account how, and why the previous legislative proposal, Bill C-192 had failed.

In September 1975 after the report of the Federal-Provincial Joint review, which pointed to many problems in the Juvenile Delinquents Act, which still existed after the commission report Juvenile Delinquency in Canada (1965), the Solicitor General's committee submitted its report. This report was titled Young Persons in Conflict with the Law and was made widely available to interested parties and provincial authorities. The report was drawn up as a discussion paper which included proposals for altering the existing Juvenile Delinquents Act and included a draft of the legislative form these proposals could take. The report also set out the major issues that had to be dealt with in the implementation of such changes and also set out the possible alternatives that were seen to be available. Young Persons in Conflict with the Law gave room for change, but it at the same time laid out the possible consequences for taking alternative ways of approaching the problem of juvenile delinquency in Canada.

The report Young Persons in Conflict with the Law may be seen as a different approach by the government in trying to change the legislation affecting young people. It was a report that was to try and make use of the previous failed efforts at changing such legislation and was to try to incorporate what methods it was felt were more effective in possibly changing the legislation. The report was a tool that was to be used in the consultation with the provinces, as the failed Bill C-192 had shown there was a strong need for consultation before possible legislation affecting the provinces could be passed. The report also allowed for changes in the form of the previous proposed legislation according to its major criticisms, one of these being age lines. The age lines proposed in Young Persons in Conflict with the Law were under 14 years of age for the minimum age and under 18 for the maximum age line.

In the report, the justification for using a minimum age line as under 14 was based on the committees opinion that those under 14 should not come under the jurisdiction of criminal legislation, and that the legislation they were proposing would deal only with young people who had committed offences against the Criminal Code. They suggested that children under 14 should be looked after under the provisions of "provincial child welfare, youth protection and juvenile correctional legislation" (Young Persons in Conflict with the Law, 1975, p. 5). It was pointed out that children do develop differently and at different rates, so setting a specific age line to determine when a child should be held criminally responsible was very difficult. Yet it was also pointed out that it was necessary to have a specific age set under the legislation so the law could be applied in a uniform manner.

Under 18 years of age was chosen as the age line dividing when an individual should be treated as an adult or when he or she should be dealt with in Youth Court. The committee felt again that this age line should be uniform across Canada and felt that this age line was supported by the fact that civil responsibility starts at 18 and 19 within the various provinces. The commission also quoted the recommendations of a report on Canadian children with emotional and learning disorders from 1970, which suggested that the jurisdiction of the juvenile courts extend to the 14 to 18 year age group (Young Persons in Conflict with the Law, 1975, p. 20).

An interdepartmental working group was set up in 1976 to oversee the response to the Young Persons in Conflict with the

Law report. This working group also explored the whole issue of the cost implications of the possible new legislation for the provinces. It was to open up consultation with the provinces and interested parties so that an understanding of the difficulties with the proposed new legislation could be gained and possible adjustments and changes could be made before a Bill would be presented in the House of Commons. This response was very different from the way Bill C-192 developed, in that it showed the Federal Government had to conduct extensive consultation with the provinces before it could hope to change the legislation that had obvious implications for them.

Two years of consultation took place between the time the Young Persons in Conflict with the Law was published and the development of a formal position by the Federal Government in response to the provinces appeared. A booklet entitled, Highlights of the Proposed New Legislation for Young Offenders, set out this response. It was tabled in the House of Commons by the then Solicitor-General, Mr. Fox in March 1977 and its proposals were discussed in June of that year at a Federal-Provincial Conference of Attorneys-General and Ministers of Correction.

The booklet Highlights of the Proposed New Legislation for Young Offenders (1977) set out what may seem to be much of a compromise between the Federal Government's position on what form the ~~new Young~~ Offenders Legislation should take, as they proposed in the 1975 report Young Persons in Conflict with the Law, and what the provinces felt the legislation should do. The booklet suggested that the minimum age of criminal responsibility should be set at under 12 years of age as it was felt that provincial legislation pertaining to child welfare or youth protection would be more effective for such young children. It is also pointed out that it would be desirable to have a uniform maximum age line, however the consultation with the provinces failed to achieve agreement as to what that age should be. The maximum age line that was proposed was under 18 years of age, with the option of setting this maximum at either, under 16 or 17 left up to the provinces and territories. It was also pointed out however that the Federal Government was in favour of a uniform maximum, as well as a minimum age line, so that the "...procedures, pratices and services of the juvenile justice process will apply equally to all young Canadians" (Highlights of the Proposed new legislation for Young Offenders, 1977, pp. 5-6).

On October 26, 1979 the Parliamentary Secretary to the Solicitor General tabled a comprehensive policy statement entitled Legislative Proposals to replace the Juvenile Delinquents Act. However this was a new Parliamentary Secretary and a new Solicitor General as there had been an election and the Conservative Party had taken power. The policy statement ended up dying on the Order Paper without debate due to the dissolution of Parliament, however consultation with the provinces continued, and it was not until 1981 that a more serious attempt was made to reintroduce a Bill that would replace the Juvenile Delinquents Act.

The problems of establishing a uniform maximum and minimum age line were to continue, and it would seem the major issue was not over whether there should, or should not be uniform age lines, but at what age they should be set. Differing provinces had differing maximum age lines, defining when a child should be treated as either child or adult. This in effect meant that some of the provinces would have to provide new necessary services and facilities to cope with a proposed change in the age line, while others already had changed their maximum age line, as provided under the Juvenile Delinquents Act and had the facilities to deal with a proposed upward change in the maximum age line. It would seem then the most serious implication came from shifting this maximum age line, as it was also recognized significantly more individuals at an older age were involved with the justice system than very young children at the minimum age line. Shifting this age line would mean providing services and facilities for this relatively large group of young people which could be seen as a large financial responsibility, especially for those provinces who were using under 16 as their established maximum age line rather than under 18.

It was, however, agreed among the provinces, in consultation with the Federal-Government that a uniform minimum age line should be set at under 12 years of age, so that no child under 12 years of age could be held criminally responsible, but rather such children would be treated under provincial child welfare legislation. The problem remained though in setting a uniform maximum age line and Bill C-61 The Young Offenders Act, when introduced into the House of Commons on February 16, 1981 reflected this.

In February 1981, Bill C-61 was introduced into the House of Commons as well as a booklet The Young Offenders Act Highlights (Feb. 1981) by Mr. Kaplan, the Solicitor General. The Bill was very close to what was suggested in the 1977 booklet Highlights of the proposed new legislation for Young Offenders. However the 1981 version did have a uniform minimum age line of under 12 years of age for establishing criminal responsibility, which was agreed by the provinces. The maximum age line under Bill C-61 was set at under 18 years of age, however at the request of a province, this age could be set at either 16 or 17 in that particular province. It was stated in the "Highlights" booklet of 1981 that the Federal Government would prefer the establishment of a uniform maximum age line, but that the provinces were unable to agree on what age would be used. Therefore, it was stated that the Federal Government was "reluctant to impose a maximum age on the provinces, given the variety of services, and attitudes they offer" (The Young Offenders Act, Highlights, Feb. 1981, p. 5).

In the House of Commons, Bill C-61, The Young-Offenders Act received much debate, especially over issues of funding and the age lines that were proposed in the Bill. The Solicitor General, Mr. Kaplan, was interested in having a uniform maximum age line of under 18 years established, but was also aware of the disagreements between the provinces as to what age should be used. He therefore, it would appear, allowed the provinces to set their own maximum age line at either under 16, 17 or 18 years, under the Bill C-61. He felt this was necessary because:

> Practically speaking, due to the specialized programs, resources and services which are in place to deal with young offenders, considerable program shifts and adjustments would be required if the maximum age, which is under 18, were to be made uniform (Debates, House of Commons, 1981, p. 9308).

However allowing the provinces to choose their own maximum age line was seen as a problem, especially by the critics, and as Mr. Hnatshyn said in the House, "[w]e have to ask ourselves whether this kind of provision will provide for the so-called checkerboard effect across Canada" (ibid., p. 9313). He felt that the uniform application of law across Canada was very important and his feelings were more strongly put to the Solicitor General by Mr. Robinson in the House.

> If there is one concern which is greater than all the rest, and which surely represents a flagrant violation of the principle of equality before the law, and which in my view, a violation of the government's own charter of fundamental rights and freedoms, it is the government's failure to bite the bullet and impose a standard age, a standard maximum age right across the land to define what constitutes a young offender (Debates, House of Commons, 1981, p. 9318).

Bill C-61 The Young Offenders Act was referred to the Committee on Justice and Legal Affairs on June 2, 1981, for amendments, and it was here that the decision to apply a uniform maximum age limit of 18 was made. The Bill was introduced into the House for its third reading, at which there were arrangements made for cost sharing between the provinces and federal government to implement the Act. The Bill was passed and given Royal Assent on July 7, 1982, however the Proclamation of the Bill was delayed until April 2, 1984, to allow for negotiation agreements to be worked out. The provinces were also given more time to implement the Act so they could adjust to the new maximum age limit, and this date was set to correspond with the coming into force of Section 15 of the Canadian Charter of Rights and Freedoms, guaranteeing "equal protection and equal benefit of the law", in April 1985.

Philosophy of Young Offenders Act

Passage of Bill C-6I The Young Offenders Act saw the change in the established age lines of the Juvenile Delinquents Act (1928), however a change in these age lines should also be considered with the change of the philosophy of the law dealing with young people. This philosophy is set out in section 3 of the Young Offenders Act, the "Declaration of Principle". Section 3(1)(a) and (b) state,

(a) while young persons should not in all instances be held accountable in the same manner and suffer the same consequences for the behaviour as adults, young persons who commit offences should nonetheless bear repsonsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young pesons, be afforded the necessary protection from illegal behaviour (Bala and Lilles, 1984, p. 14).

These ~~first~~ two paragraphs set out three of the main principles which the Act is based on. The principle of responsibility, where the young person is responsible for his or her contraventions. The principle of accountability, where the young person should not be held accountable in the same way an adult would, nor should he or she suffer the same consequences. And thirdly, the principles of the protection of society, where society has a right to be protected, which will affect the way society treats young offenders.

The special needs of the young persons are recognized in the next paragraph:

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance (ibid., p. 14).

Young people are to be considered special because of their state of dependency and level of maturity and development, and as such require guidance and assistance as well as supervision, discipline and control.

Alternative measures are also recognized as an important part of the Young Offenders Act as they are mentioned in this

Declaration of Principle section. They are measures other than judicial proceedings and recognize that the use of criminal law is not necessary in all cases. The rights of young persons are specifically recognized in paragraph (e):

> (e) young persons have the rights and freedoms in their own right, including those stated in the <u>Canadian Charter of Rights and Freedoms</u> or in the <u>Canadian Bill of Rights</u>, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms (ibid., p.14).

This paragraph may be seen to imply that young persons will be dealt with under "due process" where the proceedings will be formal and they will be afforded all the rights that an adult would, and even be given special rights under the Act to protect them.

The Act also sets out the right to the least possible interference as long as it is consistent and balanced with the protection of society. So intervention should be taken only if it is necessary for the protection of society and for the needs of the young person. The Act considers, as such, the use of custodial dispositions as a last resort. There is also contained a specific right to be informed of their rights, as well as recognition of the responsibility of parents for the care and supevision of their children (Sections (3)(f), (g) and (h)).

The main differences in philosophies between the <u>Juvenile Delinquents Act</u> and <u>The Young Offenders Act</u> may be centred around four general areas being, response of the state, mandate of the court, responsibility of the individual and treatment of the individual. The response of the state with the Juvenile Delinquents Act was to view the child as one in need of aid and encouragement. The legislation was to establish courts which would help children, giving them necessary protection with little emphasis placed on distinctions between neglect and delinquency. On the other hand the Young Offenders Act emphasises the protection of society, taking into consideration the necessity for due process to protect the individual accused.

The mandate of the court under the Juvenile Delinquents Act was to serve the best interests of the child, paying only minimal attention to technicalities, while The Young Offenders Act sets out the mandate of the court to adjudicate the guilt or innocence of the young person for a particular offence. The youth court as such is criminally based, paying strict attention to procedures which are supposed to ensure the rights and freedoms of the young person are upheld.

The responsibility of the individual is also seen differently under the two Acts. The Juvenile Delinquents Act adopting the "parens patriae" or kind father approach towards the child, where he or she is treated by the court in what is felt to be the best interests, rather than looking alone at the quesion of guilt or innocence. The Young Offenders Act however sees individuals as responsible for their actions and focuses on due process to protect their rights. Children in need of care and protection as such do not belong under such legislation and are left to provincial child welfare legislation instead.

The treatment of the individual by the courts is similar with both Acts, in respect to the recognition that adults and children should be separated and treated differently. The Juvenile Delinquents Act however placed more emphasis on the treatment of the child emphasizing care, supevision and control as methods that can be used in the reformation of the delinquent child. The Young Offenders Act on the other hand makes specific provisions to avoid involving young people in the criminal process of the court, by such methods as "alternative methods" and "least possible interference" clauses. This Act deals with the young person on more of an offense basis, considering what is suggested as the protection of society as its main objective and a recognition that its interventions may have possible negative effects.

Conclusion

The use of under 7 as the minimum age line, defining when a child was considered to be too young to be held legally responsible for his or her actions had its roots in English Common Law. This age line was not affected with the introduction of Juvenile Delinquents Act (1908) and as such, no child under seven years of age could be found delinquent but would rather be treated by provincial child welfare legislation which it would seem was quite well established at this time, especially in Ontario, according to Splane (1965). The use of this age line it would seem was not challenged until the report Juvenile Delinquency in Canada (1965) was published, which called for a much more judicial approach that the courts should take and a removal of social and welfare problems from the juvenile court to the provincial welfare legislation. Probably because of this more judicial approach and the reflection of the submissions that were made to the committee drafting the report which called unanimously for the upward revision of this minimum age line, that the recommendation for a new age line of either under 10, 11 or under 12 years of age was decided on. This age line was further revised in the recommendations of Young Persons in Conflict with the Law (1975) which called for a uniform minimum age line of under 14 years of age. This age line was justified by this report, suggesting that since the proposed legislation was criminal in nature, those under 14 would be better served by welfare legislation and should not be in an essentially criminal court.

The suggestion to use under 14 as the minimum age line was not however accepted by the majority of the provinces, and this was revised to the suggestion that under 12 years of age should be used in the 1977 Highlights booklet. Agreement for a minimum age line of under 12 years of age was firmly established by 1981 when Bill C61 was introduced into the House. This decision it would appear was a result of consultation prior to the publishing of Highlights (1977) which gained provincial agreement for 12 years of age as the new minimum age line that would be applied uniformly across Canada. This age-line followed the suggestion in the 1977 Highlights booklet and was a downward revision of the previous under fourteen recommendation of the Young Persons in Conflict with the Law (1975) report. This downward revision could be seen as being pressure which the provinces brought on the federal government, to avoid overloading and having to greatly expand their child welfare services. The uniform minimum age line was also agreed upon at an earlier stage than the maximum age line, probably because uniformity across the country already existed for this age line prior to the suggested changes and as such did not have what could be considered unfair implications for any one particular province.

The decision to revise the maximum age line that was used to define when an individual should be considered an adult or child was also made in the recommendations of the report Juvenile Delinquency in Canada (1965). Prior to this, however, it would seem that there was some pressure to keep the maximum age line at under 16 years of age, and to avoid giving the provinces the option of revising their age line to either under 17 or 18. In 1921 the Juvenile Delinquents Act (1908) was revised to allow the provinces such an option, but the

1938 Archambault Report called for a uniform maximum age line of under sixteen to be established, citing the problems reformatories and training schools have when this age line was raised.

The Archambault Report (1938), however did not challenge the basic philosophy of the Juvenile Delinquents Act (1908) and was, it would seem, suggesting changes that were felt could aid its operation under its existing philosophy. The Juvenile Delinquency in Canada (1965) report did suggest changing the philosophy of the Act and recommended a uniform maximum age line of under 17 years of age. This decision could be seen as a compromise, as the report recognized that the maximum age line should be raised to keep young people out of the adult criminal justice system, especially the jails. Yet the report also recognized the implications of raising this age line as it would have greatly increased the need for separate juvenile court, probation and custodial services, which the provinces would have had to provide. The proposed legislation was also more criminal in nature and it was felt that young people could be better dealt with under such legislation, and that the jurisdiction of this court should be expanded to include a slightly older age group.

The report Young Persons in Conflict with the Law (1975) recommended that there should be a uniform maximum age line of under 18 years of age, suggesting that this would be a more logical age line as it corresponded to the age at which civil responsibility was given to young people in most of the provinces. The provinces were not so willing to agree, and this was reflected in the 1977 Highlights booklet released by the Solicitor General. Here it was suggested that under 18 be used as the maximum age line but that provinces would have the option of using either 17 or 16 as the age line if they desired.

The final decision to adopt the uniform age line of under 18 was made by the Committee on Justice and Legal Affairs and it would seem that this decision was made taking into account a number of factors including the implications of the proposed Charter of Rights and Freedoms, which called for equality before the law, the amount of opposition raised by not adopting a uniform line and the federal government's decision to give financial assistance to the provinces for the implementation of the Young Offenders Act.

Again it should be noted that the changing of age lines was not a simple procedure, and did not involve a simple shift in attitudes as to what age a child should be held criminally responsible or not. Rather the changes in the established age lines were more a reflection of a changing in the whole philosophy of the law affecting young people, and it would seem should only be understood in relation to the social and political pressures that led to this change in philosophy.

CHAPTER V

ANALYSIS

By using the historical method in the previous two chapters, there has been an attempt to confirm the hypothesis proposed, that the changes in the age lines may be linked to broader social changes and pressures in society. These chapters have outlined the development of the age lines used in the legislation affecting young people in Canada and linked this to the broader changes in the society and the differing pressures that may have affected such change.

The focus of this chapter will expand on this by attempting to understand why the particular age lines were chosen and what factors seemed to have affected the changes that took place. This will be done by firstly presenting the changes that have occured with respect to age lines and then focusing on the development of the differing philosophies of the legislation. Attention will be given to factors that have been identified as affecting the development of the legislation and how these factors may be related to the age lines that have been used. A conceptual framework will be presented which may be an aid in understanding the changes in the age lines that have occured. This will take into account the relative importance of a number of factors and how they may have affected change in both the age lines and the philosophy of the law relating to young people.

The chapter will propose that if one wishes to gain an understanding of the changes that have occured with respect to the age lines than it is necessary to understand the particular philosophy of that legislation and its implications for young people. It is also necessary to understand what brought about change in the philosophy and the actual process involved in that change. Without this level of analysis a complete understanding of the reasons why a particular age line was used or what its implications were, may not be fully obtained. Further, this also sheds light on how the particular age lines were chosen, taking into account the effect of the political process involved which is necessary in the passage of such legislation.

Changes in The Age Lines

In Canada prior to 1908 it would seem the English Common Law rulings were used to define, firstly when a child should be considered incapable of committing a crime and secondly when it was necessary to prove that the child "...was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong" (1892, 55-56 Vict, c. 29, sect. 10, "The Criminal Code"). These rulings set the age lines at under 7 and under 14 years of age respectively, and they were consolidated in the first Canadian Criminal Code of 1892 (Sect. 9 and 10). There was however, around this time a growing concern for the plight of children involved with the criminal justice system, especially those in the penitentiary at Kingston, and this concern was highlighted by the findings of the Brown Commission of 1849. After the Commissions report there developed a number of Acts that were designed to keep children over the age of 14 out of the penitentiary and common gaols, as well as the courts (1857, 20 Vict. c. 28 and c. 29 (Can)). This legislation was to make use of under 16 years of age as an age line and was followed by the first Canadian Criminal Code, which used it for more separate trials of children under 16 whenever possible (Sect. 810-812).

Therefore it would seem that the accepted age lines in Canada prior to 1908, with regard to children were, under 7 for absolute immunity from criminal prosecution, between 7 and 14 for conditional responsibility, where it was necessary to prove the child was capable of understanding the nature and consequences of his actions and know it was wrong. There was also at this time a growing trend in the legislation for making exceptions as well as some protections from the full extent of adult criminal law for children who were 14 or over, but under 16 years of age.

The year 1908 saw the enactment of the Juvenile Delinquents Act, which firmly established the use of under 16 as an age line that would be used to distinguish between "child" and "adult" in the eyes of the law making those 16 and over adults. The use of under 14 as an age line was also to continue to be used, firstly as it had in the English Common Law and Criminal Code of 1892, where children under this age but 7 or above, were considered only conditionally responsible. Secondly children 14 and above, but under sixteen, could be transferred to adult criminal court if charged with an indictable offence, if the court felt this would be for the good of the child and in the interest of the community. The use of under 7 as an age line also continued from its Common Law ruling, as children under 7 were considered incapable of crime under the Juvenile Delinquents Act of 1908.

It would seem then the most major impact the Juvenile Delinquents Act (1908) had on the previously established age line was it consolidated the use of under 16 as the line which divides when an individual should be considered a "child" as opposed to an "adult". This was an upward revision from the Common Law ruling which considered those 14 and over to be as responsible as adults for the crimes they may have committed.

Further revision to the Juvenile Delinquents Act in 1921 saw the extension of under 16 years of age to under 18 years of age as the defining line for adult or child for individual provinces if they so desired (1921, 11-12 Geo. V, c. 37, s. 2 (Can)). And later provinces were also given the opportunity of using differing age lines for boys than girls (1929, 19-20 Geo. V, c. 17, s. 2 (Can)).

Major changes to these age lines did not occur until the enactment of the Young Offenders Act (1983) which raised the age of absolute immunity from criminal prosecutions from under 7 to under 12 years of age. Children under this Act who are 12 years of age and over, but under 18 years are considered "young persons". As such the definition of adult is those 18 years and older. The Young Offenders Act also made provision that these age lines be uniform firstly across Canada and secondly for both sexes. Young Persons 14 years and over can also be transfered to adult criminal court "...if the court is of the opinion that [it is], in the interest of society and having regard to the needs of the young person" (Young Offenders Act, Sect 16(1)). This is very similar to the provision in the Juvenile Delinquents Act (1908) however the Young Offenders Act does not make use of under 14 as an age line for conditional responsibility. As such any person 12 years and over, but under 18 is considered a "young person" and it is not a requirement to prove that the individual was competent to know the nature and consequences of his conduct, and appreciate it was wrong, as was the case prior to the Young Offenders Act for those under 14 years.

It may be considered that removing under 14 as the age line defining conditional responsibility could have been a lowering of the age line defining absolute immunity, as the age at which immunity is considered is no longer determined on an individual basis, but rather by the age line of under 12 years alone (Dalby, 1985, p. 143). However the use of under 12 years of age to define a child is an upward revision of the previous Juvenile Delinquents Act in more absolute terms, that is, no child under 12 can be held criminally responsible while the previous legislation held it was under 7 years of age.

The period of conditional responsibility for those 7 to under 14 years was also determined at the conclusion of a case and not at a pre-trial hearing under the Juvenile Delinquents Act (Greenspan, 1981, p. 26).

Overall the changes that occured with respect to the individual age lines were as follows. Under 7 was the age line accepted under English Common Law and under the Juvenile Delinquents Act as the age of absolute immunity from criminal prosecution. This was only changed in 1982 under the Young Offenders Act which established under 12 as the new age line for immunity to criminal prosecution. Under 14 was the accepted age line for conditional responsibility under English Common Law also. This was accepted under the Juvenile Delinquents Act but was removed with the introduction of the Young Offenders Act. The age 14 and over was used as the age line where it was possible to transfer individuals to adult court. This was established under the Juvenile Delinquents Act and is also present with the Young Offenders Act. Under 16 was the age line defining "child" used in the Juvenile Delinquents Act, which set out the upper limit for Juvenile Court jurisdiction. Those 16 and over were handled by adult court, but the age line was extended in 1921 to those under 18 years of age, if individual provinces so desired. However this age line has been changed to a uniform under 18 years of age with the introduction of the Young Offenders Act.

Changes in the Philosophy

As previously pointed out, the early English Common Law may be seen to have had its philosophy based on the principle of vengence and community retribution, where all those who broke the law were tried and if found guilty of the offence, punished. Young children were also tried as an adult would, however it became particularly common to give them pardons if they were under 7 years of age. This practice became established by the Eyre of Kent in 1343, which freed children under 7, assuming they could not tell the difference between right and wrong. Children over this age but not having attained puberty were also assumed to be unable to discern between right and wrong, but if malice could be proved then it would seem the child would have been tried much as an adult would. An age for determining the limit of this period of conditional responsibility rather than using the onset of puberty, was set by the writings of Sir Edward Coke, in the 1700s, at under 14 years of age. Those children over this age were treated as adults and received punishments in the same manner as adults would.

Canada prior to the 1900s largely accepted the English Common Law rulings and established them in the first Criminal Code of 1892. However the philosophy of the law relating to young people was to take a different approach, directed more towards their welfare than intentions of retribution or vengence. This approach may be seen as having its roots in a strong interest for the welfare and protection of children at the time and as such reflected many of these concerns making it a particularly welfare oriented period (Houston, 1972; Leon, 1977).

With 1908 and the introduction of the Juvenile Delinquents Act, this welfare based approach to the treatment of children was realized. The philosophy of this Act was different from the Common Law assumptions about the young and immature.. Children were not to be treated as criminals, they were to be considered "juvenile delinquents....needing aid, encouragement, help and assistance" (1908, 7-8 Edw., c. 40, s. 31 (Can)). Children were not only classed differently than adults, they were also dealt differently by the law, so they would not associate with adult criminals nor be exposed to crime. They were rather, subject to "...wise care, treatment and control" with the aims of "...strengthen[ing] their better instincts" (Ibid., preamble).

This essential theme of juvenile justice was to remain in Canada until the enactment of the Young Offenders Act (Leon, 1977). This Act changed the whole philosophy of the law relating to young people. They were now to be given more procedural rights and safeguards, yet at the same time to be held more accountable for their actions, having regard to their "special needs". Even though they were to be held more accountable, young people were not to be held as accountable as adults would. The Young Offenders Act as such, may be seen as a movement away from the previous welfare based model of the Juvenile Delinquents towards a model based more on a "justice" approach. Even though the Young Offenders Act is not totally directed towards such a due process and justice model (Reid, 1985, p. 12) as it does have elements that may be seen as welfare oriented. It may however be seen as a change in direction, away from the welfare model, towards a "rights and responsibility model" (Kaplan, R., 1982), with more of a justice based philosophy than its predecessor.

The process of changing the philosophy of the law affecting young people it would seem, may be related to an increasing concern for the needs of young people and a preceived notion that the existing laws were ineffective and that injustices were taking place. This is especially evident prior to the introduction of the Juvenile Delinquents Act (1908) and is highlighted in the "Report of the Penitentiary Commission" (Journals, Canada, 1848, app., B.B.B.B.B.), which exposed the harsh and cruel conditions that children were exposed to in the penitentiary. The Commission reported that there were gross injustices taking place and that immediate action was necessary to correct the situation. After this Report, Houses of Refuge were established and serious thought was given to what should be done with children involved in the criminal justice system. The "Commission of Inquiry into Prisons and Reformatory Systems of Ontario" chaired by W. Langmuir (1891) also pointed out many of the problems that existed in the treatment of young people, pointing towards the ineffectiveness of the system and the necessity for change.

The increased concern for the needs of young people can also be related to the social conditions and pressures to deal with children at the time. This it would seem was brought to the forefront by the effects of mass immigration, high levels of poverty and the large proportion of the population being so young. These factors, combined with an increased interest in the welfare of children, the preceived growth of crime and poverty, as well as a lack of education were to be driving forces in the process of changing the philosophy of the law for young people (Houston, 1972) around the 1900s.

Prior to the introduction of the Young Offenders Act a number of forces that led to an increased perception of the ineffectiveness and injustice of the law were also evident. "The Report of the Royal Commission to Investigate the Penal System of Canada" (1938) pointed out how the development of the juvenile court system was very uneven, and that disparities existed across Canada in how juveniles were being treated. It was also pointed out that only one age line should be used to define "child", as under 16 years of age for the Juvenile Delinquents Act. The Commission also felt that it was unfair to allow disparities to exist across Canada and called for changes to make the administration of the Act more just.

Increased concern for children involved in the juvenile justice system was later brought up by the "Report of the Correction Planning Committee" (1961), which called for an indepth inquiry into juvenile delinquency, in an attempt to correct young people before they became involved in the adult criminal justice system. This task was taken up in Juvenile Delinquency in Canada (1965) which pointed out many of the problems that were seen to exist with the Juvenile Delinquents Act, in its administration and the treatment of juveniles. The Report called for a complete overhaul of the Act in its 100 recommendations, emphasising especially a separation between the social and judical aspects of treating delinquency in Canada. The problems posed by the Act were further exposed by a report made widely available in Canada, Young Persons in Conflict with the Law (1975) as well as booklets such as Highlights of the Proposed New Legislation for Young Offenders (1977).

Individual factors may also be identified in the process of changing the philosophy of the law affecting young people in Canada. For example, populations, especially the young population, have been identified as a factor affecting change in both the Juvenile Delinquents Act and the Young Offenders Act. Mass immigration into Canada during the 1850s of the young, poor and landless people caused much concern at the time for the plight of such people. This concern is evident in the "Report of the Commissioners on the Subject of Prisons, Penitentiaries, etc." by Dr. C. Duncombe, who felt that children lacked control and needed placement. The mass immigration also placed an enormous strain on what welfare system existed at this time and meant that there were very many young people who were poor and unemployed now in the towns and cities. The Census of Upper Canada, prior to the Union demonstrates that just over 50% of the total population was under 16 (Censuses of Canada 1665-1871, VOl. VI, p. 128, Ottawa 1876). Having such a large number of young people entering the population must have had a strong drain on the existing services and called into question its effectiveness when there were so many young and poor. Certainly the large number of young people in Canada at this time it would seem, were to bring to the forefront questions about the plight of such people and the possible mechanisms for coping with the problems they possessed and posed for society at the time.

The Department of Justice Report Juvenile Delinquency in Canada (1965) also identified the population of young people in Canada as being a factor that drew attention to them as a specific group in society. This report pointed out that Canada was experiencing the effects of the post World War II baby boom, that meant more young persons were coming into their teens than any previous ~~period~~ in Canadian history.

Certainly population changes have been linked with the perceived need to change the laws affecting young people. The growth of the young population does seem to increase the attention given to this particular group and it would seem that an increased concern and interest have been vital in the process of changing the philosophy of the laws affecting young people. However gaining an understanding of the factors that affect change in the philosophy of the law should be based on a broad understanding of what brings about a perceived need for change rather than focusing on individual factors, such as a population. The apparent reason for this is that factors taken individually do not seem to have had a significant effect in the process of changing the general philosophy of the law for young people in both of these Acts, other than population. Individual factors may however be used in explaining the development of one particular Act, and certainly this has been done previously (eg., Houston, 1972; Leon, 1977; and Parker, 1976).

Overall it would seem that an increased concern for children as well as a perceived feeling of ineffectiveness and injustice have been central in the process of redirecting and changing the philosophy of the law for young people in Canada. Difficulty arises, however, when one tries to relate these factors affecting changes in philosophy to actual changes in the age lines that have occured. It would seem they can be directly related to changes in the philosophy of the law, and this is evident in the process of change, however it is more difficult to directly relate these factors to changes in the actual age lines used.

Possible Factors Affecting the Choice of Age Lines

a) Psychology

There are a number of areas that have been identified directly to changes in the age lines and as such are of specific interest for this thesis. One area in particular that could have been of use (Dalby, 1985, p. 139), or may have been used is the knowledge that has been provided by research into the psychological development of young people. Certainly the Director of the Federal Solicitor General, Young Offenders Policy Unit, Justice O. Archambault has made reference to such knowledge,

> The legislation is based on a new set of fundamental assumptions reflecting...extensive knowledge of human behaviour generally and in the moral and psychological development of children in particular (Archambault, 1983, p. 3).

Two questions it would seem are of particular importance here, firstly what information has the area of developmental psychology been able to offer us over time, especially with regard to the moral and cognitive development of children? Secondly, does the area of development psychology propose any age lines that could be of use, or whether the use of age lines themselves are of use in the development of legislation for young people? To answer these questions it is necessary to look back over developmental psychology to give an historical account of these theories and to explain the proposals that could relate to the use of age lines in the legislation.

The first time a child was the object of scientific interest was linked to the post-Darwinian period of interest in evolutionary theory. However, the origin of child psychology as we know it today in terms of a systematic study has been traced back to the work of Tidemann in 1787. He recorded observations of his own son over the first two and a half years of life and these were published in German. This it would seem was the first time in history when someone though it worthwhile to record and publish a description of the development and behaviour of a normal child, according to Bortselmann (1983). The description was a careful naturalistic one that had no theoretical bias, and Dennis (1972) points out that many of the sequences and behavioural development rates such as the transition of the grasp reflex, the increase of crying by reinforcement, and many other developmental stages were present in Tidemann's observations.

Darwin himself recorded observations of his son, "Doddy", from 1840-41 and this led to a biographical sketch of the infant. This work was later to be used when Darwin was developing his theories on evolution. He used it as a link between human behaviours and the development of behaviours in other animals.

Wihelm Prayer can be seen as the first to write about child development in the manner modern child development psychologists approach the problem. He published his work in 1882 and this was translated and published in English in

1888. The work was entitled "The Mind of the Child" and in this work he established very strict methodological standards that he followed in his study.

- He used only direct observations and compared these for accuracy with the observation of others.

- Observations were immediately entered in writing even if the details seemed uninteresting or meaningless at that time.

- The observations were to be unobtrusive so artificial strain on the child could be avoided.

- He substituted other observers if he could not observe himself for more than a day and verified what had been observed in that period, and;

- Three times a day he would observe the same child and everything that was incidentally noted was recorded (Cairns, 1983, p. 44).

He organized his findings from his research into three broad areas being sense, will and intellect. In the section on the development of will he provided information on patterns such as sitting, grabbing, pointing and standing. Here he was hoping to find out how these problems arose. For example pointing was seen as a development in stages from seizing to grabbing and only at about 9 months did pointing gain the capacity to signal to others the child's needs and wants. In his section the development of intellect he included such areas as language comprehension and production as well as the development of social cognition including the concept of self. This was, however, concerned with mostly early development, such as how the notion of I develops, which he concluded comes from the child's ability to recognize himself through the parts of his body that he can feel and see (Cairns, 1983).

Binet was another pioneer in developmental psychology. In 1890 he wrote about memory and perception in children through observation of his two young daughters. He worked closely with Victor Henri and they completed many larger studies. In 1894 they found that children reconstructed material into chunks of information that were meaningful to them. They used several hundred children to complete this study and followed it up by an intensive study of a few subjects which included his daughters and some of his friends' children. This focusing on a few subjects led him to work on the differences between children and how they differed in terms of their higher mental functioning which included language skills, common-sense judgements and imagination. These observations contributed to the eventual development of workable mental tests that he was later to pioneer (Denns, 1972).

Stanley Hall was another strong influence in developmental psychology. He worked in Europe and brought to the United States much of the information he had learned there. This included a questionnaire method to investigate the contents of children's minds. The method was intended to help teachers learn what concepts children had available at the time they entered school. The procedure involved asking children brief questions about their experiences and the meaning of words. The answers were scored and the results were used to describe groups of children. Hall also focused on the phenomena of adolescent development and he saw this period as a stage where ancestral psychological characteristics ended and the individual became free to form his own particular talents and characteristics. His work was very biogenetic and this is evident through his emphasis on how development reveals the past race of the individual according to Cairns (1983).

In 1904 he completed a major work entitled "Adolescence, Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education". In the work he discussed moral reasoning and concluded that with puberty comes a change in viewpoint, from judging actions by results, to judging by motives. Hall made this conclusion based on the results of his questionnaire which posed a situation in which the individual has to decide what should be done to a little girl, who used her new box of paints to paint her mother's chairs, intending to please her. Most of the younger children answered that she should be punished but from age fourteen the number declines rapidly. The older children suggest that the mother should explain that the act was wrong and that by explaining this to the child, it would prevent a repetition of the act (Cairns, 1983).

James Mark Baldwin was also influential in development psychology. He wrote extensively on mental development and race in his book, Mental Development in the Child and Race (1895). He looked at how thought and consciousness developed in children and in evolution. He proposed that mental development proceeds from infancy to adulthood through stages, beginning with reflexive or physiological processes continuing to sensorimotor stages and progressing to symbolic and ideational transformations. Baldwin saw consciousness emerging in stages for both the individual and the species. He obtained his information from observations of his own children and this was based very strongly on the model developed by Preyer. However most of the ideas were not tested by him, nor was he willing to put his findings through empirical testing or verification.

Overall, it may be said that by the 1900s the key findings that stages existed in the development of moral judgements had been established. It was known that older children gave greater weight to the motivation and intentions of a person than did younger children. Also age/developmental differences were observed in moral judgements, where older children were able to take the point of view of the offender in situations. These generalizations were based on questionnaires and observations that the early theorists made. Although these methods were useful they had shortcomings as scientific instruments and it was not until the 1920s and 30s that work on these issues continued, but this time with a greater appreciation of the limits of the techniques available (Cairns, 1983).

Harsthorne and May were hired in 1928 by the Institute of

Social and Religious Research to conduct a long term project on how Sunday Schools, churches and religious groups could better do their job. The project was to analyze the effects of these institutions upon moral behaviours and to determine how they could improve their performance. To do this it was realized that they would have to solve the problem of how to assess moral and ethical behaviours (Cairns, 1983).

They developed a series of tests and experimental settings designed to demonstrate the honesty, helpfulness and cooperativeness of individuals. This was done by permitting the misuse of answer sheets, peeping and other forms of cheating, which were motivated by the experimenter. It was found that there may often be a discrepancy between the moral understanding of an individual and their actual behaviour. It was also proposed that ethical conduct is a learned response that may be situational.

The use of stages in moral and cognitive development did not however become the subject for more significant research until the 1930s when Piaget published his theory on moral and cognitive development. His two stages were derived from the attitudes and experiences of different aged children towards the origin and legitimacy of rules in games of marbles and responses to stories (Ginsbury, 1969). In the first stage which was referred to as the moral realism, and constraint stage, the child feels obligated to comply with rules because they are scared and feel they are unalterable. They tend to view behaviours as totally right or wrong and will judge the rightness or wrongness of an act on the magnitude of its consequences. This stage was said to fall between the ages of 8-11 years. The more advanced stage shows the child viewing rules as established and maintained through agreement and they are subject to change and response to human needs. There is a recognition of possible differing views and the child's judgements of right and wrong place stress on intentions as well as consequences. This stage starts around 11 or 12 and Piaget believes that both cognitive development and social experience play a role in the transformation from one stage to the next.

Although Piaget's theory appeared in the late 1920s most of the published research based on it was done in the 50s and 60s. The earlier findings as reviewed by Hoffman (1984) provide considerable support for his age developmental sequence in Western countries. However the data does not indicate the same sequence occurs in other types of societies. Piaget's central hypothesis that peer interaction is necessary for normal growth has not been critically tested.

Kohlberg can be regarded as another stage theorists and he attempted to retain the best of Piaget's analysis and fit it into a more refined, comprehensive and consistent frame. Kohlberg sees moral development as occuring in a series of six qualitatively distinct stages. The end product of these stages is a sense of justice which enables the individual to determine the legitimate moral claims of people in a situation. Each stage builds upon new perspectives and criteria for making moral evaluations (Hoffman, 1984).

It is important to note that Kohlberg's approach suggests that all individuals, regardless of culture, are viewed as going through these stages in the same order, varying only in how quickly and how far they move through the sequence.

The six stages are based on case interviews with boys that focused on 9 hypothetical moral dilemmas. The child was asked to choose what he would do in each situation and answer a series of questions that would probe the thinking underlying his choice.

Each stage was then defined in terms of its position on 30 different moral issues that the children brought into their thinking. From the six stages three general groups of moral levels can be obtained. The first is the 'pre moral' level where the child evaluates the act by its punishment or reward. The child does not concentrate on the act itself, but rather concentrates on the result of the act.

The second stage is the "morality of conventional rule - conformity" where the child was guided in his evaluation of the act by what he considers was conforming to social acceptance. The child relies on the rule of authority to determine his evaluation of the situation. In the third stage "the morality of self-accepted moral principles" the child considers the intrinsic rightness or wrongness of the act.

An important note about Kohlberg's theory is that it places much less emphasis on actual age-lines for the various stages and concentrates more on the sequence in which the stages develop.

Recently a number of studies have looked at Kohlberg's study and Rest (1983) who reviewed some of these concludes that the invariant sequence assumption is not supported by the research. He found that many studies show that there is no improvement in moral judgement of some subjects over time. Also he found that there is no clear evidence that stages 5 and 6 follow each other.

Kohlberg also assumes that each stage is homogenous and that there is a high degree of uniformity in a person's moral reasoning level in different situations. This also has been an area of debate and according to Hoffman (1984) the few studies addressing the issue do not support his assumption. There is no clear support for Kohlberg's claim that the stages are homogenous, that their sequence is universal and invariant, and that moral growth results from role-taking opportunities and exposure to moderately higher levels of moral reasoning, according to Hoffman (1984).

There is also a problem with the lack of a universally accepted justice principle. This according to Hoffman raises serious questions about any theory that postulates moral development in a stage sequence that is invariant and in which movement through the stages brings the individual closer to a universal principle of justice. Until there is a universally accepted principle of justice there cannot be grounds for assuming that one stage is higher than another (Hoffman, 1984).

Mostly because of the problems faced by Piaget and Kohlberg the more modern theorists on cognitive and moral development have been focusing on the actual steps in children's development of moral concepts in different situations. These theories do not focus on whether or not moral structures cut across domains and develop in an invariant order. This has meant that there has been a move from first using puberty to determine the individual's moral development then to age lines in a sequential order and then to a focus on the sequence and not the order. To finally the more recent work of such theorists as Turiel (1983) and Damon (1977) who concentrate with the actual steps of children's development of moral concepts without focusing on the actual age or invariant order (Hoffman, 1984).

The psychological theories on moral and cognitive development have shown that the use of age lines as categories has firstly not been used very often. Secondly, these theories have moved away from such limiting terms and have moved towards a broader explanation of development focusing more on the process of development rather than the specific ages or stages of development. It would seem then if one was to use this information in the development of legislation affecting young people there would be a tendency to not use specific age lines in such legislation. Rather, it would appear then that the individual's level of development and ability to form malice is more a function of his or her individual development than a specific age line contained in legislation. The fact that the Young Offenders Act (1983) removes under 14 as the age of conditional responsibility, where it was necessary to prove that the individual was aware of the malice and nature of his actions and only uses under 12 as the age of absolute immunity from criminal prosecution seems to imply that we may have moved away from determining responsibility on more of an individual basis.

b) Political Process in Development of the Legislation.

Another influence that may have directly affected the choice of age lines is evidenced in the actual political process and development of the legislation. The Juvenile Delinquents Act (1908) kept some of the previously established age lines, such as under 7 for absolute immunity from criminal prosecution and under 14 as the limit of conditional responsibility. However the option for a transfer to adult court for those 14 and over was a new concept as the juvenile court for handling those over 14 was also new. Choosing the age line as 14 and over seems logical as previously under the English Common Law ruling those 14 and over were automatically handled by the adult court system.

The use of under 16 was also a new age line and it may be seen as having its roots in the development of the reformatory system. It was first used in 1857 in the "Act for Establishing Prisons for Young Offenders" and "An Act for the More Speedy Trial and Punishment of Young Offenders" (1857, 20 Vict., c 28 and c 29 (Can)). The "Annual Report of the Board of Inspectors for the year 1864" was however to clarify the position of using under 16 as an age line (Sessional Papers 1863, no. 14, p. 21). In this Report it was stated that no convict over 16 years should be sent to a reformatory, but rather should be dealt with under the adult system. Later Ontario legislation was to follow this recommendation ("....Act respecting Industrial Schools", 1874, 37 Vict., 29 (Ont) and "An Act for the Protection and Reformation of Neglected Children" 1888, 51 Vict., c 4 (Ont)). The first Criminal Code of 1892 also had provisions for the separate trial of persons under 16, if it was practical to do so. The Juvenile Delinquents Act (1908) continued using 16 as the specific age line that defined the limit of "child" and further justification for using this specific age line seems to have come from a number of states in the United States which were also using under 16 as the age line between adult and child.

The use of under 16 years of age was later extended to under 17 or 18 in particular provinces if they so desired (1921 11-12, Geo. V, c 37 s 2 (Can)) and it would seem the choice of extending the jurisdiction of the Juvenile Court was largely a result of particular provinces requesting that the age line be extended up to under 18 years of age. The Act also later allowed for differing age lines according to the sex of the individual (1929, 19-20 Geo V. c 17 s 7 (Can)).

The Young Offenders Act (1983) was to change a number of the previously accepted age lines. Firstly the minimum age line, the age of absolute immunity from criminal prosecution was to change. This can be related back to the Justice Committee report Juvenile Delinquency in Canada (1965). In this report it was suggested the minimum age line should be raised to at least under 10 years of age, but no higher than under 12 years of age. The justification for such a change was based on the perception that children under 10 would not be able to participate in court procedures, there could be a negative labelling effect and only a small minority of children under 10 were found delinquent anyway. The 1975 report Young Persons in Conflict with the Law called for a minimum age of under 14, suggesting that since the proposed legislation was criminal in nature, those under 14 would be better served by provincial child welfare, youth protection and juvenile correctional legislation. However after consultation with the provinces this age line was revised to under 12 years of age in the Highlights of the Proposed New Legislation for Young Offenders (1977) booklet. This age line was kept and used in the Young Offenders Act (1983), most probably because it was acceptable to both the federal government and the provinces.

The age line that was to be used under the Young Offenders Act (1983) which allows the court to transfer the individual to adult court was set at 14 and over. This seems to have followed the Juvenile Delinquents Act (1908) but prior to the introduction of Bill C61 (1981) there was confusion as to what age should be used. Young Persons in Conflict with the Law proposed that those 16 and over should be the only ones that could be transfered to adult court and in the 1977 Highlights booklet held that individuals 14 and over could be transfered. It was also however suggested in this 1977 booklet that those 12 and 13 could be transfered, but only on the approval of the Attorney General (Highlights, 1977, p. 6).

Establishing a uniform maximum age line for the Young Offenders Act was to prove to be a difficult task. This it would seem was largely a result over provincial disagreement of what age should be used. The report Juvenile Delinquency in Canada (1965) called for a uniform maximum age line of under 17 years of age. The decision it appears was largely a compromise as it was recognized there should be an increase in the maximum age line, yet raising this two years it was felt would have greatly increased the services the provinces would have had to provide, so it was recommended that under 17 should be used. The 1975 Young Persons in Conflict with the Law report however suggested using under 18 as the maximum age line, stating that this corresponded to the age of civil responsibility in most provinces. The Highlights booklet (1977) reflected this disagreement between the provinces, and suggested using under 18 as the age line, but with the option of using under 16 or 17 left up to the provinces. This position was taken with the introduction of Bill C61 in 1981, but as a result of the amount of opposition calling for one uniform age line and the implications of the proposed Charter of Rights and Freedoms it was decided to opt for under 18 as the age line. The Solicitor General Mr. Kaplan outlined the following reasons for deciding on the use of under 18 as the age line in the Justice on Legal Affairs Committee (1982).

> First, the fact that growth into full maturity is not as a general rule achieved until age 18, or even later, particularly in current times because of the prolonged period of dependency that is required of young persons.
>
> Secondly, the desirability of protecting young persons for as long a period as possible from entry into adult correctional institutions where they will be exposed to older, more experienced offenders.
>
> Third, having moved to a rights and responsibility model of juvenile justice, it is felt that the benefits of the system should be extended to the largest number of young persons possible who have not yet attained full maturity. This extension of benefits holds out the most promise of preventing a young person's further involvement in illegal activity.
>
> The full benefits of the resources of the juvenile justice system,...should be extended to young persons up to age 18 because they are until then, generally speaking, still in their formative years and at an age level when they can be favourably influenced by positive action and guidance.
>
> ...Next, given sufficient protective safeguards for society, which it is believed the new act contains, it is preferable to set the age at a higher rather than a lower level. This is especially desirable in view of the

retention of the transfer provisions to adult court, which provides the system with a safety-valve mechanism for such difficult cases as the mature criminal who is under 18 or....

Finally, this age level ~~is consistent~~ with the treatment of young persons under civil law, including age of majority. The fact that no province in Canada has its age of civil majority below the level of 18 years bears testimony to the general recognition that young persons under 18 have not yet attained full maturity and are not considered to have reached adulthood" (Justice and Legal Affairs Committee, 9th Feb. 1982, pp. 61:9 and 61:10).

Certainly it would appear that the political process involving committees, reports, recommendations, provincial interests and the whole aspect of negotiation which took place, had a direct influence on the actual age lines that were chosen. A further analysis of these age lines, it seems is available by linking the age lines chosen to the particular philosophy of the Act.

Relating Changes in Age Lines to Changes in Philosophy

It has been suggested by Asquith (1983) who studied the development of the English and Scottish juvenile justice courts, that the age of criminal responsibility (7 under the Juvenile Delinquents Act and 12 under the Young Offenders Act) may be related to the particular philosophy of the legislation.

> The implication of this is that where systems of juvenile justice are based on a welfare philosophy the age of criminal responsibility may have to be lowered otherwise the punishment of children who offend could in some cases bear all the hallmarks of injustice (Asquith, 1983, p. 6).

This seems to have been the case in the transition from the

Juvenile Delinquents Act to the Young Offenders Act in Canada. The changing in philosophy as previously pointed out has moved away from an essentially welfare based philosophy to one that is more based on what may be considered a justice, or rights and responsibility model. The age lines have also moved accordingly, increasing to a minimum age of criminal responsibility to under 12 from under 7 years of age.

The philosophy change in Canada between the two Acts also seems to have affected the maximum age lines deciding when an individual should be considered either a young person or an adult. The age line has been increased to a uniform, under 18 years of age from under 16 which was used in the majority of the provinces. The upward increase has been linked to the change in philosophy by the Solicitor General of the time,

> ...having moved to a rights and responsibility model of juvenile justice it is felt that the benefits of the system should be extended to the largest number of young persons possible...(Kaplan, 1982, p. 61:10).

The upward revision in the age lines, of both the minimum and maximum, have also been related to the philosophy change in the early proposals to change the legislation. Juvenile Delinquency in Canada (1965) called for an upward revision in both these age lines stating.

> We cannot see how the very young child, now within the Act, can be held responsible at all on any reasonable conception of the purpose and fucntion of the criminal law (Juvenile Delinquency in Canada, 1965, p. 49).

The later reports and proposals also called for increasing these age lines although there was some disagreement on how far the age lines should be increased.

It would seem reasonable to draw from this that there could be a link between the individual philosophy of the law and the maximum and minimum age lines. Movement away from a more welfare based philosophy to one based more on rights and responsibility seems to have affected the direction the age lines have shifted.

<u>A Conceptual Framework</u>

Having examined the development of the juvenile justice system in Canada and its relation to the age lines that have developed and changed, it seems reasonable to outline a conceptual framework of the factors that appear to have had an effect on the age lines that have been chosen.

It would seem that there are at least two differing sets of factors that should be accounted for in attempting to understand the changes that have occured with respect to age lines in the development of Canadian juvenile legislation. The first set of factors, which could be considered as primary factors since they have been identified as directly affecting the age lines in the development of the legislation. The next set of factors could be considered as secondary factors, since it appears they do not directly affect the age lines chosen but rather, seem to affect the primary factors.

An example of a primary factor that has been linked with actual changes in the age lines is the political process of negotiation that has taken place between the provincial and federal governments to work out what lines are acceptable to both. In this process decisions are made that affect the actual age lines that are used in the legislation. The results of the various committees and reports have also had a direct effect on the age lines that have been chosen, by bringing up the issues and options that are available and the choices that should be made. The individual philosophy of the law is also a primary factor as it has been related directly to changes in the age lines. The philosophy of the particular Act, it would seem affects the direction that shifts in the age lines take and the particular meaning of any new age lines that are adopted.

Secondary factors affect some of the primary factors yet do not seem to affect the age lines directly. An example of this is the particular social conditions that are seen to exist in a society at the time when the legislation is undergoing change. These social conditions, such as poverty, immigration and differences in the population of the young have been identified as affecting the philosophy that the law takes in dealing with these problems. They also have been related to the broader conclusion that a perceived feeling of injustice or an inability of the law to cope with a particular problem has led to change, especially change in the philosophy responding to those particular problems. Other examples of secondary factors are the various groups that have brought pressure for change and have affected the direction the law takes, such as the "child saving" movement in the 1900s.

It appears it is vital to understand the differences in age lines in conjucntion with broader changes that have affected them. These broader changes such as the change in philosophy have affected both the way the age lines have been used and also the meaning of the particular age lines. Accounting for the social conditions and groups that have called for reformation also seems important in understanding the development of the legislation, but after accounting for as many factors that may have affected the age line, it is important to understand that the actual age lines are strongly affected by a political process. Even though it has been proposed "Changes in the age of responsibility do not appear dependent upon political or administrative convenience" (Dalby, 1985, p. 143) it would appear that political and administrative convenience has had a large part to play in process. As the Solicitor General of Canada said in the Justice and Legal Affairs Committee:

> If there had been nine out of ten provinces agreeing on the maximum age, I would have picked it whatever it was. With the minimum age of 12, it seems reasonable to me, and since nine out of ten provinces favour it, I thought that it was the right thing to do (Kaplan, 1982, p. 68:49).

Conclusion

In this chapter it has been pointed out that there have been changes in the age lines affecting the way young people have been treated in the juvenile justice system. These changes occured along two dimensions, the first being changes to age lines that existed previously, such as from under 7 to under 12 for the age of absolute immunity from criminal prosecution, the former used in the Juvenile Delinquents Act (1908) and the latter in the Young Offenders Act (1983). Secondly there has also been the development of new age lines and the removal of old, such as the introduction of the use of transfer to adult court being available for the first time for those 14 and over in the Juvenile Delinquents Act. With most of these major changes to the age lines there has also been changes in the philosophy of the law. The exception to this being the extension of the jurisdiction of juvenile court given to particular provinces, and allowing for age line differences according to the sex of the individual also given to particular provinces if they so proclaimed (1921, 11-12 Geo V. c 37 s 2 (Can), 1929, 19-20 Geo V. c 17 s 2 (Can)).

A number of factors have been identified in the process of development of the law and age lines that have been used. Of these, there are factors that appear to have directly affected the choice of age lines and as such can be considered primary factors. These primary factors include the individual philosophy of the legislation, which has directly affected the particular age lines that are used under that legislation. The political process of developing legislation has also been identified as a primary factor since it also has directly affected the age lines that have been used in the legislation that has been passed. There also however are other factors that seem to have indirectly affected the choice of individual age lines in the legislation for young people. These factors as such may be considered secondary and include the particular social conditions existing at the time of change, as well as the economic climate and particular pressure groups that appear to have swayed the philosophy of the legislation. Other factors such as developmental psychology have also been identified as possibly having an effect on the choice of age lines. It may be concluded though, that the findings that are relevant from developmental psychology do not propose using specific age lines to define when an individual should be held responsible or not. Rather it is suggested that development varies among individuals with the implication that using specific fixed age lines may be inappropriate for some individuals and that a method which takes into account the relative development of the individual may be more appropriate.

Overall it can be said that our understanding of age lines and how they have developed through the legislation affecting young people in Canada should not be based on the specific changes that have taken place with respect to them alone.

Rather these age lines and their development, should be understood in conjunction with the development of the legislation that they are contained in and its particular philosophy towards young people as well as the whole society of the particular time and the pressures that brought about change. This method gives us an understanding of the changes in the age lines with a broader perspective and allows for comparisons over time, taking into account the specific conditions and situations that have changed and which in turn affected changes in the age lines.

CHAPTER VI

SUMMARY AND CONCLUSION

In the first chapter it is pointed out that the objective of the thesis is to examine the development of juvenile legislation in Canada, focusing on how age lines have been used. As such, the first chapter is an attempt to place such a study in perspective by examining differing cultures back over time to see how children have been treated and viewed. This is to firstly give a broad picture of early laws that affected children and how age has been used in these laws. It is also to give us a pespective of possible factors that may have affected the development of such legislation in these differing cultures and time periods, which may help us gain an understanding of the development of the later Canadian legislation - the focus of subsequent chapters.

The Chapter presents a view of how Western civilization appears to have treated its children from the Code of Hammurabi around 1750 B.C. to the 1700's in England, paying particular attention to the individual societies and how children have been treated in them. The legislation in these societies and time periods are given particular attention and there is a specific focus around the questions of parental authority, the rights of the child and varying definitions of what constitutes a child or adult. The pre-Greek, Greek, Roman, Medieval and Renaissance-Tudor periods are explored, as well as an examination of the English laws affecting children from the 1300's to the 1700's, which formed the basis of many later Canadian laws.

It is pointed out in the first chapter that there appears to have been considerable variation in the laws affecting children in these differing time periods and cultures. An example of this being the difference between Roman Law where only the eldest male had specific rights and power over the rest of the family, to English Common law which set out specific rights for all children. It is also pointed out how we define "child" for legal purposes, which has also shown variation, particularly with regard to English Common Law. Around the 1300's in England the Common Law held that infancy in itself was not a defense. The law it would seem was based on the principles of vengeance and community retribution, requiring a trial and punishment of those who do wrong regardless of their age. This practice however changed as it became more commonplace for those under seven years of age to be given Royal pardons. The passage of the Eyre of Kent in 1313 firmly established this procedure giving all those under seven years of age pardons and thus effectively made children under seven immune from prosecution. Later developments also saw the establishment of an age group where children were only to be considered responsible fo their actions if it was proved that they were aware of the wrongfullness of their actions. The upper age of this period was established at under fourteen - largely it would seem as a result of the general acceptance of Sir E. Cokes' interpretation of the English Common law decisions from the 1300's.

The chapter points out that there have been many changes in the way we have treated children, both over time and culture. It is also suggested though that the changes that have taken place have not done so independent of broader social change. Rather it is proposed that if we wish to understand the changes that have taken place we should not look independently at the changes themselves, but should consider them in a broader context, taking into account the differing societies and pressures which may have affected change. It is therefore hypothesized that if the changes in the the legislative age lines are related to broader social changes and pressures in that society, then the changes in the laws that affect children will correspond, and may be linked to broader social change and pressures in that society.

The second chapter goes on to describe the methodology that will be used to test this hypothesis. It is proposed that an historical analysis is the most appropriate, allowing for an examination of the development of the legislation affecting young people in Canada and the changes in the age lines contained in such legislation, in comparison to the apparent social changes and pressures that may have affected the development of such legislation. It is also proposed that by using an historical analysis we may gain a broader understanding of how we have used age lines in the development of the legislation affecting young people in Canada.

The chapter points out some of the uses of historical research as well as raising questions concerning the value of such research. The historical method of analysis is then described outlining some of its advantages and limitations and the chapter goes on to describe the method of collection, the data and time frame that will be used in the present study.

The third chapter focuses attention on the development of legislation affecting young people in Canada from 1799 to the enactment of the Juvenile Delinquents Act in 1908. Particular attention is placed on how this legislation developed, the social conditions of the time, what factors seemed to affect its development and how age categories were used. The chapter sets out to link the changes in the legislation to possible broader social changes occuring at the time.

It is suggested in the third chapter that prior to 1850, Canada - as we know it today - was much of a primitive, underdeveloped frontier land. There was however at this time some concern for the welfare of children which was reflected in the existing legislation. Provision had been made in this early legislation for the partial state support of children in certain circumstances, suggesting that the state was at least interested in the welfare of children. A number of factors it would seem, increased this interest around the 1850's, particularly the effects of mass immigration of a poor landless class, a very high proportion of the population being young, the effects of overcrowding in the urban centers and a general concern about the amount of crime and poverty. There was also a raised concern as to how children were being treated by the state and this was highlighted by commission reports on conditions in the Kingston penitentiary which exposed the harsh and cruel conditions in which some children were kept.

It would seem the changes that occured in the following years were much in response to the conditions in the society at the time. These changes established Houses of Refuge for Juveniles as well as a series of Acts aimed at keeping children out of the prisons and court system and into institutions that were supposed to care for and treat these individuals. There developed a separate system to deal with young people and if they became involved in crime, they were to be treated in a manner that would presumably care for and treat them, rather than punishing them in the way adults were.

Continued social pressure, especially in Ontario by a number of individuals interested in reforming the system that dealt with young people saw further changes to the legislation which led to the enactment of the Juvenile Delinquents Act in 1908. This Act reflected many of the wishes of these reformers and emphasized a welfare oriented approach that the state would take in dealing with young people, especially those involved in crime. This new Act used the previously established English Common Law age line of under seven for absolute immunity from prosecution and under 14 for conditional responsibility - where it was necessary to prove that the child was aware of the wrongfullness of the action to be considered responsible. The Act did however differ from the English rulings by establishing under sixteen as the age line that would define child. All those under sixteen were therefore under the Jurisdiction of the Juvenile Delinquents Act (1908) and were to be treated as delinquents and not adult criminals. The age line may be seen as having its roots in previous legislation that had used it in Canada as well as the recommendation of the Board of Inspectors for the reformatories (1864), who felt it was the appropriate age to divide "children" from "adults". Its use may have also been influenced by the experiences of other countries especially the United States which was establishing or had established similar courts in various states.

The use of under sixteen to define "child" is significant in that it differed from the English Common Law rulings upon which much of the previous Canadian law had its basis. It may also have been a response to the philosophy of the new legislation, which was to aid, encourage, help and assist young people - in that it extended the ability of the Act to do these things by extending the jurisdiction of the court to children up to sixteen years of age.

It is proposed in the conclusion of the third chapter that the change in the use of this new age line, did not represent independent change in view that children sixteen or over were now to be considered adults. Rather it is proposed that the shift may be better understood in terms of a response to the development of a separate system to deal with young people who had become involved with crime, and that this had its basis in broad social changes that had occured in Canada prior to its enactment.

The fourth chapter looks at the development of Canadian legislation affecting young people over the time period from 1908 to 1985, with particular attention being paid on how the legislation developed and changed, and what factors can be identified as affecting this change.

It is pointed out in this chapter that from 1908, with the enactment of the Juvenile Delinquents Act there followed a period of adjustment where the provinces began to implement the Act across the country. There were of course a number of amendments to the Act during this period, however these did not change the Act's basic philosophy in any significant way. Rather the Act's jurisdiction was expanded by further amendments, which enlarged the definition of "juvenile delinquent" and gave the provinces an option of increasing the jurisdiction of the juvenile court up to individuals eighteen years of age - if they so desired. The Act itself was brought into question with the publishing of the 1938 "Report of the Royal Commission to investigate the penal system of Canada", which criticized the uneven growth of juvenile courts and separate facilities for juveniles across the country. The use of differing age lines by differing provinces was also brought into question, but it would appear that the recommendations calling for change were largely ignored and it was not until the 1960's that there was an increased interest in issues relating to juveniles by the Canadian government.

A Corrections Planning Committee Report in 1961 seems to have sparked this interest by calling for a refocusing on Juvenile Delinquency in an attempt to solve the problems of the ever increasing growth in the number of young adults entering into the Canadian jails and penitentiaries. This task was taken up and the results were later published in the report Juvenile Delinquency in Canada (1965). The report made one hundred recommendations which included proposals for broad changes in the existing Juvenile Delinquents Act. It was suggested that the Act should be changed to reflect an emphasis on criminal matters rather than allowing it to deal, as it had, in what were seen as social issues. The recommendations further suggested that the age lines be changed by raising the minimum age line of under seven, to the range of under ten to under twelve. This, it was felt, was necessary if a child was to be able to participate in the proceedings of the court in any meaningful way. It was also suggested that those under this age might be better served by provincial child welfare legislation rather than the more criminal type legislation proposed.

The maximum age line was also suggested as inappropriate and it was suggested that this should be revised to a uniform age for all the provinces of under seventeen, stating that since teenagers are more dependent than they were in the 1900s when the Juvenile Delinquents Act was passed, that a higher maximum age line would be better.

The chapter points out that over the following years there proceeded various attempts to change the Juvenile Delinquents Act and enact new legislation that would incorporate the recommendations of the report Juvenile Delinquency in Canada (1965). However it was not until 1981 - when Bill C-61 was introduced into the Canadian House of Commons - that the legislation was to have any success. This Bill was given much debate especially over issues of funding and the use of the new age lines that were proposed in it, which caused a number of delays and required various revisions until a suiable compromise was found. The Bill was passed in the House and given Royal Assent in 1982, however the use of a new uniform maximum age line of under eighteen was further delayed to coincide with the coming into force of the Canadian Charter of Rights and Freedoms in April 1985.

It is noted in the fourth chapter that there was a significant change in the philosophy of the law relating to young people with the enactment of the Young Offenders Act. The new Act took on what may be seen as more of a rights and responsibility model, leaving behind the more welfare oriented philosophy of the Juvenile Delinquents Act. It is also noted however that the changes in the age lines must be understood in relation to this change in philosophy, and that the changes in the age lines did not reflect so much a change in attitude as to how long a child should be considered a child, but rather a whole change in the philosophy of the law relating to young people.

The fifth chapter is an attempt to bring together and analyze how age lines have been used in Canadian legislation affecting young people in Canada. The chapter firstly presents the changes in the age lines that have occured over time and points out that prior to the Juvenile Delinquents Act the ages of under seven and fourteen were used, with a growing trend towards the use of under sixteen. The Juvenile Delinquents Act, it is proposed, adopted these age lines as they were compatable with its philosophy. The upper age line of under sixteen was however extended up to under eighteen if individual provinces requested, in the 1920s.

The chapter points out how the enactment of the Young Offenders Act was to change these age lines, by firstly raising the minimum age line to under twelve years of age. Further the use of under fourteen as the age of conditional responsibility was removed altogether and under eighteen was made the new uniform maximum age line dividing adults from young persons.

The individual philosophies of the laws are also explored, showing how these philosophies have changed over time. It is suggested that prior to the Juvenile Delinquents Act, the

English Common Law rulings, which were used in English Canada, had their roots in the principles of vengeance and community retribution. The Juvenile Delinquents Act however directed its philosophy more towards the welfare of the child, treating children as juvenile delinquents rather than criminals. The Young Offenders Act changed this view with its philosophy based more on a rights and responsibility model.

It is suggested in this chapter that the process of changing the philosophy of the law relating to young people may be related to a broader concern for the needs of young people and a preceived notion that the existing laws are ineffective and unjust. The factors that have led to such changes in the philosophy of the law relating to young people however are quite difficult to directly relate to changes in the age lines used in the legislation. It is proposed though, that a number of areas could have directly affected the choice age lines and these are further explored.

The first is in the general area of psychological theories, more specifically research on the moral and cognitive development of children. This area is explored because reference has been made to it as affecting the choice of age lines. However it is pointed out that such theories seem to have moved away from the use of age and more recently have focused on the process of development rather than stages or specific ages. Findings from this area it is suggested, do not point towards the use of age alone for determining the relative moral or cognitive development of individuals, since developmental rates vary so much among individuals. It is proposed that we should not be looking at age alone to determine such information but also at the individual, however the recent legislation has moved away from individual considerations with the removal of the age of conditional responsibility. The chapter suggests that what may be learned from developmental psychology in relation to age lines was not used in the choice of age lines in the Young Offenders Act.

The political process involved in changing the legislation affecting young people is also examined as a possible factor directly affecting the choice of age lines. Here it is proposed that this process may have had a very strong effect on the choice of actual age lines used in the development of the legislation. This is especially evident in the development of the Young Offenders Act, which took so long to pass, partly because of the complex negotiations that had to take place with the provinces over the age issue. The differing provincial interests certainly affected the choice of the age lines and even the Charter of Rights and Freedoms may be seen as part of the political process that affected the final choice of ages.

The chapter also points out that the differing philosophical assumptions contained in the changing legislation has been related to the age lines chosen. This is noted in the English and Scottish systems of juvenile justice and was also recognized as affecting the choice of age lines by the Solicitor General of the time.

The chapter concludes by proposing a conceptual framework for understanding the effect particular factors have had on the choice of age lines. Here it is proposed that specific factors may directly affect the choice of a particular age - such as the political process that was involved. However there are also secondary factors that have to be taken into account, which do not directly affect the choice of age, yet do cause changes in the legislation, that affect policy and so indirectly affect the age lines. Here it is pointed out that both should be understood in attempting to analyze the changes in age lines and that accounting for one and not the other may lead to a questionable conclusion.

We have used age lines in the past to define such things as when an individual should or should not be considered an adult, when it may be possible to transfer that individual to adult court, or when the individual should be considered too young to be guilty of a criminal offence. It is important to note though, why we have used age to define such things. It appears age lines have been used as a measure to gain consistency and uniformity in the application of the law. Certainly it is desirable to have laws that are applied in a uniform and consistent manner, so as they appear just for all and fair in the name of equality before the law.

It has been suggested that the choice of such age lines used in the legislation affecting young people in Canada has been affected, at least indirectly, by broader social change and pressure in society, and particular social changes and pressures have been identified and related to this process of change. Yet other sources of information that one may have thought to have been useful in the choice of age lines - such as developmental psychology - have not been used. It appears this may be related to the fact that such research does not indicate what specific age lines would be most appropriate for particular definitions of such concepts as limited responsibility or immunity from criminal prosecution. Rather such research may lead us to conclude that using strict age lines to define such things may be inappropriate as we are applying fixed definitions according to age to individuals that may vary in their developmental rates according to their age.

In the struggle to standardize the law, we may have lost sight of what these age lines represent, whether they decide absolute immunity, conditional responsibility or a form of diminished accountability, they represent a cut-off point that is used to define these groups according to their chronological age. The fact that individuals may not be appropriately placed in these groups because of their differing individual rates of development seems to have become less of an issue. Rather it seems that the level of responsibility or accountability placed on young people is increasingly no longer based on the young person's individual maturity and ability to understand right from wrong, but on the chronological fact of their age. This is worth questioning, and the Young Offenders Act has moved in this direction by excluding the period of conditional responsibility - where it was necessary to prove the individual was competent to know the nature and consequences of his conduct, and appreciate it was wrong. Rather the Young Offenders Act uses the strict age line of over twelve and under eighteen years of age to define an individual as a "young person". In effect this legislation takes less account of the individual differences that may exist between individuals at this young age.

Future legislation affecting young people may well be advised to take more account of the individual differences that the psychological theories have pointed to, when assingning age lines that affect the responsibility and accountability of young people. As it may be noted that some children under twelve years of age may be more acutely aware of the wrongfulness of their actions, yet canot be held criminally responsible, while others, simply because they are over twelve years of age, will be held accountable for their action as they are considered "young people" under the meaning of the Young Offenders Act.

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Appendix 1

Legislation

1799, 39 Geo III c 3 (U.C.)
"An Act to Provide for the Education and Support of Orphan Children"

1813, 53 Geo III c 4 (U.C.)
"An Act to provide for the maintenance of Persons Disabled and the Widows and Children of such persons as may be killed in His Majesty's Services"

1827, 8 Geo II c 6 (U.C.)
"An Act respecting the appointment of Guardian"

1837, 7 Wm. IV c 8 (U.C.)
"An Act to make the remedy in cases of seduction more effectual, and render the fathers of illegitimate children liable for their support"

1847, 10 and 11 Vic. c 6 (U.C.)
"An Act for compensating families of Persons killed by accident and for other purposes therein mentioned"

1857, 20 Vict c 28 (Can)
"An Act for Establishing Prisons for Young Offenders"

1857, 20 Vict c 29 (Can)
"An Act for the More Speedy Trial and Punishment of Young Offenders"

1874, 37 Vict c 29 (Ont)
"..Act respecting Industrial Schools"

1888, 51 Vict c 4 (Ont)
"An Act for the Protection and Reformation of Neglected Children"

1890, 53 Vict c 75 (Ont)
"An Act respecting the Custody of Juvenile Offenders"

1890, 53 Vict c 76 (Ont)
"An Act respecting the Commitment of Persons of Tender Years"

1892, 55-56 Vict c 29 (Can)
Criminal Code

1893, 56 Vict c 45 (Ont)
"An Act for the Prevention of Cruelty to, and Better Protection of Children"

1894, 57-58 Vict c 58 (Can)
"An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders"

1903, 3 Edw VII c 30 (Can)
"An Act to amend the Childrens Protection Act of Ontario"

1908, 7-8 Edw. VII c 40 (Can)
"An Act respecting Juvenile Delinquents"

1912, 2 Geo. V c 30 (Can.)
"An Act to amend The Juvenile Delinquents Act, 1908"

1914, 4-5 Geo. V c 39 (Can.)
"An Act to amend The Juvenile Delinquents Act"

1921, 11-12 Geo. V c 37 (Can.)
"An Act to amend The Juvenile Delinquents Act"

1924, 14-15 Geo. V c 53 (Can.)
"An Act to amend The Juvenile Delinquents Act, 1908"

1927, 16-17 Geo. V c 108 (Can.) Revised Statutes of Canada c 108
"An Act respecting Juvenile Delinquents"

1929, 19-20 Geo. V c 46 (Can.)
"An Act respecting Juvenile Delinquents"

1932, 22-23 Geo. V c 17 (Can.)
"An Act to amend The Juvenile Delinquents Act"

1935, 25-26 Ge. V c 41 (Can.)
"An Act to amend The Juvenile Delinquents Act"

1936, 1 Edw. VIII c 40 (Can.)
"An Act to amend The Juvenile Delinquents Act, 1929"

1947, 11 Geo. VI c 37 (Can.)
"An Act to amend The Juvenile Delinquents Act, 1929"

1949, 13 Geo. V c 6, s 25 (Can.)
"An Act to amend the Statute Law"

1951, 15 Geo. VI c 30
"An Act to amend The Juvenile Delinquents Act, 1929"

1952, Revised Statutes of Canada c 160
"An Act respecting Juvenile Delinquents"

1970, Revised Statutes of Canada
"An Act respective Juvenile Delinquents"

1982, Revised Statutes of Canada
"The Young Offenders Act"

Appendix 2

Debates of the House of Commons

1929, Debates, House of Commons (Canada), 3rd Session - 16th Parliament.

1971, Debates, House of Commons (Canada), 3rd Session - 28th Parliament.

1979, Debates, House of Commons (Canada), 1st Session - 31st Parliament.

1981, Debates, House of Commons (Canada), 1st Session - 32nd Parliament.