

After the age of criminal responsibility: a defence for children who offend

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Abstract

In Scotland, the age of criminal responsibility is 8, although children cannot be prosecuted until they are 12. In England and Wales, for all purposes, the age is 10. This article argues that a further mechanism is needed to protect the young who do wrong within the criminal process and it argues for a new, bespoke defence, to be available to young people from the age of criminal responsibility until they attain the age of 18. It looks firstly at criminal capacity – what it is that needs to be understood fairly to hold anyone criminally responsible – and draws on material from developmental psychology and neuro-science, as well as looking at the child's lived experience, to provide some evidence that the young may, without fault, lack this capacity. It then examines the use of age generally in law, and the age of criminal responsibility within this. Next, it considers existing lack of capacity defences – nonage, diminished responsibility, insanity (or mental disorder) and absence of mens rea – to consider their suitability for use by young and immature defendants. Finally, it presents a proposal for the form of the new defence, taking into account the need for balance with the public interest in conviction of the guilty. Throughout, it notes and analyses the Law Commission's proposals in this respect.

Keywords: age of criminal responsibility; defence; criminal law; young offenders; youth justice; juvenile justice; criminal capacity; developmental immaturity.

1 Introduction

Throughout history, the criminal law has made concessions to children. It is reported that, in 924 AD, King Aethelstan allowed them a defence to charges of capital theft unless they had resisted or fled.¹ In the eighteenth and nineteenth centuries, Blackstone,² in relation to English law, and Hume,³ in Scotland, were concerned that capital punishment should not be inflicted on those who, by virtue of being young, could not understand fully what they had done. Today, these practices have crystallised, in both jurisdictions, into the provision of a minimum age of criminal responsibility (MACR) below which children are

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1 See Wiley B Sanders (ed), *Juvenile Offenders for a Thousand Years* (University of North Carolina Press 1970) 3–4.

2 Sir William Blackstone, *Commentaries on the Laws of England* Book 4 (1765) (Cavendish 2001) ch 2.

3 Baron D Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1844) (Law Society of Scotland 1989) 30–37.

deemed incapable of criminal guilt⁴ but, beyond that, the criminal law makes no further special provision. In Scotland the MACR is 8,⁵ but children cannot be prosecuted until they are 12⁶ (though the Scottish government is consulting on raising the MACR to 12).⁷ In England and Wales the age is 10 for all purposes.⁸ This paper argues that a further mechanism is needed to protect the young within the criminal process. In this respect, it enters the debate⁹ generated by the Law Commission, initially in its report on *Murder, Manslaughter and Infanticide*¹⁰ and latterly, more generally, in its discussion paper on *Criminal Liability: Insanity and Automatism*,¹¹ and argues for the provision of a bespoke defence of 'developmental immaturity'. This would be available to be pled by young defendants, in appropriate circumstances, at any time from the MACR until they attain the age of 18.

The criminal process brings children accused of crime under the aegis of its balancing role between their own right to a fair trial, now enshrined in Article 6 of the European Convention on Human Rights (ECHR), and the public interest in conviction of those who have committed criminal offences. Crimes committed by the young are inherently newsworthy as can be illustrated by the recent case of the murder, on 8 December 2014, in Hartlepool of a 39-year old woman, Angela Wrightson by two girls then aged 13 and 14.¹² The case was extensively covered by nine national newspapers,¹³ BBC News and Sky News as well as by social media. Where a crime is serious, the facts are widely publicised and there is little or no doubt that the correct perpetrator has been identified, lack of capacity defences may encounter public opposition.¹⁴ The article considers this issue in the context of the over-arching need for fairness to all.

The article argues that a defence is indicated because children's understanding of criminal behaviour may be limited in comparison with (or different from) that of their adult counterparts¹⁵ and/or children may be unable, or impaired in their ability, to

4 Children are also referred to different systems than adults in relation to some offending behaviour – i.e. children's hearings in Scotland; youth courts in England, though some continue to be prosecuted in the 'adult' court (Crown Court in England and Wales; Sheriff or High Court in Scotland).

5 Criminal Procedure (Scotland) Act 1995, s 41.

6 *Ibid* s 41A.

7 See <<https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility>>. In England and Wales, Lord Dholakia's Bill to raise the age to 12 had a second reading, but was not allocated for its committee stage and cannot progress. See <<http://services.parliament.uk/bills/2015-16/ageofcriminalresponsibility.html>>.

8 Children and Young Persons Act 1933, s 50, as amended by Children and Young Persons Act 1963, s 16(1).

9 See also Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) 75 *Journal of Criminal Law* 289; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13 *Youth Justice* 102.

10 Law Com No 304 (TSO 2006), paras 5.125–37 (in relation only to the defence of diminished responsibility).

11 Law Commission (2013) ch 9.

12 Andrew Norfolk, 'Killer Girls Stifled Yawns as They Were Jailed for 15 years' *The Times* (London 8 April 2016) 16.

13 *Star, Mirror, Telegraph, Express, i, Independent, Sun, Times, and Guardian*. For illustrative purposes, a search on the Nexis database of newspaper articles for 'Angela Wrightson' returned 397 hits in national British newspapers.

14 See, for example, Ralph Slovenko, 'The Insanity Defense in the Wake of the Hinckley Trial' (1983) 14 *Rutgers Law Journal* 373.

15 See Elizabeth S Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2008) 37–38; also Daniel P Keating, 'Adolescent Thinking' in S Shirley Feldman and Glen R Elliott (eds), *At the Threshold: The Developing Adolescent* (Harvard University Press 1990) 54–89, particularly on the shift between children's and adolescent thought.

exercise rational control over their behaviour.¹⁶ A defence would make it easier to ensure that, where it is relevant, evidence supporting a claim of lack of capacity, arising as a result of developmental immaturity, is available to the court. These issues also partly constitute the basis of children's vulnerability as defendants which is assumed throughout.¹⁷

In part 2, the article considers the meaning of criminal capacity – or what it is that needs to be understood in order to be held criminally responsible. It draws on material from developmental psychology and neuro-science, as well as the significance of the child's life experiences, in identifying reasons why children may lack the necessary understanding and abilities. In part 3, it considers the current use of age in law generally and the role of the MACR in particular, seeking to show that, while the law finds the kind of bright line which chronological age draws easy to manage, these lines are somewhat arbitrary. A defence which would apply across an age range would therefore have advantages. Part 4 considers the existing provision made by the law to accommodate claims of lack of capacity and their shortcomings if pled on behalf of children. Finally, part 5 turns its attention to the possible form of a defence and its operation within the criminal process.

'Children' are defined, in line with the definition in Article 1 of the UN Convention on the Rights of the Child (1989) (UNCRC) as 'every human being below the age of eighteen years'.¹⁸ While the paper draws primarily on Scots law to exemplify points, a defence of developmental immaturity is proposed for both Scotland and England and Wales.

2 Why should children have a defence? A deficit in criminal capacity

In order to be found guilty of (most) criminal offences, the accused person must have carried out the proscribed behaviour (the *actus reus*) with the accompanying mental attitude specified in the crime's definition (the *mens rea*) and s/he must have criminal capacity.¹⁹ It is self-evident that very young children do, on occasion, carry out acts which could constitute the behavioural element of offences. For example, toddlers might draw on walls (vandalism).²⁰ Newspapers quite frequently report 'offences' by so-called 'underage' offenders.²¹ As will be discussed more fully below, if it is defined (excessively) narrowly, some very young children might even be considered to have carried out these acts with the requisite *mens rea*. The key issue, then, is criminal capacity defined, applying H L A Hart's classic exposition,²² as understanding of the act in its context and its consequences and having a fair opportunity *not* to carry it out. Nicola Lacey has defined it in these terms:

16 See Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults' (2000) 18 Behavioral Sciences and the Law 741.

17 In Scotland, child witnesses are currently defined as 'vulnerable' (Criminal Procedure (Scotland) Act 1995, s 271(1)(a)).

18 'unless under the law applicable to the child, majority is attained earlier'.

19 See, for example, Andrew Ashworth and Jeremy Horder. *Principles of Criminal Law* 7th edn (OUP 2013) para 5.1; Elliott (n 9).

20 Criminal Law (Consolidation) (Scotland) Act 1995, s 52.

21 For example, 'Kids Named in £10K Blaze' *Daily Mirror* (London 10 October 2015), 33 (two children aged 6 and 9 alleged to have started a fire at a branch of Asda in Bolton, Greater Manchester); Matthew Davis, 'Rise in Criminals as Young as Two' *Express Online* (London July 7 2013) (2-year-old at centre of police probe into criminal damage in Bedfordshire, three 5-year-olds recorded as racially abusing people in Greater Manchester; 4-year-old accused of shoplifting in West Mercia).

22 Herbert L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 2nd edn (OUP 2008) ch 1.

[t]his conception of responsibility consists in both a cognitive and a volitional element: a person must both understand the nature of her actions, knowing the relevant circumstances and being aware of possible consequences, and have a genuine opportunity to do otherwise than she does – to exercise control over her actions, by means of choice.²³

The Law Commission takes the view that anyone who completely lacks criminal capacity should not be found criminally responsible.²⁴ It draws out three particular capacities needed for the fair imposition of criminal responsibility: ‘the ability rationally to form a judgment, the ability to understand wrongfulness, and the ability to control one’s physical actions’.²⁵ Children and young people may not be able to conform to some or all of these requirements because of immaturity and it is in such a situation that the proposed defence could be pled. The next section will consider some of the attributes of childhood recognised by developmental psychology, neuro-science and arising from life experience which help to substantiate the possibility of a lack of capacity in (some) young people.

For more than a century,²⁶ developmental psychology has provided an evidence base for the observable phenomenon that children develop in a number of respects – physical, mental, intellectual, emotional and moral – simultaneously,²⁷ but at different rates. Recent advances in the field of neuro-science, particularly in functional magnetic resonance imaging, have ‘provided a neurological explanation for much of the research describing adolescents’ behavioral [sic] immaturities’.²⁸ Thus, neuro-science might be said to offer a ‘harder’ science complement to psychological perspectives.

In terms of intellectual development, it is widely accepted that ‘[c]hildren’s thinking is not the same as adult thinking. As a child develops their thinking changes.’²⁹ Thus,

[w]hen children think they are constrained by their current cognitive structure. Some distorting of experience is inevitable as children attempt to incorporate, understand, or interpret this experience. A child’s mind is not like a camera; experience is always filtered through the child’s current ways of understanding.³⁰

Cognition, on Jean Piaget’s theory, is a central organising concept which makes it possible for children to ‘assimilate’ existing skills and discoveries so that they can be applied in novel contexts and to ‘adapt’ to new experiences.³¹ This has been explained as the “‘pure sensory input” [being] “transformed” by some form of “mental work””.³² In psychoanalytic theory, the ego performs much the same rationalising, controlling and centralising function over the id (the individual’s baser instincts) and the superego, which can be loosely described as the conscience.³³ ‘[T]he central organising tendency of ego

23 See Nicola Lacey, *State Punishment: Political Principles and Community Values* (Routledge 1988) 63.

24 Law Commission (n 11) para 1.20.

25 Ibid paras 3.4, 4.4–4.54.

26 Carol Brown, *Developmental Psychology* (Sage 2008) 8–10.

27 See, for example, Natarjan Sukumar Gowda, *Learning and the Learner: Insights into the Processes of Learning and Teaching* 2nd edn (PHI Learning Private 2015) 50–52.

28 Cheryl B Preston and Brandon T Crowther, ‘Legal Osmosis: The Role of Brain Science in Protecting Adolescents’ (2014) 43 Hofstra Law Review 447, 460.

29 Lisa Oakley, *Cognitive Development* (Routledge 2004) 2.

30 Patricia H Miller, ‘Piaget’s Theory: Past, Present and Future’ in Usha Goswami (ed), *The Wiley-Blackwell Handbook of Childhood Cognitive Development* (Wiley-Blackwell 2011) 649, 653.

31 For a summary, see John H Flavell, ‘Piaget’s Legacy’ (1996) 7 Psychological Science 200.

32 Howard Leventhal and Klaus Scherer, ‘The Relationship of Emotion to Cognition: A Functional Approach to a Semantic Controversy’ (1987) 1 Cognition and Emotion 3, 6 (quotes in original).

33 Erik H Erikson, *Childhood and Society* 2nd edn (WW Norton & Co 1963) 192–94, 415.

development [has been defined] as the progressive differentiation between “subject” and “object” – the aspects of self one controls and those one is controlled by.³⁴ The key point is that to be criminally responsible, with its requirement to exercise rational control over action, these central organising concepts must be well developed. Erik Erikson identifies the period between the ages of 12 and 18 as one of frenetic ego activity;³⁵ Piaget has been regarded as considering that intellectual development (which includes the development of cognition) is still ongoing until around 15.³⁶ Psychological development thus seems to be a continuing – even intensive – process well into adolescence.

Neuro-science also offers arguments in favour of giving some leeway to young people at the outer limits of childhood and even beyond. These arguments rest particularly on three areas of observed development in the brain, which is itself possible through progress in brain scan technology³⁷ in recent years, allowing ‘unique access to visualizing the brain in transition’.³⁸ There is agreement in both medical literature and legal academic discourse which relies upon it that the development of the amygdala, growing and pruning of white and grey matter and frontal lobe (prefrontal cortex) development are all of relevance.³⁹ In essence, the amygdala, is more developed in adolescents than the prefrontal cortex. This means that their decision-making tends to be more instinctive and directed by emotion (these being amygdale properties) than rational and considered (these belonging to the prefrontal cortex).⁴⁰ The ratios of white and grey matter relate to the speed and efficiency of message-carrying pathways in the brain. Until the white matter (myelin) is properly distributed, transmission of signals within the brain can, on occasion, be erratic.⁴¹ All of this is of importance because it provides a basis from which to argue that even young people whose development is advanced in areas such as intellect and morality may still have difficulty exercising rational control over reckless impulses.

Finally, in considering why children should have a defence, it is necessary to look at their lived experience. The criminal law rests on a notion of free will⁴² – that it is appropriate for the state to impose punishment because the wrong-doer exercised a choice to commit an act known to be wrongful in a situation where s/he could equally have refrained from so doing. Children’s ability to choose in this way may be more constrained by, for example, lifestyle choices made by their parents, the culture in which they live and a lack of experience of positive alternatives. This is well explained by Elliott:

. . . research has shown such a close co-relation between negative elements of the external environment in which a child is living and criminal conduct that it is clear that it is these external factors that have been determinative of the child’s criminal conduct rather than the child acting as an autonomous individual

34 P Michiel Westenberg, Augusto Blasi and Lawrence D Cohn, ‘Introduction: Contributions and Controversies’ in P Michiel Westenberg, Augusto Blasi and Lawrence D Cohn (eds), *Personality Development: Theoretical, Empirical and Clinical Investigations of Loevinger’s Conception of Ego Development* (Lawrence Erlbaum Associates 1998) 1, 3.

35 Erikson (n 33) 261–63.

36 See Larry Cunningham, ‘A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and their Status under Law’ (2006) 10 UC Davis Journal of Juvenile Law and Policy 275, 282.

37 Preston and Crowther (n 28) 458.

38 Megan Moreno and Meaghan E Trainor, ‘Adolescence Extended: Implications of New Brain Research on Medicine and Policy’ (2013) 102 Acta Paediatrica 226, 227.

39 Ibid, 227.

40 See Charlotte Walsh, ‘Youth Justice and Neuroscience: A Dual-Use Dilemma’ (2011) 51 British Journal of Criminology 21, 23.

41 Preston and Crowther (n 28) 458.

42 Ashworth and Horder (n 19), para 2.1, which also discusses theoretical challenges to this ‘choice theory’.

exercising a choice. Perhaps focusing on issues of morality and ignoring personal responsibility was historically understandable, but as social research techniques have become more advanced and the resulting statistical evidence has become clearer regarding the impact of such issues as poor parenting and poverty on a child's criminal behaviour, it is now blatantly unjust simply to ignore the social reality.⁴³

An example is found in a case study on restorative justice. The mother of a victim attending a restorative conference gave her impression of the young offender:

I didn't think he could see where the harm was in all he'd done. I asked him why he went into the hall and he said: 'I was looking for something to steal'. He said it so openly like it was, 'What else would I be doing?'

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.⁴⁴

From an economic perspective, Jens Qvortrup has commented that 'children are accounted for in terms of their parents' economic situation, and they are thus split up in accordance with criteria that do not characterize their own life conditions'.⁴⁵

The key point is that children's ability to make lifestyle choices and their understanding of the moral norms of the culture in which they grow up will be heavily constrained by those of their parents and, indeed, their peers⁴⁶ to an extent which is much greater than for adults. This affects the argument that all crime is committed with free will and through the exercise of informed choice. The Law Commission has also recognised all of these issues: 'a defendant may wish to rely on either biological factors or social or environmental influences, or all of these to support a claim of developmental immaturity'.⁴⁷

The material from developmental psychology, in particular, additionally suggests that, currently, the MACR is set at a point where a significant proportion of those *deemed* to have criminal responsibility may, in fact be relatively *immature* intellectually, emotionally and morally. The neuro-science leads to a similar conclusion about mental development. Setting the MACR requires a clear policy choice as to whether to use a young age so that the likelihood of failing to impose criminal responsibility on precocious children of early maturity is diminished or setting it further through the lifespan so that a higher proportion of those deemed criminally responsible will be sufficiently mature developmentally to have criminal capacity in fact. The choice currently taken is the former and this is highlighted through part 3's analysis of the way in which the law uses age generally.

3 The use of age in law generally and the deployment of the MACR

Chronological age is used in law to draw bright lines so that the issue of whether an individual has acquired a particular age-defined right or taken on such a responsibility can be formulated as a clear unambiguous yes/no binary.⁴⁸ Such line-drawing offers certainty

43 Elliott (n 9) 300.

44 *Time for a Fresh Start: Report of the Independent Commission on Youth Crime and Antisocial Behaviour* (Police Foundation 2010) 63.

45 Jens Qvortrup, 'Childhood Matters: An Introduction' in Jens Qvortrup, Marjatta Bardy, Giovanni Sgritta and Helmut Wintersberger (eds), *Childhood Matters: Social Theory, Practice and Politics* (Avebury 1994) 1, 16.

46 Preston and Crowther (n 28) 454, 456.

47 Law Commission (n 11) para 9.12.

48 See, also, Kathryn Hollingsworth, 'Responsibility and Rights: Children and their Parents in the Youth Justice System' (2007) 21 *International Journal of Law, Policy and the Family* 190, 196–97.

but, in view of the individualised way in which children develop, the lines drawn are bound to be somewhat arbitrary. For example, body piercing is legal at 16;⁴⁹ tattoos not until 18.⁵⁰ Young people can join the army⁵¹ and get married⁵² at 16. The UK parliamentary election voting age is 18,⁵³ but in Scotland (for elections relating to Scotland) it has been lowered to 16.⁵⁴ Films are certificated for viewing at various points throughout childhood. In 2009, the Scottish government published a leaflet for children entitled *What Can I Do at My Age?*⁵⁵ Its only entry under the age of 8 is 'be held responsible for crimes'.⁵⁶ There are no entries at all for ages 9, 10 and 11. At 12, according to the leaflet,⁵⁷ children can, inter alia, register as an organ donor without parental consent⁵⁸ and be the subject of an anti-social behaviour order.⁵⁹ Tellingly, jury membership is only possible at 18.⁶⁰

Legally imposed and conferred responsibilities and rights for children, then, arrive with them in an unsystematic fashion throughout the period of childhood. As Jonathan Todres has commented: '... the law's approach to ... the concept of maturity [has been to consider it] in a piecemeal and issue-specific fashion. The result is a legal construct of maturity that is anything but consistent or coherent.'⁶¹ While a defence would also use age to determine the limits of the period of the lifespan during which it could be pled, it would be available across a range of ages thereby making better provision for the individual nature of children's development.

The way in which the MACR currently fits into the matrix of chronological ages in law is also of relevance in the argument for a defence. It is an outlier, conferred without most of the other rights which maturity otherwise brings (for example, to vote;⁶² to marry; to have sex; to work; to adorn the body permanently).⁶³ The Commentary to the Beijing Rules⁶⁴ suggests that the MACR *should* be better aligned: '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.).'⁶⁵ By allocating only the responsibility for wrong-doing at this early stage, the law misses the opportunity to facilitate more rounded development through the acquisition

49 Without parental consent in terms of licences issued to premises under the Civic Government (Scotland) Act 1982, Parts I and II.

50 Tattooing of Minors Act 1969, s 1 (the offence is committed by the tattooist).

51 Armed Forces (Enlistment) Regulations 2009/2057, reg 4.

52 Marriage (Scotland) Act 1977, s 1(1).

53 Representation of the People Act 1983, s 1(1)(d).

54 Ibid s 2(1)(d) and (1A).

55 Cl@n Childlaw, *What Can I Do At My Age?* (Scottish Government 2009) <<http://www.gov.scot/Resource/Doc/268906/0079936.pdf>>.

56 Ibid 05.

57 Ibid 06–07.

58 Human Tissue (Scotland) Act 2006, s 8.

59 Antisocial Behaviour etc (Scotland) Act 2004, s 4(2)(a).

60 Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 1(1)(b).

61 Jonathan Todres, 'Maturity' (2011–2012) 48 *Houston Law Review* 1107, 1107.

62 Another way of bringing the ages of significant rights acquisition into better mutual alignment would be to lower the voting age. See discussion in Aoife Nolan, 'The Child as "Democratic Citizen": Challenging the "Participation Gap"' (2010) *Public Law* 767, 777–78.

63 For discussion of certain markers of adulthood, particularly in the US, see Todres (n 61).

64 UN Standard Minimum Rules for the Administration of Juvenile Justice (1985).

65 Ibid Commentary on rule 4. Note that civil majority is not conferred until 18: Age of Majority (Scotland) Act 1969, s 1.

and refining of rights and responsibilities together, which would be more likely to happen naturally if the MACR was higher.⁶⁶ The current arrangement would, however, matter less if, on attainment of the MACR, a defence was available, since it could operate to bridge the gap between the acquisition of criminal responsibility and other attributes of adulthood.

In certain respects, the criminal law's proscriptions serve a directive function in telling citizens what to do.⁶⁷ For example, the fact that possession of controlled substances is a crime⁶⁸ is an indication to individuals not to take possession of prohibited drugs. The MACR makes a similarly definite provision of the point in the lifespan at which a child will become criminally responsible, but it cannot order, in the same way, that s/he simultaneously acquires the abilities, understandings, emotional responses and moral decision-making capability which ought to underpin this.⁶⁹ This remains a matter of individual development. In some cases then, it imposes on a child a responsibility which, due to developmental immaturity, it is, factually, impossible for him/her to shoulder. The provision of a defence immediately after the MACR would also help to address this concern.

4 Existing lack of capacity defences

Despite these perceived shortcomings, the provision of a MACR is considered to be necessary and important because, without one, children of all ages, even the very youngest, become potentially liable to prosecution for their criminal acts.⁷⁰ The MACR is also significant as the only defence available specifically to children. As well as the protection provided by the MACR, this part will discuss other, generalised, lack of capacity defences (diminished responsibility; insanity or mental disorder; and absence of *mens rea*) to gauge their suitability to be pled by children.

The MACR provision is framed around the young child's deemed inability, through lack of criminal capacity,⁷¹ to be guilty of crime. The statutory wording is identical in both Scotland and England and Wales: '[i]t shall be conclusively presumed that no child under the age of eight/ten years can be guilty of any offence'.⁷² This is a conclusive presumption. There is no test or discretion. Thus, in England and Wales, a child aged 9 and 364 days has no criminal responsibility. On his/her 10th birthday s/he acquires the same responsibility (albeit with different sanctions) as an adult.⁷³

Any young child charged with an offence would plead 'nonage'⁷⁴ – i.e. that s/he is below the MACR. This is a complete defence resulting in automatic acquittal or it could be pled definitively in bar of trial.⁷⁵ While this may sound promising, in a country like the

66 On this point about the need for responsibility to go hand-in-hand with rights. See Hollingsworth (n 48) and Nolan (n 62) 773–74.

67 See Winnie Chan and Andrew P Simester, 'Four Functions of *Mens Rea*' (2011) 70 Cambridge Law Journal 381, especially 388–93.

68 Misuse of Drugs Act 1971, s 5(1).

69 On a similar point, see Hollingsworth (n 48) 195.

70 See Elaine E Sutherland, 'The Age of Reason or the Reasons for an Age? The Age of Criminal Responsibility' (2002) Scots Law Times 1, 4–5.

71 See *Merrin v S* 1987 SLT 193.

72 Criminal Procedure (Scotland) Act 1995, s 41/Children and Young Persons Act 1933, s 50, as amended by Children and Young Persons Act 1963, s 16(1).

73 See Heather Keating, 'The "Responsibility" of Children in the Criminal Law' (2007) 19 Child and Family Law Quarterly 183, 191.

74 See Hume (n 3) 30; Blackstone (n 2) 22.

75 See James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green 2006) paras 1.01 and 2.17.

UK where birth registration has been in existence since the nineteenth century,⁷⁶ it is likely that few children ever have the opportunity to use the plea since the issue of age can be easily established.

Beyond nonage, the criminal law offers slim pickings to anyone, of any age, who seeks to plead that his/her understanding or appreciation of the criminal act is different, or impaired, by comparison with the (adult) norm or that his/her mental state rendered it impossible for him/her to avoid committing the offence. Perhaps the best option for the young would be diminished responsibility⁷⁷ because it recognises a deficit – or even merely a difference from the ‘norm’ – in mental functioning which is not total. It also allows *some* responsibility to be taken for the offence. It can, however, only be pled to a charge of murder as a partial defence so that, if successful, the defendant would be convicted on the reduced charge of manslaughter or culpable homicide. In its Scottish formulation, it applies where ‘the [accused’s] ability to determine or control conduct’ was ‘substantially impaired by reason of abnormality of mind’.⁷⁸ The English defence rests on ‘an abnormality of mental functioning which – (a) arose from a recognised medical condition’.⁷⁹ Lack of neurological, and/or psychological development in a child is not usually abnormal and to have to claim that it is, for the purposes simply of being able to use the defence in the first place, might be stigmatising.⁸⁰ Also, the criminal law can only easily accommodate the operation of diminished responsibility to ‘reduce’ the crime in relation to murder where a lesser charge on the same facts can readily be substituted. What is it to do where, say, the conviction is for theft? A person of lesser capacity could receive a lesser sentence but s/he is still criminally responsible for the ‘full’ crime of theft. Outwith the context of homicide, the criminal law is ill-equipped to respond to partial criminal capacity at the initial stage of determining guilt.

Where the defendant suffers a more complete form of mental disorder, resulting in an overarching inability to understand his/her criminal act, then s/he can plead insanity⁸¹ (in England and Wales) or mental disorder⁸² (in Scotland). Each requires something ‘wrong’ with the accused person’s mind. In Scotland the defence is pled where ‘the person was at the time of the conduct unable *by reason of mental disorder* to appreciate the nature or wrongfulness of the conduct’;⁸³ in England the defence is available where ‘the party accused was labouring under such a defect of reason, *from disease of the mind*, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong’.⁸⁴

A child-defendant could, similarly to an adult and regardless of his/her age, suffer from a form of mental illness or disorder which would trigger this defence. If not, however, then the defence has some of the shortcomings attributed above to diminished responsibility, particularly stigma, but does not readily accommodate a lack of developed understanding or impulse control which could be ‘normal’ in young people. Though it

76 Births and Deaths Registration Act 1836 made registration compulsory in England and Wales; Registration of Births, Deaths and Marriages (Scotland) Act 1854 did the same for Scotland.

77 Coroners and Justice Act 2009, s 52 (England and Wales); Criminal Procedure (Scotland) Act 1995, s 51B 1995 Act, s 51B(1).

78 Homicide Act 1957, s 2(1)(a) (as amended by the Coroners and Justice Act 2009, s 52(1)).

80 On the stigma attaching to being labelled ‘criminally insane’, see Claire Hogg, ‘The Insanity Defence: An Argument for Abolition’ (2015) 79 *Journal of Criminal Law* 250, 252–53.

81 See David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* 14th edn (OUP 2015) para 11.2.2.

82 Criminal Procedure (Scotland) Act 1995, s 51A.

83 *Ibid* s 51A(1) (emphasis added).

84 From the M’Naghten Rules – (1843) 19 Cl & Fin 200, 210 (emphasis added).

may be that children could plead this defence – in England and Wales it has been regarded as at least potentially available to those in a temporary hypoglycaemic state caused by diabetes,⁸⁵ that is to someone suffering from an illness usually categorised as physical rather than mental – the grounds on which a child would be likely to offer it are different from the severe forms of abnormal mental state which it is designed to cover. It is not a good fit,⁸⁶ which suggests that something more tailored is needed for children.

Perhaps the most promising existing mechanism is a plea of absence of *mens rea*.⁸⁷ However, this immediately raises a question of definition, given that it has been suggested that '[t]he term "*mens rea*" is rivalled only by the term "jurisdiction" for the varieties of senses in which it has been used and for the quantity of obfuscation it has created'.⁸⁸ It is axiomatic that criminal offences have both a physical element or *actus reus* – the proscribed act, state of affairs or omission – and a mental element.⁸⁹ On one definition, the latter could incorporate all aspects of the criminal charge which relate to the defendant's mental state which would encompass both his/her attitude to the criminal act and his/her criminal capacity. Alternatively, it could be defined narrowly to represent only the specific mental attitude comprised in the crime's definition which has a direct relationship with the defined *actus reus*.⁹⁰ In this second sense, then, the *mens rea* of theft in English law is, in summary, the intention permanently to deprive the owner of the item taken.⁹¹ Even a toddler might be able to take a thing (a toy belonging to another say) and *mean* to keep it, thus satisfying the *mens rea* if it is defined as the thinnest possible concept. If, however, the mental element is taken to include broader issues of understanding and, indeed, development, then the *mens rea* is more likely to be deemed absent. This might involve matters such as the ability to exercise rational control over the act and the understanding of the legal concepts of appropriation and permanent deprivation. For an 'absence of *mens rea*' argument to operate to protect children, it would have to examine these broader understandings. It is, however, possible to establish 'thin' *mens rea* without doing so. At the least, then, pleading absence of *mens rea* may have uneven results depending on the over-arching view of the *mens rea* concept applied by the court.⁹²

Other problems with relying on absence of *mens rea* are that the approach would be fruitless if the crime charged was of strict liability and therefore had no *mens rea*. Also, there are occasions when it is difficult to distinguish between the *actus reus* and the *mens rea*, for example, in theft where the thing initially comes into the thief's possession lawfully but his/her decision to keep it turns the transaction into an offence.

Overall, then, it is not impossible for a child-defendant to plead insanity (or mental disorder), absence of *mens rea* or, where the charge is murder, diminished responsibility. It

85 See *R v Quick* [1973] QB 910, though here, on appeal, a distinction was drawn on the basis that it was the defendant's failure to use insulin properly (he had not eaten as he was required to) which had caused the hypoglycaemia and that, as this was an external factor, automatism was the requisite defence.

86 For a discussion of issues arising where a child used the (now amended) Scottish 'insanity' plea in bar of trial, see Clare Connelly and Claire McDiarmid, 'Children, Mental Impairment and the Plea in Bar of Trial' (2000) 5 Scottish Law and Practice Quarterly 157.

87 In this respect, the Scottish Law Commission took the view that there might be 'formidable difficulties in proving the criminal capacity of the child': Scottish Law Commission, *Report on Age of Criminal Responsibility* (Scot Law Com No 185 TSO 2002) para 3.8(a).

88 Sanford H Kadish, 'The Decline of Innocence' (1968) 26 Cambridge Law Journal 273, 273.

89 Encapsulated in the Latin maxim *actus non facit reum nisi mens sit rea*. See, for example, Jeremy Horder, 'Two Histories and Four Hidden Principles of *Mens Rea*' (1997) 113 Law Quarterly Review 95.

90 Chan and Simester (n 67) 381–82.

91 From the Theft Act 1968, s 1.

92 For a fuller discussion, see Claire McDiarmid, *Childhood and Crime* (Dundee University Press 2007) ch 3.

is, nonetheless, clear that each has shortcomings when applied to children such that the case which they seek to make to exculpate from the crime charged might require to be shoe-horned into an ill-fitting legal framework.

5 The form of the defence

It appears, then, that there are good reasons for seeking to protect young people within the criminal process, that the conferment of rights and responsibilities by reference to a single, chronological age can be too arbitrary, that the MACR, whilst vital, may not be sufficient fully to protect children and that other lack of capacity defences are not entirely appropriate for children. Some grounds for the provision of a bespoke defence are thus emerging. Before considering aspects of the form this might take, however, the issue of the public interest in conviction of those who, often manifestly, carried out certainly the *actus reus* of serious crimes now needs to be taken into account.

The Law Commission 'acknowledged that the recommendation [for a new defence for the young in relation to diminished responsibility] was potentially controversial',⁹³ because some of its consultees took the view that mitigating murder on the grounds of developmental immaturity was 'too generous to those who had killed with the fault element for first degree murder'.⁹⁴ It is clear that there is resistance in some spheres to allowing criminal responsibility to be mitigated or removed on grounds of incapacity. A classic example is the case of John Hinckley Jr who, in 1981, was found not guilty by reason of insanity in relation to the attempted assassination of the then US president, Ronald Reagan. There was considerable public opposition to the not guilty verdict to the extent that a number of states sought to abolish their laws on insanity.⁹⁵ Loran G Johansen commented that, the 'public outcry was deafening' such that '[m]ultiple jurisdictions rewrote statutory insanity defenses that had been carefully crafted over years using the emerging bio-medical understanding of mental illnesses'.⁹⁶

Closer to home, the recommendations of a recent report on the youth justice system in England and Wales are tempered by an underlying anxiety about public opinion in relation to children who commit serious crimes. It recommended that (in the immediate term) the MACR should be raised to 12 'for all but the most grave offences (murder, attempted murder, rape, manslaughter and aggravated sexual assault)'.⁹⁷ Public opinion⁹⁸ was one of the main reasons for the 'grave crimes' exception despite the report's acknowledgment of 'the contradictions implicit in such a recommendation: that is, in continuing to hold children who have committed the most heinous crimes responsible for their behaviour one likely criminalises those most in need of help'.⁹⁹ Equally, the murder of Angela Wrightson in Hartlepool indicates that, on occasion, public opinion may also have to be reined in. It has emerged that the original trial in 2015 was halted because the nature of the comment on social media was so extreme and abusive that it affected the

93 Law Commission (n 11) para 9.7.

94 Law Commission (n 10) para 5.129.

95 Montana, Utah, Idaho and Kansas have done so. See Fatma Marouf, 'Assumed Sane' (2015–2016) 101 *Cornell Law Review Online* 25, 32.

96 Lauren G Johansen, 'Guilty but Mentally Ill: The Ethical Dilemma of Mental Illness as a Tool of the Prosecution' (2015) 32 *Alaska Law Review* 1, 5.

97 Centre for Social Justice, Youth Justice Working Group, *Rules of Engagement: Changing the Heart of Youth Justice* (Centre for Social Justice 2012) 21.

98 *Ibid* 207–08, para 8.6.2.1

99 *Ibid* 211.

chances of a fair trial. The judge is reported to have referred to it as an “avalanche of prejudicial material” posted on [Facebook] by a “virtual lynch mob”,¹⁰⁰

The provision of a defence would not exempt a young person over the MACR from the trial process in the way that the MACR does. S/he would still be prosecuted. It would thus resolve the immediate issue identified in relation to public opinion and grave crimes – that raising the MACR would prevent any calling to account of the young defendant. The key point here is, however, more about the balancing required by the criminal process between fairness to child-accuseds and the public interest in conviction of those who carry out seriously harmful acts. Unlike a MACR, a defence is not a blanket exemption from criminal liability. No child defendant would have to plead it and, indeed, making the plea is no guarantee of success, which depends on the evidence. It would, nonetheless, ensure that a person who was developmentally immature, and therefore lacked criminal capacity, had a clear mechanism by which to bring this before the court. In principle, this seems unobjectionable, provided that the defence itself is cast in appropriate terms. This will now be considered.

A defence is normally set up as a test. The question arising is: what is it that would require to be established to acquit on the grounds of developmental immaturity? For around 1000 years, from Aethelstan’s law in the tenth century until s 34 of the Crime and Disorder Act 1998, English law operated a form of a test in the shape of the *doli incapax* presumption. This required the prosecution to lead evidence in rebuttal that a child-defendant knew that his/her act was seriously wrong as opposed to merely naughty.¹⁰¹ Latterly, it was applied to children aged between 10 and 14. While this provided a buffer between children just over the MACR and the full rigours of criminal responsibility, it in no way reflected the complexity of the issue of criminal responsibility.¹⁰² Elliott criticises it for focusing narrowly on ‘the moral awareness of the child’,¹⁰³ noting that:

. . . [m]oral awareness might be symptomatic of children’s capacity in terms of their intellectual development, but is only one aspect of it. There will be other consequences of a child’s mental immaturity which the concept of *doli incapax* totally ignores.¹⁰⁴

Indeed, the presumption had previously been criticised in the Court of Appeal’s judgment in *C (A Minor) v DPP*¹⁰⁵ on the basis that “if “seriously wrong” means neither “legally wrong” nor “morally wrong,” what other yardstick remains?”¹⁰⁶ *Doli incapax*, then, captured only one facet of the complex of understandings required for the fair imputation of criminal responsibility. That facet – knowledge of the difference between right and wrong – is, nonetheless, clearly important in this context, but in both of these possible senses: the moral and the legal. In other words, understanding of the general, innate unacceptability of the conduct (moral) and that it contravenes the law thereby engendering particular consequences which do not apply to other types of wrong-doing (legal) are both required. The nature of the child’s life experiences may be of importance in this respect.

100 Martin Evans, ‘Judge’s Threat to Haul Facebook into Court’ *Daily Telegraph* (London 8 April 2016) 11.

101 *R v Gorrie* (1918) 83 JP 136; *JM (A Minor) v Raneckles* (1984) 79 Cr App R 255; *C (A Minor) v DPP* [1996] AC 1.

102 See Claire McDiarmid, ‘An Age of Complexity: Children and Criminal Responsibility in Law’ (2013) 13 Youth Justice 145.

103 Elliott (n 9) 295.

104 *Ibid* (footnote omitted).

105 [1996] AC 1.

106 *Ibid* 10, quoting Laws J in the Divisional Court.

Equally fundamental is the requirement that the child's development is such that s/he has the ability to exercise rational control over action. This may incorporate consideration of a number of issues. First, the central organising concepts discussed before – cognition and the ego – need to be sufficiently developed so that the child is able to apply them to determine rationally how to act and to bring action into line with these determinations. Even if Piaget's view that intellectual development is complete by about the age of 15 is accepted, this is still well above the existing MACRs. Indeed, it has been said that Piaget's conclusions 'fail to account for the complete picture of adolescent abilities, including the changes that happen in the adolescent brain'.¹⁰⁷ The evidence from neuro-science of impaired impulse control – of instinct, emotion and peer pressure being dominant, on occasion over acceding to rational direction – should also be taken into account.

Exercising rational control also requires the 'ability to use reasons in acting, thinking, choosing, wanting, etc.'¹⁰⁸ Thus, criminal capacity includes the ability to bring reason(s) to bear in directing and constraining action. A young person who has developed this ability could still say 'I don't know why I did it' or 'I did it for no reason', but this would not affect his/her criminal capacity.

An understanding of causation is also required. An example can be found in an examination of facts following a successful plea in bar of trial in Scotland on the (then) ground of insanity¹⁰⁹ put forward on the basis of the developmental delay suffered by a 13-year-old. The decision partly turned on his probable lack of understanding of the effects of setting light to a pool of petrol. Its vapour ignited causing fatal injuries to another child. The judge took the view, on the basis of expert evidence from a senior fire officer, a forensic witness and a consultant psychiatrist that, while the accused child would have understood the flammability of the physical pool of petrol which he could see, he would not have known about the (more) flammable qualities of the invisible vapour.¹¹⁰ Part of having criminal capacity is the ability to understand the consequences of the (allegedly) criminal act. This is dependent on an acceptable knowledge of causation.

There is a fine line to be drawn between ignorance of the law, which is not a defence and the inability, through lack of development, to understand the legal concepts on which that law is based. The latter is also different from unfamiliarity with legal terminology. The examination of facts provides an example of what is meant here with regard to the concept of recklessness.

In relation to a child, [the judge said that he] would agree [with defence counsel] that if a child of a certain age would not have the capacity or experience to foresee a certain danger then the standard of conduct expected of him may have to be reduced . . . Certainly, children can act recklessly (and it may be that they are even more prone to do so than adults) but their capacity to appreciate the dangers they are creating may not always be sufficient to attach criminality to their conduct.

It is the inability to appreciate the building blocks of criminal offences, rather than the lack of understanding of technical legal language, which is relevant to criminal capacity. (Linguistic difficulties may, however, be relevant to a plea in bar of trial.)

107 Preston and Crowther (n 28) 455.

108 John Gardner 'The Mark of Responsibility' (2003) 23 *Oxford Journal of Legal Studies* 157, 164.

109 See, now, Criminal Procedure (Scotland) Act 1995, ss 53F and 55.

110 *HMA v S* (High Court, Glasgow) (unreported) 15 October 1999 <www.scotcourts.gov.uk/search-judgments/judgment?id=57c686a6-8980-69d2-b500-ff0000d74aa7>.

Overall, then, what is sought is a test for a defence which can encompass all of these elements but which is not (necessarily) restricted to them. The wording below gives at least a flavour of how such a defence might be rendered in legislation. It is, in some respects, almost a generic lack of capacity defence but it is tied in to children by the concept of developmental immaturity. Its structure is drawn from the Scottish defence of mental disorder.¹¹¹

A child [or young person] is not criminally responsible for conduct which would otherwise constitute an offence and should be acquitted if, due to developmental immaturity,

- (a) s/he was unable sufficiently to know the full implications of, to understand, and/or to appreciate the nature of, that conduct, its criminality, its wrongfulness and/or its consequences (legal and/or physical); and/or
- (b) s/he was severely restricted in his/her ability to judge whether to carry out the conduct, to exercise rational control over the conduct and/or to refrain from carrying it out.

This is very comprehensive and could allow a child who is developmentally immature in only one of the areas covered potentially to be acquitted. The use of ‘sufficiently’ and ‘severely restricted’ leave scope for a court to determine that the child’s developmental immaturity was such that s/he lacked criminal responsibility even if criminal capacity was not completely absent. To make the defence more restricted, these could, of course, be replaced with more absolute terminology and it would be possible to cut down the list of types of circumstance in which the defence could be pled. In terms of balancing the child-defendant’s rights against the public interest, the proposed formulation would offer considerable leeway to the child. Equally, it is constrained by the need for all or any of these incapacities to stem directly from developmental immaturity and also by the upper age limit which, in accordance with the UNCRC’s definition of child, should be 18.¹¹²

Following a successful plea, it is proposed that the trial judge should have a power (but not an obligation) to refer the child to the relevant family proceedings court (or, in Scotland, to the children’s hearings system) for intervention on welfare grounds, if this is appropriate in all the circumstances. This could also apply, exceptionally, where it is clear that the child-accused did *not* commit the offence but evidence emerges which would warrant such a referral. In either case, it should be made clear that such a referral is *not* on the grounds of criminal behaviour.

6 Conclusion

The Prison Reform Trust reported in 2010¹¹³ that children in custody are among the most vulnerable group in society. The Howard League reported earlier this year that children who are looked after in children’s homes are being criminalised at excessively high rates.¹¹⁴ A high number of children with mental health problems are present in the

¹¹¹ See Criminal Procedure (Scotland) Act 1995, s 51A.

¹¹² In fact, the Royal College of Psychiatrists’ evidence to the Law Commission indicated that it should remain possible to consider developmental immaturity as relevant to diminished responsibility up to the age of 21. Law Commission (2006) (n 10) para 5.129.

¹¹³ Jessica Jacobson, Bina Bhardwa, Tracey Gyateng, Gillian Hunter and Mike Hough, *Punishing Disadvantage: A Profile of Children in Custody* (Prison Reform Trust 2010).

¹¹⁴ Howard League, *Criminal Care: Children’s Homes and Criminalising Children* (Howard League 2016) <<http://howardleague.org/wp-content/uploads/2016/02/Criminal-Care.pdf>>.

youth justice system.¹¹⁵ The provision of a bespoke defence for children aged between the MACR and 18 charged with a crime may be a mechanism which keeps those young people who lack criminal capacity because of developmental immaturity from progressing too far through the system. It has the benefit over an increase in the age of criminal responsibility of differentiating between individuals in terms of their actual understanding so that child-defendants neither 'get away with it' nor, more importantly, are criminalised where they lack capacity. It would allow information on issues of maturity and capacity into the criminal process at the stage of determining guilt where, otherwise, these might only be heard in mitigation of sentence. Because it could only be pled in circumstances of developmental immaturity it should not upset the balance between the rights of the accused and the public interest in conviction of the guilty. For all of these reasons, it is commended as a humane and necessary step to protect the young who do wrong.

115 Prathiba Chitsabesan, Leo Kroll, Sue Bailey, Casandra Kenning, Stephanie Sneider, Wendy MacDonald and Louise Theodosiou, 'Mental Health Needs of Young Offenders in Custody and the Community' (2006) 188 *British Journal of Psychiatry* 534; Robert Newman, Jenny Talbot, Roger Catchpole and Lucie Russell, *Turning Young Lives Around: How Health and Justice Services Can Respond to Children with Mental Health Problems and Learning Disabilities who Offend* (Prison Reform Trust and Young Minds 2013).

