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Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice

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Catherine Elliott*

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Abstract When children reach 10 years old they are exposed to the full brunt of the criminal law with no defence available to them to reflect their status as children. Legal theorists have repeatedly argued that criminal responsibility should only be imposed on individuals who have the capacity and freedom to choose how they behave. Children only have limited personal autonomy and therefore lack this capacity and freedom to make a genuine choice about their behaviour. They should therefore benefit from a new defence which moves away from the *doli incapax* emphasis on moral understanding and is available to children up to the age of 14.

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Keywords Minors; *Doli incapax*; Criminal responsibility; Defence

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When children reach 10 years old they are exposed to the full brunt of the criminal law with no defence available to them to reflect their status as children.¹ This situation has frequently been criticised,² but the law has not been changed; in fact it has been made more severe for children with the abolition of the *doli incapax* defence confirmed in *R v JTB*.³ One reason why criticism of this area of law has not lead to reform may be that there has been no methodical analysis to explain why it is wrong to criminalise young children, instead there are general assertions of the harm done to children in the criminal justice system or general references to children's human rights. This article seeks to fill this gap by exploring the fundamental question of why criminal responsibility should not be imposed on children aged over 10 years old. To do this, we need to go back to the fundamental question considered by legal theorists about when criminal responsibility should be imposed.⁴ In this article it will be argued that criminal responsibility should only be imposed on individuals who have the capacity and freedom to choose

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1 Section 50 of the Children and Young Persons Act 1933 provides: 'It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence'.

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2 See, e.g., the European Committee of Social Rights, Conclusions XVII-2 (United Kingdom), reference period 1 January 2003 to 31 December 2004.

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3 [2009] UKHL 20, [2009] 2 WLR 1088, interpreting s. 34 of the Crime and Disorder Act 1998.

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4 See, e.g., H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press: Oxford, 1968).

1 how they behave. Children only have limited personal autonomy and
2 therefore do not have the capacity and freedom to make this choice and
3 there is therefore a fundamental injustice when criminal liability is
4 imposed on children. While the concept of childhood may be a social
5 concept with no fixed boundaries, a 10-year-old is unquestionably in
6 UK society a child who is still experiencing childhood, but there is
7 currently no recognition of this in the criminal law. Childhood now
8 provides young people with very little protection from the full rigours of
9 the criminal law and the priority of retribution. While there were clearly
10 problems with the defence of *doli incapax* which have been well docu-
11 mented,⁵ its abolition represents a move towards ‘adultification’⁶ and
12 the gap left by the abolition of the old defence needs to be filled with a
13 new defence that more accurately reflects the reason why children
14 should be treated differently than adults. By exploring the concept of
15 criminal responsibility it will become clear that the historical defence of
16 *doli incapax* was fundamentally flawed because it was permitting the
17 defence for reasons which were not at the heart of why criminal
18 responsibility was inappropriate for many children. This gap between
19 the legal requirements for the defence and the reason for denying
20 criminal responsibility ultimately meant the defence became disengaged
21 from reality and lost the support of the judges and practitioners, to the
22 point where it became almost routine to conclude the presumption of
23 *doli incapax* had been rebutted, with very little evidence to support this
24 rebuttle being required. The way forward is to establish a new defence of
25 being a minor which has its foundations built on the child’s lack of
26 capacity and freedom to choose because of his or her limited personal
27 autonomy, which is the reason for the denial of criminal responsibility
28 and the intervention of the civil system instead.

30 Young people and the courts

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32 In recent years, the criminal justice net for young people has widened
33 with such legal developments as the abolition of the defence of *doli*
34 *incapax* and the creation of anti-social behaviour orders, which are civil
35 orders, but which, if breached, give rise to criminal liability. The aboli-
36 tion of the defence of *doli incapax* was confirmed by the House of Lords
37 in *R v JTB*.⁷ This case was criticised by Francis Bennion who argued that
38 the decision:

39 should be treated as incorrect so far as it fails to recognize that in the case
40 of complex offences, for example forgery and certain consensual sexual
41 behaviour such as that engaged in by Boy A, the prosecution may still need
42 to establish by evidence that a defendant who is below the age of discretion
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44 5 Laws J in the Divisional Court in *C (A Minor) v DPP* [1994] 3 WLR 888 declared
45 the presumption defunct, and though his decision was reversed on appeal ([1996]
46 AC 1), the House of Lords accepted that the rebuttable presumption could give
47 rise to anomalies.

48 6 L. Steinberg and R. G. Schwartz, ‘Developmental Psychology Goes to Court’ in
49 T. Grisso and R. G. Schwartz (eds), *Youth on Trial: A Developmental Perspective on*
Juvenile Justice (University of Chicago Press: Chicago, 2000) 13.

50 7 [2009] UKHL 20, [2009] 2 WLR 1088.

1 possesses the requisite *mens rea*. In *JTB* this meant that the prosecution
 2 needed to prove beyond reasonable doubt that Boy A understood the
 3 substance of the ingredients of the offence in question, for example those
 4 imported by the [Sexual Offences Act 2003] definition of ‘sexual’.⁸

5 Bennion’s arguments could amount to bringing back the issues raised in
 6 the *doli incapax* defence through the concept of *mens rea* but only for
 7 ‘complex offences’. The main difference to the former defence would be
 8 the burden of proof. But even if Bennion’s argument is accepted, there
 9 will be problems identifying which offences should be treated as ‘com-
 10 plex’ for these purposes, and this analysis of the law still provides
 11 inadequate protection to children.

12 There is clearly unease among some judges and academics with the
 13 current application of the criminal law to young children. It is particu-
 14 larly in the context of sexual offences that the problems with the current
 15 law have been highlighted. It is possible that a 10-year-old child might
 16 well regard his sexual experimentation as ‘naughty’ without realising
 17 that it could give rise to criminal liability. The dangers of criminalising
 18 children were observed in the context of sexual experimentation by
 19 Lord Hope in his dissenting judgment in *R v G*:

20 A heavy responsibility has been placed on prosecuting authorities, where
 21 both parties are of a similar young age, to discriminate between cases
 22 where the proscribed activity was truly mutual on the one hand and those
 23 where the complainant was subjected to an element of exploitation or
 24 undue pressure on the other. In the former case more harm than good may
 25 be done by prosecuting.⁹

26 The lack of control over the exercise of this discretion to prosecute adds
 27 to the risk of injustice.¹⁰

28 In *S and Marper v United Kingdom*¹¹ the European Court of Human
 29 Rights referred to the UN Convention on the Rights of the Child of 1989
 30 and commented upon the importance of treating young people differ-
 31 ently than adults with regard to the criminal justice system ‘given their
 32 special situation and the importance of their development and in-
 33 tegration in society’.¹²

34 Internationally, the law in England is out of step because of its early
 35 criminalisation of minors. Worldwide, the current median age at which
 36 criminal responsibility will be imposed is 12 years.¹³ The United Nations’
 37 Committee on the Rights of the Child, has condemned the UK for
 38 imposing criminal liability on very young children. The European Com-
 39 mittee of Social Rights, the body responsible for the monitoring of

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 41 8 F. Bennion, ‘Mens Rea and Defendants below the Age of Discretion’ [2009] Crim
 42 LR 757 at 769.

43 9 [2003] UKHL 50, [2003] 4 All ER 765 at [14].

44 10 Compare *R v G* [2008] UKHL 37, [2009] 1 AC 92 where the young offender was
 45 prosecuted under s. 5 of the Sexual Offences Act 2003 and the case of *R (on the*
 46 *application of S) v DPP* [2006] EWHC 2231 (Admin) where, on similar facts, the
 47 case was prosecuted under the less serious offence of s. 13 of the Sexual Offences
 48 Act 2003.

49 11 App. Nos 30562/04 and 30566/04 (2009) 48 EHRR 50.

50 12 *Ibid.* at [124].

51 13 D. Cipriani, *Children’s Rights and the Minimum Age of Criminal Responsibility: A Global*
 52 *Perspective* (Ashgate: Aldershot, 2009) ch. 7.

1 compliance with the European Social Charter, has also found that
2 minimum ages of criminal responsibility of under 12 are incompatible
3 with Article 17 of the Charter.¹⁴

5 **The Legal Theory of Criminal Responsibility**

6
7 The existing defence available to children under 10 years of being a
8 minor relies completely on the simple status of being a child as a
9 justification for the defence. But the status of being a child experiencing
10 childhood does not neatly stop at 10. The perception of a child depends
11 on a society's culture and values which evolve over time.¹⁵ Don Cipriani
12 has commented:

13 the notion and meaning of childhood is not itself a natural phenomenon or
14 scientific fact, even though it is certainly related to the natural, biological
15 realities of children.¹⁶

16
17 While our existing defence for children is a status defence, the delimita-
18 tion of its boundaries at the age of 10 seem impossible to justify as the
19 young offender still falls firmly within the status of a child at the age of
20 11 and beyond. So a simple explanation of the defence on the basis of
21 status is unsatisfactory and instead a deeper exploration of why the
22 defence is available needs to be undertaken in order to determine where
23 a logical boundary for its application should fall.

24 While nothing will be gained by comparing the different legal ap-
25 proaches taken around the world to children, all the countries are
26 grappling with the same fundamental question—'At what age should
27 criminal responsibility be imposed on children?'—and this in itself rests
28 on fundamental issues of when criminal responsibility is justified. The
29 UK government's Consultation Paper, *Tackling Youth Crime*¹⁷ that pre-
30 ceded the Crime and Disorder Act 1998 justified the abolition of the
31 defence of *doli incapax* on the basis that this would send a clear signal
32 that in general children of 10 and over 'should be held accountable for
33 their own actions'.¹⁸ Accountability and responsibility in this context are
34 effectively synonyms, but the government makes no effort to consider
35 the fundamental question of whether children can justifiably be found
36 criminally responsible for their acts. Nicola Lacey has explained that
37 criminal responsibility is a:

38 practice of attribution which is specific to criminal law yet which is con-
39 nected with prevailing intellectual ideas, including—though, obviously,
40 not restricted to—philosophical theories about the nature of human be-
41 ings. The content and emphasis of these problems can be expected to
42 change according to the environment in which the system operates, with

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44 14 European Committee of Social Rights, above n. 2: 'a minimum age of criminal
45 responsibility below the age of 12 years is considered by the Committee not to be
internationally acceptable'.

46 15 J. Fionda, *Devils and Angels: Youth Policy and Crime* (Hart: Oxford, 2005) ch. 1.

47 16 Cipriani, above n. 13 at 2.

48 17 Home Office, *Tackling Youth Crime: Reforming Youth Justice* (Home Office: London,
1997).

49 18 *Ibid.* at [15].

1 important factors including the distinction of political interests and eco-
2 nomic powers; the prevailing cultural and intellectual environment; the
3 organization and relative status of relevant professional groups and the
4 array and vigour of alternative means of social ordering.¹⁹

5 Thus criminal responsibility is not a static concept, but adapts to the
6 social environment in which it is applied. The concept should not just
7 adapt to 'the relative status of relevant professional groups'²⁰ it must also
8 show a sensitivity to the vulnerabilities of certain groups in society. In
9 the context of children, the criminal law needs to be able to adapt its
10 focus to a child-centric view of the world where children are 'under-
11 stood in relation to their own social world and therefore assign children
12 a more primary position and active role . . . which may enable the adult
13 community to understand more and condemn less'.²¹

14 At the heart of the criminal justice system is the power to punish;
15 criminal responsibility should be imposed on people who deserve to be
16 punished, if punishment is not required then the civil system is more
17 appropriate. To impose a punishment the criminal law should be looking
18 for personal responsibility which requires capacity and choice²² which in
19 themselves are a reflection of personal autonomy. Young children lack
20 capacity and they are not autonomous individuals. That lack of auton-
21 omy is visually obvious with regard to a baby who cannot even clothe
22 and feed itself, but continues to exist well beyond this period. The great
23 legal philosopher Professor Hart explained:

24
25 What is crucial is that those whom we punish should have had, when they
26 acted, the normal capacities, physical and mental, for doing what the law
27 requires and abstaining from what it forbids, and a fair opportunity to
28 exercise these capacities. Where these capacities and opportunities are
29 absent. . . . the moral protest is that it's morally wrong to punish because
30 'he could not have helped it', or 'he could not have done otherwise' or 'he
31 had no real choice'.²³

32 **Capacity and children**

33
34 Regarding the issue of capacity as a requirement for justifying the
35 imposition of criminal responsibility, Cane has observed that:

36
37 It is generally agreed that a minimum level of mental and physical capacity
38 is a precondition of culpability. A person should not be blamed if they
39 lacked basic understanding of the nature and significance of their conduct
40 or basic control over it, unless their lack of capacity was itself the result of
41 culpable conduct on their part.²⁴

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45 19 N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social
46 Sciences in Criminal law Theory' (2001) 64 MLR 350 at 351.

47 20 Ibid.

48 21 Fionda, above n. 15 at 32.

49 22 Hart, above n. 4 at 152.

23 Ibid.

24 P. Cane, *Responsibility in Law and Morality* (Hart Publishing: Oxford, 2002) 65.

1 Duff and von Hirsch have argued that criminal responsibility is founded
2 upon 'the notion of rational agency'.²⁵ In other words, criminal liability
3 can only be imposed if a person is capable of recognising that his or her
4 conduct was not motivated by good reasons. John Gardner has argued
5 persuasively that criminal liability should only be imposed on those who
6 have the 'ability to live within reason'.²⁶ Hart argues that there is a
7 minimum mental and physical capacity a person must possess if they
8 are to be subjected to criminal liability, which he called 'capacity
9 responsibility'.²⁷

10 Science can provide the proof that children lack capacity and cannot
11 therefore be treated as 'rational agents', 'motivated by reason' for the
12 purposes of the imposition of criminal responsibility. The College of
13 Psychiatrists observed:

14 Biological factors such as the functioning of the frontal lobes of the brain
15 play an important role in the development of self-control and of other
16 abilities. The frontal lobes are involved in an individual's ability to manage
17 the large amount of information entering consciousness from many
18 sources, in changing behaviour, in using acquired information, in planning
19 actions and in controlling impulsivity. Generally the frontal lobes are felt to
20 mature at approximately 14 years of age.²⁸

21 The under-developed intellectual competence of children is referred to
22 directly by the United Nations Standard Minimum Rules for the Admin-
23 istration of Juvenile Justice (known as the Beijing Rules) regarding the
24 setting of the minimum age of criminal responsibility. Rule 4.1 states
25 that the minimum age '... shall not be fixed at too low an age level,
26 bearing in mind the facts of emotional, mental and intellectual matur-
27 ity'.²⁹ Fortin has studied the scientific research on child development
28 and concluded that:

30 the intellectual competence of young children aged up to about 11 or 12 is
31 far less sophisticated than that of adolescents between the ages of 12 and
32 18. Researchers... have also noted significant changes in the cognitive and
33 social development within both groups as they grow older... It is only
34 during the onset of early adolescence that young people become competent
35 to think in abstract terms. With this comes the capacity to feel guilt and
36 shame, linked with an awareness of the implications for others of the
37 offender's wrongful actions.³⁰

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39 25 A. Duff and A. von Hirsch, 'Responsibility, Retribution and the "Voluntary": A
40 Response to Williams' [1997] CLJ 103. See on this subject H. Keating, 'The
41 'Responsibility' of Children in the Criminal Law' [2007] CFLQ 183.

42 26 J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law*
43 (Oxford University Press: Oxford, 2008) 112.

44 27 Hart, above n. 4 at 227.

45 28 Royal College of Psychiatrists, *Child Defendants: Occasional Paper*, OP56 (2006) 38.

46 29 United Nations General Assembly, United Nations Standard Minimum Rules for
47 the Administration of Juvenile Justice A/RES/40/33, 29 November 1985, available
48 at <http://www.un.org/documents/ga/res/40/a40r033.htm>, accessed 7 June 2011.

49 30 J. Fortin, *Children's Rights and the Developing Law* (Cambridge University Press:
50 Cambridge, 1998) 72-3, cited by H. Keating 'Reckless Children?' [2007] Crim LR
51 546 at footnote 61. See also M. Rutter and M. Rutter, *Developing Minds: Challenge
52 and Continuity across the Life Span* (Penguin Books: London, 1993) and J. Coleman
53 and L. Hendry, *The Nature of Adolescence* (Routledge: London, 1999).

1 Emotional maturity in legal decision-making contexts is generally lower
2 among children aged between 11 and 13 years compared to older
3 children; they are less able to understand the long-term consequences of
4 their behaviour, perceive risks, resist peer influences, and comply with
5 authority figures.³¹ Alarm bells ring when one learns that the children
6 convicted as criminally responsible for the murder of Jamie Bulger had
7 access to a play area during adjournments at their trial.³²

8 The *doli incapax* defence failed to respond directly to the need for a
9 child to have intellectual capacity in order for criminal liability to be
10 imposed. It focused instead on a very subjective side-issue which was
11 difficult to assess: the moral awareness of the child. Jeremy Horder has
12 argued that it is the absence of a child's developed moral character which
13 justifies the existence of a defence for children:

14 . . . whilst even very young children are quite capable of engaging in
15 intentionally harmful conduct, they do not have developed moral charac-
16 ters to which such conduct can be related. It is the possession of such a
17 character that makes possible the formation of an action upon an in-
18 telligent conception of the good (in) life, and hence makes it possible to
19 subject one's (potential) conduct to critical moral evaluation, and shape it
20 in the light of that evaluation.³³

21 Though the *doli incapax* defence placed the emphasis on the child's
22 personal morality, perhaps a historical product of the defence's evolu-
23 tion, in a modern society this looks less and less convincing as the reason
24 for seeking to provide a defence to a child. In the Home Office White
25 Paper, *No More Excuses*, the government stated that:

26
27 In presuming that children of this age generally do not know the difference
28 between naughtiness and serious wrongdoing, the notion of *doli incapax* is
29 contrary to common sense.³⁴

30 Moral awareness might be symptomatic of the child's capacity in terms
31 of their intellectual development, but is only one aspect of it.³⁵ There
32 will be other consequences of a child's mental immaturity which the
33 concept of *doli incapax* totally ignores. For example, Brown's research
34 has demonstrated that young male drivers are more dangerous than
35 other drivers because of hazard perception failure rather than a different
36 attitude to risk.³⁶ Because the emphasis of the *doli incapax* was on
37 morality rather than capacity, it set a very low cognitive threshold: a
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40 31 T. Grisso *et al.*, 'Juveniles' Competence to Stand Trial: A Comparison of
41 Adolescents and Adults' Capacities as Trial Defendants' (2003) 27 *Law and Human*
42 *Behaviour* 333; R. Abramovitch *et al.*, 'Young People's Understanding and Assertion
43 of their Rights to Silence and Legal Counsel' (1995) 37 *Canadian Journal of*
44 *Criminology* 1.

45 32 Mr Justice Billen, 'Age of Criminal Responsibility: The Frontier Between Care and
46 Justice' [2007] IFL 7.

47 33 J. Horder, 'Pleading Involuntary Lack of Capacity' (1993) 52(2) CLJ 298 at 301.

48 34 *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales*, Cm
49 3809 (1997) para. 4.4.

35 See Fortin, above n. 30 at 72.

36 I. D. Brown, 'The Traffic Offence as a Rational Decision' in S. Lloyd-Bostock (ed.),
Psychology in Legal Contexts (Macmillan: London, 1981) 203.

1 knowledge of right from wrong entails only a minimal capacity for
2 rational understanding.³⁷

3 In reality, it is the victim's lack of capacity in its broader sense which
4 justifies a refusal to impose criminal liability. Thus, the Law Commission
5 has written:

6 Some 10-year-old killers may be sufficiently advanced in their judgement
7 and understanding that such a conviction [for murder] would be fair.³⁸

8 This reference to 'judgement and understanding' seems to be looking
9 instinctively for more than just a moral awareness which might be
10 incorporated in the term 'judgement, but also an intellectual maturity
11 reflected in the idea of 'understanding'.
12

13 **Personal autonomy and choice**

14
15 As well as a child having capacity, criminal liability, in order to be just,
16 must be grounded on the fact that the defendant has made a choice to
17 behave in the offending way.³⁹ That choice is evidence that the person
18 was acting as an autonomous individual. Horder suggests that children
19 'can be rationally motivated and they have feelings; they can hence
20 engage not merely in voluntary but in intentional conduct',⁴⁰ but such
21 an analysis takes a classically blinkered view of the childhood experi-
22 ences which continue to govern a child's behaviour. When children are
23 very young, they are very much under the control and influence of their
24 parents. They are expected to listen to their parents' instructions and to
25 obey them unquestioningly. Thus, if a parent instructs a five-year-old
26 child to take a toy in a shop, put it in their pocket and leave without
27 paying, we are comfortable with only criminalising the adult and leaving
28 the child untainted by the criminal law. There is, however, increasingly
29 strong research showing that the impact of parents on a child's poten-
30 tially criminal conduct continues well beyond the age of 10 when the
31 current defence of being a minor disappears. The continuing influence
32 of adults over a child's behaviour is reflected in the observations made
33 by the Court of Appeal in *Wilson*:⁴¹

34 There may be grounds for criticizing a principle of law that does not afford
35 a 13-year-old boy any defence to a charge of murder on the ground that he
36 was complying with his father's instructions, which he was too frightened
37 to refuse to disobey. But our criminal law holds that a 13 year old boy is
38 responsible for his actions and the rule that duress provides no defence to
39 a charge of murder applies however susceptible the defendant may be to
40 the duress, absent always any question of diminished responsibility.⁴²

41 37 B. C. Feld, 'Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and
42 Sentencing Policy' (1997) 88 *Journal of Criminal Law and Criminology* 68 at 98.

43 38 Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304
44 (2006) para. 5.130.

45 39 A. Ashworth, 'Belief, Intent and Criminal Liability' in J. Eekelaar and J. Bell (eds),
46 *Oxford Essays in Jurisprudence*, 3rd Series, (Oxford University Press: Oxford, 1987)
47 1; M. Moore, *Placing Blame: Theory of Criminal Law* (Clarendon Press: Oxford, 1997)
48 ch. 13.

49 40 Horder, above n. 33 at 302.

50 41 [2007] EWCA Crim 1251; [2007] 2 Cr App R 31.

51 42 *Ibid.* at [18].

1 Peter Cane has observed that there is an ‘important focus of legal
 2 responsibility practices which finds little or no (explicit) place in many
 3 philosophical analyses of responsibility—namely social values . . . Policy
 4 considerations are central to legal responsibility practices because law is
 5 a social phenomenon, and because the principles of legal responsibility
 6 are of general application’.⁴³ Thus, in looking at criminal responsibility
 7 we need to be prepared to take into account the social reality of a child’s
 8 personal experiences, including bad parenting, poverty and violence,
 9 rather than trying to artificially ignore these factors. These factors can
 10 reasonably be taken into account with regard to children’s liability
 11 because with their limited capacity they do not have a genuine oppor-
 12 tunity to make a choice as to how they behave, the impact of these
 13 external factors become determinative of their behaviour since children
 14 are not autonomous individuals. This lack of autonomy is reflected in
 15 the striking research results showing the strong correlation between
 16 poor parenting, poverty, abuse and youth offending.⁴⁴ It is only as that
 17 correlation fades that we can genuinely consider that young people are
 18 autonomous individuals who have made a choice to commit crime and
 19 can be subjected to criminal responsibility.

20 The issue of capacity and choice in the context of children is inter-
 21 linked. While the intellectual competence of children is under-
 22 developed,⁴⁵ the impact of the care (or absence of care) from their
 23 parents and the social conditions in which they live are too strongly
 24 determinative of their behaviour, including potentially criminal behavi-
 25 our, so that they cannot be viewed as autonomous individuals with the
 26 freedom to make a fully informed choice about the commission of a
 27 criminal offence. Tadros has observed:

28 In attributing responsibility we need to consider more than the nature of
 29 the action, we need a broader focus, both psychologically and temporally,
 30 to investigate whether that action reflected on the agent qua agent.⁴⁶

31 Hart has argued that the defendant’s capacities will only be sufficient to
 32 generate responsibility if the defendant has sufficient opportunity to act
 33 otherwise. It is true that, even for adults, the working assumption that
 34 people act on the basis of their own free will, may be based more on a
 35 myth than reality:⁴⁷

36 The idea of free will in relation to conduct is not, in the legal system, a
 37 statement of fact, but rather a value preference having very little to do with
 38 the metaphysics of determinism or free will . . . Very simply, the law treats
 39

40 43 Cane, above n. 24 at 53.

41 44 See, e.g., J. Graham and B. Bowling, *Young People and Crime* (HMSO: London,
 42 1995) 23; D. Utting, J. Bright and C. Henricson, *Crime and the Family* (Family
 43 Policy Studies Centre: London, 1996); D. J. West and D. P. Farrington, *Who Becomes
 44 Delinquent?* (Heinemann: London, 1973).

45 G. Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti Research
 46 Centre: Florence, 2005) 4; Q. Spender and A. Johns, ‘Psychological and Psychiatric
 47 Perspectives’ in J. Fionda (ed.), *Legal Concepts of Childhood* (Hart: Oxford, 2001) 57.

48 46 V. Tadros, *Criminal Responsibility* (Hart: Oxford, 2005) under the heading ‘Capacity,
 49 choice and responsibility’.

50 47 T. O’Connor, ‘Free Will’ in E. N. Zalta (ed.), *Stanford Encyclopedia of Philosophy*
 (Stanford University Centre for the Study of Language and Information: Stanford,
 2002).

1 man's conduct as autonomous and willed, not because it is, but because it
2 is desirable to proceed as if it were.⁴⁸

3 While the determinists have highlighted problems with these concepts
4 in everyday life which the law chooses to ignore, the absence of these
5 qualities of personal autonomy and individual choice become too acute
6 in the context of children to be justly ignored: the gap between the
7 theory and the reality becomes too pronounced in the context of
8 children.

9 A young person is not actually allowed in law to make many funda-
10 mental choices for themselves, for example, until the courts determine
11 that the child is *Gillick*⁴⁹ competent the parents are legally entitled to step
12 in and make decisions regarding the medical treatment of the child. In
13 considering the setting of minimum ages of criminal responsibility, the
14 Beijing Rules adopted by the United Nations General Assembly in 1985
15 observe:

16 In general, there is a close relationship between the notion of responsibility
17 for delinquent or criminal behaviour and other social rights and responsi-
18 bilities (such as marital status, civil majority, etc).⁵⁰

19 These social rights reflect the acquired autonomy of children as emerg-
20 ing adults and their ability to make choices for themselves.

21 The influences on a child are multiple, it is not just his or her family
22 (or absence of an effective family) that will be influencing a child's
23 behaviour, but also increasingly, for example, the electronic media in
24 the form of computer games, the internet, the television and so forth. In
25 this media children 'are fed unrealistic fantasies of power, and action is
26 portrayed which remains without social consequences'.⁵¹ Children's
27 moral competency develops dynamically over time through their rela-
28 tionships with the people around them.⁵² If those relationships are
29 unsatisfactory, then this will directly impact on their personal develop-
30 ment. Steps in social learning and the formation of conscience and
31 responsibility require intense care and personal warmth with the
32 child.⁵³ Defects in parental care may restrict the child's cognitive devel-
33 opment.⁵⁴ In addition the physical environment in which a child grows
34 influences the way in which he or she perceives the wrongfulness of
35 behaviour. For example, if children grow up in an area where there is a
36 lot of visible crime, they may take this to be the social norm.⁵⁵ Graham

37
38 48 H. L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: Stanford,
39 1968) 74–5.

40 49 *Gillick v West Norfolk and Wisbech Area Health Authority* [1984] QB 581.

41 50 United Nations General Assembly, above n. 29 at commentary to para. 4.1.

42 51 D. Frehsee, 'Strafreife—Reife des Jugendlichen oder Reife der Gesellschaft' in
43 P Albrecht, (3d) *Festschrift Fur Schuler-Springorum zum 65 390. Geburtstag* (1993),
44 quoted by T. Crofts, *The Criminal Responsibility of Children and Young Persons*
(Ashgate: Aldershot, 2002) 191.

45 52 J. Fagan, 'Context and Culpability in Adolescent Crime' (1999) *Virginia Journal of*
46 *Social Policy and the Law* 507.

47 53 M. Walter, *Jugendkriminalitat* (Borberg: Stuttgart, 1995) 59 quoted by Crofts, above
48 n. 51.

49 Ibid. at 60.

50 H. Angenent and A. de Man, *Background Factors of Juvenile Delinquency* (Lang: New
51 York, 1996) 179.

1 and Bowling's research has identified the strong correlation between
 2 parental behaviour and youth crime.⁵⁶ West and Farrington have shown
 3 that factors such as parental criminality or social deviance, conflict-
 4 ridden or broken homes, lack of early care and supervision and living in
 5 a delinquent neighbourhood were all predictive of delinquent behav-
 6 iour, while 'good homes' were a protective factor against offending.⁵⁷
 7 Where children commit murder, their home backgrounds are charac-
 8 terised by paternal psychopathy, alcohol abuse, violent fathers, absence
 9 from the home, a depressed mother and histories of serious sexual and
 10 physical abuse.⁵⁸ Kazdin has noted that delinquent children had had
 11 greater exposure to a variety of traumas, such as child abuse and
 12 domestic violence compared to non-delinquent samples.⁵⁹ Petit *et al.*
 13 have developed a model to explain how early experiences such as abuse
 14 or insecure attachments can ultimately lead to aggressive behaviour.⁶⁰

15 The majority of children who come into contact with the criminal
 16 justice system are characterised by poverty.⁶¹ Crowley's study of per-
 17 sistent child offenders found that:

18 experience of poverty, deprivation, abuse and neglect were . . . common-
 19 place, as were family disruption and violence.⁶²

20 Two separate studies have shown that social and environmental influ-
 21 ences can even in extremely rare cases, lead young people to kill.⁶³

22 The fact that a person is born into a dysfunctional family and an
 23 unsatisfactory social environment is an example of bad luck over which
 24 that person has no control. The criminal law has to decide how sensitive
 25 to be where luck or bad luck have played a part in determining an
 26 individual's criminal conduct. Rawls has argued that while luck should
 27 be ignored when distributing resources, it is relevant to the allocation of
 28 responsibility.⁶⁴ Although traditionally the criminal law chooses actively
 29

30 56 Graham and Bowling, above n. 44 at 23; see also Utting, Bright and Henricson,
 31 above n. 44.

32 57 West and Farrington, above n. 44.

33 58 S. Bailey, 'Adolescents who Murder—A Critical Comment on Key Provisions
 34 relating to Children in the Crime and Disorder Act 1998' (1996) 19 *Journal of*
 35 *Adolescence* 19. See also G. Boswell, *Young and Dangerous—the Background and*
 36 *Careers of Section 53 Offenders* (Avebury: Aldershot, 1996); D. M. Fergusson,
 37 J. L. Horwood and M. T. Lynskey, *The Childhoods of Multiple Problem Adolescents: A*
 38 *15 Year Longitudinal Study* (Christchurch Child Health and Development Study,
 39 1992).

40 59 A. E. Kazdin, 'Adolescent Development, Mental Disorders and Decision Making of
 41 Delinquent Youths' in T. Grisso and R. Schwartz (eds), *Youth on Trial: A*
 42 *Developmental Perspective on Juvenile Justice* (University of Chicago Press: Chicago,
 43 2000) 49.

44 60 G. Pettit, J. Polaha and J. Mize, 'Perceptual and Attributional Processes in
 45 Aggression and Conduct Problems' in J. Hill and B. Maughan (eds), *Conduct*
 46 *Disorders in Childhood and Adolescence* (Cambridge University Press: Cambridge,
 47 2001) 304.

48 61 D. P. Farrington, 'Human Development and Criminal Careers' in M. Maguire,
 49 R. Morgan and R. Reiner (eds), *Oxford Handbook of Criminology* (Oxford University
 50 Press: Oxford, 2002).

51 62 A. Crowley, *A Criminal Waste: A Study of Child Offenders Eligible for Secure Training*
 52 *Orders* (The Children's Society: London, 1998) quoted by L. Gelsthorpe, 'Much
 53 Ado about Nothing' (1999) 11 CFLQ 209 at footnote 64.

54 63 Bailey, above n. 58; Boswell, above n. 58.

55 64 J. Rawls, *A Theory of Justice* (Clarendon Press: Oxford, 1972) 310.

1 to ignore circumstances which explain the context for a given act,⁶⁵ to
2 do so with regard to the conduct of young children risks ignoring the
3 very essence of what has occurred and as a result is unjust and unjustifi-
4 able. The research has shown such a close co-relation between negative
5 elements of the external environment in which a child is living and
6 criminal conduct that it is clear that it is these external factors that have
7 been determinative of the child's criminal conduct rather than the child
8 acting as an autonomous individual exercising a choice. Perhaps focus-
9 ing on issues of morality and ignoring personal responsibility was his-
10 torically understandable, but as social research techniques have become
11 more advanced and the resulting statistical evidence has become clearer
12 regarding the impact of such issues as poor parenting and poverty on a
13 child's criminal behaviour, it is now blatantly unjust to simply ignore the
14 social reality.

15 Legal recognition of the parental input into the criminal conduct of a
16 child is reflected in the growth of legislation which sanctions parents for
17 their children's illegal acts.⁶⁶ For example, s. 8 of the Crime and Disorder
18 Act 1998 allows the courts to impose a parenting order requiring a
19 parent to attend counselling or guidance sessions on how to bring up
20 their children. They may also be required to exercise control over their
21 child. But this development has not been accompanied by an equivalent
22 reduction of the criminal liability of the child.

23 A reduction in the minimum age of responsibility would reflect the
24 fact that as children grow up into autonomous adults they actually
25 frequently choose to stop breaking the criminal law—children naturally
26 grow out of crime.⁶⁷ Most adolescent offending is carried out by youths
27 in mid to late adolescence who do not proceed to a career in crime.⁶⁸
28 Therefore a child's lack of intellectual competence, autonomy and free
29 will is a temporary state which the children will normally grow through
30 and their behaviour will naturally cease to be problematic. The fact that
31 children grow out of crime is seen by Horder as a fundamental justifica-
32 tion for allowing children a defence:

33 A less demanding standard of self-control ought to be expected of a young
34 defendant (depending, obviously, on his or her exact age), with the result
35 that disproportionate (murderous) attacks by provoked young persons, in
36 response to an objectively trivial provocation may none the less sometimes
37 be excused. 'Why? For the simple reason that the less well-developed
38 powers of self-control of young persons are a reflection of their naturally as
39 yet incompletely-realised potential to become fully accountable moral
40 agents. Their less well-developed powers of self-control can hence be a

41
42 65 J. Armour, 'Just Deserts: Narrative, Perspective, Choice and Blame' (1996) 57
University of Pittsburgh Law Review 525.

43 66 E. Brank, S. Kucera and S. Hays, 'Parental Responsibility Statutes: An
44 Organisation and Policy Implications' (2005) 7 *Journal of Law and Family Studies* 1.

45 67 A. Rutherford, *Growing Out of Crime: The New Era* (Waterside Press: Winchester,
1992) 11.

46 68 E. Mulvey and M. Aber, 'Growing Out of Delinquency: Development and
47 Desistance' in R. L. Jenkins and W. Brown (eds), *The Abandonment of Delinquent*
48 *Behaviour: Promoting the Turnaround* (Praeger: New York, 1988); T. E. Moffitt
49 'Adolescence—Limited And Life-Course-Persistent Anti-Social Behaviour: A
Developmental Taxonomy' (1993) 100 *Psychological Review* 674.

1 reflection of their mental normality and are thus appropriately catered for
 2 by special treatment, within the confines of a doctrine designed for those
 3 who are, in Ashworth's phrase 'in a broad sense, mentally normal'.⁶⁹

5 **A New Defence for Children Aged Between 10 and 14**

6
 7 Once the rationale for allowing a defence for children is clearly under-
 8 stood it becomes obvious that the *doli incapax* defence did need to be
 9 abolished because it continued to place the emphasis on children's
 10 personal responsibility for their conduct and failed to acknowledge their
 11 lack of autonomy whether or not they had an advanced moral under-
 12 standing of their conduct. Even so, the *doli incapax* defence needed to be
 13 replaced by a new defence which was not discretionary on the child's
 14 personal moral development, but which focused on the child's capacity
 15 and ability to choose. While these may seem very loose theoretical
 16 concepts on which to base a legal defence, they have already been placed
 17 at the heart of the offence of rape and the potential availability of a
 18 defence of consent, through the statutory definition of consent which
 19 makes explicit reference to capacity, freedom and choice.⁷⁰

20 At a certain point the child must make the transition from an indi-
 21 vidual who is within the control and remit of his or her carers and an
 22 autonomous individual responsible for his or her own conduct. This
 23 transition takes place progressively and depends on their personal cir-
 24 cumstances and their personal development. However, in law, con-
 25 sistency and clear rules are important, which could not be provided by
 26 the flexible *doli incapax* rule. It is impossible to identify fixed ages at
 27 which children reach certain levels of development. Attempts have been
 28 made to identify the stages through which children develop,⁷¹ but these
 29 have subsequently been criticised as over-simplistic and not taking into
 30 account adequately the individual differences in the way children de-
 31 velop.⁷² It is undesirable to have a flexible age limit as was provided for
 32 by the defence of *doli incapax*, because the concepts that ground the
 33 defence are almost impossible to measure accurately: social background
 34 and intellectual competence. The *doli incapax* defence was ultimately
 35 socio-culturally dependent, relying on concepts which were neither
 36 measurable nor predictable. The resulting risk that judges might exercise
 37 their discretion in a discriminatory way was highlighted by the United
 38 Nations Human Rights Committee.⁷³

39 Thus a fixed year needs to be chosen which will be applied to all
 40 children. One thing we can safely say is that this level of autonomy does

69 J. Horder, 'Between Provocation and Diminished Responsibility' (1999) *King's College Law Journal* 143 at 144.

70 Sexual Offences Act 2003, s. 74.

71 L. Kohlberg, 'Development of Moral Character and Moral Ideology' in M. Hoffman and L. Hoffman (eds), *Review of Child Development Research*, vol. 1 (Russell Sage Foundation: New York, 1964); J. Piaget, *The Moral Judgement of the Child* (Harcourt: New York, 1932); E. Erikson, *Childhood and Society* (Penguin: Harmondsworth, 1950) 239.

72 Rutter and Rutter, above n. 30 at 1.

73 The Committee viewed the defence of *doli incapax* in Sri Lanka as a matter of profound concern: CCPR/ C/79/Add.56, 27 July 1995.

1 not develop at the age of 10: in UK society 10-year-old children are very
2 much under the influence of the adults and peers around them. The
3 logical point at which it would make sense to put this age limit would be
4 16 when the child is civilly recognised as developing his or her personal
5 autonomy by having the right to leave school and to get married. In
6 reality, it would probably be easier politically to set the minimum age
7 limit at 14 with a view to raising it to 16 at a future date, as society's
8 attitudes to children and misbehaviour adapt. The different rationale for
9 the status defence (under 10) and the 'lack of autonomy' defence (10 to
10 14) could be reflected in the legislation so that they could be applied as
11 two separate defences rather than being legislated as one single unitary
12 defence.

13 In its Consultation Paper, *Tackling Youth Crime*,⁷⁴ the government
14 suggested that justice would be better served if the courts took account
15 of the child's age and maturity at the stage of sentencing rather than
16 through a mechanism which hindered prosecution,⁷⁵ but this ignores
17 the fact that it is fundamentally unjust and inappropriate to hold person-
18 ally to account young people who are not autonomous individuals
19 benefiting from a freedom of choice.

20 At the moment the only recourse that young offenders aged over
21 nine years old can have to avoid the full weight of the criminal law is to
22 argue that they are unfit to plead,⁷⁶ but this carries the risk of a hospital
23 order or confinement in a secure unit. It is a procedural argument which
24 focuses on the defendant's capacities at the time of the trial, rather than
25 looking at his or her capacity at the time of the offending behaviour and
26 the reasons for the criminal conduct in the first place. Because youth is
27 not static, it is possible that a young person's understanding may well
28 have advanced from the time of the offending behaviour, but more
29 importantly a defence that the young person is unfit to plead does not fill
30 the gap left by the absence of a defence of being a minor lacking
31 autonomy and freedom of choice. While capacity to understand the trial
32 proceedings and give evidence are important requirements and this
33 procedural defence should continue to exist, one can easily imagine a
34 child who has this capacity, but at the time of the offence was still not
35 acting as an autonomous individual who chose to act in the relevant
36 way.

37 The Law Commission's recommendations on reforming the homicide
38 offences reflect anxieties that the current law is unduly harsh on young
39 offenders, but it proposed only a partial defence to the most serious
40 offence of murder and its availability would be focused on 'devel-
41 opmental immaturity' which would be drawn within the defence of
42 diminished responsibility.⁷⁷ The Law Commission has explained that
43 this defence would be available if defendants could prove that the
44
45

46 ⁷⁴ Home Office, above n. 17.

47 ⁷⁵ *Ibid.* at para. 13.

48 ⁷⁶ *CPS v P* [2007] EWHC 946 (Admin).

49 ⁷⁷ Law Commission, above n. 38 at paras 5.125–5.137.

1 defendant's capacity for judgement, control or understanding was sub-
 2 stantially impaired by developmental immaturity.⁷⁸ Various objections
 3 can be made to this proposal. It provides no solace to young people who
 4 misbehave with less serious consequences. It ties youth with a defence
 5 which is generally associated with mental ill health. It suggests that
 6 young people who benefit from this defence are abnormal in their
 7 'developmental immaturity' whereas actually they are typical of young
 8 children; it is the consequences of their action which is abnormal. The
 9 criteria of maturity or immaturity is as subjective as moral awareness
 10 and therefore avoids none of the problems associated with *doli incapax*.
 11 Ultimately, the Law Commission needs to go back to the roots of why
 12 children should be treated differently from adults; it is allowing this
 13 defence by purely focusing on one justification for not criminalising
 14 children—their lack of intellectual capacity—while unreasonably ignor-
 15 ing the second—their lack of individual autonomy and free will. Chil-
 16 dren are not fully independent of their adult carers and the availability
 17 of a defence for children should acknowledge this. Interestingly, when
 18 looking for developmental immaturity the Law Commission suggests
 19 that the court could take into account 'social and environmental influ-
 20 ences',⁷⁹ but the primary focus is still too narrow, ignoring the issue of
 21 autonomy and free will. A search for 'developmental immaturity' or
 22 'moral awareness' for *doli incapax* is a red herring which distracts the
 23 courts from the crucial issue that the child defendant not only lacked
 24 capacity, but also lacked autonomy at the time of the offending behavi-
 25 our to justify criminal liability.

26 **Civil justice over criminal justice**

27 Arguments have been made that criminal responsibility can be imposed
 28 on children because the youth justice system is geared more towards
 29 education and reform rather than punishment.⁸⁰ Glanville Williams
 30 wrote back in 1954 that:

31 at the present day the 'knowledge of wrong' test stands in the way not of
 32 punishment, but of educational treatment. It saves the child not from
 33 prison, transportation or the gallows, but from the probation officer, the
 34 foster-parent, or the approved school.⁸¹

35 While such arguments may be well meaning, they are ultimately mis-
 36 leading.⁸² The UK has a child welfare system which can cater for
 37 children without them being criminalised beforehand. In practice, the
 38 youth justice system clearly does punish children including detaining
 39 them away from their parents against their will, even if basic opportuni-
 40 ties for education and reform are offered at the same time. Following
 41 the Criminal Justice and Public Order Act 1994 children aged 10 can be
 42

43 78 Ibid. at para. 5.131.

44 79 Ibid. at para. 5.132.

45 80 G. Williams, 'The Criminal Responsibility of Children' [1954] Crim LR 493.

46 81 Ibid. at 496.

47 82 G. Van Bueren, 'Child-Oriented Justice—An International Challenge for Europe'
 48 (1992) 6 *International Journal of Law and the Family* 381 at 381–2; P. Cavadino
 49 'Goodbye doli, must we leave you?' (1997) 9 CFLQ 165.

1 given long-term sentences of detention for serious offences. The United
2 Nations' Committee on the Rights of the Child criticised the UK for 'high
3 and increasing numbers of children being held in custody at earlier ages
4 for lesser offences and for longer custodial sentences'.⁸³ In January 2007
5 2,364 children under 18 were being held in youth offender institutions⁸⁴
6 which only have very limited facilities for education and rehabilitation.
7 While the Youth Justice Board set a target of 30 hours per week of
8 education and training for young people being held in custody, no
9 juvenile establishment has succeeded in meeting this target.⁸⁵ Thus at
10 the moment children in custody do not have the same access to educa-
11 tion and special needs provision which are enjoyed by children outside
12 custody.

13 Parliament's Joint Committee on Human Rights has stated that the
14 level of physical assault and the degree of physical restraint experienced
15 by children in detention represents an unacceptable contravention of
16 the United Nations Convention on the Rights of the Child.⁸⁶ The Joint
17 Committee recommended that:

18 . . . the Government revisit the idea of completely separating the organisa-
19 tion responsible for the custody of offenders under the age of 18 from the
20 Prison Service. These young people should be looked after by a group of
21 people whose outlook is firmly grounded in a culture of respect of child-
22 ren's human rights, devoted to rehabilitation and care.⁸⁷

23 Field's research into police handling of young offenders shows why the
24 criminal justice system is the wrong place for young offenders.⁸⁸ The
25 police are inevitably focused on the offence that has been committed
26 and, in their decision-making, push aside issues about the child's back-
27 ground considering them to be a distraction:

28 [C]ustody sergeants tended to exclude most offender-based issues from
29 their account of their own decision-making. Matters of family background,
30 whether it be evidence of parental support or neglect, were said not to be
31 relevant.⁸⁹

32 The tensions that can arise in a criminal justice system which is
33 theoretically aiming to protect the welfare of the child was recognised
34 back in 1960 by the Ingleby Committee. Efforts to educate and deal with
35 the welfare problems of the child will not succeed in a criminal justice
36 system which has been built on the foundations of punishment. The
37 penal system does not ensure that the welfare needs of child defendants

39 83 Concluding Observations of the UN Committee on the Rights of the Child: United
40 Kingdom of Great Britain & Northern Ireland (2002) 15, para. 57.

41 84 UK Government, *The Consolidated 3rd and 4th Periodic Report to UN Committee on the*
42 *Rights of the Child* (Department for Children, Schools and Families: Nottingham,
43 2002) para. 8.76.

44 85 European Committee of Social Rights, above n. 14.

45 86 House of Lords/House of Commons Joint Committee on Human Rights, UN
46 Convention on the Rights of the Child, 10th Report of Session 2002/03, para. 12,
47 available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/117/11704.htm>, accessed 7 June 2011.

48 87 *Ibid.* at para. 65.

49 88 S. Field, 'Early Intervention and the "New" Youth Justice: A Study of Initial
Decision-making' [2008] Crim LR 177.

89 *Ibid.* at 185.

1 are noted, assessed and actually met. For example, consistent systems
2 are not in place to make sure that all child defendants undergo a welfare
3 assessment. Children are remanded into secure accommodation for
4 months before their trial, where little attention is given to welfare and
5 treatment issues, as this is not the role of secure accommodation ser-
6 vices.⁹⁰ There is frequently a total lack of medium- to long-term care
7 planning by local authorities in relation to children who are caught up as
8 defendants in criminal proceedings:

9 It may be assumed that, since children placed on remand in secure accom-
10 modation are being cared for, they are also 'in care', even in the absence of
11 a care order. The issue of who is parenting such child defendants and who
12 has parental responsibility for the child is often lost in the anxiety to protect
13 the evidence. This means that professionals may become paralysed in their
14 thinking about the welfare considerations and may state that no care plan
15 can be considered until the trial is over. Confusion exists about the preced-
16 ence that should be taken by the criminal justice system requirements over
17 any welfare considerations such as therapy for the child or contact with
18 relatives, when it is feared that such processes could contaminate evidence
19 in the trial.⁹¹

20 In 1960, the Ingleby Committee observed:

21 It is not easy to see how the two principles can be reconciled: criminal
22 responsibility is focused on an allegation about some particular act isolated
23 from the character and needs of the defendant, whereas welfare depends
24 on a complex of personal, family and social considerations.⁹²

25 The way forward is to develop fully the civil solutions to support young
26 people. The recognition of a child's lack of criminal responsibility due to
27 his or her lack of capacity and freedom of choice also points the civil
28 courts in the right direction in how to deal with these children. All
29 efforts need to be focused on why these children behaved in the manner
30 concerned and those causes must be tackled, which will inevitably
31 include the possibility of taking the child into care where the parenting
32 is clearly failing with dangerous consequences. The funding for the civil
33 system could be greatly enhanced by removing the funding currently
34 poured into the youth justice system.

35 In 2007, Smith LJ⁹³ recognised that in some cases civil proceedings
36 under the Children Act 1989 would be more appropriate than criminal
37 proceedings. In *DPP v R*,⁹⁴ Hughes LJ commented in the High Court
38 that:

39 . . . where very young, or very handicapped, children are concerned there
40 may often be better ways of dealing with inappropriate behaviour than the
41 full panoply of a criminal trial. Even where the complaint is of sexual
42 behaviour it ought not to be thought that it is invariably in the public
43 interest for it to be investigated by means of a criminal trial, rather than by
44

45 90 Royal College of Psychiatrists, above n. 28 at 57.

46 91 *Ibid.* at 9.

47 92 *Report of the Committee on Children and Young Persons* (Ingleby Committee), Cm 1191
48 (1960) para. 60.

49 93 *R v W* [2007] EWCA Crim 1251, [2007] 2 Cr App R 31 at [33], [35] and [51].

94 [2007] EWHC 1842 (Admin).

1 inter-disciplinary action and co-operation between those who are experi-
2 enced in dealing with children of this age and handicap.⁹⁵

3 Criminal proceedings should not be the gateway to educational and
4 social services,⁹⁶ these should be completely separate from criminal
5 proceedings because they have very different roles in our society. The
6 priority of the criminal justice system is, by definition, punishment and
7 annexing educational and social services does not remove the fact that a
8 child has been stigmatised with a criminal conviction and punished for
9 that behaviour.

10 That is not to say that children should not receive punishment for
11 their misbehaviour—children are often punished without recourse to
12 the criminal courts and this will continue to be the case, but the
13 punishment will be proportionate to the personal responsibility of the
14 child which will inevitably be restricted because of his or her limited
15 capacity and personal autonomy. Instead the genuine emphasis of the
16 civil system will be on education and welfare without the distractions of
17 punishment which take priority in a criminal justice system. But experi-
18 ence both in the UK and abroad suggests that we must be careful in any
19 transition from criminal proceedings to civil proceedings to avoid chil-
20 dren having the disadvantages of a civil solution (the burden of proof
21 only being on the balance of probabilities and the more lenient pro-
22 cedural approach) combined with the disadvantages of a punishment in
23 the guise of a supposedly educational or welfare solution. Don Cipriani
24 has commented that administrative proceedings ‘too frequently result in
25 the imposition of forms of deprivation of liberty in the guise of educa-
26 tional or protective measures, often for lengthy periods that may be
27 neither pre-determined nor properly monitored and reviewed’.⁹⁷

28 By going down the route of criminal responsibility, society is placing
29 the blame for the wrongdoing firmly at the feet of the child, whereas the
30 evidence suggests that the causes of such wrongdoing are actually
31 the product of the child’s social environment. Once this is accepted, the
32 justification for criminal responsibility fades away leaving the uncom-
33 comfortable reality that we can no longer neatly blame one individual for the
34 wrongdoing that has occurred, but we have to accept a shared responsi-
35 bility for it. The remedy is not to seek to punish that one individual
36 child, but to look at the social environment in which he or she has been
37 placed and see what changes need to be made to avoid future wrong-
38 doing. When the wrong done is as serious as the murder of a child, such
39 as James Bulger, this is a particularly painful lesson to accept, but the
40 inclination to turn into a lynch mob against the children who were the
41 direct perpetrators of the wrongful conduct must be avoided in a civil-
42 ised society.

43 What the law has done is to choose from among the characteristics of
44 certain children, not their lack of a decent education (through no fault of
45

46
47 ⁹⁵ [2007] EWHC 1842 (Admin) at [37].

48 ⁹⁶ For an alternative view, see G Williams, ‘The Criminal Responsibility of Children’
[1954] Crim LR 493.

49 ⁹⁷ Cipriani, above n. 13 at x.

1 their own,) or their location in dilapidated slum housing (through no fault
 2 of their own), or their unattended to health problems (through no fault of
 3 their own), etc., but the instance of conduct in which they violated the
 4 penal law. So long as the legal system thus isolates and highlights that
 5 aspect of the child which rationally calls for the least sympathy, and ignores
 6 the conditions of his life that would evoke a desire to help, the law simply
 7 serves to reinforce the severity of public attitudes.⁹⁸

8 This is not to say that a child who commits a serious wrong is morally
 9 blameless, but it accepts that civil law procedures can tackle more
 10 effectively children whose behaviour is symptomatic of the social
 11 environment in which they have found themselves. Whenever children
 12 are naughty they need to be punished in order for them to learn
 13 appropriate behaviour, but the punishment must be proportionate to
 14 the level of personal wrongdoing of the child. Because the criminal law
 15 places all of the blame on the individual offender and ignores the social
 16 context in which the offending has taken place, the resulting punish-
 17 ment can be out of all proportion to the actual individual wrongdoing.
 18 The criminal law is not the only setting in which a child can be
 19 punished—a child may be scolded by means of a severe telling-off by his
 20 parents, sent to his bedroom or banned from playing on his computer for
 21 a number of hours or days. There is no need for the criminal system to
 22 be involved, simply because a level of punishment is required, but by
 23 enrolling the criminal law in the process, the stage is set for a dispropor-
 24 tionate punishment to be imposed.⁹⁹

25 Once it is accepted that there is a collective responsibility for the
 26 wrongdoing, then society can accept the additional financial and per-
 27 sonal resources that need to be invested through the civil welfare system
 28 in order to tackle such behaviour. Children can be forced to confront the
 29 moral blameworthiness of their conduct without dragging them
 30 through a criminal justice system that was designed for adults.

31 When a child commits a serious harm there might be an under-
 32 standable desire to punish that child through the criminal justice system,
 33 but the evidence is that this will prove counter-productive.¹⁰⁰ The most
 34 effective delinquency prevention and early intervention programs for
 35 young children are non-punitive and home and school-based, focusing
 36 on the parents and other family members.¹⁰¹ These programmes are
 37 delivered by the mental health and child welfare services rather than the

98 S. Fox, 'Responsibility in the Juvenile Court' (1969–70) 11 *William and Mary Law Review* 659 at 674.

99 Gelsthorpe, above n. 62.

100 T. Thornberry, D. Huizinga and R. Loeberet, 'The Causes and Correlates Studies: Findings and Policy Implications' (2004) 9 *Juvenile Justice* 3; D. Farrington, 'Early Identification and Preventive Intervention: How Effective Is This Strategy?' (2005) 4 *Criminology and Public Policy* 237; US Government Accountability Office, *Residential Treatment Programs, Concerns Regarding Abuse and Death in Certain Programs for Troubled Youth* (US Department of Justice: Washington, 2007); R. Loeber, D. Farrington and D. Petechuk, *Child Delinquency: Early Intervention and Prevention*, Child Delinquency Bulletin Series (US Department of Justice, Office of Juvenile Justice and Delinquency Prevention: Washington, 2003).

101 B. Burns *et al.*, *Treatment Services and Intervention Programs for Child Delinquents*, (US Department of Justice, Office of Juvenile Justice and Delinquency Prevention: Washington, 2003).

1 criminal justice system.¹⁰² The Youth Inclusion Programme would seem
2 to be a model of the way forward in tackling youth crime: prevention
3 rather than a punitive reaction. This programme was established in 2000
4 and targets children aged between 8 and 16 who are considered to be at
5 high risk of involvement in offending or anti-social behaviour. It pro-
6 vides children with somewhere safe to learn new skills, take part in
7 activities, get help with education and receive career guidance. An
8 independent national evaluation of the programme in its first three
9 years found that of the 50 children most at risk of committing crime in
10 each of the schemes set up, the arrest rate had been reduced by 65 per
11 cent.¹⁰³

12 13 **Conclusion**

14
15 The current law ignores the social reality that a range of ‘bad luck’ social
16 factors frequently lead a child of under-developed intellectual capacity
17 to misbehave. The imposition of criminal responsibility is the gateway to
18 punishment, and only those people for whom individual punishment
19 can be justified should be subjected to this level of responsibility. An
20 exploration of the concept of criminal responsibility has highlighted that
21 it cannot be justified where children lack capacity and freedom of choice
22 in their behaviour. This analysis challenges the use of the criminal
23 justice process in dealing with youth offending. Unfortunately, at the
24 moment, children are increasingly being criminalised, particularly fol-
25 lowing the abolition of the defence of *doli incapax*. Admittedly, this old
26 defence placed an unsatisfactory emphasis on a child’s moral awareness,
27 but the remaining status defence of being a minor is only available to
28 children aged under 10. This article therefore proposes that a new
29 defence should be established for minors aged between 10 and 14 which
30 would bring to the fore a key rationale for the defence—that the child
31 lacked autonomy because of his or her lack of capacity and choice. These
32 issues would then be central to how the child is to be dealt with by the
33 civil justice system.¹⁰⁴

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44 102 P. Greenwood, *Changing Lives: Delinquency Prevention as Crime Control Policy*
(University of Chicago Press: Chicago, 2005).

45 103 UK Government, above n. 84 at para. 8.109.

46 104 R. Allen, *From Punishment to Problem-Solving: A New Approach to Children in Trouble*
47 (Centre for Crime and Justice Studies: London, 2006). See also Commission on
48 Families and the Well-being of Children, *Families and the State: An Inquiry into the*
49 *Relationship between the State and the Family* (Family and Parenting Institute:
London, 2005).