

# Age and Criminal Responsibility

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*Age is a relatively unexplored topic in the theoretical literature on criminal responsibility. The first part of this paper examines a project on the age of criminal responsibility conducted by the Scottish Law Commission, the official law reform body for the law in Scotland. A key finding of that project was that legal systems tend to use two distinct senses of age of criminal responsibility. One concerns the capacity of a child to commit a crime; the other relates to exemption of a child from the “full” or adult system of prosecution and punishment. The Commission recommended that for Scots law, emphasis should be given to the age of criminal responsibility in this second sense.*

*The second part of the paper explores issues about the age of criminal responsibility at a more theoretical level. It argues that the more coherent theoretical accounts of the concept are at the level of criminal process rather than as capacity or attribution. This is certainly true of cases where age prevents a child from participating in a criminal trial. Furthermore, there are difficulties in conceptualizing the age of criminal responsibility simply in terms of the capacity or incapacity of a child to act with the appropriate mens rea for an offense. Problems also attend theories that consider children as not being the sort of persons to whom the norms of the criminal justice system are addressed. These theories tend to use an analogy between children and the mentally disordered, but this analogy is inaccurate. Instead, it is argued, children below the age of criminal responsibility have, at the least, a degree of responsibility for their criminal actings. Not holding children as criminally responsible is to some extent contrary to fact and is concerned with ensuring that children who commit crimes are exposed to the special social goals of juvenile justice systems.*

Does the fact that someone is a certain age affect his or her responsibility for criminal conduct and liability to punishment? If we look at the provisions of most legal systems, then the clear answer is “Yes,” for the vast majority of systems have rules on the “age of criminal responsibility.” I will examine some of these rules later, but what is important to note at this stage is that there is a considerable variety of types of such rules.

There is a second question about age and criminal responsibility: Does the idea of age give rise to any interesting philosophical issues relating to the *concept* of criminal responsibility? If we consult the theoretical literature on criminal responsibility, it would appear that age is a topic that involves, at the most, only

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slender philosophical interest. The focus is on other matters: on what mental elements (knowledge, intention, foresight) should the judgment that a person is responsible for some act be founded? When is criminal conduct to be excused or held to be justified? And so on. Where age is mentioned it is often just as a marginal note to the difficult question of the criminal responsibility of persons with a mental illness or disorder.<sup>1</sup> The mentally ill (and the normal adult) are the hard cases, whereas children are the easy cases that do not pose the same level of difficulty or interest.

In this paper I will explain a recent law reform project that involved the rules on the age of criminal responsibility in Scots law.<sup>2</sup> This project suggests that the idea of the age of criminal responsibility is not as straightforward as might first be thought. Then I will consider what theoretical issues are involved in the relationship between age and criminal responsibility.

## I.

If age is a neglected topic in the theory of criminal responsibility, then I am as guilty (if I can use that term here) of that neglect as anyone else. For years as an academic lawyer I taught classes on “Criminal Responsibility,” but I cannot recollect ever specifically examining the relationship between age and criminal responsibility. Indeed my first real encounter with this topic came in the quite different setting of law reform. Recently the Scottish Law Commission was asked to consider the rules of Scots law relating to age of criminal responsibility with a view towards proposing measures of reform.<sup>3</sup> During the course of the project we realized that in the context of age there were two contrasting senses of criminal responsibility. The first sense concerned the *capacity* of a person to engage in criminal conduct. The second related to the *process* whereby a person was held answerable for such conduct. The distinction between responsibility as capacity and as answerability was important for the more pragmatic outcomes of our project. But it also gave us an insight into deeper conceptual issues, which I wish to explore further in this paper.

Yet when we started our project, our thoughts were focused on questions of a more down-to-earth variety. What most people thought we would be examining, as initially we did ourselves, was the following rule of Scots law: “It shall be

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<sup>1</sup> For example, H.L.A. Hart’s highly influential book PUNISHMENT AND RESPONSIBILITY (1968) mentions age of criminal responsibility only in passing, on pages 184 and 229.

<sup>2</sup> SCOTTISH LAW COMM’N, DISCUSSION PAPER NO. 115, AGE OF CRIMINAL RESPONSIBILITY (2001), available at [http://www.scotlawcom.gov.uk/downloads/dp115\\_criminal\\_response.pdf](http://www.scotlawcom.gov.uk/downloads/dp115_criminal_response.pdf) [hereinafter DISCUSSION PAPER]; SCOTTISH LAW COMM’N, REPORT NO. 185, AGE OF CRIMINAL RESPONSIBILITY (2002), available at <http://www.scotlawcom.gov.uk/downloads/rep185.pdf>.

<sup>3</sup> The Scottish Law Commission is a public but independent body whose function is to keep the law of Scotland under review and to make recommendations for reform of the law where appropriate. The Commission was set up in 1965 under the Law Commissions Act 1965. Fuller details of its work can be obtained from its website, *supra* note 2.

conclusively presumed that no child under the age of eight years can be guilty of an offense.”<sup>4</sup>

This rule was surely the correct object of our scrutiny. The statute itself gave the rule the title “Age of Criminal Responsibility.” So what were the options for reforming this rule? The initial reaction was to consider the rationale for any rule that stated that a child of a certain age could not be regarded as criminally responsible. There is an intuitive feeling that somehow children do not deserve punishment, at least in any sense of criminal punishment, in the same way as adults. After all, they are only children and do not have the same level of development of their mental and intellectual capacities as adults. Although this intuition would need some teasing out, it would not be too difficult to present an argument that it would be *unfair* to subject young children to criminal punishment. Indeed this has been the approach taken in Scots criminal law since it first became a developed system in the work of the jurist David Hume.<sup>5</sup> Hume, like Blackstone in England, stated the rules on children in terms of the different ages at which capital punishment could justifiably be inflicted. The writer Archibald Alison summarized the rules of Scots law in the following way:

- (1) Minors, whether male or female, who have attained the age of fourteen years, are liable to any punishment, not excepting death itself, for grave offenses.
- (2) Pupils, though below fourteen years of age, nay though only nine, ten, or eleven years of age, may be subjected to an arbitrary punishment, if they appear qualified to distinguish right from wrong, but not to the pain of death.
- (3) Children under *seven* years of age are held to be incapable of crime, and not the object of any punishment.<sup>6</sup>

Accordingly, for our immediate task of law reform, the issues seemed relatively straightforward. At some age the stage of a child’s moral and intellectual development would be reached, such that at and above that age the child could be treated as a responsible agent (for purposes of the criminal law), and below that age the child could not be so treated. The question then became one of determining that age, and as the issue seemed to involve child development, the answer would be discovered by consulting the works of child psychologists.

Note that if we had been considering the criminal responsibility of the mentally disordered, one option which we would have had to examine would have

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<sup>4</sup> Criminal Procedure Act, 1995, c. 46, § 41 (Scot.).

<sup>5</sup> 1 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND, RESPECTING CRIME 30–35 (2d ed., Edinburgh, Bell & Bradfretre 1819). David Hume, who was a distinguished professor of law at Edinburgh University, was a nephew of the famous philosopher of the same name.

<sup>6</sup> ARCHIBALD ALISON, PRINCIPLES OF THE CRIMINAL LAW OF SCOTLAND 663–67 (Edinburgh, Blackwood 1832).

been abolition of the defense. But there seems to be no argument advanced for abolishing the rules on the age of criminal responsibility. There has to be a rule and the question is: What is the appropriate age? Since 1932 the age in Scots law has been eight years. At first sight this age seems low. However, it might be thought that children are developing at a quicker rate than previously. Today children eight years of age have a greater understanding of the world (certainly of technology) than the seven-year-old children in the eighteenth and nineteenth centuries (when the rule in Scots law developed). This might then suggest that there could be a case for *lowering* the age in the Scottish rule from eight to a younger age.

As it turned out, the law reform project developed along quite different lines. In the first place, we noted that the context for the Scottish Law Commission's consideration of this issue was a proposal that the age of criminal responsibility should be *raised* (possibly to twelve or even eighteen). Secondly, when we widened our research we noticed two remarkable facts. The first was the very wide range of ages which different systems fixed as their age of criminal responsibility.<sup>7</sup> The ages ranged from seven to eighteen. There seemed to be no obvious pattern to this distribution (though we noted that Sweden, Finland, Denmark and Norway all fix the age at fifteen).<sup>8</sup> In the Netherlands the age is twelve, in Belgium eighteen. In Canada the age is twelve, whereas in most of the states of the USA the age is either sixteen or eighteen. If an age of criminal responsibility was a matter of applying developmental psychology, then even allowing for cross-cultural differences, why was there such disparity in the ages adopted?

The other important discovery was that even within Scots law, age played a more complex role in the criminal justice system than the rule in section 41 quoted earlier. For example, where a child under sixteen years of age appears in the sheriff court in less serious types of cases, the procedure is different from that used for adults. Similarly a court cannot impose a sentence of imprisonment on a person between the ages of sixteen and twenty-one unless it is of the opinion that no other method of dealing with him is appropriate.

Perhaps the most significant rule about age in Scots criminal law was to be found in the next section of the same statute which contains the rule on age of criminal responsibility. This section, which is headed "Prosecution of Children," reads as follows: "No child under the age of 16 years shall be prosecuted for any offense except on the instructions of the Lord Advocate."<sup>9</sup> (The Lord Advocate is head of the system of criminal prosecution in Scotland).

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<sup>7</sup> DISCUSSION PAPER, *supra* note 2, at Appendix D. These data were derived from the LAW REFORM COMM'N OF HONG KONG, REPORT ON THE AGE OF CRIMINAL RESPONSIBILITY IN HONG KONG (2000).

<sup>8</sup> Curiously, we could not find any legal system that uses the ages of eleven or seventeen.

<sup>9</sup> Criminal Procedure Act, 1995, c. 46, § 42 (Scot.).

This rule was introduced in 1971 as part of a new system of children's hearings. This system is not part of the criminal justice system, and is not to be equated with the special juvenile justice systems found elsewhere. Instead, the hearings, which are essentially welfare-based, deal with children under sixteen years of age who are in need of compulsory measures of care. One of the grounds for referring a child to a hearing is that the child "has committed an offense," and in practice this is the most commonly used ground. The expert Committee (the Kilbrandon Committee) that proposed this new method of dealing with children-in-need recommended that in principle, no child under sixteen years of age who committed an offense should be prosecuted in the criminal courts.<sup>10</sup> The Committee did accept that some provision for the criminal prosecution of children should be retained, but insisted that it should be used only in the most exceptional cases and only for grave reasons of public policy. The result was the rule now found in section 42. The effect of the rule is that the prosecution of children in the Scottish criminal courts is very rare indeed. From the statistics available to the Scottish Law Commission, we calculated that in a typical year over ninety-nine percent of children who were alleged to have committed a criminal offense were dealt with in the hearings system and only about 0.5% were prosecuted in the criminal courts.<sup>11</sup>

We drew several conclusions from our research. The most significant concerned the ways in which age can interact with the different senses of criminal responsibility, responsibility as capacity and as answerability, alluded to earlier. There were two different ways in which a legal system could deal with "age of criminal responsibility." In the first sense this is the age below which a child is deemed to lack the capacity to commit a crime. By contrast another sense of age of criminal responsibility is the point at which the age of a suspect or offender has no relevance for his treatment or disposal as part of the criminal justice system, most typically the age at which an accused person becomes subject to the full, or "adult," system of prosecution and punishment.<sup>12</sup>

We noted that Scots law had rules on age of criminal responsibility in both senses. The rule on capacity appeared earlier than that on non-prosecution. We also argued that the historical reasons for adopting a rule on the age of criminal

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<sup>10</sup> COMMITTEE ON CHILDREN AND YOUNG PERSONS SCOTLAND, REPORT OF THE COMMITTEE ON CHILDREN AND YOUNG PERSONS, SCOTLAND, 1964 Cmnd 2306 [hereinafter THE KILBRANDON REPORT].

<sup>11</sup> After the publication of our final report in 2002, we were told, on an informal basis, by the Crown Office (the public prosecution service in Scotland) that our statistics *overstated* the number of child prosecution cases.

<sup>12</sup> The Ingleby Committee which examined age of criminal responsibility in English law had earlier made this point: "In many countries the 'age of criminal responsibility' is used to signify the age at which a person becomes liable to the 'ordinary' or 'full' penalties of the law. In this sense, the age of criminal responsibility in England is difficult to state: it is certainly much higher than 8." COMMITTEE ON CHILDREN AND YOUNG PERSONS, REPORT OF THE COMMITTEE ON CHILDREN AND YOUNG PERSONS, 1960, Cmnd 1191, para 79.

responsibility tended to reflect concern about the *punishment* (especially capital punishment) of very young children. However, we took the view that part of this concern could be explained in terms of the impropriety of the *processes* used against children in determining their liability for punishment. Certainly a process-based rule on age became an explicit part of Scots law in 1971 as a key element in the introduction of the welfare system of children's hearings. Our overall conclusion was that, given the existence of the process sense of the age of criminal responsibility (i.e., the rule on immunity from prosecution), there was no need to retain the rule on age in the capacity sense. The two rules did effectively the same job. Applying the principle of Ockham's razor we proposed that the section 41 rule should be repealed, and that section 42 should remain as the Scottish rule on age of criminal responsibility.

It may be noted that our initial proposal was that section 42 should be left as it is, that is as providing a (qualified) immunity from prosecution to children under the age of sixteen.<sup>13</sup> In our final report we modified this proposal by recommending that for children under the age of twelve the immunity from prosecution should be absolute. At first we considered that no change was needed to the law, as it was virtually impossible to imagine circumstances in which a child under twelve would be prosecuted.<sup>14</sup> However, we were persuaded to change our approach by several of our consultees who argued that rules on age and criminal responsibility express important social values. Allowing for the possibility, even if remote in practice, that a child under twelve years of age could be prosecuted sent out a wholly inappropriate message about both the criminal justice and the children's hearings systems.

So, in a manner of speaking, we were proposing that the age of criminal responsibility should be abolished. This may seem radical, but it was not the first time this particular reform was proposed. Although the work of the Kilbrandon Committee (which led to the introduction of the children's hearing system) has been much studied, and usually admired, one matter that received virtually no critical attention is what the Committee said about the age of criminal responsibility.

The Kilbrandon Committee identified what it saw as a major flaw in the existing juvenile court system. Juvenile courts were concerned with the welfare of the child as an important consideration. Yet at the same time, these courts were part of the wider criminal justice system, which embodied the traditional "crime-

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<sup>13</sup> It should be noted that our terms of reference did not permit us to consider whether the hearings system (and hence the rule on immunity from prosecution) should apply to persons sixteen years of age or older.

<sup>14</sup> In addition to the need to adhere with the ethos of the children's hearings system, there were also the requirements of the European Convention on Human Rights. The European Court of Human Rights has held that where a child is to be prosecuted in the criminal courts the procedure must be adapted to enable the child to participate effectively in the proceedings. *V v. United Kingdom* (2000) 30 Eur. H.R. Rep. 121. In Scotland, this requirement was widely understood to mean that in practice a child under twelve could not be prosecuted.

responsibility-punishment” concept rather than proceeding on preventive and educational principles. The Committee’s solution was to separate the distinct issues of (i) has a child committed an offense?, and (ii) what are the appropriate measures for dealing with a child who offends? The second issue was to be removed from the courts (and not just the criminal courts) altogether and given to a new specialized agency whose sole function was “the consideration and application of training measures appropriate to the child’s needs.”<sup>15</sup>

If the vast majority of offenders under the age of sixteen were to be subject to the new agencies rather than to criminal prosecution, what should happen to the age of criminal responsibility (in the sense of the age below which a child cannot be convicted of an offense)? The Kilbrandon Committee argued that the rule is not based on any empirical data concerning children’s understanding. They traced the historical development of the rule to a concern with not exposing very young children to criminal punishment. The Committee concluded:

The legal presumption by which no child under the age of 8 can be subjected to criminal proceedings is not therefore a reflection of any observable fact, but simply an expression of public policy to the effect that in no circumstances should a child under the age of 8 be made the subject of criminal proceedings and thus liable to the pains of the law. Equally, at various intermediate stages prior to adulthood, the effect of statute law is to exempt juveniles below certain ages from certain forms of judicial action . . . . It is clear, therefore, that the “age of criminal responsibility” is largely a meaningless term, and that in so far as the law refers to age of 8 as being the minimum age for prosecution, this is essentially the expression of a practical working rule determining the cases in which a procedure which may result in punishment can be applied to juveniles.<sup>16</sup>

The Committee argued that the original basis for the rule, the harshness of criminal punishment as applied to young offenders, had already disappeared. It accepted that there might be cases where children even younger than eight years of age should be subject to criminal proceedings,<sup>17</sup> but considered that the question of more practical importance was whether children of eight and older should be better dealt with by some form of non-criminal procedure. The Committee therefore

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<sup>15</sup> THE KILBRANDON REPORT, *supra* note 10, at para. 73.

<sup>16</sup> *Id.* at para. 65.

<sup>17</sup> “It is, of course, arguable on the basis of observable fact that children under the age of 8 do sometimes commit acts amounting in law to criminal offenses, and do so in the knowledge that they are doing wrong. There may well be occasions, e.g., where they are acting in concert with slightly older children, in which it would be equally appropriate that even at that early age that they should be the subject of action under criminal, as distinct from ‘care and protection,’ procedure. Such cases would on any criterion be likely to be rare.” *Id.* at para. 67.

recommended that “any rule of law or statutory provision establishing a minimum age of criminal responsibility should be repealed.”

At the Scottish Law Commission we should perhaps have paid closer attention to what happened to this particular recommendation of the Kilbrandon Committee. It was never implemented into law nor was there any official explanation for the refusal to implement it. It can, however, be guessed<sup>18</sup> that if there were going to be difficulties in “selling” to the general public a radical approach to dealing with youth crime in a general sense, then those difficulties would be exacerbated by a new statutory provision, which could so easily be misinterpreted, that children under sixteen years of age would no longer have criminal responsibility.<sup>19</sup>

Certainly our own proposal for abolishing the age of criminal responsibility (in its capacity sense) has not been implemented by statute. It has also been subject to academic criticism. An influential group of criminal law academics have recently produced a draft criminal code for Scotland, one of whose provisions is as follows: “A person is not guilty of an offense by reason of anything done when the person is or was a child under twelve years of age.”<sup>20</sup> The group argues against the Law Commission’s approach on the basis that children under twelve years of age are too young to be held guilty of a criminal offense. They see the issue as “a matter of criminal responsibility rather than just a matter of temporary protection from prosecution.”<sup>21</sup> On this approach the Scottish Law Commission has misunderstood what the concept of criminal responsibility means.

## II.

In this part of my paper I want to explore issues about age of criminal responsibility at a much more theoretical level than was possible, or appropriate, in the Scottish Law Commission project. The main theme of these theoretical comments is precisely the point with which I finished the first part, namely what *is* criminal responsibility? I deal with a number of points, some only in a very tentative way.

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<sup>18</sup> This is to some extent informed guesswork. See D.J. COWPERTHWAIT, *THE EMERGENCE OF THE SCOTTISH CHILDREN’S HEARINGS SYSTEM* 39 (1988) (Cowperthwaite was a senior civil servant in the government department that was responsible for implementing the recommendations of the Kilbrandon Committee.).

<sup>19</sup> Some astute commentators at the time did note that the hearings system by its very nature did change the rule on age of criminal responsibility. See, e.g., J.V.M. Shields, *Report of the Committee on Children and Young Persons, Scotland*, 9 *JURID. REV.* 180, 185 (1964): “The most important point made in the recommendations made by the Kilbrandon Committee is, if the proposals contained in the Report are adopted, that the age of criminal responsibility is in effect being raised to sixteen.”

<sup>20</sup> ERIC CLIVE ET AL., *A DRAFT CRIMINAL CODE FOR SCOTLAND WITH COMMENTARY* (2003). The discussion of children is at section fifteen of the draft code.

<sup>21</sup> *Id.* at 42.

A. *Is Not Prosecuting Children Because of Their Age Connected with the Idea of Criminal Responsibility?*

I want to begin by presenting a general plan or map of the criminal justice system (as that is perceived as a set of rules or norms rather than a set of actual practices). The criminal justice system can be broken down into four component parts:

- (1) *The substantive criminal law (law of crimes)*. This is concerned with the type of activity or conduct which is and should be given the label of wrongful or illegal in the special sense of "criminal."
- (2) *Criminal responsibility*. Without begging too many questions, criminal responsibility is concerned with the criteria for attributing to a person who has been found to have engaged in criminal conduct liability to receive some sanction for it. Most typically the attribution is based either on some mental element of the accused in the act itself, or on a more general capacity to engage in criminal conduct.
- (3) *The criminal process*. This deals with the methods and procedures used to determine whether the rules of criminal law have been breached, and to identify the person or persons who can be held guilty of having committed the acts in question.
- (4) *Punishment (sentencing)*. In one sense the criminal justice system ends with the punishment of the guilty accused. There is of course a large literature on punishment, and the issues are familiar even if still difficult to answer. Why punish at all? What types of punishment are appropriate for all, or some, or no types of case? If a particular type of punishment is to be used, how much of it should be used in an individual case?

Most philosophical attention has focused on the punishment part of the criminal justice system. There are good reasons for this. To the extent that punishment involves the deliberate infliction of something unpleasant on someone (and most definitions of punishment would accept this), usually in the name of, or on behalf of, society in general, then punishment, both as a general system and in any particular case, clearly calls for justification. However, as punishment is part of a wider criminal justice system, a full theory or justification of punishment has to show how punishment fits in, or interacts, with the other parts of the system. Accordingly, we can say that a punishment is justified only if:

- (1) the offense of which the accused is guilty relates to conduct which is properly treated as criminally wrong (so that a punishment for breaking a law promoting racial segregation would not be justified);

- (2) the offender is properly held to be “responsible” for his criminal conduct (so we should not punish people who lacked *mens rea* for an offense or who are mentally disordered);
- (3) the criminal process has been properly applied in the determination of the guilt of the accused (so that a punishment of a person whose guilt was proved by fabricated evidence would lack justification); and
- (4) the type and amount of punishment inflicted is appropriate (such that capital punishment is wrong, as is imprisonment for minor offenses).

Most attention has hitherto been on the relationship between level (4) and level (2) (punishment and responsibility). There are also important and difficult issues concerning the connection between levels (4) and (3) (punishment and criminal process). These issues have only recently gained theoretical focus,<sup>22</sup> and at least for common law systems, there is still to be developed a general theory of the criminal process. But where are we to assign rules about age of criminal responsibility? Much here depends on the type of rule in question. Earlier I said that in Scots law we have (at least) two different rules on age of criminal responsibility: one says that a child under the age of eight cannot be guilty of an offense; the other that no child under sixteen years of age can be prosecuted in the criminal courts. At the Scottish Law Commission, we proposed that the first rule should be abolished, as it adds nothing to the second rule. The question here is whether we really are proposing the abolition of age of criminal responsibility in Scots law. To put the point in another way: is the second rule (about immunity from prosecution) a rule about criminal *responsibility* as opposed to one of the criminal *process*?

My answer is that the rule can properly be classified as a rule of criminal responsibility. I am not arguing that all instances of immunity from prosecution have to do with criminal responsibility (e.g., where prosecution has become time-barred). However, there is a sense in which the immunity granted to children has to do with their incapacity to *answer for* their criminal conduct. Hart once pointed out that, at least on the basis of the etymology of the word “responsible” in the English language, there is a connection between this sense of answering and traditional concepts of criminal responsibility:

The original meaning of the word “answer” . . . was not that of answering questions, but that of answering or rebutting accusations or charges, which, if established, carried liability to punishment or blame or other adverse treatment . . . . There is, therefore, a very direct connection between the notion of answering in this sense and liability-responsibility, which I take to be the primary sense of responsibility: a person who fails

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<sup>22</sup> See, e.g., R.A. DUFF, TRIALS AND PUNISHMENT 99–142 (1986); ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY (2d ed. 1998).

to rebut a charge is liable to punishment or blame for what he has done, and a person who is liable to punishment or blame has had a charge to rebut and failed to rebut it.<sup>23</sup>

B. *Is a Capacity Rule on Age Related to Problems of (Proving) Mens Rea?*

Whatever the rights and wrongs of the Scottish Law Commission's views on appropriate rules on the age of criminal responsibility (and most people seem to think we are wrong), there is undoubtedly a concept of age of criminal responsibility that focuses on the more traditional sense, which Hart referred to in the passage quoted above.

The rule in Scots law, it will be recalled, is that it "shall be conclusively presumed that no child under the age of eight years can be guilty of an offense." Why have an age rule of this type? Two quite different bases can be suggested. The first is to do with the connection between age and *mens rea*; the second, which I consider in the next section, is concerned with the nature of children as persons. First of all then, let us consider the view that children below a certain age lack the capacity to form the mental element required to commit a crime. If there is no *mens rea*, then there cannot be a criminal act for which the child can be held responsible. On this basis, the rule is correctly in the form of a legal presumption because it embodies a generally correct empirical basis in respect of the age specified in the rule. This approach to the rule has been adopted by the courts in Scotland. One of the grounds for referring a child to the welfare children's hearing system is that the child "has committed an offense." In one case, the court held that as a child under eight was deemed to lack *mens rea*, she could not commit a crime, and therefore this ground of referral to a children's hearing could not apply to any child under the age of eight!<sup>24</sup> So the paradox was propounded that a child aged eight who committed a crime was in need of welfare measures, whereas one of the age of seven years and eleven months was not.

But there are problems in conceptualizing a rule on age of criminal responsibility in terms of presumptive lack of criminal capacity in the sense of forming *mens rea*. During our project I (semi-jokingly) asked my colleagues why we should not propose a new rule on an *upper* age of criminal responsibility. The argument went something like this. We might discover empirical evidence that people of a certain age are liable to suffer from various forms of mental incapacity. If that were the case, then should we not introduce a rule that it shall be conclusively presumed that no person over the age of eighty shall be guilty of any offense? We would not get far with this sort of argument, not because the

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<sup>23</sup> HART, *supra* note 1, at 265.

<sup>24</sup> *Merrin v. S.*, 1987 S. L. T. 193 (Court of Session). The Scottish Law Commission recommended that this interpretation should be changed. We proposed that a child who commits an act in breach of the criminal law could be referred to a hearing on that ground, even if the child could not be found guilty of the offense or could not be prosecuted for it.

empirical evidence might be lacking, but because it does not seem relevant or appropriate. (There are of course all sorts of problems about prosecuting older people, especially in legal systems where there are no statutes of limitation for crime. Certainly in the UK, there has been a recent rise in the number of prosecutions for crimes involving abuse of children said to have taken place decades ago, with the consequence that the victims are now themselves middle-aged and the alleged perpetrators are in their seventies or eighties. These are, however, problems in the criminal process rather than problems connected with criminal responsibility).

One justification for using presumptions is that they are time-saving devices in the law of evidence.<sup>25</sup> Presumptions embody generally accepted facts that do not require proof in the absence of evidence to the contrary. Yet the presumption contained in a provision like section 41 in Scots law does not at first sight look as if it embodies experience about children's ability to act intentionally, with foresight of consequences, etc, or in other words the ability to form the *mens rea* for any offense. Moreover, why should the rule be stated in the form of a *conclusive* presumption? Even if most children under eight could not act with the appropriate *mens rea*, why not allow the prosecution to prove otherwise in respect of a particular child who is being tried for an offense? Indeed proof of *mens rea* by the prosecution is required in all criminal trials. Why should a similar requirement not apply to an accused under the age of eight?

It may be noted that some legal systems (including until quite recently England) have rebuttable presumptions about the criminal capacity of children of certain ages (usually children between ten and fourteen, or twelve and sixteen). But again, it is not clear that the distinction between rebuttable and conclusive presumptions about the age of criminal responsibility has anything to do with findings from child psychology. The point is rather that *no* type of rule on age of criminal responsibility can be determined by evidence on the age of the typical moral development of children. Something else is involved, a point trenchantly made by Nigel Walker's comment on moves to raise the age of criminal responsibility in English law in the twentieth century: "Nor was it the result of research by psychologists into the moral development of children, although Piaget's work was well known in England by the 1960s. It simply reflected the increasing preference of penal reformers for non-punitive, welfare measures."<sup>26</sup>

A related problem arises from the Scottish Law Commission's proposals to abolish the capacity rule on age of criminal responsibility, but to retain an immunity-from-prosecution rule. The argument against our proposals is that we allow for the prosecution, and possible criminal conviction, of a person who is older than twelve at the time of the prosecution for something which he did when

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<sup>25</sup> Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931).

<sup>26</sup> Nigel Walker, *Childhood and Madness: History and Theory*, in PROVIDING JUSTICE FOR CHILDREN 19, 26 (Alison Morris & Henri Giller eds., 1983).

he was much younger (indeed when he was seven or younger). Now there are a number of pragmatic points which can be used to rebut this objection. In the first place, someone aged twelve or older has a right that a criminal prosecution and trial should be brought without undue delay.<sup>27</sup> Accordingly prosecuting authorities could not hold back the prosecution of a young person until she reached the age at which the immunity disappeared. Secondly, prosecuting someone age (say) seventeen for something she did when age seven would not remove the fundamental principle that the prosecution must prove the accused's guilt. Proof of guilt includes proof that at the time of the offense the accused had acted with the requisite *mens rea*. Indeed this point strongly suggests that rules about age of criminal responsibility are not based primarily on problems with *mens rea*. If it is the case that a particular child six years of age is unable to form the requisite *mens rea* for a particular offense, then a later prosecution of that child for that offense will be unsuccessful for that very reason. In some cases the Crown might be able to prove that an accused when she was six years old did a particular act with a particular state of mind, but in other cases such proof might not be possible. Rather the objection to the Commission's proposals must be based on a view that it is wrong *in principle* to attribute criminal guilt to a person below a certain age—the age of criminal responsibility—and that this is so no matter how long after the events in question the process that results in that attribution occurs. It is *this* concept of age of criminal responsibility that I consider next.

C. *Are Rules Relating to Age of Criminal Capacity Concerned with Attribution of Responsibility?*

Most writers on age of criminal responsibility do not view age of criminal responsibility as concerned chiefly (or at all) with problems of proof of *mens rea*. Instead they take the view that children are not to be held criminally responsible because children (of a certain age) are not persons to whom responsibility can be appropriately attributed. For example, Michael Moore writes that a theory of responsibility presupposes a concept of personhood.<sup>28</sup> Children, it is said, lack a capacity to engage in meaningful practical reasoning. A child might well do a particular act with full intention and knowledge of the immediate consequences of the act (in other words the child could form a *mens rea*).<sup>29</sup> However, a child simply as a child, whatever her particular stage of mental or intellectual

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<sup>27</sup> This is both a human right as well as one embodied in some systems of positive law. See, e.g., European Convention on Human Rights, Nov. 5, 1950, art. 6, 213 U.N.T.S. 222.

<sup>28</sup> MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 35 (1997).

<sup>29</sup> This is so, at least on one level of *mens rea*, where attention is focused on “mental events” of the actor at or about the time of the act. However some legal systems read in a moral, as opposed to a mere psychological or interpretative, dimension into *mens rea*. This was certainly true of Scots law in the eighteenth and early nineteenth centuries. See LINDSAY FARMER, *CRIMINAL LAW, TRADITION AND LEGAL ORDER* 132–34, 150–52 (1997).

development, is not the sort of person to whom the norms of the criminal justice system are addressed:

In addition to the capacity to form valid practical syllogisms consisting of beliefs and intentions-with-which, human beings must be able to initiate movement through choice (volition, will, simple intention) if they are to perform an action. Some form of this basic personal capacity must be added to rationality before there is a person eligible for responsibility, and a theory of responsibility must have a theory about the nature and extent of autonomy necessary for personhood.<sup>30</sup>

What is interesting is that Moore normally discusses infancy in the context of the responsibility of the mentally disordered. Infancy is the easy and obvious example of a type of status excuse for denying responsibility, in contrast to the more difficult and controversial case of the mentally disordered:

Thus it is easy to understand the historical tendency to analogize the mentally ill to infants and wild beasts. For we do not think of these beings as engaging in practical reasoning to the same extent as do normal, adult human beings. Only when an infant begins to act in ways explicable by his practical syllogisms, do we begin to see him as a moral agent who can justly be held responsible. The same is true of the mentally ill.<sup>31</sup>

It is worth noting that there is a long history of treating children and the “insane” as belonging to the same category for purposes of criminal responsibility.<sup>32</sup> Nonetheless I very much doubt if the assimilation is either accurate or is useful. Indeed, it could easily be misleading about the link between

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<sup>30</sup> MOORE, *supra* note 28, at 63.

<sup>31</sup> *Id.* at 609. Elsewhere Moore, discussing the types of persons who are not fit subjects of responsibility, states: “About the infancy defense this classification is relatively uncontroversial. For centuries Anglo-American criminal law has used general capacity tests to separate the non-responsible infant from the responsible adult.” *Id.* at 61.

<sup>32</sup> See Anthony Platt & Bernard L. Diamond, *The Origins of the “Right And Wrong” Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227 (1966). They refer to a book written in 1340 (DAN MICHEL, AYENBITE OF INWYT, OR REMORSE OF CONSCIENCE 86 (Richard Morris ed., Oxford Univ. Press 1965) (1340)) that contains the following passage: “[A]s St Augustine says: All men have freedom [of will] but it is restrained in children, in fools, and in the witless who do not have reason whereby they can choose the good from the evil.” In Scots law the assimilation of the defense of insanity and the plea of non-age can be traced back to HUME, *supra* note 5, at 37: “We may next attend to the case of those unfortunate persons, who have to plead the miserable defence of idiocy or insanity. Which condition, if it is not assumed or imperfect, but a genuine and thorough insanity, and is proved by the testimony of intelligent witnesses, makes the act like that of an infant, and equally bestows the privilege of an entire exemption from any manner of pain.”

rationality and personhood on the one hand, and criminal responsibility on the other. Certainly if someone is lacking completely in the sort of rational capacity which Moore refers to, then there are good reasons for not attributing criminal responsibility to that person. Such a person cannot respond to the reasons for acting, which the criminal law (both through the norms of substantive criminal law and through punishment) provides. As in the case of a child, someone who is severely mentally disordered may be able to form the *mens rea* in respect of a criminal act. Take the case of a woman who kills her children by smothering them in order to drive out demons from their souls. She correctly understands the physical nature of her actions. She correctly understands the consequences of what she is doing. Indeed she is aiming to bring about the death of her children. She also knows that she is doing something that at one level is wrong, but she considers that she has overriding reasons for her actions. The point is that her reasons for acting do not make sense to the rest of us. Killing children because they have demons in their souls, or to protect them from the killer's own inadequacies as a parent, or because God has instructed the parent to do so (and so on) are *distorted* reasons for acting. In such cases the existence of a mental disorder has the effect that the person concerned does not engage in "correct" forms of practical reasoning.

Accordingly what definitions of the defense of insanity (or mental disorder) attempt to do is to identify those persons whose mental state at the time of the offense was such that they were beyond the reach of the law as a source of reasons for acting.<sup>33</sup> But not all forms of defective reasoning qualify as a complete defense. Some persons may suffer from a mental disorder that does not exempt them from criminal responsibility (for example people with learning disorders).

But does the plea based on age work in the same way as the insanity defense? In the first place, very young children cannot communicate with us at all; they are literally infants. In that respect there is an analogy between very young children and animals. Unlike the mentally disordered,<sup>34</sup> they cannot communicate with us; they cannot provide their own reasons for acting such that we can judge their rationality. But note that this lack of "responsibility" is a process-based one. There is no suitable mechanism for the infant to engage in meaningful dialogue with the rest of society to explain and account for the wrongful conduct. Infancy is accordingly a plea in bar of trial (or what some legal systems call a type of unfitness to plead).<sup>35</sup> But a rule that disallows the trial of a child because that child *completely* lacks communicative capacity is not concerned with criminal

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<sup>33</sup> This point remains true despite the fact that legal systems vary in the way in which the defense is defined.

<sup>34</sup> I am of course referring here to persons who were mentally disordered at the time of the offense but who are later fit to stand trial.

<sup>35</sup> Some (but by no means all) commentators in Scots law treat the rule in section 41 of the 1995 Act as a plea in bar of trial rather than as an aspect of criminal capacity. *See, e.g.,* GERALD H. GORDON, *THE CRIMINAL LAW OF SCOTLAND* 332 (3d ed. 2000).

responsibility in the sense of attribution of criminal guilt (as a prerequisite to liability to punishment). Rather such a rule is a process-based rule of the type that I considered in Part II (A) above.

Secondly, if non-age and insanity are both concerned with delimiting the criminal responsibility of certain types of people because they cannot engage in meaningful practical rationality, one would expect that the definitions of the two defenses would have the same broad structure. What an age-based defense would specify then would be the types of children who because of their age cannot fully understand or appreciate the nature of their actions. Just as with the mentally disordered, not all children would necessarily fall within the scope of the defense of this type. However, in most legal systems, pleas of non-age do not embody this sort of test. Rather the plea simply exempts children below a certain age from criminal responsibility without the need for any inquiry about the actual state of any child's rational faculties.

In my view the assimilation of the infant and the insane is misleading. It tries to squeeze into the age-based defense the same justification as that used for insanity, namely that the person accused of an offense is completely lacking in practical rationality. But this does not seem as obviously true of children as it is for the mentally disordered. Children of a certain age (and often of a young age) can give reasons for doing what they do. Sometimes these reasons seem distorted in the same way as those provided by the mentally disordered ("fairies told me to do it"), but usually children explain actions in terms of coherent reasons which make (some) sense of the world around us. Rather the point is that as adults we judge that children have a defective or incomplete capacity to consistently apply or act out their motivations or reasons for acting. Children, even at a relatively early age (in other words when they proceed beyond infancy), have the capacity for rational action. But chiefly because of their *inexperience* (which is explained by their age), sometimes children are weak in using this capacity.

Accordingly if there is an analogy to be used here it is between children and the category of persons formerly known as psychopaths. Both have the capacity for engaging in rational action but both, for very different reasons, find it difficult to apply it in a consistent way. The criminal responsibility of the psychopath is, to put it mildly, controversial, even more so than that of persons who are more definitely mentally disordered. Yet even if the analogy is weak, there is an interesting consequence. A dominant (but far from exclusive) view about psychopaths is that they are not completely lacking in criminal responsibility. Their responsibility for their conduct is incomplete. As a consequence, although the psychopathic criminal may be liable to conviction, his condition has relevance at the punishment (or disposal) stage of the criminal justice system.

In my view much the same holds in respect of children. On this basis children are responsible agents, but their responsibility is in some way defective or incomplete. Some writers have described this situation by using the Scots law

term “diminished responsibility.”<sup>36</sup> In Scots law diminished responsibility is essentially a plea in mitigation rather than a defense.<sup>37</sup> And indeed historically that is the way in which the rules on age of criminal responsibility developed in Scots law. Age was regarded as a mitigating factor in respect of criminal punishment, as opposed to being related to criminal responsibility in the narrower technical sense in which it is used in modern times. During the nineteenth and twentieth centuries a different approach was adopted. The response to the diminished or underdeveloped criminal responsibility of children was now one of modifying not simply the punishment element of the criminal justice system but also its process element. A separate system for “juvenile” justice within the criminal justice system emerged. A further and quite different response was to remove children from the ambit of the criminal justice system altogether.

In discussing proposals in English law for the application of civil law “care and discipline” measures to children under twelve years of age without any inquiry into their “responsibility” for their actions, Hart wrote:

It may be thought that the benefits to very young children of a system of responsibility are too small to weigh conclusively against the need to save them from a criminal career, even if the attempt to save them involves measures which may be difficult (in spite of the formal differences) for them or their parents to distinguish from punishment and in some cases from a heavy punishment for a trivial offense.<sup>38</sup>

I will examine some of the issues relating to special juvenile and non-criminal systems in the next section. What I want to stress here is a point only implicit in the quotation from Hart. This is that these responses are made not because children are lacking in criminal responsibility in every possible sense of that concept. On the contrary most children (other than the very young) can form the *mens rea* for offenses and most children can engage in some forms of practical reasoning. When we say that children lack criminal responsibility we are making a quite different form of assertion. We are saying that children could be held criminally responsible if non-responsibility was based solely on the complete lack of practical rationality. However, we deny criminal responsibility to children because there are other values which override treating children as (fully) responsible agents in the criminal justice system. To resort to the terms which Moore has used, it may well be correct to say children do not have the appropriate

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<sup>36</sup> See, e.g., Ido Weijers, *The Moral Dialogue: A Pedagogical Perspective on Juvenile Justice*, in PUNISHING JUVENILES 141 (Ido Weijers & Antony Duff eds., 2002).

<sup>37</sup> Its practical effect is in relation to murder cases. Where an accused is of diminished responsibility she is still found guilty but of the lesser crime of culpable homicide. This enables the judge to impose a more flexible sentencing disposal than would be available if the conviction were for murder. Significantly in some legal systems the condition of psychopathy is treated as a basis of diminished responsibility (but not as a form of the “insanity” defense).

<sup>38</sup> HART, *supra* note 1, at 184.

personhood for criminal responsibility; but this lack of personhood is not explained (as it is with the mentally disordered) by their complete lack of rationality.

Earlier (Part II(B)) I argued that children do (or may) have criminal capacity in the sense of ability to form *mens rea*. In this section I have also argued that criminal capacity in the sense of engaging in criminal conduct as a consequence of applying practical reasoning is not something completely lacking in children (other than very young children, who are accordingly immune from trial). So denying criminal responsibility to children (and formulating legal rules to do so) cannot be based on *either* of these approaches to criminal capacity (i.e., inability to form *mens rea* or lack of suitable “personhood”).

D. *What is the Relationship Between “Juvenile” Justice and the Age of Criminal Responsibility?*

Many legal systems have developed special systems for dealing with juvenile offenders. These systems vary considerably in type and underlying rationales, but clearly if there is to be a special juvenile justice system, then there must be rules for determining who is and who is not a “juvenile.” In my view such rules embody one conception of age of criminal responsibility. Indeed probably the most significant application of rules on age of criminal responsibility arises in this context. Of course it is possible to argue that the criminal justice system should apply equally to young and adult alike. Some proponents of restorative justice adopt this position.<sup>39</sup> If we take the criminal justice system as focusing on mediation and reparation for harm done by the offense, then there is no need for a separate system for young offenders.<sup>40</sup> Even in such systems there have to be rules on age to identify those who are too young to participate in the mediative processes, but here the concept of age is a process-based one.

A more traditional approach to juvenile justice is to argue that the focus for dealing with young offenders should be reformatory or educative. Many of these juvenile justice systems are still located within the criminal justice system, but they are subject to modification, usually in respect of process and disposal. This approach has more recently been taken by writers who accept that criminal justice has or should have a restorative aim that informs the juvenile justice system. Here the restorative goal is achieved either through the sentencing or punishment stage,<sup>41</sup> or even through the criminal trial itself.<sup>42</sup>

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<sup>39</sup> See, e.g., Lode Walgrave, *Not Punishing Children, but Committing them to Restore*, in PUNISHING JUVENILES, *supra* note 36, at 93.

<sup>40</sup> See *id.* at 111:

Focusing on the harm and suffering, and not on the offender’s culpability for the offense or on his person, leads to questioning the existing two-track model in criminal justice, one track for adults and one for juveniles. For a victim, indeed, it makes no difference whether he has been robbed or beaten up by a boy of 16 or by a young adult of 21.

<sup>41</sup> See, e.g., Antony Duff, *Punishing the Young*, in PUNISHING JUVENILES, *supra* note 36, at 115.

Interestingly, a separate approach to juveniles, but one located within the traditional criminal justice system, is justified on the basis that while juveniles are not completely lacking in responsibility for their conduct, their responsibility is underdeveloped or “diminished.” The aim of the special procedures is to allow for the offenders’ “moral development into fully responsible members of the community.”<sup>43</sup> Often, on this approach, a distinction is made between two categories of young person, paralleling the old Roman law distinction between pupils and minors. “Juveniles” are those young persons with some, but diminished, criminal responsibility (roughly those in the eleven-to-nineteen age bracket); “children” are those lacking in criminal responsibility (those below eleven years of age).

Yet another approach to the young is to remove them altogether (or virtually so) from the criminal justice system. This approach has been applied in Scotland since 1971 when the system of children’s hearings was introduced. A crucial feature of this system is that it applies to all children under the age of sixteen no matter their age,<sup>44</sup> and that the commission of a crime is only one of several events that bring the system into operation.

What then are the implications of juvenile justice systems for the age of criminal responsibility?

- (1) An important point, which is alluded to by Hart in the passage quoted earlier, is that young offenders are not denied the status of being criminally responsible in the sense of capacity to commit crimes or to have criminal action attributed. Rather, young offenders have criminal responsibility in these senses, but it is overridden to achieve the goals of the juvenile system. Accordingly the sense of criminal responsibility that is appropriate for these systems is not one which focuses on capacity or attribution.
- (2) Another point arises from the need to draw a line between children who are subject to juvenile justice and those who, because of their very young age, are not so. What is the basis of this distinction? The approach taken is that some children who engage in (what is

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<sup>42</sup> Weijers, *supra* note 36, at 135. Weijers writes: “My critical comment concerns the focal point of the communicative approach: whereas others focus on punishment itself, I think that this approach is primarily relevant to the offender’s appearance in court. It is first of all in the criminal court proceedings (and in the restorative sessions) that we can find room for the idea that punishment can and should be something that benefits the person being punished.” *Id.* at 144. As a Scots lawyer I find this approach difficult to square with the presumption of innocence.

<sup>43</sup> Duff, *supra* note 41, at 131.

<sup>44</sup> At present because of an anomalous court decision, *see supra* text accompanying note 24, a distinction is made in respect of referral on the basis that a child has committed a crime between children under eight years of age (who cannot be subject to the hearings system) and children between ages eight and fifteen (who are within the scope of the scheme). However, it is generally accepted that that decision is wrong and should be overruled.

from an external perspective) criminal conduct are too young to be subject to special systems. But, are the reasons for this view based on the child's inability either to commit a crime (a *mens rea* argument) or to fully appreciate criminal conduct (an attribution argument), or is it rather that a very young child will not properly understand the educative, reformatory, reparative *process* that the juvenile justice system involves? If the latter, then the concept of criminal responsibility being invoked is a process based one.

### III.

There are a variety of ways in which age interacts with criminal responsibility. Most of the theoretical attention on age (and there has not been much of it) has been concerned with criminal responsibility in a central or traditional sense. It has focused on two issues: at what ages do children lack the capacity to form a "guilty" mind (*mens rea*)? And, at what ages do children lack the type of personhood that is a necessary prerequisite for attributing criminal guilt? My argument is that neither of these concepts has the solid foundation that is implied by the taken-for-granted approach adopted by many criminal justice theorists. Rather, age is important in the criminal justice system because it poses problems for the methods or processes that the system uses to achieve its goals. The Scottish Law Commission proposed giving primacy to a process-based rule on age of criminal responsibility (and removing a rule using the capacity sense). This view may well be wrong but it is not necessarily a theoretically unsophisticated one.