



McDiarmid, Claire (2013) An age of complexity : children and criminal responsibility in law. Youth Justice, 13 (2). pp. 145-160. ISSN 1747-6283 , <http://dx.doi.org/10.1177/1473225413492056>

This version is available at <https://strathprints.strath.ac.uk/44045/>

Strathprints is designed to allow users to access the research output of the University of Strathclyde. Unless otherwise explicitly stated on the manuscript, Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Please check the manuscript for details of any other licences that may have been applied. You may not engage in further distribution of the material for any profitmaking activities or any commercial gain. You may freely distribute both the url (<https://strathprints.strath.ac.uk/>) and the content of this paper for research or private study, educational, or not-for-profit purposes without prior permission or charge.

Any correspondence concerning this service should be sent to the Strathprints administrator: strathprints@strath.ac.uk

AUTHOR QUERY FORM

Journal title: YJJ

Article Number: 492056

Dear Author/Editor,

Greetings, and thank you for publishing with SAGE. Your article has been copyedited, and we have a few queries for you. Please respond to these queries when you submit your changes to the Production Editor.

Thank you for your time and effort.

Please assist us by clarifying the following queries:

No	Query
1	Is irrebuttably correct? '[c]hildren below th[e] age are irrebuttably presumed to be incapable of committing crime'
2	Is this p.374? If so, add p. As we explained in <i>Stanford</i> , 492 U. S., at 374
3	Caldwell, 2011–12. Article appears to have been published in 2011, so change text citation and reference in Refs List to Caldwell (2011)?
4	Number the next four headings 1 to 4?
5	Should this be an A (bold) heading rather than a B (italics) heading?
6	I suggest changing 'pled' (US spelling) to 'pleaded'.
7	Please indicate where Ashford (2010) should be cited in the text.
8	Barbee, 2011–12. Please decide which year this article was published in. Change text citation and reference in Refs List to Barbee (2011) or Barbee (2012).
9	Clarkson, Keating and Cunningham (2010) in text; year of publication is 2010 in Refs List. Which is correct?
10	Midson reference. Journal vol(issue) numbers?



An Age of Complexity: Children and Criminal Responsibility in Law

Youth Justice
0(0) 1–16

© The Author(s) 2013

Reprints and permissions:

sagepub.co.uk/journalsPermissions.nav

DOI: 10.1177/1473225413492056

yji.sagepub.com



Claire McDiarmid

Abstract

This article examines the age of criminal responsibility in English law. It argues that the fair imputation of criminal responsibility requires understanding of a number of interlinked concepts, including knowledge of wrongfulness, understanding of criminality and its consequences and an internalized moral appreciation of the quality of the conduct. Taken together, alongside the child's psychological development and lived experience, the matter is complex. Development from baby to adulthood also involves a shift from dependence to autonomy. The age of criminal responsibility must be set so as properly to take into account both the underlying complexity and the acquisition of autonomy.

Keywords

age of criminal responsibility, children, criminal capacity, *doli incapax*

Introduction

The age of criminal responsibility as established in English law is deceptively easily stated: 'It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence' (Children and Young Persons Act 1933, s. 50 as amended by Children and Young Persons Act 1963, s. 16(1)). (The provision in Scots law is worded identically, although the age is eight. Additionally, in Scotland, no child under 12 may be prosecuted in court (Criminal Procedure (Scotland) Act 1995, ss. 41 and 41A(1). Children aged 8, 9, 10 or 11 may be referred to a children's hearing on the ground of having committed an offence (Children's Hearings (Scotland) Act 2011, s. 67(2)(j)). The principle underlying the age can also be stated succinctly: '[c]hildren below th[e] age are irrebuttably presumed to be incapable of committing crime' (Clarkson et al., 2010: 428). Or '[a] person under the age of criminal responsibility cannot commit any offence' (Gordon, 2000: 8.28). **[AQ: 1]**

Corresponding author:

Dr Claire McDiarmid, The Law School, University of Strathclyde, Level 7, Graham Hills Building, 50 George Street, Glasgow, G1 1QE, UK.

Email: claire.mcdiarmid@strath.ac.uk

The matter of criminal responsibility is, however, rather more complicated than these statements might suggest and this article examines some of the issues that surround the child's deemed inability to offend. In particular, it argues that criminal capacity – the core set of understandings which are required as the basis on which to impute criminal responsibility – is complex, a key point which must be properly recognized in setting or changing the minimum age of criminal responsibility. This, it will be contended, is because it rests not on a simplistic, single strand, such as knowledge of the difference between right and wrong but rather on a set of interlinked understandings, some of which the criminal law has previously excavated, but not synthesised, in relation to the, now abolished, *doli incapax* presumption. In addition, the child's psychological development and his/her lived experience should be taken into account. In proceeding to examine, on this basis, where to set the age, the role played by the acquisition of criminal responsibility in the transition from the total dependence of babyhood to the autonomy of adulthood will be particularly scrutinized. Drawing these points together, the core argument advanced in this article is that the ages of criminal responsibility that pertain to UK jurisdictions should be raised.

Debate in this area is sometimes characterized by entrenched views as to the relative complexity of the concept of criminal responsibility when placed alongside the age-based understandings associated with other developmental milestones identified in law. In other words, it is sometimes assumed that criminal responsibility rests on such a simple moral foundation that it is easily acquired and imputed. Justice Antonin Scalia's dissenting judgment in the US supreme court case of *Roper v Simmons* (543 U.S. Prelim. Print 551 2004–2005) provides an example of this in relation to homicide. (The majority decided that the death penalty could not be imposed on anyone convicted of murder who was aged less than 18 when the crime was committed.) Scalia said: **[AQ: 2]**

As we explained in *Stanford*, 492 U. S., at 374, it is 'absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards'. Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life (at p. 619).

This article argues, to the contrary, that 'sophisticated' understandings are required before criminal responsibility may fairly be imputed automatically on the basis of age.

The Purpose and Function of the Age of Criminal Responsibility in Law

As a legal concept, the age of criminal responsibility is not particularly meaningful, on its own. In Scotland, for example, the age, as such, remains eight but the vast majority of young people (though not quite all) who offend between that age and 16 will be referred to the children's hearings system which is required to hold their welfare, throughout their childhood, as its paramount consideration (Children's Hearings (Scotland) Act 2011, s. 25). (The legislative framework permits the prosecution, in court, of any child aged 12 or

over but only on the instructions of the Lord Advocate (Criminal Procedure (Scotland) Act 1995, ss. 41A and 42(1). In practice, this happens rarely.) This does not mean that the acquisition of criminal responsibility at eight has no consequences but it does, to some extent, mitigate these in that no disposal ordered by a children's hearing should be overtly punitive and there are restrictions on recording (as criminal convictions) offences admitted or established through the hearings system (Rehabilitation of Offenders Act 1974, ss. 3, 5(3)(b), 5(5)(f) but also s 7 and s 8B(1A)).

The issue under consideration here is the minimum age of criminal responsibility, or MACR. It is an absolute cut-off point, signified by a chronological age, below which children are deemed incapable of committing crime. It constitutes a bright line signifying the total criminal *irresponsibility* of the very youngest individuals. Higher ages are used, in some jurisdictions, alongside this lowest one to provide some acknowledgment that children develop, and may therefore become criminally responsible, at different rates. Variants of the *doli incapax* presumption (discussed below), for example, indicate a period prior to adulthood (commencing with the MACR) when young people generally are deemed either criminally responsible or not. Evidence may be brought to rebut the presumption where an individual child-defendant's development does not conform to the deeming provision (see for example, Arthur, 2012: 15–17). The (absolute) age after which young people are automatically referred to adult courts and criminal justice systems is known as the age of criminal majority (see, for example, Hjalmarsson, 2009: 211).

The need for a normative justification of the age

The basic notion that (young) children should be treated differently from adults in terms of being excluded from adult criminal justice systems by virtue of age is widely accepted. In his comprehensive examination of MACRs across the globe, Don Cipriani identifies only 19 (out of over 200) states (Bahrain, Cambodia, Cuba, Democratic Republic of Congo, France, Luxembourg, Malaysia, Marshall Islands, Mauritius, Micronesia, Mozambique, Nauru, Nepal, Pakistan, Poland, Solomon Islands, Somalia, Sudan and some US states) with a MACR of zero – in other words, effectively, no age of criminal responsibility so that all children, however young, can, potentially, be criminally liable. (In fact, the issue is rather more complicated with some of these jurisdictions claiming a MACR, while still imposing penal measures below that age and others seeking to assess the child's discernment on a case-by-case basis (Cipriani, 2009: Annex 2). Overall, this widespread provision of a MACR is evidence of a recognition that criminal responsibility is not appropriate for the very young. **[AQ: 3]**

The normative justification for this is, however, sometimes challenged on occasions where a child who is only just over the MACR commits a grave, and widely reported, crime. This may lead to invocation of an 'adult crime; adult time' mantra (see for example, Hudson, 2009). The argument is that serious crimes characterized by, say, extreme cruelty or a sexual element, should be categorized as 'adult' because such behaviour is not 'childish'. Thus, a child who commits such an act is said to deserve to be sentenced in the same way as an adult because the 'adult' quality of the act justifies this. This has stimulated the use of waiver procedure in the US whereby juveniles can be transferred into the

adult system on the basis of the gravity of their offences (Caldwell, 2011–2012: 119–120, 129–130). In the UK, there is the 20 year-old example of the murder of two year-old James Bulger, which generated a visceral, negative reaction against the two 10 year-old perpetrators (see for example, Hay, 1995). More recently, in 2010, there has been a case of abduction and torture carried out by two children aged 10 and 11 from Edlington near Doncaster, which has been called, in some newspapers, the case of the ‘devil brothers’ (Taylor, 2010; Watson, 2010). Though the MACR is a legal safeguard for younger children, it does not prevent the mobilization of these arguments against them. Indeed, some sections of the press have used freedom of information laws and/or official statistics to quantify acts carried out by so-called ‘under-age offenders’ – children younger than the MACR who come to police attention for behaviour which, but for their age, would constitute offences (see for example, Coates, 2012; Gilbride, 2012). The manner of reporting of these cases suggests that the failure to criminalize these young children *unfairly* spares them punishment as in this comment: ‘the culprits of 1500-plus crimes, including rape, robbery and racist attacks, escaped punishment last year because the prime suspects were too young to prosecute’ (Coates, 2012).

It is, therefore, important to continue to make the argument for a MACR. In examining where it might be set, a first step is to consider the complexity of the concept of criminal capacity – the set of underlying understandings on the basis of which criminal responsibility can be fairly imputed. This will be done by reference first to the requisite understandings themselves and, secondly, to the role and significance of the child’s lived experience.

The Complexity of Criminal Capacity (I): Understandings

In considering understanding, the key issue is what it is that must be understood in order, fairly, to impute criminal responsibility. A distinction should be drawn here between the factual basis of the Crown’s case – the points which must be proved beyond reasonable doubt to achieve a conviction – and the set of underlying understandings (collectively, criminal capacity) required to make prosecution for that criminal offence meaningful (and, hence, fair) to the defendant. There is a tendency for the criminal law to proceed as if the existence of criminal capacity can be reduced to a yes/no binary. Indeed, the system operates on an assumption that its subjects are, crudely, sane adults (Duff, 1998: 195) who only commit criminal offences with understanding and through the exercise of free will. Children as, on a similar binary categorization, ‘not adults’ do not fit this assumption yet the imputation of criminal responsibility at the age of ten (an age which, for all (other) purposes, falls squarely within childhood (see for example, Elliott, 2011: 292)) brings them within its ambit. This may be unfair.

The troubled legal exposition of the, now abolished, *doli incapax* presumption (Crime and Disorder Act 1998, s. 34) can serve to demonstrate the difficulty and the complexity of determining a young person’s capacity to be criminally responsible and to highlight the limitations of a single question approach in law. When the presumption applied, in order to rebut it, the prosecution was required, in every case of a child-defendant aged over the MACR but under 14 to lead evidence that the child was, in terms of his/her understanding,

capable of the wrongfulness required to constitute a criminal offence. This law is no longer applicable but it still constitutes a unique repository of legal tests of the child's criminal capacity. It is, therefore, of value, in any exploration of the complexity of this concept. **[AQ: 4]**

Leaving to one side the generally accepted *doli incapax* test, set down in 1919 in the case of *Gorrie* (1919 83 JP 136), which will be discussed subsequently, judicial authority on the nature of the understanding required was, at best, singular to the case to which it related and, at worst, directly contradictory. A survey of some of the case law from the mid-19th century onwards demonstrates this. Four possible interpretations are presented.

A simple recognition of doing wrong

In its simplest terms, the presumption could be rebutted if there was evidence that the child-defendant knew that s/he was doing wrong. In *R v Elizabeth Owen* (1830 4 C & P 236) where the ten year-old defendant was alleged to have stolen a few knots of coal from a large coal heap, the judge, Littledale J looked for 'a guilty knowledge that she was doing wrong' (at 237).

In *R v Manley* (1844 1 Cox 104), the defendant was nine and was charged with the theft of the contents of his father's till at the behest of the father's apprentice. The case raised an issue in the law on accessories to crime. The test which Wightman J told the jury to apply to the nine year-old was 'whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt, and entirely at the dictation of the [apprentice]'

In both cases, it is submitted that these, deceptively simple, tests are inadequate. *Knowledge* of wrongness is more superficial than a self-generated *understanding* of what it means to do wrong. For young children, such knowledge is delivered externally by adult command (Piaget, 1932/1975: 120). They are likely to view the issue as a property of the object concerned rather than a moral imperative. Thus, 'do not touch the fire' and 'do not hit your brother' are similar prohibitions yet only the latter relates to the prevention of a wrongful act. The other concerns personal safety. There may be a quasi-moral argument that children should be obedient but the key point is that even very young children may *know* that certain conduct is wrong. This is not the same as understanding why this is so and conforming behaviour to that understanding.

It is true that the concept of 'guilt' is incorporated into the tests set out in both of the cases cited above but, without further elaboration, it is unclear whether it is used in a technical criminal sense or to describe an emotional response to the behaviour in question. This formulation simply does not convey the complexity of the matter at issue. It requires nothing beyond an acknowledgment that the behaviour should not be carried out and does not probe understanding of the reasons for this or, indeed, of the concept of seriousness.

The difference between right and wrong

A variant on recognition of wrongdoing is knowledge of the difference between right and wrong. This has also been used more than once. In *B v R* (1960 44 Cr App R 1) the appellant was aged eight (the then MACR) and had accompanied his cousin on a bob-a-job visit

to a house when the cousin had pocketed the key. The next day, the appellant, the cousin and three others returned, let themselves in, caused ‘complete chaos’ (at p. 3) and stole a gold bracelet and some money. The case develops the much criticized notion that a child from ‘a respectable family and properly brought up’ (at p. 4) would be more likely to have the understanding necessary for the imputation of criminal responsibility because this would be a part of such an upbringing. In terms of the legal test, it was stated that such a child ‘would know in the ordinary sense the difference between good and evil and what he should do and what he should not do’ (at p. 4).

In *R v B; R v A* (1979 1 WLR 1185), two 13-year-olds appealed their convictions for blackmail. Together with five other juveniles and one adult they had extracted money from an ‘eccentric’ (at p. 1186, per Lord Widgery) man aged 53. The case turned on whether evidence of previous convictions could be led to rebut the *doli incapax* presumption. It is notable because, when it was determined at their trial that this could be done, the two young men formally admitted that they were not incapable of criminal intent. The question then arises of whether the prosecution did, actually, lead evidence to rebut the presumption, as they were required to do or whether, instead, the defendants were placed in the difficult position of having to choose between having previous convictions presented to the court or admitting that they had the understandings necessary to sustain a conviction for blackmail. In terms of the test, Lord Widgery stated that it was appropriate for the prosecution to lead evidence ‘which is relevant on the issue of the young man’s capacity to know good from evil’ (at p. 1187).

Both of these cases hint at layers surrounding the core understanding of good from evil yet the former’s reliance on an untested value judgment concerning upbringing is, at least, troubling and has been described as ‘divisive and perverse’ (*C (a minor) v DPP* (1996 AC 1 per Laws, J at 11). In *R v B; R v A*, there is an allusion to the concept of capacity but it is not developed and the core question of knowing good from evil is the one to which the case comes back.

The criminal responsibility of children is a multi-faceted issue but the question of which of its facets are relevant, or the way in which the court might excavate these, is not properly addressed in either of these cases. Knowledge of the distinction between good and evil, with which we are left, is insufficient on its own.

A recognition that the behaviour constituted a crime

Knowledge that the behaviour in question constitutes a crime seems pivotal. Children, in particular, may be brought to account for perceived wrongdoing in a number of situations (sometimes known as ‘status offences’: see, Sutherland, 2002: 4) – for example, truancy from school. Such behaviours alone are not, however, criminal. A crime is wrongdoing of a different order – so serious that it is deemed appropriate for the state, through its agents, to intervene and, potentially, to impose punishment on behalf of its citizens. Thus, there should be some understanding of this underlying social meaning attaching to crime generally, coming back to the notion that offences can only be committed with free will. H.L.A. Hart (1968) refers to this aspect as ‘exercis[ing] control over ... actions, by means of choice’. Without knowledge of the dimension of state involvement and seriousness which

distinguishes crime from other wrongdoing, it is difficult to argue that the criminal behaviour was freely chosen, as such. This integrative knowledge is necessary as a basis on which to assess the criminality of individual acts (see McDiarmid, 2007: 62–4; 74–5).

In its engagement with the *doli incapax* presumption, however, the law seems only to have been concerned with the issue of whether the child-defendant had *knowledge* that the act in question constituted a crime. Again, this over-simplifies the issue of the child's criminal capacity. Also, the approaches taken were often contradictory.

In *R v Sydney Smith* (1845 1 Cox 260) where the ten year-old defendant was charged with maliciously setting fire to a hayrick, Erle J stated that, to rebut the *doli incapax* presumption, the child required a 'guilty knowledge that he was committing a crime' (at p. 260).

The very brief report of the case of *A v DPP* (1992 *Crim LR* 34) then appears to contradict this, stating that 'the test was not knowledge of unlawfulness' (at p. 35).

Overall, it is probably correct that any test of the child's criminal capacity should not be solely composed of knowledge of unlawfulness, but such knowledge ought to be one of its component elements.

A recognition of moral wrongdoing

Finally, other cases have discussed the test as the recognition of wrongdoing in a moral sense. There is a strong link between morality and the provisions of criminal law in that many crimes are a reflection of moral prohibitions. Thus, for example, murder and rape constitute criminal offences and it is equally clear that killing and non-consensual sexual intercourse are breaches of conventional morality. In some areas, particularly those related to sexual behaviour, the link between law and morality is slippery and hard to pin down and societal consensus (which the criminal law should reflect) is elusive. This is apparent in legal debates dating from the 1950s over, for example, homosexual offences and prostitution (see for example, Bassham, 2012).

Two *doli incapax* cases drew the test in moral terms. Again, the outcomes conflict. In *JBH and JH v O'Connell* (1981 *Crim LR* 632) the appellants were aged 13 and 11 respectively. Their convictions for burglary and malicious damage arising from breaking into a school, stealing various items and redecorating the premises with duplicating ink were quashed. The test for *doli incapax* was affirmed to be proof that the defendants had known that what they were doing was wrong morally (at p. 633).

Nonetheless, shortly thereafter, Goff LJ contradicted this view. In *JM (a minor) v Runeckles* (1984 79 Cr App R 255) the appellant, a 13 year-old girl, had pursued, attacked and stabbed with a broken milk bottle another girl also aged 13. In determining what was necessary to rebut the presumption, he said, 'I do not feel able to accept that the criterion in cases of this kind is one of morality' (at p. 260).

The behaviours criminalized in these two cases – stealing, vandalism and assault – are quite clearly wrong in both morality and law. Accordingly, morality seems to be applied here in the sense of an innate recognition of unacceptable qualities of the behaviour. Again, this would be insufficient on its own as a test of criminal capacity – many activities might be regarded as morally questionable which could not be treated as criminal – but

the sense that the recognition of the wrongful quality of the behaviour should come from the child him/herself as an understanding which is mobilized in a *decision* to commit a criminal offence would be significant. **[AQ: 5]**

The need for a cumulative approach

The *doli incapax* presumption no longer exists in English law so, to that extent, the way in which it was applied may seem irrelevant. It does, however, offer one of few direct perspectives on the conceptualization of the child's understanding in the criminal law context. As Heather Keating (2007: 193) has said, 'there were significant problems with the operation of the presumption. But it was, nonetheless, a crude developmental test: responsibility was judged not in years but on the basis of the understanding and judgment of the individual child'.

Still, even where there is no conflict in the judicial dicta presented above, the multiple tests formulated do not lend themselves to certainty. The other striking feature of each, however, is, as noted above, their simplicity as questions. Each points to a single dimension of understanding when, in fact, the view taken here is that the level of understanding required to fairly impute criminal responsibility is complex and would require a mixture of all of the above points. Thus, to be fairly found to be criminally accountable, the child should, as a minimum, know that the act is wrong, know the difference between right and wrong, understand that the act itself is contrary to the criminal law (together with some recognition of the wider meaning and consequences of criminality) and be able to place this within a moral context.

The role of psychological development

Even the combination of the above only takes account of a purely legal construction of what the child 'ideally', would understand. It leaves out of the equation completely other developmental acquisitions, the absence of which will have a direct impact on the child's ability to determine and control his/her conduct. Cognition, which is recognized in theories of intellectual development, for example, is necessary to enable the child to integrate his/her rational control over functioning with the skills, abilities and developmental acquisitions which s/he has achieved (Flavell et al., 2002). Psychoanalytic theorists recognize the similar function performed by the developing ego in bringing into line the id (the individual's baser tendencies) and the superego (corresponding broadly to the conscience) (Erikson, 1963: especially 192–194). These developmental processes are unconscious yet, unless they have advanced to a particular point, there is an argument that the child remains incapable of bringing to bear rational control over action in the same way, and to the same extent as an adult would. If the criminal process makes no provision to test for this, then it has to proceed on the, possibly erroneous, assumption that the child-defendant can do this.

Lack of understanding in the criminal process

Indeed, there is a dearth of defences for *any* defendant who wishes to found his/her case on deficient understanding. Beyond non-age itself, for which the test is the purely factual

one of chronological age, only insanity or, to a murder charge, diminished responsibility, are available. It is sometimes said that the need to prove the (factual) mental element (or *mens rea*) of the crime operates as a further protection against prosecution of those over the MACR who still do not sufficiently understand (see for example, Scottish Law Commission, 2002: 3.8(a)). The definition of each crime has a specific *actus reus* – or behavioural element – which is accompanied by a similarly bespoke *mens rea*, by which blameworthiness is also incorporated. Thus, for example, the *actus reus* of theft is the appropriation of property belonging to another. The *mens rea* requires that this is done dishonestly and with the intention to deprive the owner (Theft Act 1968, s. 1).

Mens rea can be drawn very narrowly. If we take the concept of ‘intention’, even the very youngest children may come quite quickly to the idea of doing something (say, crying) to *bring about* something else (say, comfort or food), rather than doing this merely instinctively (Maier, 1988: 32–34). It may be more appropriate to look on this as the beginning of voluntary (rather than clearly intentional) conduct but the two are obviously related. Returning to the crime of theft, all that is really required to constitute the *mens rea* is that the defendant took something for him/herself (or for another) knowing that it belonged to a third party. It takes no account of motive (taking food because of hunger is as much theft as shoplifting diamond bracelets) nor, more importantly, of the ability to understand and distinguish between the criminal offence of theft and any other form of taking. Proof of *mens rea* is based on inference from facts, not investigation of understanding. Arguing the absence of *mens rea* may, therefore, constitute some kind of safeguard against conviction, but it is not necessarily a particularly strong one.

The Complexity of Criminal Capacity (2): Experience

The child’s lived experience is also relevant to criminal capacity. If, for example, the child’s normal life involves offending, his/her ability to appreciate (or not) the wrongfulness of such behaviour will reflect that. A recent report on youth crime provides an example as part of a restorative justice case study: ‘It turned out he was the oldest of six children and the mother just sent him out to steal and that was his way of being brought up’ (Independent Commission on Youth Crime and Anti-Social Behaviour, 2010: 63).

Alongside their own, individual upbringings, children, as a group, also lack experience in the sense that this is accumulated through observing, encountering and undergoing things. This accumulation occurs over time. In this respect then, children have less experience overall than adults because their lifespans to date are, by definition, shorter. They have been observing, encountering and undergoing events for less time. This may have consequences which are of relevance in the youth justice context in relation to purely factual issues. In assault, for example, a child-defendant may understand that an attack causes pain and injury. S/he may not, however, have experience (either personal or gleaned from his/her surrounding culture) of factors that would aggravate the offence. Thus, an initial attack may cause unseen internal injuries; open wounds may become infected; sub-zero air temperatures may cause exposure. Any of these factors may turn a simple assault into manslaughter if death occurs. In such a scenario, recognition of the finality and irreversibility of death itself is not necessarily a given. Nonetheless, all of these understandings may be inferred within the criminal process.

Finally, a young person's options are frequently delimited by adult choice. For instance, relocation away from criminogenic influences might seem desirable but the decision to move home is likely to be in the hands of parents or other adults. As Catherine Elliott (2011: 297) explains more generally:

... in looking at criminal responsibility we need to be prepared to take into account the social reality of a child's personal experiences, including bad parenting, poverty and violence, rather than trying artificially to ignore these factors. These factors can reasonably be taken into account with regard to children's liability because with their limited capacity they do not have a genuine opportunity to make a choice as to how they behave; the impact of these external factors become determinative of their behaviour since children are not autonomous individuals. This lack of autonomy is reflected in the striking research results showing the strong correlation between poor parenting, poverty, abuse and youth offending. It is only as that correlation fades that we can genuinely consider that young people are autonomous individuals who have made a choice to commit crime and can be subjected to criminal responsibility.

Aspects of the child's necessarily limited experience have resonance then, in relation to his/her ability to bear criminal responsibility. A further criticism of the operation of the agreed legal test of *doli incapax* as this was set down in 1919 is its failure properly to take account of this, in a formulation which, in fact, though not always overtly, was heavily reliant upon experience.

In *R v Gorrie* (1919 83 JP 136), it was held that the test of *doli incapax* was, 'when the boy did this he knew that he was doing what was wrong – not merely what was wrong but what was gravely wrong, seriously wrong' (at p. 136). In a subsequent case, the House of Lords held that, overall, 'when the phrase is contrasted with "merely naughty or mischievous", ... its meaning is reasonably clear' (*C (a minor) v DPP* 1995 2 WLR 383 at 397 per Lord Lowry). The concept of seriousness was, thus, intrinsic to the test. A child's understanding of that concept must, however, rest, to some extent at least, on his/her own experiences. Rough physical interaction may be a common element in some forms of play for example. If this causes injury it may, objectively, to adults, appear to be 'seriously wrong' but its genesis (as play) for the child will not have changed.

Overall, then, taking into account the understandings required, together with the child's lived experience, criminal capacity is a complex concept. This, in itself, suggests that the MACR should be raised. Other arguments support this.

Responding to Complexity: The Possibilities of Raising the Age of Criminal Responsibility

The contribution of neuroscience

A possible, if radical, solution to anxieties raised by a low MACR of ten is to delay the assumption of criminal responsibility until the onset of adulthood. Neuroscientific research provides some support for such a proposal. Frontal lobe maturity in the brain is not thought to occur until around the age of 14 (Royal College of Psychiatrists, 2006: 38).

The effect of this, in relation to the acquisition of criminal responsibility, is that children's reasoning and risk assessment will be more impulsive than adults' reasoning until this point. This is particularly important in relation to recklessness. Indeed, other research has suggested that the brain does not mature fully in relation to all of the elements that are necessary to allow the fair imputation of criminal responsibility until people reach their early 20s (Barbee, 2011–2012; Midson, 2011).

The role of children's rights

Considering the issue, next, from a rights perspective, the MACR sits within a nexus of international instruments (particularly the United Nations Convention on the Rights of the Child, 1989 (CRC), Article 40) setting out a framework for children in conflict with the law (see for example, Cipriani, 2009; Ramages, 2011). Within this, Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 ('the Beijing Rules'), and its commentary could be interpreted to provide further support for raising the minimum age of criminal responsibility:

Age of criminal responsibility

4.1 In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

Commentary

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Currently, any relationship between criminal responsibility and other rights and responsibilities conferred, in law, by chronological age is, at best, severely attenuated. For example, young people reach civil majority at 18 (Family Law Reform Act 1969, s. 1); they can vote at age 18 (Representation of the People Act 1983, s. 1(1)(d)); it is necessary to be 18 to sit on a jury (Juries Act 1974, s 1(1)(a)); and they are permitted to marry at 16 (Marriage Act 1949, s. 2). There is, quite simply, *no* comparison between these ages and a MACR of ten years yet the commentary above states that there should be a close relationship between them.

The right to vote and the age of criminal responsibility

The right to vote raises interesting issues in this context and, as with the age of criminal responsibility, views may be entrenched. Gerald Howarth, Conservative MP for Aldershot provides an example, concerning the Scottish independence referendum:

... the proposal to extend the franchise to 16 year-olds, who cannot lawfully buy alcohol, drive a motor car or be called to fight on the front line, but who will now be invited to opine on one of the greatest constitutional issues of our time, is surely a nonsense that will create a dangerous precedent. (Howarth, 2012: c. 67).

It is, unfortunately, not quite clear *why* such a reduction in the voting age is regarded so negatively but it is possible to infer that the right to vote is regarded as significant and weighty such that its exercise mandates maturity. In the context of the child's status as citizen, however, Aoife Nolan (2010) has argued strongly in favour of extending democratic participation rights to children. Indeed, if we consider this right alongside the assumption of criminal responsibility, it would appear more likely to assist in building capacity because of the critical reflection on which its exercise ought to be based. External consequences of voting may be non-existent if, say, the candidate selected is not elected. The outcome of the premature acquisition of criminal responsibility may be incarceration and the, potentially lifelong, stigma of a criminal conviction. There is a 'public interest' consideration in the decision to prosecute crime which is absent from an individual's choice in an election however, from the perspective of promoting developing understanding in young people, early conferment of the right to vote seems more beneficial than the status quo. It encourages consideration of the issue prior to exercise of the right. Criminal responsibility, on the other hand, assumes, possibly erroneously, autonomy and freewill in the initial decision to offend but does not provide a forum for this to be discussed until *ex post facto*.

The right to sit on a jury and the age of criminal responsibility

The other responsibility conferred at age 18 years that seems particularly relevant in this context is the ability to sit on a jury. Indeed, the starkness of the contrast between that age and the age of ten years is particularly pronounced when comparing the MACR with this right. Can it really be the case that it is possible to understand the concept of criminal responsibility sufficiently to legitimately be held accountable personally at the age of ten, but that a further eight years must pass before discernment is sufficiently advanced that the decision that others are similarly responsible can be taken? If the idea of a jury of ten year-olds (see Morrison, 1997: 100–101) is an uncomfortable one, it should at least give pause for thought in relation to holding children of this age to be criminally accountable.

The Early Assumption of Rights in Order to Build the Child's Capacity

While there are these clear disparities between the MACR and the age at which other social rights and responsibilities are assumed, it is necessary also to examine any advantage which derives from this. Both Cipriani (2009) and Hollingsworth (2007) have considered the issue in relation to the shift from dependence to autonomy – from the young child's need for protection rights to the adult/adolescent/older child's need for rights

which facilitate and recognize independence. The argument is that the assumption of criminal responsibility is a necessary step along that path which assists in drawing out developing competency. Hollingsworth states: ‘conferring criminal responsibility on the child, even where he may lack actual capacity, can be seen as giving effect to the child’s autonomy rights’ (Hollingsworth, 2007: 196). Cipriani’s view is even more forceful:

Children’s criminal responsibility is indeed an integral and necessary part of children’s rights – a logical extension of the concept of children’s evolving capacities insofar as it is an appropriate step in respecting children’s progression from lesser to greater competence, which gradually prepares them for adult rights and responsibilities in society. (Cipriani, 2009: 34).

It is important to hold young people to account when they carry out wrongful acts (whether these are criminal offences, morally problematic or simply contrary to school rules). A *growing* awareness of being responsible in this sense is an important step towards autonomy. Criminal responsibility is, however, conferred *absolutely* at the age of ten and Hollingsworth’s position, while interesting, would be more tenable if other, more positive, thought-provoking, capacity-*building* civil rights and responsibilities, like enfranchisement, were conferred simultaneously. The issue can perhaps be expressed colloquially as ‘what’s so special about *criminal* responsibility?’ If a young person can be assisted to take *responsibility* for his/her actions, in terms of, say expressing remorse, making amends and moving forward and away from a wrongful act, what is lost if this responsibility is not criminal but ‘only’ moral or personal or within another rule system such as that of the school?

Possible Consequences of Raising the Age of Criminal Responsibility

Of course there are very obvious responses to the question above in a society where competing political interests and parties have engaged in an ‘arms race’ (Independent Commission on Youth Crime and Anti-Social Behaviour, 2010: 23) around youth justice policy. For example, a young person who did have the ‘emotional, mental and intellectual maturity’ (Beijing Rules, 1985: Rule 4.1) necessary to be criminally responsible would not be brought to account in a criminal court and so would not be subjected to state-sanctioned punishment such as incarceration, nor would s/he acquire a criminal record. This relates to the public interest in justice both being done and being seen to be done. The shaming function of a public trial would be lost. There is also risk – the possibility that dangerous young offenders are not contained. When John Hinckley successfully pled insanity to the charge of attempting to assassinate President Ronald Reagan in the USA in 1982, a number of American states took steps to abolish the insanity defence so that other ‘offenders’, no matter how mentally disordered, would not ‘get away with’ their crimes on the same basis (Callahan et al., 1987). If youth justice policy changed suddenly so that young people were routinely diverted out of the criminal process, would there be a similar backlash? **[AQ: 6]**

A different type of objection relates to the right to a fair trial – or to the child’s right to due process, lack of respect for which – within the then juvenile court system in the US in

the 1960s – led to a major shift in its juvenile justice policy after the case of *In re Gault* (1967 387 US 1). It is particularly important to guard against a situation where young people are removed from the criminal justice system but end up suffering much of the same stigma as would arise from a criminal conviction, without having had the right to argue their innocence, to trial by jury and to legal representation.

Much depends, then, on what is ‘done’ instead. If the age of criminal responsibility becomes say, 18, this does not mandate a system whereby anyone aged up to 17 and 364 days may commit crime with total impunity. It is important that the young should be answerable for their wrongdoing, that they should be encouraged to take responsibility and to move on. It might, however, be possible to do this outwith the highly charged criminal justice arena. The children’s hearings system in Scotland does not punish and, at its best, will facilitate a dialogue with a young person around his/her offence and its wrongfulness which can assist with his/her own voluntary assumption of responsibility (McDiarmid, 2007: 169–172). It is not suggested that a high age of criminal responsibility should mean that nothing is ‘done’. The question is whether other mechanisms might be more effective in the prevention of recidivism through positive responsibility-taking. The children’s hearings system has not, despite its aspiration, eliminated delinquency but neither has it led to a massive increase in juvenile offending. Rates have stayed relatively constant (McDiarmid, 2005).

Ultimately, we have quite strong evidence that very many young people just stop offending:

... the AL [adolescent-limited offender] type consists of normal children behaving anti-socially during adolescence, and the vast majority of offenders belong to this type. ... Their motivation stems from their experience of a ‘maturity gap’, where they feel biologically mature, but are denied access to a range of adult privileges and responsibilities, such as in relation to alcohol, driving, sex, and being financially and socially independent.

... As the ALs grow older and enter adult social roles, they cease to experience a maturity gap, and will therefore desist from anti-social behavior. (Skardhamar, 2009: 866)

If they were not criminalized at all, which would be the effect of raising the age of criminal responsibility, it seem reasonable to think that this would still happen. A considerable increase in the current MACR, then, should no longer be unthinkable.

Conclusion

The age of criminal responsibility is deceptively simple to state but conceals political, moral and legal depths. Criminal capacity, the set of core understandings on which criminal responsibility rests is complex, requiring understanding across a range of interlinked concepts. These include knowledge of wrongdoing and of the distinction between right and wrong but neither of these is itself sufficient. Understanding of the basis and consequences of criminality in a *general* sense, together with understanding of wrongdoing in respect of the *specific* offence for which the child is charged is also necessary. Beyond this, the child’s stage of psychological development and his/her lived experience also

have resonance. Both neuroscientific research and international law in the form of the Beijing Rules (1985) provide support for the view that the MACR should be raised. Taken together with the complexity of criminal capacity, the question then becomes, 'how high'? This article has put in issue the possibility of raising the age to exclude criminal (though not other forms of) responsibility for all those aged under 18. They are, after all, the group recognized as children by Article 1 of the CRC (1989).

References

- Arthur R (2012) Rethinking the criminal responsibility of young people in England and Wales. *European Journal of Crime Criminal Law and Criminal Justice* 20(1): 13–29.
- Ashford C (2010) Barebacking and the 'cult of violence': Queering the criminal law. *Journal of Criminal Law* 74(4): 339–357. [AQ: 7]
- Barbee M (2011–2012) Juveniles are different: Juvenile life without parole after *Graham v Florida*. *Mississippi Law Journal* 81(2): 299–325. [AQ: 8]
- Bassham G (2012) Legislating morality: Scoring the Hart-Devlin debate after fifty years. *Ratio Juris* 25(2): 117–132.
- Caldwell B (2011–2012) Punishment v restoration: Comparative analysis of juvenile delinquency law in the United States and Mexico. *Cardozo Journal of International and Comparative Law* 20(1): 105–141.
- Callahan L, Mayer C and Steadman HJ (1987) Insanity defense reform in the United States – post-Hinckley. *Mental and Physical Disability Law Reporter* 11(1): 54–59.
- Cipriani D (2009) *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*. Farnham: Ashgate.
- Clarkson CMV, Keating HM and Cunningham SR (2007) *Clarkson and Keating Criminal Law: Text and Materials*, 6th edition. London: Sweet & Maxwell. [AQ: 9]
- Coates J (2012) 'Make parents pay for crimes of the very young' Assaults, burglary and arson go unpunished. *Sunday Express* 17 June: 9.
- Duff RA (1998) Law, language and community: Some preconditions of criminal liability. *Oxford Journal of Legal Studies* 18(2): 189–206.
- Elliott C (2011) Criminal responsibility and children: A new defence required to acknowledge the absence of capacity and choice. *Journal of Criminal Law* 75(4): 289–308.
- Erikson EH (1963) *Childhood and Society*. New York: WW Norton & Co.
- Flavell JH, Miller PH and Miller SA (2002) *Cognitive Development*, 4th edition. London: Prentice-Hall.
- Gilbride P (2012) Shocking crime toll by children too young for the law to punish. *Scottish Express* 31 August: 4
- Gordon GH (2000) (3rd edition by Christie MGA) *The Criminal Law of Scotland*. Edinburgh: W Green.
- Hart HLA (1968) *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Clarendon Press.
- Hay C (1995) Mobilisation through interpellation: James Bulger, juvenile crime and the construction of a moral panic. *Social & Legal Studies* 4(2): 197–223.
- Hjalmarsson R (2009) Crime and expected punishment: Changes in perceptions at the age of criminal majority. *American Law and Economics Review* 11(1): 209–248.
- Hollingsworth K (2007) Responsibility and rights: Children and their parents in the youth justice system. *International Journal of Law, Policy and the Family* 21(2): 190–219.
- Howarth G (2012) Hansard HC debate, 15 October.
- Hudson DL (2009) Adult time for adult crime: Is life without parole unconstitutional for juveniles? *American Bar Association Journal* 95(11): 16–17.
- Independent Commission on Youth Crime and Anti-Social Behaviour (2010) *Time for a Fresh Start*. London: The Police Foundation.
- Keating H (2007) The responsibility of children in criminal law. *Child & Family Law Quarterly* 19(2): 183–203.

- McDiarmid C (2005) Welfare, offending and the Scottish Children's Hearings System. *Journal of Social Welfare and Family Law* 27(1): 31–42.
- McDiarmid C (2007) *Childhood and Crime*. Dundee: Dundee University Press.
- Maier HW (1988) *Three Theories of Child Development*. London: University Press of America.
- Midson B (2011) Risky business: Developmental neuroscience and the culpability of young killers. *Psychiatry, Psychology and Law*: 1–19. **[AQ: 10]**
- Morrison B (1997) *As If*. London: Granta.
- Nolan A (2010) The child as 'democratic citizen': Challenging the 'participation gap'. *Public Law* October: 767–782.
- Piaget J (1932/ 1975) *The Moral Judgment of the Child*. London: Routledge and Kegan Paul.
- Ramages K-A (2011) *The Minimum Age of Criminal Responsibility in African Legal Systems: A Comparative Analysis*. Saarbrücken: LAP Lambert.
- Royal College of Psychiatrists (2006) *Child Defendants*, Occasional Paper 56. London: Royal College of Psychiatrists.
- Scottish Law Commission (2002) *Report on the Age of Criminal Responsibility*, Scot Law Com No 185. Edinburgh: The Stationery Office.
- Sutherland EE (2002) The age of reason or the reasons for an age? The age of criminal responsibility. *Scots Law Times* 1: 1–5.
- Skardhamar T (2009) Reconsidering the theory on adolescent-limited and life-course persistent anti-social behaviour. *British Journal of Criminology* 49(6): 863–878.
- Taylor A (2010) Next time they'll kill; Fury as devil boys get 5 years. *The Sun* 23 January: 19.
- Watson D (2010) Never let the devils out. *Daily Record* 23 January.

Claire McDiarmid is a Senior Lecturer in Law at the University of Strathclyde, Glasgow, UK.