

# On Becoming a Responsible Person

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Gerry Maher poses four questions in his paper;<sup>1</sup> I discuss them in turn.

## I. CRIMINAL RESPONSIBILITY AND THE PROSECUTION OF CHILDREN

The first question that Maher poses concerns *the link between “not prosecuting children because of their age” and the idea of criminal responsibility*. Criminal responsibility is then characterized as being 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.”<sup>2</sup> The attribution is then typically based either on “some mental element of the accused in the act itself, or on a more general capacity to engage in criminal conduct.”<sup>3</sup>

The problem now is that if we analyze the different conditions that must be satisfied if punishment is to be justified as Maher does, there seems to be no natural place for age limits. It might therefore seem that the question of an age limit has no direct contact with the justification of punishment, and that the age requirement is not a real part of the responsibility issue. This understanding would support the view that the rules relating to age are procedural rather than substantive in nature. In my view, Maher correctly paves the way for recognition of the age question as a substantive responsibility issue, and this holds despite the fact that the rule in question might at first glance look procedural, as Section 42 of the Criminal Procedure (Scotland) Act 1995 does.

I must say that for a person trained in Nordic and German criminal law theory, such a result seems very obvious. Somehow the English word “responsibility” is vaguer than the terms used in German-influenced legal cultures. The German term “*Zurechnungsfähigkeit*” (translated usually as “capacity”) covers both age requirements and requirements of sufficient mental capacity. This concept, which I would like to call a *foundational* concept, deals with that aspect of responsibility that concerns a profound ability to take responsibility for one’s actions. This requirement must be fulfilled in order for us to ask more detailed questions about liability for a specific act or omission. It is actually the most profound level of the culpability issue—and the one, as well, that has the closest connection with the concept of a person. These prerequisites are, so to speak, person-centered and not act-centered. It would be very natural in those legal

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<sup>1</sup> Gerry Maher, *Age and Criminal Responsibility*, 2 OHIO ST. J. CRIM. L. 493 (2005).

<sup>2</sup> *Id.* at 501.

<sup>3</sup> *Id.*

cultures to regard the age issue as part of responsibility, and responsibility again as part of the general prerequisites of penal liability, all of which are held together by being linked to the aim and justification of punishment.<sup>4</sup>

This brings us to Maher's second question: "*Is a capacity rule on age related to problems of (proving) mens rea?*"

## II. AGE AND *MENS REA*

Maher takes a look at two possible rationales behind a rule like Section 41 of the Criminal Procedure (Scotland) Act 1995, which excludes children below the age of eight years from criminal responsibility: the connection between the age requirement and *mens rea*, and the connection between the age requirement and the understanding of children as persons. The first approach has been usual in the courts in Scotland. Here we should say that, of course, there is a link between the two levels of culpability, the person-related and the act-related. I think it would be odd, for instance, to say that insane persons are wholly incapable of forming intentions. For that reason we must separate the two questions and order them in such a way that the "foundational" question of the capacity to take responsibility comes first, and the more concrete question of *mens rea* later. The capacity dimension concerns the person's general ability to conform to requirements set in legal norms by controlling their actions, whereas the other aspects of culpability deal with the intentionality, knowledge and other factors that constitute the ground for blaming an individual actor for his or her concrete act. We might say that we blame the person for not having controlled his or her intentions better. Thus I agree with Maher that "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*."<sup>5</sup>

The second issue, the connection between the age requirement and the child's status as a person, is crucial. How could we truly operate with sharp age-related boundaries when it is clear that individual children's actual general capacities to understand what they are doing vary considerably? The concept of a person thus seems very abstract in this connection. We will probably not be able to construct an idea of a standard person with certain capacities that would help us to measure whether a child in fact possesses the required capacities or not, and will thus have to operate with abstractions. We could draw on studies in child psychology, but at the end of the day we must simply make a decision on where to draw the line—a decision that amounts to legally defining what a child is and what her status is in

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<sup>4</sup> For a comparison of the Anglo-American and continental doctrinal models of crime, see 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES (Albin Eser & George P. Fletcher eds., 1987). For an analysis of the concept of responsibility from the point of view of the principle of conformity in terms of ability and opportunity to conform, see NILS JAREBORG, ESSAYS IN CRIMINAL LAW 78–81 (1988).

<sup>5</sup> Maher, *supra* note 1, at 503.

legal terms. This kind of issue is not that rare: we are used to making such decisions in other branches of the law.

In continental systems age-limit rules are, I believe, not usually presumptions, but conclusive rules: there is, therefore, no possibility of raising the question of responsibility if the child has not reached the specified age. However, continental legal systems often allow some flexibility in relation to the age limit. In Germany, for instance, the special juvenile courts serve both functions: they can order educational measures as well as punishments, and in such a system it might seem reasonable to allow evidence of sufficient maturity for penal responsibility to be adduced even when the offender is below the normal age limit. If I have understood the German system correctly, however, it sets a strict age limit of fourteen, below which children cannot be held criminally responsible, and then allows evidence to be introduced to rebut the presumption of responsibility for those who are over fourteen but are lacking in maturity. These rules work to the benefit of young people who fall below the average, but not to the detriment of those whose capacities are greater than the average. If we were instead to legislate a strict age limit without any discretion in individual cases, then it would probably be fair and reasonable to set the standard according to those whose development is the slowest. It is thus a matter of inclusion and exclusion, and several possibilities can be utilized.<sup>6</sup> For instance, if we compare the German rules with those in the Nordic countries, it seems rational to have a higher age limit in the Nordic countries, because the age limit is more rigid and inclusive.

### III. AGE AND THE ATTRIBUTION OF RESPONSIBILITY

Maher's next question is: "*Are rules relating to age of criminal capacity concerned with attribution of responsibility?*"

Here Maher discusses the link between the age requirement and the idea that those below that age lack something as persons.<sup>7</sup> Children would then just not be seen as the kind of persons that we have in mind when we attribute responsibility in criminal law. Maher refers to Michael S. Moore's view that the concept of responsibility presupposes the concept of personhood, and I agree that we can see the foundational questions of responsibility as having to do with what we require of a person as a subject. I do not see that excluding young babies, who cannot communicate verbally with their social surroundings, from responsibility would present any difficulty here.

But what kind of a defect does a young person of, let's say, sixteen years of age, typically have in his or her ability to make sense of the world and to comply with the requirements of social morality or the legal system, or to control her

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<sup>6</sup> See the discussion in THOMAS CROFTS, *THE RESPONSIBILITY OF CHILDREN AND YOUNG PERSONS: A COMPARISON OF ENGLISH AND GERMAN LAW* 219–47 (2004), as well as the German Code of Juvenile Courts: *Jugendgerichtsgesetz*, ch. 2.

<sup>7</sup> Maher, *supra* note 1, at 505.

behavior? An analysis of this would probably be helpful in forcing us to think about what really constitutes “a responsible person” in the first place. For Jaakko Forsman, an important figure in nineteenth century Finnish criminal science, who followed German Hegelian models, responsibility (in German: “Zurechnungsfähigkeit,” in Swedish “tillräknelighe,t” in Finnish “syyntakeisuus”) in this deeper sense meant being a person who can be held accountable for an act. For the Hegelians, this specific understanding of accountability (imputation) was connected with an understanding of an act as depending on the actor’s will.<sup>8</sup>

Accountability meant that a person could be blamed for what had happened in the world, that is, this happening could be regarded as depending on the actor’s will in such a way that the person should “carry” or “bear” the guilt for what had happened.<sup>9</sup> The young persons who were regarded as being responsible in only a diminished sense were partly lacking such capacities, since it takes time to build up the full “character” that is needed for the ability to follow the requirements of the criminal law’s norms. The presumption was therefore that this ability to resist temptations had to be learned through experience. The juvenile will lacked sufficient energy to resist temptation (the classical Aristotelian problem of weakness of the will). In that sense, the period of diminished responsibility was seen as a “training period” for later non-reduced responsibility.

Nowadays we would formulate this issue of the person’s capacity for rational action as Moore does, in terms of the capacity for practical reasoning and the ability to give rational reasons for action. R.A. Duff has, similarly, pointed out that ascribing intentional agency presupposes that the agent is regarded as rational. Ascriptions of intentional agency provide, as he stresses, the paradigm of responsible agency. Being free and responsible as an agent is actually nothing other than being rational.<sup>10</sup>

Maher’s suggestion that children are capable of practical reasoning but lack the necessary experience, is probably correct. We, as adults, judge that children cannot fully act according to their rational motivations. Children cannot “press down” those reasons for action that do not really hold up in a moral discussion. It might be useful in this context to look more closely at the psychological theory of “neutralization” techniques by which people try to justify their actions after the event.

I would accept Maher’s claim that, in the last instance, the decision not to regard children as responsible when they face allegations of having done wrong is not based on psychological or philosophical considerations, but is the result of a conscious criminal policy and of societal experience in dealing with children as

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<sup>8</sup> See GEORG W.F. HEGEL, PHILOSOPHY OF LAW § 120 (1820) (with comment).

<sup>9</sup> JAAKKO FORSMAN, ANTECKNINGAR ENLIGT PROFESSOR JAAKKO FORSMAN’S FÖRELÄSNINGAR ÖFVER STRAFFRÄTTENS ALLMÄNNA LÄROR 61 (1900) (Jaakko Forsman’s lectures copied down and edited by Lars Wasastjerna).

<sup>10</sup> ANTONY DUFF, INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 99–105 (1990).

offenders. The criminal justice system does not have much to offer children. The idea of rehabilitation has lost credibility, and different versions of the “general prevention” theory find it hard to explain why the “recognition of responsibility” would be so valuable when weighed against the probable negative effects for the individuals who would then be punished. We well know that a criminal career is partly a product of a penal system that takes such risks and costs too lightly.

We might try to connect these findings loosely with the more anthropological approach of Axel Honneth, who researches non-verbal ways in which human beings either recognize each other as people in social interactions, or may expressly deny the other person such status.<sup>11</sup> Of course these findings are valid only in concrete social interaction. But we could still say that it is worth taking a closer look at the ways in which the agents of our penal and welfare system might “look through” child offenders. The work done within the paradigm of Braithwaite’s “re-integrative shaming,” according to which blame for the wrong committed should be combined with an express recognition of the offender as a valuable person, points in the same direction. Can we really maintain that punishing a person through the normal processes of the criminal justice system is itself a way of recognizing him as a person?

We should, thus, when thinking about the merits of recognizing a child as an autonomous and responsible subject, also look at alternative practices such as victim-offender mediation. Such practices have the merit of introducing the conflict and of opening up a concrete dialogue of liabilities and responsibilities, without putting the main emphasis on the communication of the blameworthiness of the act through the severity of the punishment. The attribution of guilt can, in such practices, be better separated from the punishment issue, and as we believe less in punishment than before, we should focus on the dialogue about responsibility instead.

Maher concludes that “denying criminal responsibility to children . . . cannot be based on *either* of these approaches to criminal capacity (i.e. inability to form mens rea or lack of suitable ‘personhood’).”<sup>12</sup> I think that this conclusion is questionable. Admittedly, the mens rea aspect does not take us far. But if we take the concept of a responsible person to entail a capacity not only for practical reasoning and rational action, but also for consistency in the setting of preferences, stability of reasons, etc., I think we might find something here to support our intuition that children are, as persons, different, even in a way relevant to determining criminal responsibility.

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<sup>11</sup> AXEL HONNETH, UNSICHTBARKEIT: STATIONEN EINER THEORIE DER INTERSUBJEKTIVITÄT (2003).

<sup>12</sup> Maher, *supra* note 1, at 510.

## IV. JUVENILE JUSTICE AND THE AGE OF RESPONSIBILITY

Maher's last question is: "*What is the relationship between 'juvenile' justice and the age of criminal responsibility?*"

Here Maher discusses the reasons for having a separate justice system for juveniles, and how the division of tasks between "juvenile" justice and the normal criminal justice system is perceived through different ideological lenses.<sup>13</sup> A proponent of restorative justice will not see much need for such a division at all, whereas someone who believes more in educational measures than in punishment for juvenile offenders will wish to defend the independence of "juvenile" justice from the adult system. These kinds of issues surely influence what we expect our definition of criminal responsibility to be able to deliver.

The concept of diminished responsibility has often been regarded as an intermediate solution. "Juvenile justice" is then part of the larger system, although the age-related special principles that dominate the field grant it a certain ideological autonomy. Criminal responsibility is, however, "overridden to achieve the goals of the juvenile system."<sup>14</sup> One merit that Maher correctly attributes to such a view is that "juvenile justice" is then able to recognize juveniles as responsible actors—something that separates "juvenile justice" from child welfare systems that do not share this view of children as responsible persons.

It might be worth distinguishing between respect for the autonomy of a person and criminal responsibility. I would say that children at the age of twelve already enjoy many kinds of protection of their individual autonomy, but are still not held criminally responsible. One explanation for this difference might be that the protection of autonomy should begin at the age when the fastest developers reach the appropriate level of maturity, whereas criminal responsibility should follow the development of the slowest.

It might also be the case that children face authorities in different roles. Older children can already speak for themselves, whereas younger children are simply left under a paternalistic decision process in which their interests are represented and assessed by others: parents, child welfare agencies, etc. I would presume that even though the youngest children (let's say those aged seven to ten) might sometimes commit "offenses," our views on responsibility actually only form some kind of background context for us to conceive of what has happened. The attribution of actions to human beings requires such a frame, and as long as we interpret the events as "offenses," this connection with responsibility follows in the back of our minds. Therefore, I do not see it as necessary to try to find the point in the development of children where it all begins.

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<sup>13</sup> *Id.* at 510–12.

<sup>14</sup> *Id.* at 511.

## V. AGE, PERSONHOOD AND RESPONSIBILITY

In his conclusion, Maher restates that there are many ways in which age interacts with criminal responsibility.<sup>15</sup> His argument is that neither of the concepts, that is, age related to the capacity to form a *mens rea* and age related to personhood, gives a solid foundation for understanding this connection.<sup>16</sup> I agree.

My argument would be that, to begin with, we need a sufficiently sophisticated concept of a crime in order to be able to handle these problems. The issue of responsibility has several layers. We should surely recognize that there is a connection between the age-responsibility problem and the ability to form a *mens rea*, even though non-responsible actors might be able to form a *mens rea*. Criminal responsibility is a foundational concept, a concept not directly related to a particular situation in which we are applying a specific criminalization norm, but rather one that sets a first general prerequisite for us to proceed into a more concrete determination of liability. In fact the requirements that we set on the person in this respect are crucial to the legitimacy of punishment, and therefore deserve a central place in our account.

I think that the foundational concept of responsibility has probably had a more solid footing in the continental European legal and philosophical tradition than in the Anglo-American world. But I do not wish to overemphasize this return of the “subject,” this return of the “person” and “personhood” to our theoretical thinking: this will remain a topic that only requires limited attention. But, of course, we can also take up the challenge to proceed further into this topic: we do need a more elaborate concept of personhood—and the problem of the relation between age and responsibility would form a useful way into that task.

The topic of age-limits is, to sum up, very fruitful, since it forces us to analyze in detail the abilities that constitute a responsible person and how such abilities can be acquired. It is perhaps unfair to suggest that the question of the penal responsibility of children and young people is a neglected topic. If we look at the vast literature already devoted to this problem in the nineteenth century, we note that we are not the first to address these issues. Writing on the legal treatment of young people who have committed offenses has become rich and highly specialized, and as the legal systems dealing with these issues grow in complexity, moral and legal philosophers must work hard to insert their voices into that debate.

Another explanation for the lack of philosophical interest in the topic might be that the philosophical climate during the twentieth century was pretty hostile to debates about persons and subjects: Anglo-American linguistic philosophers of action were not very willing to engage in this type of metaphysical thought. Even the concept of an act itself was regarded as suspicious, because it so easily had a metaphysical flavor. But still, as Michael S. Moore put it, “[c]entral to any theory

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<sup>15</sup> *Id.* at 512.

<sup>16</sup> *Id.*

of wrongdoing is a theory of action.”<sup>17</sup> And as we saw earlier, Moore even defends the concept of personhood as a necessary element when criminal responsibility is being analyzed. For Moore himself, volitions are the crucial metaphysical entities that produce actions.<sup>18</sup>

One of the strengths of the Hegelian philosophy that had such an influence on the legal thought of its time was that it produced a very sophisticated doctrine of human action with the concept of a person at the center. It seems that the concept of a person is haunting us here again. As I noted earlier, the concept of a person—“personhood”—seems to attract more attention than before, because the recognition of children’s rights has led to many new applications, such as the requirement of informed consent for medical treatment. It would be absurd to try to prove that the young do not have moral and legal rights before becoming adults. They do have rights of their own. And somehow our concept of legal and penal responsibility must take account of this understanding, this recognition, of juveniles as right-holders, as autonomous persons.

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<sup>17</sup> MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 251 (1997).

<sup>18</sup> MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 113–65 (1993).