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

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

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

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

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

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

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

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

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

Young people and the courts

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

> should be treated as incorrect so far as it fails to recognize that in the case of complex offences, for example forgery and certain consensual sexual behaviour such as that engaged in by Boy A, the prosecution may still need to establish by evidence that a defendant who is below the age of discretion

5 Laws J in the Divisional Court in *C (A Minor)* v *DPP* [1994] 3 WLR 888 declared the presumption defunct, and though his decision was reversed on appeal ([1996] AC 1), the House of Lords accepted that the rebuttable presumption could give rise to anomalies.

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

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

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

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

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

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

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

In *S and Marper* v *United Kingdom*[11] the European Court of Human Rights referred to the UN Convention on the Rights of the Child of 1989 and commented upon the importance of treating young people differently than adults with regard to the criminal justice system 'given their special situation and the importance of their development and integration in society'.[12]

Internationally, the law in England is out of step because of its early criminalisation of minors. Worldwide, the current median age at which criminal responsibility will be imposed is 12 years.[13] The United Nations' Committee on the Rights of the Child, has condemned the UK for imposing criminal liability on very young children. The European Committee of Social Rights, the body responsible for the monitoring of

8 F. Bennion, 'Mens Rea and Defendants below the Age of Discretion' [2009] Crim LR 757 at 769.
9 [2003] UKHL 50, [2003] 4 All ER 765 at [14].
10 Compare *R* v *G* [2008] UKHL 37, [2009] 1 AC 92 where the young offender was prosecuted under s. 5 of the Sexual Offences Act 2003 and the case of *R (on the application of S)* v *DPP* [2006] EWHC 2231 (Admin) where, on similar facts, the case was prosecuted under the less serious offence of s. 13 of the Sexual Offences Act 2003.
11 App. Nos 30562/04 and 30566/04 (2009) 48 EHRR 50.
12 Ibid. at [124].
13 D. Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility:A Global Perspective* (Ashgate: Aldershot, 2009) ch. 7.

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

The Legal Theory of Criminal Responsibility

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

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

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

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

> practice of attribution which is specific to criminal law yet which is connected with prevailing intellectual ideas, including—though, obviously, not restricted to—philosophical theories about the nature of human beings. The content and emphasis of these problems can be expected to change according to the environment in which the system operates, with

14 European Committee of Social Rights, above n. 2: 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable'.
15 J. Fionda, *Devils and Angels: Youth Policy and Crime* (Hart: Oxford, 2005) ch. 1.
16 Cipriani, above n. 13 at 2.
17 Home Office, *Tackling Youth Crime: Reforming Youth Justice* (Home Office: London, 1997).
18 Ibid. at [15].

> important factors including the distinction of political interests and economic powers; the prevailing cultural and intellectual environment; the organization and relative status of relevant professional groups and the array and vigour of alternative means of social ordering.[19]

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

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

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

Capacity and children

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

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

19 N. Lacey, 'In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal law Theory' (2001) 64 MLR 350 at 351.
20 Ibid.
21 Fionda, above n. 15 at 32.
22 Hart, above n. 4 at 152.
23 Ibid.
24 P. Cane, *Responsibility in Law and Morality* (Hart Publishing: Oxford, 2002) 65.

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

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

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

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

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

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

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

27 Hart, above n. 4 at 227.

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

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

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

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

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

> . . . whilst even very young children are quite capable of engaging in intentionally harmful conduct, they do not have developed moral characters to which such conduct can be related. It is the possession of such a character that makes possible the formation of an action upon an intelligent conception of the good (in) life, and hence makes it possible to subject one's (potential) conduct to critical moral evaluation, and shape it in the light of that evaluation.[33]

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

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

Moral awareness might be symptomatic of the child's capacity in terms of their intellectual development, but is only one aspect of it.[35] There will be other consequences of a child's mental immaturity which the concept of *doli incapax* totally ignores. For example, Brown's research has demonstrated that young male drivers are more dangerous than other drivers because of hazard perception failure rather than a different attitude to risk.[36] Because the emphasis of the *doli incapax* was on morality rather than capacity, it set a very low cognitive threshold: a

31 T. Grisso *et al.*, 'Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants' (2003) 27 *Law and Human Behaviour* 333; R. Abramovitch *et al.*, 'Young People's Understanding and Assertion of their Rights to Silence and Legal Counsel' (1995) 37 *Canadian Journal of Criminology* 1.

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

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

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

35 See Fortin, above n. 30 at 72.

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

knowledge of right from wrong entails only a minimal capacity for rational understanding.[37]

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

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

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

Personal autonomy and choice

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

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

37 B. C. Feld, 'Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy' (1997) 88 *Journal of Criminal Law and Criminology* 68 at 98.
38 Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304 (2006) para. 5.130.
39 A. Ashworth, 'Belief, Intent and Criminal Liability' in J. Eekelaar and J. Bell (eds), *Oxford Essays in Jurisprudence*, 3rd Series, (Oxford University Press: Oxford, 1987) 1; M. Moore, *Placing Blame: Theory of Criminal Law* (Clarendon Press: Oxford, 1997) ch. 13.
40 Horder, above n. 33 at 302.
41 [2007] EWCA Crim 1251; [2007] 2 Cr App R 31.
42 Ibid. at [18].

Peter Cane has observed that there is an 'important focus of legal responsibility practices which finds little or no (explicit) place in many philosophical analyses of responsibility—namely social values . . . Policy considerations are central to legal responsibility practices because law is a social phenomenon, and because the principles of legal responsibility are of general application'.[43] Thus, 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 to artificially 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.[44] 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.

The issue of capacity and choice in the context of children is interlinked. While the intellectual competence of children is underdeveloped,[45] the impact of the care (or absence of care) from their parents and the social conditions in which they live are too strongly determinative of their behaviour, including potentially criminal behaviour, so that they cannot be viewed as autonomous individuals with the freedom to make a fully informed choice about the commission of a criminal offence. Tadros has observed:

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

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

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

43 Cane, above n. 24 at 53.

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

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

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

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

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

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

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

> 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).[50]

These social rights reflect the acquired autonomy of children as emerging adults and their ability to make choices for themselves.

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

48 H. L. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: Stanford, 1968) 74–5.
49 *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1984] QB 581.
50 United Nations General Assembly, above n. 29 at commentary to para. 4.1.
51 D. Frehsee, 'Strafreife—Reife dess Jugendlichen oder Reife der Gesellschaft' in P Albrecht, (3d) *Festschrift FurSchuler-Springorum zum 65* 390. Geburstag (1993), quoted by T. Crofts, *The Criminal Responsibility of Children and Young Persons* (Ashgate: Aldershot, 2002) 191.
52 J. Fagan, 'Context and Culpability in Adolescent Crime' (1999) *Virginia Journal of Social Policy and the Law* 507.
53 M. Walter, *Jugendkriminalitat* (Borberg: Stuttgart, 1995) 59 quoted by Crofts, above n. 51.
54 Ibid. at 60.
55 H. Angenent and A. de Man, *Background Factors of Juvenile Delinquency* (Lang: New York, 1996) 179.

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

The majority of children who come into contact with the criminal justice system are characterised by poverty.[61] Crowley's study of persistent child offenders found that:

> experience of poverty, deprivation, abuse and neglect were . . . commonplace, as were family disruption and violence.[62]

Two separate studies have shown that social and environmental influences can even in extremely rare cases, lead young people to kill.[63]

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

56 Graham and Bowling, above n. 44 at 23; see also Utting, Bright and Henricson, above n. 44.
57 West and Farrington, above n. 44.
58 S. Bailey, 'Adolescents who Murder—A Critical Comment on Key Provisions relating to Children in the Crime and Disorder Act 1998' (1996) 19 *Journal of Adolescence* 19. See also G. Boswell, *Young and Dangerous—the Background and Careers of Section 53 Offenders* (Avebury: Aldershot, 1996); D. M. Fergusson, J. L. Horwood and M. T. Lynskey, *The Childhoods of Multiple Problem Adolescents: A 15 Year Longitudinal Study* (Christchurch Child Health and Development Study, 1992).
59 A. E. Kazdin, 'Adolescent Development, Mental Disorders and Decision Making of Delinquent Youths' in T. Grisso and R. Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press: Chicago, 2000) 49.
60 G. Pettit, J. Polaha and J. Mize, 'Perceptual and Attributional Processes in Aggression and Conduct Problems' in J. Hill and B. Maughan (eds), *Conduct Disorders in Childhood and Adolescence* (Cambridge University Press: Cambridge, 2001) 304.
61 D. P. Farrington, 'Human Development and Criminal Careers' in M. Maguire, R. Morgan and R. Reiner (eds), *Oxford Handbook of Criminology* (Oxford University Press: Oxford, 2002).
62 A. Crowley, *A Criminal Waste: A Study of Child Offenders Eligible for Secure Training Orders* (The Children's Society: London, 1998) quoted by L. Gelsthorpe, 'Much Ado about Nothing' (1999) 11 CFLQ 209 at footnote 64.
63 Bailey, above n. 58; Boswell, above n. 58.
64 J. Rawls, *A Theory of Justice* (Clarendon Press: Oxford, 1972) 310.

to ignore circumstances which explain the context for a given act,[65] to do so with regard to the conduct of young children risks ignoring the very essence of what has occurred and as a result is unjust and unjustifiable. The 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 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 to simply ignore the social reality.

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

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

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

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

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

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

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

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

A New Defence for Children Aged Between 10 and 14

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

At a certain point the child must make the transition from an individual who is within the control and remit of his or her carers and an autonomous individual responsible for his or her own conduct. This transition takes place progressively and depends on their personal circumstances and their personal development. However, in law, consistency and clear rules are important, which could not be provided by the flexible *doli incapax* rule. It is impossible to identify fixed ages at which children reach certain levels of development. Attempts have been made to identify the stages through which children develop,[71] but these have subsequently been criticised as over-simplistic and not taking into account adequately the individual differences in the way children develop.[72] It is undesireable to have a flexible age limit as was provided for by the defence of *doli incapax*, because the concepts that ground the defence are almost impossible to measure accurately: social background and intellectual competence. The *doli incapax* defence was ultimately socio-culturally dependent, relying on concepts which were neither measurable nor predictable. The resulting risk that judges might exercise their discretion in a discriminatory way was highlighted by the United Nations Human Rights Committee.[73]

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

69 J. Horder, 'Between Provocation and Diminished Responsibility' (1999) *King's College Law Journal* 143 at 144.
70 Sexual Offences Act 2003, s. 74.
71 L. Kohlberg, 'Development of Moral Character and Moral Ideology' in M. Hoffman and L. Hoffman (eds), *Review of Child Development Research*, vol. 1 (Russell Sage Foundation: New York, 1964); J. Piaget, *The Moral Judgement of the Child* (Harcourt: New York, 1932); E. Erikson, *Childhood and Society* (Penguin: Harmondsworth, 1950) 239.
72 Rutter and Rutter, above n. 30 at 1.
73 The Committee viewed the defence of *doli incapax* in Sri Lanka as a matter of profound concern: CCPR/ C/79/Add.56, 27 July 1995.

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

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

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

The Law Commission's recommendations on reforming the homicide offences reflect anxieties that the current law is unduly harsh on young offenders, but it proposed only a partial defence to the most serious offence of murder and its availability would be focused on 'developmental immaturity' which would be drawn within the defence of diminished responsibility.[77] The Law Commission has explained that this defence would be available if defendants could prove that the

74 Home Office, above n. 17.
75 Ibid. at para. 13.
76 *CPS* v *P* [2007] EWHC 946 (Admin).
77 Law Commission, above n. 38 at paras 5.125–5.137.

defendant's capacity for judgement, control or understanding was substantially impaired by developmental immaturity.[78] Various objections can be made to this proposal. It provides no solace to young people who misbehave with less serious consequences. It ties youth with a defence which is generally associated with mental ill health. It suggests that young people who benefit from this defence are abnormal in their 'developmental immaturity' whereas actually they are typical of young children; it is the consequences of their action which is abnormal. The criteria of maturity or immaturity is as subjective as moral awareness and therefore avoids none of the problems associated with *doli incapax*. Ultimately, the Law Commission needs to go back to the roots of why children should be treated differently from adults; it is allowing this defence by purely focusing on one justification for not criminalising children—their lack of intellectual capacity—while unreasonably ignoring the second—their lack of individual autonomy and free will. Children are not fully independent of their adult carers and the availability of a defence for children should acknowledge this. Interestingly, when looking for developmental immaturity the Law Commission suggests that the court could take into account 'social and environmental influences',[79] but the primary focus is still too narrow, ignoring the issue of autonomy and free will. A search for 'developmental immaturity' or 'moral awareness' for *doli incapax* is a red herring which distracts the courts from the crucial issue that the child defendant not only lacked capacity, but also lacked autonomy at the time of the offending behaviour to justify criminal liability.

Civil justice over criminal justice

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

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

While such arguments may be well meaning, they are ultimately misleading.[82] The UK has a child welfare system which can caters for children without them being criminalised beforehand. In practice, the youth justice system clearly does punish children including detaining them away from their parents against their will, even if basic opportunities for education and reform are offered at the same time. Following the Criminal Justice and Public Order Act 1994 children aged 10 can be

78 Ibid. at para. 5.131.
79 Ibid. at para. 5.132.
80 G. Williams, 'The Criminal Responsibility of Children' [1954] Crim LR 493.
81 Ibid. at 496.
82 G. Van Bueren, 'Child-Oriented Justice—An International Challenge for Europe' (1992) 6 *International Journal of Law and the Family* 381 at 381–2; P. Cavadino 'Goodbye doli, must we leave you?' (1997) 9 CFLQ 165.

given long-term sentences of detention for serious offences. The United Nations' Committee on the Rights of the Child criticised the UK for 'high and increasing numbers of children being held in custody at earlier ages for lesser offences and for longer custodial sentences'.[83] In January 2007 2,364 children under 18 were being held in youth offender institutions[84] which only have very limited facilities for education and rehabilitation. While the Youth Justice Board set a target of 30 hours per week of education and training for young people being held in custody, no juvenile establishment has succeeded in meeting this target.[85] Thus at the moment children in custody do not have the same access to education and special needs provision which are enjoyed by children outside custody.

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

> . . . the Government revisit the idea of completely separating the organisation responsible for the custody of offenders under the age of 18 from the Prison Service. These young people should be looked after by a group of people whose outlook is firmly grounded in a culture of respect of children's human rights, devoted to rehabilitation and care.[87]

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

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

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

83 Concluding Observations of the UN Committee on the Rights of the Child: United Kingdom of Great Britain & Northern Ireland (2002) 15, para. 57.
84 UK Government, *The Consolidated 3rd and 4th Periodic Report to UN Committee on the Rights of the Child* (Department for Children, Schools and Families: Nottingham, 2002) para. 8.76.
85 European Committee of Social Rights, above n. 14.
86 House of Lords/House of Commons Joint Committee on Human Rights, UN Convention on the Rights of the Child, 10th Report of Session 2002/03, para. 12, available at *http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/117/11704.htm*, accessed 7 June 2011.
87 Ibid. at para. 65.
88 S. Field, 'Early Intervention and the "New" Youth Justice: A Study of Initial Decision-making' [2008] Crim LR 177.
89 Ibid. at 185.

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

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

In 1960, the Ingleby Committee observed:

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

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

In 2007, Smith LJ[93] recognised that in some cases civil proceedings under the Children Act 1989 would be more appropriate than criminal proceedings. In *DPP* v *R*,[94] Hughes LJ commented in the High Court that:

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

90 Royal College of Psychiatrists, above n. 28 at 57.
91 Ibid. at 9.
92 *Report of the Committee on Children and Young Persons* (Ingleby Committee), Cm 1191 (1960) para. 60.
93 *R* v *W* [2007] EWCA Crim 1251, [2007] 2 Cr App R 31 at [33], [35] and [51].
94 [2007] EWHC 1842 (Admin).

> inter-disciplinary action and co-operation between those who are experienced in dealing with children of this age and handicap.[95]

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

That is not to say that children should not receive punishment for their misbehaviour—children are often punished without recourse to the criminal courts and this will continue to be the case, but the punishment will be proportionate to the personal responsibility of the child which will inevitably be restricted because of his or her limited capacity and personal autonomy. Instead the genuine emphasis of the civil system will be on education and welfare without the distractions of punishment which take priority in a criminal justice system. But experience both in the UK and abroad suggests that we must be careful in any transition from criminal proceedings to civil proceedings to avoid children having the disadvantages of a civil solution (the burden of proof only being on the balance of probabilities and the more lenient procedural approach) combined with the disadvantages of a punishment in the guise of a supposedly educational or welfare solution. Don Cipriani has commented that administrative proceedings 'too frequently result in the imposition of forms of deprivation of liberty in the guise of educational or protective measures, often for lengthy periods that may be neither pre-determined nor properly monitored and reviewed'.[97]

By going down the route of criminal responsibility, society is placing the blame for the wrongdoing firmly at the feet of the child, whereas the evidence suggests that the causes of such wrongdoing are actually the product of the child's social environment. Once this is accepted, the justification for criminal responsibility fades away leaving the uncomfortable reality that we can no longer neatly blame one individual for the wrongdoing that has occurred, but we have to accept a shared responsibility for it. The remedy is not to seek to punish that one individual child, but to look at the social environment in which he or she has been placed and see what changes need to be made to avoid future wrongdoing. When the wrong done is as serious as the murder of a child, such as James Bulger, this is a particularly painful lesson to accept, but the inclination to turn into a lynch mob against the children who were the direct perpetrators of the wrongful conduct must be avoided in a civilised society.

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

95 [2007] EWHC 1842 (Admin) at [37].
96 For an alternative view, see G Williams, 'The Criminal Responsibility of Children' [1954] Crim LR 493.
97 Cipriani, above n. 13 at x.

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

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

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

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

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

99 Gelsthorpe, above n. 62.

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

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

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

Conclusion

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

102 P. Greenwood, *Changing Lives: Delinquency Prevention as Crime Control Policy* (University of Chicago Press: Chicago, 2005).
103 UK Government, above n. 84 at para. 8.109.
104 R. Allen, *From Punishment to Problem-Solving: A New Approach to Children in Trouble* (Centre for Crime and Justice Studies: London, 2006). See also Commission on Families and the Well-being of Children, *Families and the State: An Inquiry into the Relationship between the State and the Family* (Family and Parenting Institute: London, 2005).