Capacity, Culpability and Children:

Rethinking the Presumption embodied in Section 50 of the Children and Young Persons Act 1933

By

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Abstract

Section 50 of the Children and Young Persons Act 1933 states that the minimum age of criminal responsibility in England and Wales is 10 years of age.[1] The provision has been the subject of considerable criticism, particularly since the rebuttable presumption of *doli incapax* was abolished in 1998.[2] For example, the United Nations Committee on the Rights of the Child believes that the age of criminal responsibility is 'unacceptably low' and has urged policymakers to increase it to at least 14 years of age.[3] Like many other proponents of law reform, the Committee believes that the low age is at odds with recent scientific research which demonstrates that children, particularly those below the age of 14, are 'unlikely to understand the impact of their actions'.[4] The Committee states that this is because the rapid brain development which occurs during adolescence 'affects risk-taking, certain kinds of decision-making and the ability to control impulses'.[5] Much of the extant scholarship also claims that scientific research, particularly in the emerging field of neuroscience, demonstrates that the presumption of capacity embodied in section 50 is flawed and is in need of reform. Furthermore, proponents of law reform often argue that the minimum age of criminal responsibility treats children as 'fully responsible' from 10 years of age.[6]

Whilst there is now a considerable body of literature which contends that children above the minimum age of criminal responsibly lack the capacity to be deemed criminally responsible, there exists no singular body of work which critically considers whether such scholarship provides an objective basis for reforming section 50. The thesis therefore seeks to make an original and substantial contribution to the field of study by filling this significant gap in the existing scholarship. Furthermore, the thesis advances original recommendations as to how limitations of the existing scholarship could be addressed.

[1] Children and Young Persons Act 1933, s50.
[2] Crime and Disorder Act 1998, s34.
[3] United Nations Committee on the Rights of the Child (2019), General comment no. 24, para 22. Available at: https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child, accessed on 08 July 2024.
[4] Ibid.
[5] Ibid.
[6] For example: ATH Smith, 'Doli Incapax under Threat' (1994) Cambridge LJ 426, 427 ,Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' [2012] National Association for Youth Justice Campaign Paper. Available at: https://thenayj.org.uk/campaigns-and-publications/, accessed 03 March 2025, Kathryn Hollingsworth 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) Mod. L. Rev. 1046, and Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145.

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Chapter 1: Purpose and originality of the thesis and research methodology

1.1 Purpose of thesis

The purpose of this thesis is to advance the debate surrounding whether section 50 Children and Young Persons Act 1933, the statutory provision which sets the minimum age of criminal responsibility in England and Wales at 10, needs to be reformed. However, it does not seek to do this in what might be regarded as a traditional way. There exists a significant body of literature which argues that the age of criminal responsibility ought to be raised from a wide variety of differing perspectives. The literature can be loosely group accordingly to the following themes: non-compliance with internationally acceptable standards, incoherent treatment of children in different areas of domestic law, ineffectiveness of criminal interventions as a method of dealing with youth crime and failure to account for children's developmental immaturity and corresponding lack of capacity to be deemed criminally responsible. However, despite such a depth of literature, section 50 remains unchanged. The central objective of this thesis is therefore to take a step back and refocus the debate, by examining the extant literature concerning children's capacity to be held criminally responsible to establish whether it actually provides a clear and objective basis for reforming the minimum age of criminal responsibility, as many scholars claim it does. This is the first original contribution to knowledge that this thesis makes. Establishing whether existing scholarship demonstrates a clear and objective basis for reforming section 50 will then allow recommendations to be made which reframe, and in some cases challenge directly, assumptions which are made about the way in which the current law dealing with young offenders is operating. This is the second original contribution to knowledge in this area which this thesis makes.

The purpose of this thesis is not to consider whether the age of criminal responsibility is appropriate, nor will it evaluate whether scholarship which covers issues outside of the presumption of capacity provides an objective basis for reforming section 50, such as literature about the effectiveness of subjecting children to criminal proceedings or compliance with international instruments. It is focused on scholarship surrounding the presumption of capacity only.

It is the position of this thesis that:

1. Existing scholarship does not demonstrate that children above the age of 10 lack capacity to be criminally responsible.
2. The extant literature concerning children's capacity to be deemed criminally responsible does not provide a clear and objective basis for reforming section 50.
3. The fact that the age of criminal responsibility in England and Wales appears to be low, particularly when compared to other countries around the world, does not necessarily mean that English law treats children as adults from the age of 10. In

England and Wales, the law already recognises an intermediate period in which young defendants are deemed to be less responsible and less culpable for their offending behaviour than adult defendants.

1.2 Background to the thesis

In almost every legal jurisdiction, the law specifies a minimum age of criminal responsibility which determines the age at which a person may be held legally responsible for committing a criminal offence.[7] Children below the specified age cannot be subject to criminal proceedings in any circumstances. This practice reflects a widespread belief that children, particularly young children, should be protected from the full extent of criminal law. There is, however, no consensus as to the age at which it is appropriate to subject children to criminal proceedings. In England and Wales, section 50 of the Children and Young Persons Act 1933 sets the minimum age of criminal responsibility at 10 years of age.[8] This is lower than any other minimum age of criminal responsibility in Europe and is lower than many other jurisdictions worldwide.[9] For example, in Scotland the age is 12, in Germany it is 14, in Sweden it is 15, in Portugal it is 16 and in Luxembourg it is 18.[10] The most common age of criminal responsibility internationally is 14.[11]

In recent years, the age of criminal responsibility in England and Wales has been the subject of considerable criticism and bodies such as the United Nations Convention on the Rights of the Child (UN Committee) and the Human Rights Joint Committee have argued that it should be raised.[12] The UN Committee has repeatedly criticised the current age and considers it to be 'unacceptably low'.[13] It has implored all States to raise the age 'to at least 14 years of age' to take account of recent scientific findings in the fields of child

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[7] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge 2016).

[8] Children and Young Persons Act 1933, s50 (as amended by the Children and Young Persons Act 1963, s16(1)). For ease, unless otherwise specified all references to 'the age of criminal responsibility' from hereon in refer to the age of criminal responsibility in England and Wales and all references to 'section 50' refer to this statutory provision.

[9] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge, 2016). Ch 5.

[10] Ibid.

[11] Ibid.

[12] See for example United Nations Committee on the Rights of the Child (2019) 'General Comment No. 24: On children's rights in the child justice system' < https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child> accessed on 08 July 2024, and Human Rights Joint Committee 'Twenty-Fifth Report: Children's Rights' (Human Rights Joint Committee Publications, Session 2008-9) para 61 <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/15702.htm> accessed on 08 July 2024.

[13] United Nations Committee on the Rights of the Child (2019) 'General Comment No. 24: On children's rights in the child justice system' < https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child> accessed on 08 July 2024.

development and neuroscience which 'indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years'.[14] The UN Committee claims that such research suggests that children under the age of 14 are 'unlikely to understand the impact of their actions or to comprehend criminal proceedings'.[15] Similarly, the Human Rights Joint Committee, a panel of twelve members appointed from both the House of Commons and the House of Lords to examine matters relating to human rights within the United Kingdom, has repeatedly recommended that the government review the low age of criminal responsibility.[16] It recommends that, in the absence of 'very convincing evidence' to justify the criminalisation of young children, the age of criminal responsibility should be increased to 12 years.[17]

There is also a considerable body of scholarship which argues that the age of criminal responsibility should be raised.[18] Some scholarship argues that the way in which children are treated by criminal law is inconsistent with the way that they are dealt with in other areas of law. For example, some commentators argue that it is illogical to presume children have the capacity to be deemed criminally responsible at the age of 10 when they must be 12 years old to buy a pet, 16 years old to give consent to sexual intercourse, consent to/decline sex education against the wishes of their parents or leave school, and 18 years old to marry or vote.[19] Other scholars argue that children who commit crime should be dealt with outside of the criminal justice system, since this is a more appropriate

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[14] Ibid.
[15] United Nations Committee on the Rights of the Child (2019), General comment no. 24, para 22. Note: The United Nations Convention on the Rights of the Child 1989 Art 40(3) requires states to establish a minimum age of criminal responsibility but does not specify a low age limit.
[16] Human Rights Joint Committee 'Twenty-Fifth Report: Children's Rights' (Human Rights Joint Committee Publications, Session 2008-9) para 61 <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/15702.htm> accessed on 08 July 2024.
[17] Ibid.
[18] See for example: Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' [2012] National Association for Youth Justice Campaign Paper. Available at: https://thenayj.org.uk/campaigns-and-publications/, accessed on 23 03 2025. See also: Heather Keating 'Reckless Children' (2007) Crim LR 546, Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145, Heather Keating 'The 'Responsibility' of Children in the Criminal Law' (2007) 19(2) CFLQ 183,
Children's Commissioner, 'One million voices: The Big Ambition calls for children's solutions to be at the heart of election manifestos' <https://www.childrenscommissioner.gov.uk/blog/one-million-voices-the-big-ambition-calls-for-childrens-solutions-to-be-at-the-heart-of-election-manifestos> accessed 08 July 2024, The Association of Youth Offending Team Managers 'Where we stand statements' < https://aym.org.uk/about-us/where-we-stand/> accessed 08 July 2024, Helen Pidd et al 'Age of criminal responsibility must be raised, say experts' *The Guardian* (London, 04 November 2019)< https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts>, accessed 08 July 2024.
[19] See for example: Kathyrn Hollingsworth 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) MLR 1046.

and effective way of addressing the root causes of offending behaviour.[20] Many scholars argue that the law in England and Wales is an outlier when compared to equivalent laws in other jurisdictions. There are two limbs to this argument. The first is that the age of criminal responsibility fails to comply with internationally acceptable standards, such as the UNCRC (discussed above). The second is that section 50 set a lower minimum age than in other jurisdictions in Europe and the rest of the world. As Howard and Bowen observe 'it is clear that the minimum age of criminal responsibility in England and Wales is much lower than most other countries in Europe and many countries worldwide'.[21] Some commentators argue that this indicates that the minimum age of criminal responsibility in England and Wales is too low and should be subject to reform to bring it in line with other jurisdictions. For example, Elliott believes 'the law in England is out of step because of its early criminalisation of minors'.[22] Similarly, Gillen explains that the age is 'among the lowest ages of criminal responsibility of any of the European States' and has argued that raising the age of criminal responsibility 'is certainly justified when compared with the relevant age in other jurisdictions'.[23] Such claims have an intuitive appeal because child development has typically been viewed as a universal process.[24] It therefore seems logical to assume that similar ages of criminal responsibility would be adopted across Europe and the rest of the world. However, Fionda argues that the reason that there is such a degree of divergence is because different countries have adopted different strategies for dealing with young people who offend. She argues that some countries apply a 'policy view' of criminal responsibility whereas others adopt a 'legal view' of criminal responsibility.[25]

According to Fionda, the 'policy view' of criminal responsibility 'can be most clearly seen in the European and other jurisdictions where the minimum age of criminal responsibility is much higher than that operating in England and Wales'.[26] She argues that 'the only sensible way of understanding these higher minimum ages is in relation to the policy view

[20] See for example: Lesley McAra & Susan McVie 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315, Vicky Kemp, Angela Sorsby, Mark Liddle and Simon Merrington, *Research Briefing 2: Assessing responses to youth offending in Northamptonshire* (Nacro, 2002), Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' [2012] National Association for Youth Justice Campaign Paper. Available at: https://thenayj.org.uk/campaigns-and-publications/, accessed 08 July 2024 and Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.
[21] Helen Howard and Michael Bowen 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 J Crim L 380.
[22] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.
[23] John Gillen 'The Age of Criminal Responsibility: "The Frontier between Care and Justice"' (2006) 12(2) Child Care in Practice 129.
[24] Roger Smith, *A Universal Child?* (Bloomsbury Publishing, 2009).
[25] Julia Fionda, *Devils and Angels: Youth Policy and Crime* (Hart, 2005), 17.
[26] Ibid.

that has been taken in such jurisdictions that it is wrong as a matter of policy, to subject young people under that age to the rigours of the criminal justice process'..[27] For this reason, the 'policy view' has also been referred to as the 'immunity from prosecution' view..[28] Under the policy view the age of criminal responsibility is 'decoupled' from notions of capacity..[29] Other countries have, however, applied a 'legal view' of criminal responsibility which focuses on identifying the age at which children can be said to have acquired the capacity required to be held legally responsible for their behaviour..[30] Given that this approach hinges on the notion of capacity, it is posited that the term 'capacity view' may be more apt. It is submitted that the fact that many other countries have chosen to adopt higher ages of criminal responsibility does not in itself demonstrate that the age in England and Wales is too low, as some scholars have claimed. However, the fact that many other jurisdictions opt to deal with young offenders without recourse to criminal proceedings does appear to indicate a widespread preference for dealing with young offenders outside of the criminal justice system and this lends credence to claims that welfare-based interventions may be a more suitable, and perhaps more effective, method of dealing with youth crime.

The function and significance of an age of criminal responsibility is determined by the surrounding policies and processes that a jurisdiction has put in place to deal with children, both above and below the age of criminal responsibility, who engage in offending behaviour..[31] For example, a country may select a much higher age of criminal responsibility because policymakers believe that it is preferable to deal with most or all young offenders outside of the criminal justice system. In such circumstances, the age selected could justifiably be much higher than the age at which children are presumed to have criminal capacity because the age reflects the point at which, as a matter of policy, it is considered to be appropriate to subject children to criminal proceedings (rather than the age at which children are presumed to have capacity to be criminally responsible). On the other hand, a minimum age of criminal responsibility which is below the age at which children can be presumed to have criminal capacity is likely to be unjustifiable unless additional legal safeguards are in place to ensure that children who lack the requisite capacity are not convicted of criminal offences (for example, a defence is available to such children).

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[27] Ibid.

[28] Ibid. See also Barry Goldson, 'Counterblast: "Difficult to Understand or to Defend": A Reasoned Case for Raising the Age of Criminal Responsibility' (2009) 48 Howard J Crim Just 514.

[29] Kathyrn Hollingsworth 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) MLR 1046, 1065 and David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546

[30] Julia Fionda, *Devils and Angels: Youth Policy and Crime* (Hart, 2005), 17.

[31] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge 2016).

It is also important to highlight that a minimum age of criminal responsibility does not necessarily determine that a child *will* be subject to criminal proceedings. For example, a country may choose to set a low age of criminal responsibility but operate a system which effectively diverts the majority of children away from the criminal justice system. Similarly, the age of criminal responsibility does prevent children from being subject to other forms of state intervention before they reach the specified age. For instance, a country may select a high age of criminal responsibility but subject children below that age to welfare-oriented measures which unduly restrict their liberty or impinge on other freedoms, and in some countries the use of such measures is clearly penal in nature.[32] It is therefore necessary to ensure that any form of state intervention into the lives of children who engage in offending behaviour is justifiable, irrespective of whether those interventions are a consequence of criminal proceedings or not. It is therefore submitted that when a minimum age of criminal responsibility is considered in isolation from the justice system in which it operates, it does not provide an accurate indication of how the law responds to children who engage in offending behaviour and does not, therefore, provide a sound basis for determining whether the minimum age of criminal responsibility is appropriate or in need of reform. Similarly, comparing the ages adopted in different countries is likely to result in erroneous inferences being drawn about the appropriateness of the age of criminal responsibility in England and Wales.

The key point to note for this thesis is that 'all countries are grappling with the same fundamental question and that is at what age should criminal responsibility be imposed on children?'.[33]. Elliot argues that the answer to this question 'rests on fundamental issues of when criminal responsibility is justified.'.[34] It is for this reason that a significant proportion of the extant scholarship argues that it is unjust to presume children are criminally responsible from the age of 10.[35] Such scholarship claims that the presumption of capacity that is embodied in section 50 is flawed. Proponents of law reform often claim that there is a growing body of scientific evidence which demonstrates that children above

[32] Ibid.
[33] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.
[34] Ibid.
[35] See for example: Heather Keating 'Reckless Children' (2007) Crim LR 546, Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145, Heather Keating 'The 'Responsibility' of Children in the Criminal Law' (2007) 19(2) CFLQ 183,Children's Commissioner, 'One million voices: The Big Ambition calls for children's solutions to be at the heart of election manifestos' <https://www.childrenscommissioner.gov.uk/blog/one-million-voices-the-big-ambition-calls-for-childrens-solutions-to-be-at-the-heart-of-election-manifestos> accessed 08 July 2024, The Association of Youth Offending Team Managers 'Where we stand statements' < https://aym.org.uk/about-us/where-we-stand/> accessed 08 July 2024, Helen Pidd et al 'Age of criminal responsibility must be raised, say experts' *The Guardian* (London, 04 November 2019).

the age of 10 lack the capacity to be deemed criminally responsible. More specifically, they claim that research, particularly in the fields of child development and neuroscience, proves that children are developmentally immature when compared to adults and argue that this demonstrates that they lack the capacity to be deemed criminally responsible. Furthermore, proponents of law reform often claim that section 50 should be reformed because it unfairly treats children as *fully* responsible once they reach the age of 10.[36] This thesis critically considers whether proponents of such arguments have proffered evidence which proves that the presumption embodied in section 50 is flawed and challenges the claim that the law holds children fully responsible once they reach the minimum age of criminal responsibility.

The thesis has four key objectives:

1. To critically examine why a minimum age of criminal responsibility was established and why it is set at 10 years of age. This is addressed in chapters 2 and 3.
2. To critically evaluate whether proponents of law reform have proffered evidence which demonstrates that the section 50 presumption is flawed. This is addressed in chapter 4.
3. To evaluate whether research concerning child development demonstrates that children above the age of 10 are generally less responsible for their behaviour and should, therefore, be considered to be less culpable for criminal conduct. This is addressed in chapter 4.
4. To demonstrate that reconceptualising the age of criminal responsibility as the age at which immunity from criminal proceedings ceases would help to advance the debate surrounding reform of section 50. This is addressed is chapter 5.

The research objectives set out above will be achieved by answering the research questions outlined in section 1.3 below.

1.3 Research hypotheses and research questions

Research Hypotheses

All research must commence from a supposition, which is used as the starting point for

[36] For example, Bateman states that 'in England and Wales, children are deemed to be criminally responsible and become subject to the full rigour of the criminal law, from the age of ten' (Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' [2012] National Association for Youth Justice Campaign Paper. Available at: https://thenayj.org.uk/campaigns-and-publications/, accessed 03 March 2025). Similar claims are expressed in ATH Smith, 'Doli Incapax under Threat' (1994) Cambridge LJ 426, 427, Kathryn Hollingsworth 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) Modern Law Review 76(6) 1046 and Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145.

further investigation. In this case, this supposition is based around the author's academic interest in youth justice more generally. This has led to this research being based around two hypotheses:

1. Existing scholarship does not demonstrate that children above the age of 10 lack capacity to be criminally responsible, and it therefore cannot be conclusively shown that the section 50 presumption, that children above the age of 10 have the capacity to be deemed criminally responsible, is flawed
2. English law already recognises an intermediate period in which young defendants are deemed to be less responsible than adults for their offending behaviour.

In order to test the hypotheses, this research aims to address one primary research question, separated into four key research sub-questions.

Primary research question:

Does existing scholarship demonstrate that either children above the age of 10 lack capacity to be criminally responsible or that the law regards such children as fully responsible for their offending behaviour?

Research sub-questions:

1. Why was a minimum age of criminal responsibility established and how did it come to be set at 10 years of age?

2. What presumptions are embodied in section 50 of the Children and Young Persons Act 1933?

3. What evidence, if any, has been proffered to support claims that children aged 10 lack the capacity to be deemed criminally responsible?

4. Does English law recognise an intermediate period in which young defendants are deemed to be less responsible than adults for their offending behaviour?

1.4 Originality of thesis

There is now a significant body of literature which contends that section 50 should be reformed. However, the majority of this literature focuses on arguments that children above the minimum age of criminal responsibility may lack the capacity to be deemed criminally responsible or are unjustifiably treated as fully responsible for their offending behaviour. It is the position of this thesis that this debate needs to be refocused, the starting point of which is to critically consider whether such scholarship provides an objectively justifiable basis for reforming section 50. No singular body of work has been carried out to date which does this.

The need for such a body of work is significant for the following reasons. The fact that an argument has been made does not necessarily mean that its evidential basis is sufficient

to lead to the law being amended. This thesis demonstrates that it is too often assumed in scholarship that both the body of evidence put forward is sufficient and that the lack of reform in the area exclusively stems from a simple lack of political will to change the law. This work is the first to draw all of the extant literature together and contend, following a detailed critical analysis of the evidential base underpinning such literature, that this is simply not the case.

It is this significant gap in scholarship which this thesis fills; one which has allowed for assumptions to be made and repeated, for the most part unchallenged. This thesis fills the lacuna in scholarship in two specific ways. First, it critically considers whether the evidence presented in the extant literature demonstrates that the presumption of capacity embodied in section 50 is flawed, thus making an original and substantial contribution to the field of study. Second, flowing from this, the thesis advances several novel lines of argument and makes original recommendations which reframe, and in some cases challenge directly, assumptions are made about the way the current law which dealing with youth criminal behaviour is operating. This is the second original contribution to knowledge in this area which this thesis makes. It is in these two ways that the originality is demonstrated.

The research, conclusions and recommendations of this study will therefore make an original contribution to knowledge in the field.

1.5 Structure of the thesis

Chapter 2 will partially address research question 1 and 2. It will do so by providing a detailed historical overview of the development of the age of criminal responsibility and exploring the relationship between the common law doctrine of *doli incapax* and the statutory age of criminal responsibility set out in section 50. Crucially, it will examine the underlying justification(s) for establishing age-based thresholds which absolve young children from criminal responsibility. This is to provide vital context to the debate surrounding reform of section 50, particularly the discussion surrounding the abolition of the rebuttable presumption of *doli incapax* in chapter 3 and the nature and scope of presumption of capacity in chapter 4.

Chapter 3 will complete the research involved to fully address research question 1. It will provide a critical examination of how the retreat from welfarism impacted the debate concerning the age of criminal responsibility, with detailed commentary being provided on the underlying economic, social and political factors which, evidence suggests, have influenced the development and implementation of youth justice law and policy. It will explore the reasons why there appears to be a distinct lack of political appetite for raising the age of criminal responsibility, which will provide important context to the recommendations advanced in chapter 5.

Chapter 4 will fully address research question 2 and directly address research question

3. It will begin by outlining the nature and scope of the presumption embodied in section 50. It will then undertake a detailed investigation of the extant literature which claims that this presumption is flawed. Importantly, it will then move on to critically evaluate whether the scientific evidence which has been proffered by proponents of law reform proves that the presumption that children above the age of 10 have the capacity to be criminally responsible is unsound.

Chapter 5 will directly address research question 4. It will draw together the research findings presented in chapters 2, 3 and 4 and will critically evaluate whether the evidence presented in the thesis proves the second hypothesis. Furthermore, it seeks to advance the debate concerning reform of section 50 by outlining recommendations as to how limitations of the existing scholarship, outlined in chapter 4, could be addressed.

1.6 Methodology

Legal research involves examining legal problems using a suitable methodological framework.[37] Identifying and implementing an appropriate research methodology is therefore a 'core' component of legal research.[38] This section of the thesis outlines the methodological approach selected to fulfil the research objectives of this thesis. The primary research method chosen for this research is the socio-legal research method (outlined in 1.6.2 below). The thesis does, however, also incorporate elements of doctrinal research and legal history research (discussed in sections 1.6.1 and 1.6.3 below). The rationale for selecting this research methodology is outlined in sections 1.6.1, 1.6.2 and 1.6.3.

1.6.1 Doctrinal research method

Doctrinal research is 'expository research'.[39] and is a predominant method employed by many legal researchers.[40] It 'can be defined as research which asks what the law is in a particular area' and is therefore 'concerned with the legal doctrine's analysis, development and application'.[41] 'In asking 'what is the law?' it takes an internal, participant-orientated epistemological approach to its object of study and, for this reason, is sometimes described as research *in* law'.[42]

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[37] Kothari CR. *Research Methodology: Methods and Techniques* (2nd edn, New Age International Publishers 2007).

[38] Laura Cahillane and Jenifer Schweppe, *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016) 1-2

[39] Harry William Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Information Division, Social Sciences and Humanities Research Council of Canada 1983).

[40] Ishwara Bhat, *Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles', Idea and Methods of Legal Research* (online edn, Oxford Academic, 2020) 143.

[41] Oliver Wendell Holmes, 'The Path of the Law' (1997) 110(5) Harv L Rev 991. See also Ian Dobinson and John Francis, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2012).

[42] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds*), Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30

Doctrinal research entails rigorous analysis[43] and critical inquiry or investigation[44] into legal rules, doctrines, principles, and concepts.[45] It involves either research directed at finding a specific statement of the law or a more complex and in-depth analysis of legal reasoning.[46] It therefore typically encompasses a critical review of legal doctrines through analysis of primary sources of law, such as statutory provisions and case law. For this reason, doctrinal research is also known as 'theoretical'[47] or 'black-letter' legal research.[48] The primary purpose of doctrinal research is the formulation of legal 'doctrines' through the analysis of legal rules and creative synthesis of multiple doctrinal strands.[49] Because the doctrinal approach focuses on internal (legal) sources of information, it is sometimes perceived to more simplistic and narrow than other forms of legal research. Such perceptions overlook the fact that '[d]octrinal restatement is one of the essential contributors that legal researchers make to their research'[50] and that such research now 'accommodates within its fold historical and comparative methods of legal research'.[51] Doctrinal research therefore 'remains an essential tool for the proper conduct of research into the law and for the comprehensive critique of legal regimes and systems' and makes a valuable and significant contribution to legal scholarship.[52]

A purely doctrinal research method is not suitable for this research because the thesis is primarily concerned with what the law *should be* and not what the law *is.* Furthermore, a doctrinal method would not allow the researcher to address all the research questions outlined in section 1.3 above.

Research question 1 is concerned with the historical development of the *doli incapax*

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[43] Ishwara Bhat, 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles' in *Idea and Methods of Legal Research* (Delhi, 2020; online edn, Oxford Academic, 23 Jan 2020) 143.

[44] Filipos Aynalem and Khushal Vibhute, *Legal Research Methods, Teaching Material, Justice and Legal System* (Research Institute, Ethiopia 2009) cited in Rita Abhavan Ngwoke, Ibiene P Mbano and Oriaifo Helynn, 'A Critical Appraisal of Doctrinal and Non-Doctrinal Legal Research Methodologies in Contemporary Times' (2023) 3(1) Int J Civ L & Legal Res 8, 9.

[45] Ibid.

[46] Myneni SR *Legal Research Methodology* (Allahabad Law Agency 2006)

[47] Oliver Wendell Holmes, 'The Path of the Law' (1997) 110(5) Harv L Rev 991. See also Ian Dobinson and John Francis, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2012).

[48] Paul Chynoweth 'Legal research' in Andrew Knight and Les Ruddock (eds*), Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29

[49] Ishwara Bhat, 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles' in *Idea and Methods of Legal Research* (Delhi, 2020; online edn, Oxford Academic, 23 Jan 2020) 143

[50] Gaurav Shukla, *Doctrinal Legal Research: A Library-Based Research in Social Research Methodology and Publishing Results* (IGI Global Publishing 2023) 227

[51] Ishwara Bhat, 'Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles' in *Idea and Methods of Legal Research* (Delhi, 2020; online edn, Oxford Academic, 23 Jan 2020) 198

[52] Ronan Kennedy, 'Doctrinal Analysis: The Real 'Law in Action'' in Laura Cahillane and Jennifer Schweppe *Legal Research Methods* (Clarus Press 2016) 21

doctrine and requires the researcher to investigate the various social and political factors that shaped the development of the law. To tackle this research question, the researcher must engage with legal and external non-legal sources/material. Although some aspects of this research will be doctrinal in nature, the researcher must apply the socio-legal (discussed in 1.6.2 below) and external legal history methods (discussed in 1.6.3 below) to undertake the breadth of research required to answer the research question. To address research question 2 the researcher must engage in doctrinal analysis of criminal law in order to determine what the presumption of capacity embodied in section 50 entails. Research question 3 will entail a critical analysis and evaluation of scholarship which argues that the minimum age of criminal responsibility should be increased because children lack capacity to be deemed criminally responsible for their actions. Because it is not concerned with analysis or synthesis of the law, it simply cannot be tackled by doctrinal analysis. Research question 4 aims illustrate that the law recognises an intermediate period in which children are considered to be less responsible, and therefore less culpable, for their offending behaviour. To support this argument, the researcher will demonstrate that law already recognises and treats children in a manner which recognises their reduced capacity and diminished responsibility.

Although the researcher has selected the socio-legal approach as the primary research method, the thesis does include some elements of doctrinal research. It is worthwhile highlighting that it is very common for different forms of legal research to include elements of doctrinal research. As Chynoweth observes, '[s]ome element of doctrinal analysis will be found in all but the most radical forms of legal research'.[53] Similarly, Cownie emphasises that law reform researchers 'emphasise the importance of traditional legal analysis within their socio-legal work'.[54] Doctrinal analysis is therefore sometimes considered to be 'the defining characteristic of academic legal research'.[55]

1.6.2 Socio-legal research method

The thesis is concerned with determining whether existing scholarship demonstrates that there is a scientific basis to support claims that the minimum age of criminal responsibility should be raised. Furthermore, it seeks to challenge claims that the law should be reformed because it treats children above the age of 10 as fully responsible agents. It aims to achieve this by illustrating that the law already recognises an intermediate period in which children are regarded as being less responsible and less culpable than adult offenders. It is therefore appropriate to classify the research as 'law reform research' which, according to Arthur's taxonomy of legal research styles, is best suited to a socio-

[53] Paul Chynoweth 'Legal research' in Andrew Knight and Les Ruddock (eds*), Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 31
[54] Fiona Cownie, *Legal Academics: Culture and Identities* (Hart Publishing 2004) 55
[55] Paul Chynoweth 'Legal research' in Andrew Knight and Les Ruddock (eds*), Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 31

legal research method.[56] This is the primary research method selected for this study.

What socio-legal studies is, exactly, is 'heavily contested'.[57] This is because the sheer breadth of socio-legal research makes it difficult to define.[58] However, it is now generally defined as legal scholarship that entails an examination of both research *in* law and research *about* law.[59] Whereas, doctrinal research is purely 'internal', the socio-legal approach is 'external' and is therefore much broader in scope than doctrinal research.[60] Socio-legal researchers utilise methods and materials from other disciplines, including social sciences, humanities, economics and politics.[61] It is therefore a form of interdisciplinary research. Cownie and Bradney state that because academic lawyers engaged in socio-legal research have utilised methods and materials from 'a very wide range of disciplines… it is now difficult to think of any discipline in the social sciences or the humanities that has not be used by scholars working in the socio-legal mode'.[62] The socio-legal approach can therefore encompass a wide variety of legal research activity.[63] Indeed, some scholars would go so far as to argue that any legal research that does not employ the doctrinal methodology would likely be classified as socio-legal research.[64]

The socio-legal method is underpinned by the belief that 'analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation'.[65] Such research focuses on the question 'of relating how the form and content of the law (as may be found in statements of law in legal textbooks), which are matters for intellectual comprehension and interpretation, move beyond such intellectual existence into social reality'.[66] For these reasons socio-legal research is often described as research 'about law' or research which examines the 'law in context'.[67]

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[56] Paul Chynoweth 'Legal research' in Andrew Knight and Les Ruddock (eds*), Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 29

[57] David Ibbetson, 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 864

[58] See for example Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) J Law & Soc 171; Don Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 2 Legal Stud 315; Dermot Feenan, *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan 2013).

[59] Paul Chynoweth 'Legal research' in Andrew Knight and Les Ruddock (eds*), Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30

[60] Christopher McCrudden, 'Legal Research and The Social Sciences' (2006) Law Q Rev 122, 633.

[61] Economic and Social Research Council, 'Review of Socio-Legal Studies: Final Report' (Swindon, 1994) 1

[62] Fiona Cownie and Anthony Bradney, 'Socio-legal studies. A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton*, Research Methods in Law* (Routledge 2018) 43

[63] Michael Salter and Judith Mason, *Writing Law Dissertations* (Pearson Longman 2007) 122

[64] Christopher McCrudden, 'Legal Research and The Social Sciences' (2006) Law Q Rev 122, 633

[65] Christopher McCrudden, 'Socio-Legal Theory: Social Structure and Law' (1994) 39 Mod L Rev 287, 287.

[66] John Eekelaar and Mavis Maclean, *A Reader in Family Law* (Oxford University Press 1994) 2.

[67] Darren O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justification and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe, *Legal Research Methods: Principles and Practicalities*

A major benefit of adopting the socio-legal approach is that it allows the researcher to explore 'the law in practice … rather than legal rules existing in a social, economic, and political vacuum'.[68] Chapters 2 and 3 of the thesis are concerned with tracing the development of legal rules in order to determine how and why the minimum age of criminal responsibility came to be set at 10 years of age. To fulfil the research objectives of these chapters, it is necessary to analyse both legal and non-legal source material to identify the various social and political factors that influenced the development of the law. Examining the development of the law in isolation from its wider social and political context would ignore the fact that law reform is often driven by external factors. Understanding the influence of these external factors enables the researcher to understand why the law has developed in the way it has. For example, it would enable the researcher to understand why the minimum age of criminal responsibility was established and why it has been set at different ages at different points in time. Similarly, it will enable the researcher to understand why legislative provisions which would have increased the minimum age of criminal responsibility to 14 were passed but never brought into effect. This level of detailed historical analysis is necessary to answer research question 1. The socio-legal method is therefore the most suitable approach for undertaking the research for chapters 2 and 3. Furthermore, a core objective of this research is to establish whether claims that the minimum age of criminal responsibility needs to be increased are supported by the evidence put forward by proponents of law reform (addressed in chapter 4). This aspect of the study will necessarily involve critically analysing academic scholarship from law and other disciplines. The socio-legal approach, which is interdisciplinary in nature, is therefore the most appropriate method for chapter 4.

The primary research material used will be peer-reviewed journal articles from law and other disciplines. From a methodological perspective, it is important to highlight that some of these articles will refer to empirical research conducted by others and that the author will not be undertaking empirical research but will, where appropriate, critically evaluate whether claims made by other scholars are supported by the empirical research they have cited in support of their claims. This will involve secondary analysis of empirical data collected and published by others. This type of analysis is appropriate to the research study because the aim of chapter 4 is to determine whether the claims made by numerous scholars are supported by the evidence they have presented or referred to in their scholarship. It is not necessary or appropriate for the researcher to undertake empirical research or attempt to critically evaluate research findings in other disciplines. For example, the researcher does not have the training or expertise to be able to undertake

(Clarus Press 2016) 109. See also David Ibbetson 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) 863-864 and Mike McConville and Wing Hong Chui *Research Methods for Law* (Edinburgh University Press 2012) 1.

[68] David Ibbetson 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003) 864

empirical data concerning brain development in children and does not have the expertise to be able to evaluate the merits of research published in fields such neuroscience or psychology. However, where academic lawyers have cited such research to support their arguments, it is possible for the researcher to critically evaluate whether such evidence supports the claim(s) made. This is the approach that will be adopted to fulfil the research objectives of chapter 4.

As has been outlined above, socio-legal research typically includes some element of doctrinal analysis. This is because socio-legal researchers analyse primary and secondary legal source materials to identify what the law is and then analyse external materials to critically evaluate the law or the way it operates in practice. Socio-legal researchers therefore use a wider range of material than doctrinal lawyers. A range of source material will be used to fulfil the research objectives of this study. The researcher will identify and analyse primary legal source material, such as statutes and case law, to establish how the age of criminal responsibility developed over the course of time. Secondary source material, such as peer-reviewed journal articles and books, will be used to ascertain why the law developed in the way that it did. Primary legal source material will also be critically examined to determine whether the law recognises a period in which children are deemed to be less responsible for criminal conduct than adults. Finally, academic literature, such as peer-reviewed journal articles, will be critically examined and evaluated to determine whether existing scholarship has proffered scientific evidence that provides an objective basis for increasing the age of criminal responsibility.

1.6.3 External legal history approach

'History unravels the growth of legal concepts, ideas, conscience of the community underlying the law, political and social movements which produced the law, and international relations, which shaped the law at the national and international levels'..[69] In order to answer research question 1, it is necessary to explore the historical development of the minimum age of criminal responsibility. In particular, it is necessary to understand how shifting attitudes towards children, and to children that commit criminal offences, have impacted the development of the law.

There are two approaches to legal history methodology: the internal and the external. The internal approach is essentially doctrinal in nature and is focused exclusively on analysing primary sources which are involved in the legal process itself ..[70] Although this approach is appropriate for some research projects, the internal approach has been criticised for assuming that 'legal change is caused exclusively by legal phenomena and that current

[69] Ishwara Bhat, *Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles', Idea and Methods of Legal Research* (online edn, Oxford Academic, 2020) 198

[70] Laura Cahillane 'The use of history in law: avoiding the pitfalls in legal research methods: principles and practicalities' in Laura Cahillane and Jennifer Schewppe *Legal Research Methods* (Clarus Press 2016) 62

legal issues could be decided by logical deductions from past law'..[71] A major difficulty with the internal approach is that 'dangerous assumptions can be made about the meanings of past concepts, which without studying them in their context, may not translate easily into modern times'..[72] For example, as Cahillane has observed, 'the word 'child' could refer to a person under the age 12, 16 or 18 depending on the period in time and the context' in which it is used..[73] The term 'child' may also have different meanings in different statutes or legal contexts. When engaging in an analysis of legal history, it is therefore essential to appreciate the fact that 'terms and concepts which hold one meaning for us held a different meaning in different times'..[74] In the context of this research, it is necessary to ensure that important terms and concepts, such as 'child', 'responsibility' and 'capacity', are situated and interpreted in accordance with the relevant temporal or social context. The internal legal history approach is therefore not an appropriate method for this study.

External legal history is 'the history of law as embedded in its context, typically its social or economic context'..[75] It contextualises law in its social milieu..[76] The external legal history research method has become more popular than the internal approach because it looks at the 'law in context' and is therefore 'almost a historical version of the socio-legal approach'..[77] As Cahillane explains, the external legal history approach 'is much closer to the method used by historians in that the law is not studied in isolation but within its social context, and the external legal historian is interested in the effect of that social context'..[78]

For the purposes of this thesis, the researcher must understand how the relevant legal rules developed and how their development was influenced by external social, economic and political factors. It is necessary to determine why a legal rule that dictates that children below a specified age are not criminally responsible was established and to ascertain whether the purpose or significance of this rule has changed over the course of time. Understanding the relationship between legal developments and wider social factors will enable the researcher to determine why the minimum age of criminal responsibility has been set at different ages at different points in time and this will enable the researcher to evaluate whether the decision to set the age of criminal responsibility at 10 years of age

[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Michael Lobban (2012) 'The Varieties of Legal History' available at: https://journals.openedition.org/cliothemis/1727 accessed 08 Jul 2024.
[75] David Ibbetson, 'What is Legal History a History of? in Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues* (2003(6)) (Oxford University Press 2004) 33.
[76] Ishwara Bhat, *Doctrinal Legal Research as a Means of Synthesizing Facts, Thoughts, and Legal Principles', Idea and Methods of Legal Research* (online edn, Oxford Academic, 2020) 198
[77] Laura Cahillane 'The use of history in law: avoiding the pitfalls in legal research methods: principles and practicalities' in Laura Cahillane and Jennifer Schweppe *Legal Research Methods* (Clarus Press, 2016) 61.
[78] Ibid.

was, and still is, objectively justified. Understanding the development of the law will also enable the author to critically analyse and evaluate claims that law reform is necessary (the primary objective of chapter 4) and enable the author to argue that concepts such as responsibility and capacity can change to reflect advances in knowledge and/or shifting social attitudes (discussed in chapter 5). Similarly, it is important to highlight that the significance of the minimum age of criminal responsibility (or the *doli incapax* rule that preceded it) is determined, at least in part, by its relevance and function within the wider justice system at different points in time. It is for this reason that even though the age of criminal responsibility has been set at 10 since 1963, most of the scholarship concerning reform of section 50 was published after the rebuttable presumption of *doli incapax* was abolished in 1998. Without understanding and appreciating the relevance of the various social and political factors that influenced important legal developments, such as the abolition of the presumption of *doli incapax,* it would not be possible to answer research question 1. The external legal history method is therefore an appropriate methodological tool for undertaking much of the research presented in chapters 2 and 3.

1.7 Conclusion

The aim of this chapter was to set out the purpose and objectives of the thesis, the research hypothesis, the research questions, the structure of the thesis and the research methodology. The remaining chapters of the thesis will test the hypothesis and answer the research questions outlined in section 1.3.

Chapter 2: The Rise of Welfarism and the Age of Criminal Responsibility

2.1 Introduction to chapter 2

This chapter deals directly with the first research hypothesis; that existing scholarship does not demonstrate that children above the age of 10 lack capacity to be criminally responsible, and it therefore cannot be conclusively shown that the section 50 presumption, that children above the age of 10 have the capacity to be deemed criminally responsible, is flawed. In order to test this part of the hypothesis and make recommendations as to how any identifiable limitations of the existing scholarship could be addressed, it is first necessary to explain what the minimum age of criminal responsibility is and to understand why it was set at 10 years of age. It is the purpose of this chapter to outline the reasons why the law has developed in the way that it has and to explain how historical, social and political factors have impacted the evolution of the law. This requires an examination of the development of the common law age limits which preceded section 50, and in particular an examination of the development of the doctrine of *doli incapax*. The primary purpose of this chapter is therefore to critically examine the historical development of the relevant statutory provisions and common law rules to determine why a minimum age of criminal responsibility was established and to understand how it came to be fixed at 10 years of age. The chapter therefore directly addresses research question 1.

This chapter provides essential context to the research discussed in chapter 3, which explains why there now appears to be a distinct lack of political appetite to reform the age of criminal responsibility. Collectively, chapters 2 and 3 provide a comprehensive chronological overview of the key policy developments that resulted in the age of criminal responsibility being fixed at 10 years of age. The research presented in this chapter also provides important context for much of the content covered in chapters 4 and 5. For example, this chapter highlights and discusses important legal developments that are referred to, or discussed in, the scholarly literature scrutinised in chapter 4. It also explains the reasons why a distinct youth justice system evolved, and this provides essential context to the conclusions and recommendations outlined in chapter 5.

2.2 Children and the criminal law in ancient times: Protecting children from the full extent of the law

The law has long recognised the need to protect children from the full extent of the criminal law. Although 'in early times infancy was no defence' to criminal liability, children were often spared from severe punishment.[79] For example, Ancient Anglo-Saxon law

[79] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 364.

appears to have afforded some protection to children, particularly children below the age of 12.[80] In 924 A.D The Laws of King Aethelstan stated that a child under the age of 12 could only be punished for theft if they attempted to resist arrest or flee. Furthermore, children below the age of 15 would be imprisoned rather than 'slain' unless they fled the scene of the crime or refused to surrender for arrest.[81] During ancient times the law did not seek to absolve children from criminal liability but it did offer children limited protection from severe punishment providing they did not resist arrest.[82] Punishments during these times were typically brutal and this is widely believed to be the most likely reason that such safeguards for children were established.[83]

2.3 The evolution of the good and evil test: Protection for children who lacked the capacity to understand 'evil'.

Over time, the common law developed to allow judges to determine whether a child should be spared punishment because the child was 'within age' or was 'too young to be punished'.[84] The decision to spare a child from punishment was therefore a matter for judicial discretion. Although clearly defined upper or lower age limits did not exist, cases often refer to the 'age of discretion' being the point at which children could be considered able to discern 'good' from 'evil' and be punished accordingly. Children 'within age' were generally not liable to be punished unless the judge believed that evidence demonstrated that the child had knowledge of evil. The origins of the good and evil test are thought to derive from biblical passages, the philosophical theorists of the Middle Ages or a combination of both these sources.[85]

The first confirmed use of the test was in 1313 in a case reported in Eyre of Kent. It stated that 'an infant under seven years, though he be convicted of a felony, shall go free of judgement, because he knoweth not of good and evil'.[86] 'Since the phrase appears without explanation or justification, one must assume that it was commonly used by

[80] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 5.
[81] Wiley Sanders, *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900,* (The University of North Carolina Press 1970) 4
[82] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 5
[83] Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1227.
[84] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 7
[85] Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1227.
[86] Reported in the Eyre of Kent 1313, see also Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1233.

judges of that period and its meaning was commonly understood'.[87] It is therefore likely that the test had been 'thoroughly embedded in the law' before the 1313 case but it is not possible to identify precisely when the test was established.[88] Some sources suggest that the test was probably in use during ancient times because ancient Saxon laws protected children from severe punishments providing they did not resist arrest.[89] However there is a lack of evidence to demonstrate that the act of resisting arrest was deemed to be relevant because it demonstrated a child's capacity to discern between good and evil. Sir William Blackstone's account of ancient Saxon law states that 'the age of twelve years was established for the possible age of discretion, when the first understanding might open; and from thence until the offender was fourteen, it was *aetas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity'.[90] According to Blackstone, children below the age of 12 could not be guilty of a criminal offence because they lacked 'capacity' whereas children between the ages of 12 and 14 could be criminally liable depending on their 'natural capacity or incapacity'. The legal position appears to have been that children who were 'within age' were too young to be punished whereas children who had reached 'the age of discretion' were deemed to be at an age where they *might* be able to discern between good and evil. The age of discretion therefore appears to have marked the beginning of a period of conditional liability. Blackstone's account of the law sets the age of discretion at 12 and the period of conditional liability between 12 and 14. The extent to which this is an accurate representation of the law is disputed because there is a lack of evidence to suggest that clearly defined age limits were established before the 17th century.[91]

Case reports confirm that the good and evil test was applied throughout the 14th, 15th and 16th centuries but references to the relevant age limits during this period are 'both sporadic and inconsistent'.[92] This strongly indicates that the relevant age limits were not settled.[93] A case reported in 1302 states that 'a child indicted for homicide ought not to suffer judgment if he did the deed before he was seven years old'.[94] This authority suggests that in cases of homicide children below the age of seven were conclusively presumed to lack the capacity to discern between good and evil. However, some case

[87] Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1258.
[88] Ibid.
[89] Wiley Sanders, *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900* (The University of North Carolina Press 1970) 4.
[90] Sir William Blackstone, *Commentaries on the Laws of England: Vol. IV* (London, Murray, 1857) Chapter II of the Persons Capable of Committing Crimes
[91] Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1258.
[92] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 368.
[93] Ibid.
[94] Ibid. See also Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate, 2002) 7.

reports suggest that even children 'within age' could be punished if they were deemed to have knowledge of evil. For example, a case reported in 1488 explained that a nine-year-old child was deemed to be within age but was hanged because the judge believed that the child had understood that their actions had been evil. The child had hidden himself and then claimed that the blood on his clothes was from a nosebleed. This conduct was deemed to be evidence that demonstrated the child's ability to discern between good and evil.[95] Similarly, in another homicide case an infant within age killed his friend and then 'concealed himself'. The judge believed that because the child had hidden, he was able to discern between good and evil and he was hanged.[96] Blackstone's claim that the age of discretion had been set at 12 since ancient times does not appear to be supported by the available evidence. It is much more likely, as Kean posits, that 'until the seventeenth century the age-lines had not yet been determined, and it was left to the judge in each case to decide whether or not the child was old enough to be punished'.[97]

The 'rules of infant capacity remained constant' in English law and even though the distinction between absolute and conditional liability was well-established 'the boundary lines between the different periods were not yet fixed'.[98] Scholars such as Kean and Crofts believe that this is likely to be attributable to the fact that there was no system of birth registration until the 17th century so there would have been little point in setting specific age limits before such a system was implemented.[99] A child's maturity and chronological age were therefore facts to be considered and determined by the presiding judge.[100] This explanation of the legal position is supported by the fact that many reported cases during this period refer to a child's approximate age only.[101]

The good and evil test served to protect children from vicious punishments unless there was clear evidence that the crime had been committed with malicious or evil intent. This position appears to have reflected a widespread belief that punishment was only considered to be appropriate in cases where the child was morally blameworthy for their conduct. This view is supported by the fact that the good and evil test was also applied to defendants suffering from insanity, 'lunacie' or madness.[102] The widely accepted justification for exempting such defendants from criminal liability is their lack of mental

[95] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 36, 367.
[96] Ibid.
[97] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 367.
[98] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 364 and 367.
[99] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 368 and Thomas Crofts *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 7.
[100] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 370.
[101] Wiley Sanders, *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900* (The University of North Carolina Press 1970) 21-36.
[102] William Lambard*, Eirenarcha (*1851) reproduced in A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 369.

capacity and corresponding lack of moral culpability.[103] As Moore explains '[t]he insane, like young infants, lack one of the essential attributes of personhood namely, rationality. For this reason, human beings who are insane are no more the proper subject of moral evaluation than are young infants, animals, or even stones'.[104] This is why from 'a historical point of view children and madmen seem to go hand in hand as soon as they appear in the textbooks of criminal law'[105] and why many criminal law textbooks still deal with the age of criminal responsibility alongside the special defence of insanity.[106] Case law confirms that the good and evil test remained in use throughout the 17th and 18th centuries and was applied in the United States from the 19th century.[107]

2.3 The emergence of fixed presumptions of capacity

The age of discretion was eventually confirmed by Hale in 1736. His account of the law stated that a child under the age of seven could never be regarded as guilty of a criminal offence 'whatever the circumstances proving discretion may appear, for *ex presumptione juris* he cannot have discretion, and no averment shall be received against that presumption'.[108] From this point, children below the age of seven were presumed to lack the capacity to discern between good and evil and could not be found guilty of any criminal offence under any circumstances. The presumption that children below the age of discretion lacked capacity was therefore absolute. The age of discretion was fixed at seven and this was, in effect, the first minimum age of criminal responsibility.

It is important to remember that the age of discretion was not the age at which the law presumed that a child knew the difference between good and evil 'but rather the age at which it was thought that a child could begin to have this understanding'.[109] It therefore marked the onset of a period of conditional liability. The upper limit of this period remained uncertain until eventually 'Coke's account of the law was accepted, and restated by Hale,

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[103] Nigel Walker 'Childhood and Madness' in Alison Morris and Henri Geller *Providing Criminal Justice for Children* (Edward Arnold 1983) 22.
[104] Michael Moore *Placing blame: A theory of criminal law* (Clarendon Press 1997) 534-535.
[105] Nigel Walker 'Childhood and Madness' in Alison Morris and Henri Geller *Providing Criminal Justice for Children* (Edward Arnold 1983) 22.
[106] See for example, chapter 5 of Michael J. Allen and Ian Edwards, *Criminal Law* (16th edn, Oxford University Press 2021), chapter 13 of Nicola Monaghan, *Criminal Law Directions* (6th edn, Oxford University Press 2020) and chapter 6 of Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019).
[107] Wiley Sanders *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900* (The University of North Carolina Press 1970) 21. See also Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1227.
[108] Matthew Hale *The History of the Pleas of the Crown* (1736) Vol 1, 25-28. Available at https://lawlibrary.wm.edu/wythepedia/library/HaleHistoryOfThePleasOfTheCrown1736Vol1.pdf accessed 10 March 2023.
[109] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 8.

and the lines were fixed at seven and fourteen'..[110] The presumption which applied to children aged between seven and 14 was a *rebuttable* presumption of incapacity.

Interestingly, Hale's writings suggest that the period of conditional liability was further subdivided into two stages (seven to nine and 10 to 14)..[111] Similar subdivisions were also described in Sir William Blackstone's Commentaries on the Laws of England, which state that:

> civil law distinguished the age of minors… into three stages: infantia, from birth until seven years of age; pueritia, from seven to fourteen, and pubertas, from fourteen upwards. The period of pueritia, or childhood, was again subdivided into equal parts: from seven to ten and a half was aetas infantiae proxima; from ten and a half to fourteen was aetas pubertati proxima..[112]

According to Hale's writings, the presumption of incapacity was easier to rebut between the ages of seven and 10 whereas Blackstone believed that '[d]uring the first stage of infancy and the next stage of childhood, infantiae proxima, they were not punishable for any crime'..[113] Blackstone's view was therefore that the absolute presumption of incapacity applied to children up until 10 and half years of age. In any event the subdivisions 'did not survive' and the presumptions of capacity settled..[114] A conclusive presumption of *doli incapax* applied to children below the age of seven, a *prima facie* presumption of *doli incapax* applied to children aged seven to 14, and a conclusive presumption of capacity applied to children aged 14 and over. The *prima facie* presumption which applied to children aged seven to 14 could be rebutted by evidence which proved that the child was 'doli capaces' or 'capable of mischief'..[115] Over time, these presumptions came to be known as the *doli incapax* presumptions or the doctrine of *doli incapax.*

2.4 The rebuttable presumption of *doli incapax*

The development of the doctrine of *doli incapax* most likely reflected the view that a

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[110] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 370.
[111] Matthew Hale (1736) 'The History of the Pleas of the Crown' Vol 1, 26. Available at https://lawlibrary.wm.edu/wythepedia/library/HaleHistoryOfThePleasOfTheCrown1736Vol1.pdf accessed 10 March 2023.
[112] Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (London: Murray, 1857), Vol. IV, Of Public Wrongs, (editors lib). Chapter II Of the Persons Capable of Committing Crimes. 19
[113] Ibid.
[114] A W G Kean, 'The History of the Criminal Liability of Children' (1937) 53 Law Q Rev 364, 371.
[115] Matthew Hale (1736) 'The History of the Pleas of the Crown' Vol 1, 26. Available at https://lawlibrary.wm.edu/wythepedia/library/HaleHistoryOfThePleasOfTheCrown1736Vol1.pdf accessed 10 March 2023.

defendant should only be deemed to be criminally responsible for their conduct if they were morally blameworthy for it. In other words, the law reflected the popular belief that it would be unjust to punish a person who lacked the mental capacity to understand and appreciate the wrongfulness of their actions. The rebuttable presumption of *doli incapax* reflected the fact that 'there are variations in the speed of the maturation process'.[116] It recognised a 'twilight period' in which direct proof of a child's actual ability to understand the wrongfulness of their actions was required.[117] This is clearly illustrated in Blackstone's commentaries on the law, which states that '… the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment'.[118] The rebuttable presumption of incapacity was a strong one which could only be disproven by 'strong and clear' evidence of malice which proved 'beyond all doubt and contradiction' that the child could discern between good and evil.[119]

Blackstone's commentaries on the law clearly illustrate that the test for capacity focused heavily on a child's ability to understand that their actions had been 'evil' or 'wrong'. Blackstone states that:

> a girl of 13 has been burnt for killing her mistress; and one boy of ten, and another of 9 who had killed their companions, have been sentenced to death and, he of ten actually hanged; because it appeared in their trials that one hid himself, and the other hid the body he had killed; which manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century, where a boy of 8 years old was tried in Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty and condemned and hanged accordingly. [120]

The cases described by Blackstone demonstrate that a child's capacity to discern between good and evil could be inferred from their behaviour. For example, the act of hiding seems to have clearly demonstrated that the child was capable of discerning between good and evil. Reported cases also confirm that actions such as hiding a dead body or washing to remove bloodstains would have been considered evidence of 'heinous

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[116] Penal Affairs Consortium 'The Doctrine of 'Doli Incapax' (London, November 1995,) 5.
[117] Glanville Williams 'The Criminal Responsibility of Children' (1954) Crim LR 494, 494.
[118] Matthew Hale (1736) 'The History of the Pleas of the Crown' Vol 1, 26. Available at https://lawlibrary.wm.edu/wythepedia/library/HaleHistoryOfThePleasOfTheCrown1736Vol1.pdf accessed 10 March 2023.
[119] Ibid.
[120] Sir William Blackstone, *Commentaries on the Laws of England: In Four Books* (London: Murray, 1857), Vol. IV, Of Public Wrongs, (editors lib). Chapter II Of the Persons Capable of Committing Crimes.

malice' and this would have been sufficient to rebut the presumption of incapacity.[121] The common law test of capacity therefore clearly focused on the child's ability to understand or appreciate that their actions had been wrong. For this reason, during the early nineteenth century the phrases 'good and evil' and 'right and wrong' were used 'interchangeably and synonymously'.[122] Over time, references to good and evil faded and the test focused on whether the child had the capacity to discern between 'right' and 'wrong' instead. The case of *R v Smith* (1845) confirmed that the rebuttable presumption of *doli incapax* placed a burden on the prosecution to prove that the child had 'malicious intent' when they committed the offence. The judgment clarified that 'malicious intent' meant 'a guilty knowledge that he was doing wrong'.[123] The test for capacity was, therefore, centred around a defendant's ability to understand that their actions were wrong and evidence which proved the child had such understanding was sufficient to rebut the presumption.

2.5 Raising the threshold for rebutting the presumption: The serious wrongdoing condition

The test for capacity did not change in any significant way until the early part of the 20th century when the case *R v Gorrie* (1919) was decided. In *Gorrie* the judge explained that the prosecution had to show that the defendant 'knew that he was doing what was wrong – not merely what was wrong, but what was gravely wrong, seriously wrong'.[124] This decision therefore made it more difficult for the prosecution to rebut the presumption of *doli incapax* because evidence which demonstrated that the child understood that what they had done was wrong was no longer considered to be enough to rebut the presumption. Instead, the prosecution was required to proffer evidence which proved that the child had understood that their actions had been *seriously* or *gravely* wrong. After the *Gorrie* decision, children between the ages of seven and 14 could only be deemed to be criminally liable for their conduct if they had the capacity to discern between conduct which was wrong and conduct which was seriously or gravely wrong. It is submitted that the decision in *Gorrie* represented a logical development of the law because it recognised the fact that children's capacity to understand and appreciate the wrongfulness of their actions develops and improves over time. Given that even very young children are often able to understand that some behaviours are wrong, it would have been reasonable for the law to demand that older children had the capacity to understand and appreciate the gravity of their actions, rather than simply require them to understand that their actions

[121] Wiley Sanders, *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900* (The University of North Carolina Press 1970) See also Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 10.
[122] Anthony Platt, 'The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States' (1966) 53(3) Cal L Rev 1227, 1237.
[123] *R v Smith* (1845) 9 JP 683
[124] *R v Gorrie* (1919) 83 JP 136

had been wrong. The test set out in *Gorrie* was subsequently affirmed and 'proof of an understanding that the act was seriously wrong formed the basis of the test for criminal responsibility from that time until its abolition'.[125]

The modification of the *doli incapax* rule was not, however, without its critics. Williams was highly critical of *Gorrie* decision because he believed that it went beyond the previous case law authorities and added a moral dimension to the test of wrongdoing.[126] In his view, the existing case law confirmed that the presumption could be rebutted where a child understood that their conduct amounted to a 'legal wrong' in the sense that it was 'something that will attract the attention of the policeman'.[127] However, he believed that the *Gorrie* decision introduced a new dimension to the test which was 'necessarily a moral one' because children could 'hardly be expected to distinguish between slight and grave degrees of legal wrong'.[128] He argued that the test was 'bound up with retributivist punishment' and the 'mystical theory of moral responsibility'.[129] However, Williams's analysis of the law fails to acknowledge that a defendant's inability to appreciate that their conduct constituted a 'legal wrong' is not a legally recognised defence to any offence. It would, therefore, have been illogical to frame the test around a child's ability to understand that their conduct amounted to a legal wrong. The *Gorrie* decision would have represented a logical development in the law because it allowed the court to hold a child criminally responsible for their conduct if they knew that it amounted to a serious wrongdoing, even if the child had failed to appreciate their conduct constituted a criminal offence.

In 1984, the judge in the case of *JM v Runeckles* (1984) seized the opportunity to clarify the legal position and confirmed that there was no onus on the prosecution to prove that a child had understood that their actions were unlawful or that they were morally wrong.[130] The judgment did however confirm that proof of such knowledge would be sufficient to rebut the presumption and this principle was affirmed in a number of subsequent cases.[131] The case also confirmed that evidence which showed that a defendant knew that their conduct was merely 'naughty' or 'mischievous' would not be sufficient to rebut the presumption. A number of later authorities confirmed that knowledge of serious wrongdoing had to go 'beyond mere childish mischief or

[125] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 41.
[126] Glanville Williams, 'The Criminal Responsibility of Children' [1954] 56(3) Crim LR 493, 496.
[127] Glanville Williams, 'The Criminal Responsibility of Children' [1954] 56(3) Crim LR 493, 494.
[128] Glanville Williams, 'The Criminal Responsibility of Children' [1954] 56(3) Crim LR 493, 493.
[129] Glanville Williams, 'The Criminal Responsibility of Children' [1954] 56(3) Crim LR 493, 496.
[130] *JM v Runeckles* (1984) 79 Cr App R 255
[131] *JBH and JH v O'Connell* [1981] Crim LR 682. See also *IPH v CC of South Wales* [1987] Crim LR 42, *A v Director of Public Prosecutions* [1992] Crim LR 34 and *C v Director of Public Prosecutions* [1995] ALL ER 43,

naughtiness'.[132] The test for capacity was therefore whether the child had the capacity to discern between serious wrongdoing and behaviour which was merely naughty or mischievous. In the case of *C v Director of Public Prosecutions* [1996] Lord Lowry described the term serious wrongdoing as 'conceptually obscure'.[133] However he conceded that 'when the phrase is contrasted with 'merely naughty or mischievous' ... 'its meaning is reasonably clear'.[134] Framing the test around a child's ability to distinguish between behaviour which was merely naughty or mischievous and behaviour which amounted to a serious wrongdoing would have been logical since it is 'highly doubtful that children think in terms of acts as being either morally or legally wrong'.[135]

2.6 Rebutting the presumption of *doli incapax:* Proving knowledge of serious wrongdoing

As discussed above, the *doli incapax* test focused exclusively on the defendant's ability to understand that their conduct amounted to serious wrongdoing. To rebut the presumption of *doli incapax* the prosecution was required to proffer positive evidence which proved that the defendant understood that their actions had been seriously wrong. In *R v Smith* (1845) the court confirmed that a child's guilty knowledge 'must be proved by express evidence and cannot in any case be presumed from the mere commission of the act'.[136] In some cases, the prosecution's failure to discharge this obligation resulted in the defendant's conviction(s) being quashed.[137] It is submitted that the requirement that the prosecution proffer additional positive evidence to rebut the presumption would have been necessary, otherwise the prosecution would only have had to prove that a defendant satisfied the *mens rea* and *actus reus* elements of the offence(s) in question. This would have rendered the presumption of *doli incapax* redundant since the prosecution has to prove those elements in all criminal cases in any event. Nevertheless, some judges were critical of this principle because they felt that it was 'ridiculous that evidence of some mischievous discretion should be required' in cases where the offence was so obviously wrong that most children would have understood that it amounted to a serious wrongdoing.[138] Nevertheless, the requirement survived until the presumption was abolished. It was also a well-established principle that proof of guilty knowledge had to 'be clear and beyond all possibility of doubt'.[139] Because the prosecution could not simply rely on evidence which proved the commission of the offence, the courts had to determine which other forms of evidence could be used to prove a child's knowledge of

[132] *IPH v CC of South Wales* [1987] Crim LR 42
[133] *C v Director of Public Prosecutions* [1996] 1 AC 1 at [53]
[134] C v *Director of Public Prosecutions* [1996] 1 AC 1 at [53]
[135] C v *Director of Public Prosecutions* [1996] 1 AC 1 at [53]
[136] *R v Smith* (1845) 1 Cox CC
[137] See for example *JBH (a minor) v O'Connell* [1981] Crim LR 632
[138] *JBH (a minor) v O'Connell* [1981] Crim LR 632
[139] *B v R* (1958) 44 Cr App R1 at 3

serious wrongdoing. The sections below provide a brief synopsis of the various forms of evidence that could be used to rebut the presumption of *doli incapax.*

The relevance of the defendant's age

The case of *B v R* (1958) confirmed that a child's age at the time of the offence was relevant because it impacted the strength of the presumption of *doli incapax*.[140] The case established the principle that 'the lower the child is in the scale between eight and fourteen, the stronger the evidence necessary to rebut the presumption'.[141] This approach was justified on the basis that it was logical to recognise that younger defendants were closer in age to children who were conclusively presumed to be *doli incapax* and as such it was reasonable to require stronger evidence to rebut the presumption for defendants towards the bottom end of the scale. Similarly, older defendants were much closer in age to children who were presumed to be *doli capax,* meaning that the presumption of incapacity would be much weaker in respect of children at the top end of the scale. The problem with this approach was that it failed to acknowledge that children develop and mature at different rates, even though that was precisely what the rebuttable presumption was designed to do.[142] For this reason, courts viewed the age of the defendant as a factor that could be considered to be relevant but only when it was considered in the context of other supporting evidence.

In the case of *JBH (a minor) v O'Connell* [1981] the judge suggested that evidence which proved that the defendants were 'ordinary children with ordinary mental aptitudes' could help to rebut the presumption.[143] In that case, two schoolboys aged 11 and 13 broke into a school, stole various items and used ink to cause damage to the walls of the building. The magistrates convicted the defendants on the basis that ordinary boys of their ages would have known that they what they were doing was seriously wrong. The approach applied in this case is often referred to as the presumption of normality and it operates on the basis that some acts are so seriously wrong that any 'normal' child of the defendant's age would have understood such actions amounted to serious wrongdoing.[144] However, the Divisional Court quashed the convictions because the prosecution had failed to provide additional express evidence to rebut the presumption. The case of *A v Director of Public Prosecutions* [1992] confirmed that courts were not permitted to make assumptions about whether a child was 'normally' developed for their age based simply

[140] *B v R* (1958) 44 CR App 1 p3
[141] *B v R* (1958) 44 CR App 1 at 3
[142] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to the Rebuttal of the Presumption of Doli Incapax' (2018) 40(3) Syd L Rev 339, 347.
[143] *JBH and JH v O'Connell* [1981] Crim LR 632
[144] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to the Rebuttal of the Presumption of Doli Incapax' (2018) 40(3) Syd L Rev 339, 339.

on the child's physical appearance or age.[145] This meant that the prosecution had to provide additional evidence concerning a defendant's mental development.

In any event, the presumption of normality was problematic because it was clearly incompatible with the *prima facie* presumption of incapacity. The rebuttable presumption operated on the basis that children were presumed to lack criminal capacity, so it was nonsensical for courts to presume that children who were normally developed for their age had capacity. For this reason, Crofts has argued that 'proof of normality should actually confirm a lack of understanding rather than be taken to prove the opposite'.[146] Furthermore, the normality principle failed to assess a defendant's *actual* capacity to understand serious wrongdoing and was therefore at odds with the underlying principle that children in this age group could only be deemed criminally responsible where their capacity to understand that their conduct amounted to serious wrongdoing was proved by express evidence.

The relevance of the nature of the offence(s) committed

It is important to note although the prosecution was under an obligation to prove the defendant understood that their conduct amounted to serious wrongdoing it did not mean that the offence itself had to be serious in nature.[147] Instead the prosecution had to demonstrate that the child had understood that their actions went beyond naughty or mischievous behaviour that would ordinarily be dealt with by their parent(s).[148] However, some legal authorities suggested that because some offences are clearly more wrong than others, the nature of the offence committed could help to demonstrate the child's understanding of serious wrongdoing. For example, in *JBH (A minor) v O'Connell* [1981] the judge stated that in cases where the defendant was accused of a sophisticated crime, such as forgery, 'it might require a considerable body of evidence before magistrates were satisfied that they knew what they were doing was wrong'.[149] Similarly in *C v Director of Public Prosecutions* [1996] Lord Lowry explained that his view of the law was that the presumption would be easier to rebut in cases where the crime was 'more obviously heinous'.[150] In essence this principle was based on the contention that it should be easier to conclude that the defendant knew their act was seriously wrong if the offence committed was one which is obviously wrong to most people. For instance, the presumption of *doli incapax* would be easier to rebut where the child was accused of an offence such as murder because most children would think that murder is seriously wrong

[145] *A v Director of Public Prosecutions* [1992] Crim LR 34, 34-5
[146] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to the Rebuttal of the Presumption of Doli Incapax' (2018) 40(3) Syd L Rev 339, 344.
[147] Ibid.
[148] HL Deb, 19 March 1998, vol 537, col 830 (Lord Goodhart)
[149] *JBH (A minor) v O'Connell* [1981] Crim LR 632
[150] *C v Director of Public Prosecutions* [1996] 1 AC at [33].

rather than mischievous or naughty.

There is an intuitive logic to this argument because where a defendant is proven to have committed an offence that most people would know to be seriously wrong it is more difficult to believe that the defendant thought that their behaviour was merely childish or mischievous. This approach was however problematic. First of all, it would have been necessary to identify which offences would be considered to be 'more obviously wrong' or 'more obviously heinous' and this is not as straightforward as it may first seem. For example, the case of *JBH (a minor) v O'Connell*, discussed above, concerned criminal damage to a school. Although the judge believed that most children would have understood that such behaviour was seriously wrong, the offence itself is not necessarily one that most people would categorise as being obviously heinous or seriously wrong. Furthermore, the approach has been criticised because 'a child's understanding of wrongfulness is not inexorably related to the seriousness or heinousness of the offence'.[151] As Fortin points out, children who commit the most heinous of crimes are precisely the ones who are least likely to be normally developed.[152]

Had the nature of the offence itself been deemed to be sufficient to prove a child's understanding of serious wrongdoing it would have amounted 'to a presumption in the graver class of case that the child appreciated that what he did was seriously wrong', which would have been 'inconsistent with the presumption that he has no such knowledge'.[153] In other words, it would have rendered the presumption of *doli incapax* redundant in any case where the defendant was charged with a serious or grave offence. Nevertheless, there were some circumstances in which the nature of offence committed could indicate that the defendant understood that their conduct amounted to serious wrongdoing. In *L v Director of Public Prosecutions* [1996] the child was charged and convicted of possessing a weapon. The weapon in question was a CS gas cannister.[154] The court believed that the child must have known that it was wrong to possess such an item because CS gas cannisters were illegal and were not available to the public generally. The legal position was, therefore, that the nature of the offence committed could not in itself prove a defendant's knowledge of serious wrongdoing, but it could be considered as part of the prosecution's evidence against the defendant.

The relevance of the defendant's actions before and after the commission of the offence(s)

[151]Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to the Rebuttal of the Presumption of Doli Incapax' (2018) 40(3) Syd L Rev 339, 348.
[152] Jane Fortin, *Children's Rights and the Developing Law* (Butterworths 1998) 444
[153] *C v Director of Public Prosecutions* [1996] AC 1 [6]
[154] *L v Director of Public Prosecutions* [1996] 2 Cr App R 501

Evidence concerning the defendant's actions before or after the commission of the offence was often used to demonstrate the child's knowledge of serious wrongdoing. According to Knapman, distinguishing between acts that were part of the commission of the offence and acts that were closely associated to the commission of the offence was illogical as '[t]heir relevance, in the proper sense of that word, is exactly the same whether they are elements of the offence or circumstances surrounding it'.[155] However, as has been outlined above, the prosecution were required to provide additional evidence to rebut the presumption because evidence concerning the actual commission of the offence was deemed insufficient to prove a defendant's guilty knowledge. There is a long line of authorities which illustrate that evidence concerning the defendant's behaviour before or after the commission of the offence(s) could be used to rebut the presumption. For example, behaviour such as carefully planning the offence or giving careful consideration as to when or where to commit the offence could demonstrate a defendant's understanding of serious wrongdoing. In the case of *A v Director of Public Prosecutions* [1997] a twelve-year-old boy took the victim to a chute room on the 20th floor of a block of flats and then forced her to commit sexual acts with several boys under threat of violence.[156] The fact that the defendant had deliberately selected a remote location where the boys were unlikely to be disturbed indicated that he knew his actions were seriously wrong.

A defendant's behaviour following the commission of the offence was also a relevant consideration. Acts such as hiding, taking steps to conceal the crime, disposing of evidence, lying, denying the act, blaming others for the act or running away from the police could all be taken as evidence which indicated the defendant knew that their actions were seriously wrong.[157] In *A v Director of Public Prosecutions* [1997], discussed above, the defendant and the other boys threatened the victim, ignored her clear distress and ran away when they heard adults outside of the room.[158] These acts were deemed to prove that the defendant knew that his actions were seriously wrong. It is, however, important to note that some acts were not enough to rebut the presumption without other evidence of the child's knowledge of serious wrongdoing. In *A v Director of Public Prosecutions* [1992] an 11-year-old boy was convicted of an offence under the Public Order Act 1986. The evidence proved that he had thrown bricks at a police vehicle and

[155] Lynne Knapman, 'Children and Young Persons: Doli Incapax - Evidence to Rebut Presumption - Circumstances Surrounding Offence' (1997) Crim LR 125, 127.
[156] *A v Director of Public Prosecutions* [1997] Crim LR 125.
[157] See for example *LMS* [1996] 2 Cr App R 50, *T v Director of Public Prosecutions* [1996] Cr App R 501 at 509, *W, GH and CH* [1996] 2 Cr App R 501 at 513 and *Sheldon* [1996] 2 Cr App R 50. *A v Director of Public Prosecutions* [1992] Crim LR 34; JM v Runeckles (1984) 79 Cr App R 255, 258. 87 [1996] AC 1, 39, quoted in *L v Director of Public Prosecutions* [1996] 2 Cr App R 501, 504. 88, *C (A Minor) v Director of Public Prosecutions* [1996] AC 1, 39.
[158] *A v Director of Public Prosecutions* [1997] Crim LR 125

then fled the scene.[159] His conviction was quashed by the Divisional Court because the act of running away was not in itself sufficient to rebut the presumption. The court reluctantly acknowledged that the defendant may have run away simply because he thought that he had been naughty. Although Bingham LJ felt that the presumption appeared 'to lead to results inconsistent with common sense' the approach was confirmed in *C v Director of Public Prosecutions* [1996].[160] In that case Lord Lowry explained that there were some cases 'where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness. An example might be selling drugs at a street corner and fleeing at the sight of a policeman.' But he also acknowledged that a child might have run away from police simply because they think they have done something naughty or mischievous or because they are afraid of the police. As Crofts has observed, 'the context of running away is therefore important'.[161]

The relevance of statements made by the defendant.

In addition to the behaviour of the defendant immediately after the commission of the offence, the prosecution was also entitled to rely on evidence concerning any statements a defendant made about the offence.[162] Crofts has argued that statements made by the child were 'particularly probative' in contrast to evidence inferred from factors such as the type of offence committed and the child's behaviour before or after the commission of the offence.[163] He argues that 'this type of evidence is preferable to inferential evidence because it comes directly from the child and refers directly to the child's appreciation of the act'.[164] There are several cases in which statements have been used to rebut the presumption. In the case of *JM v Runeckles* (1984) a girl of 13 had been charged with stabbing another girl with a broken milk bottle.[165] She had fled the scene of the crime but was later apprehended by a police officer. Upon arrest, the girl told the police officer that she thought the police would be looking for her. Those statements, which had been taken under caution, together with the act of fleeing the scene of the crime were deemed to have clearly indicated that the girl knew that her conduct amounted to serious wrongdoing. Similarly in *L v Director of Public Prosecutions* [1996] the defendant denied having had possession of a CS gas cannister despite the fact the police officer has seen him throw it to the floor.[166] The fact that the boy had told a 'deliberate and blatant lie' to

[159] *A v Director of Public Prosecutions* [1992] Crim L.R. 34
[160] *C v Director of Public Prosecutions* [1996] A.C. 1
[161] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to the Rebuttal of the Presumption of Doli Incapax' (2018) 40(3) Syd L Rev 339, 350.
[162] *L v Director of Public Prosecutions* [1996] 2 Cr App 501
[163] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to the Rebuttal of the Presumption of Doli Incapax' (2018) 40(3) Syd L Rev 339, 360.
[164] Ibid.
[165] *JM v Runeckles* (1984) 79 Cr App R 255
[166] *L v Director of Public Prosecutions* [1996] 2 Cr App R 501

the police officer was taken to indicate that the defendant knew his actions were seriously wrong. It is, however, important to note that the statements must have demonstrated the child's knowledge of serious wrongdoing. In *IPH v Chief Constable of South Wales* [1987] a boy accused of criminal damage had admitted that he foresaw that pushing a van against a post would result in damage.[167] Lord Justice Woolf felt that the statement demonstrated that the boy knew the consequences of his actions but not that he understood them to be seriously wrong.

Dissatisfaction with the development of the rebuttable presumption of doli incapax rules

Over the course of the 21st century there was growing dissatisfaction with the way that the *doli incapax* rule had developed. As noted above, several judges expressed dismay or frustration with the way that the presumption operated in practice and there was a growing sense that in many cases it was simply too difficult to infer a child's knowledge of wrongdoing from the evidence that was available. Consequently, several judges expressed that they had felt compelled to reach decisions which they believed were contrary to common sense. Despite this, the presumption was not abolished until 1998.[168] The various political and social factors which influenced the government's decision to abolish the presumption are explored in detail in chapter 3. In order to fully appreciate those reasons, and to understand why the minimum age of criminal responsibility was increased from seven to eight and then from eight to 10, it is necessary to understand why youth justice law and policy developed in the way that it did and to understand how its historical development has impacted current policy. The remainder of this chapter therefore provides a detailed overview of the key policy developments which led to the age of criminal responsibility being incrementally raised to 10.

2.7 The (not so) special status of children in law

The fact that the law has long afforded children protection from the full force of the criminal law is in itself significant because 'childhood has not always been a time in the life cycle to which much importance was attached'.[169] The concept of childhood is, after all, a social construction that changes with the passage of time and in different social and legal contexts.[170] There was not a distinct system for dealing with children who committed criminal offences until children and their offending behaviour became subjects of social and political concern. It was the emergence of the concept of 'youth delinquency', which was perceived to be a distinct social problem which warranted a distinct legal response,

[167] *IPH v Chief Constable of South Wales* [1987] Crim LR 42
[168] Crime and Disorder Act 1998, s34.
[169] John Muncie, *Youth and Crime* (5th edn, SAGE Publications Ltd 2021) 48
[170] John Clarke 'Histories of Childhood' in Dominic Wyse *Childhood studies: an introduction* (Blackwell Publishing 2004) 7.

that resulted in the development of a separate youth justice system.

In pre-industrial England, it was very common for children to mingle with adults 'in everyday life, in work and in leisure' to a far greater degree than they do today.[171] Children and adults inhabited the same worlds and were subject to the same codes of morality.[172] Children engaged in many activities which most people would now consider to be wholly inappropriate. For example, children engaged in hard manual work, drank alcohol and gambled.[173] At this time there was very little to distinguish children from adults.[174] The fact that children were essentially viewed and treated as 'small adults' was reflected in law by a distinct absence of child-specific legislation.[175] As Morris observes, the 'concept of childhood was peripheral to law'.[176] Children were, therefore, subject to the same laws and legal processes as adults.[177] Despite this, there appears to have been a longstanding view that subjecting young offenders to brutal punishments was not necessarily appropriate. For this reason, children who were convicted of offences were often spared from severe punishments, such as the death penalty, by virtue of the exercise of executive clemency.[178] This practice was widespread and was most likely driven by a desire to spare children from the brutal nature of the punishments that were imposed at the time. Punishments commonly included death by burning, death by hanging, transportation, burning of hands or cheeks and whipping.[179] It is also worthwhile highlighting that brutal punishments were not reserved for heinous crimes; records of children's cases tried in the Old Bailey reveal that young pickpockets and thieves were routinely sentenced to death or transportation.[180]

The idea of childhood as a distinct period in life emerged during the 17th century and by the 18th century an 'ideal' vision of the child had been conceived and widely projected.[181] 'This ideal child was dependent, hard-working, submissive to authority, obedient, modest

[171] John Muncie, *Youth and Crime* (5th edn, SAGE Publications Ltd 2021) 48. See also Barry Goldson and John Muncie *Youth Crime & Justice* (2nd edn, Sage Publishing 2015).
[172] John Muncie, *Youth and Crime* (5th edn, SAGE Publications Ltd 2021) 48 -50.
[173] Law Mar Empey, *American delinquency, its meaning and construction* (Dorsey Press 1982).
[174] Margaret May 'Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century' (1973) 18(1) Victorian Studies 7, 8.
[175] John Clarke 'Histories of Childhood' p7 cited in Dominic Wyse *Childhood studies: an introduction* (Blackwell Publishing 2004).
[176] Allison Morris, Henri Gellar, Elizabeth Szwed and Hugh Geach, *Justice for Children* (Palgrave MacMillan 1980) 1
[177] Julia Fionda, *Legal Concepts of Childhood* (Hart Publishing 2001) 78
[178] Wiley Sanders *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900'*(The University of North Carolina Press 1970) 21.
[179] Wiley Sanders *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900'*(The University of North Carolina Press 1970) 21-36.
[180] Ibid. See also William Reiney 'Problem of Age and Jurisdiction in the Juvenile Court' [1996] 19(3) Vanderbilt Law Review 835.
[181] Wiley Sanders *Juvenile Offenders for a Thousand Years. Selected Readings from Anglo-Saxon Times to 1900'*(The University of North Carolina Press 1970) 21-36.

and virtuous'.[182] However, as Muncie observes, the prevailing constructs of childhood in the 18th century were at best 'class-specific'.[183] Such constructions of childhood had little or no semblance to the lives of most working-class children.[184] This was because only the privileged classes could afford the 'luxury of childhood with its demands on material provision, time and emotion'.[185] In the 18th and 19th centuries child labour was an economic necessity for many working-class families.[186] Children were often regarded as a vital source of family income and were placed in work as soon as it became viable. For example, on rural farms child labour from the ages of four or five years was a long-established practice.[187] The need to make children economically active as soon as possible precluded any prolonged periods of childhood dependency.[188] This 'lends credence to the notion that childhood and youth are not universal biological states, but rather social constructions in particular historical contexts.'[189]

The use of child labour grew exponentially as a consequence of the Industrial Revolution and in the 19th century children formed the majority of factory workforces.[190] Children routinely worked in a wide range of industries, including textiles, mining, agriculture, domestic service, docks and machinery and metals.[191] Child labour was particularly popular in mines because children were small enough to be able to easily navigate the narrower road-ways and crawl under machines to clear waste.[192] In the first decades of the 19th century, it is estimated that approximately 80 percent of cotton mill workers were children.[193]

The widespread use of child labour continued unopposed for many years. This was because families relied heavily on their children's income and factory owners exploited children as a cheap source of labour.[194] There were no restrictions on how many hours children could work and no special regard for their safety or health. Because of this the everyday life of the 'factory child' was markedly different from the lives of middle-and upper-class children.[195] Over time, pressure to restrict the use of child labour grew and

[182] John Muncie *Youth & Crime* (4th edn, Sage Publishing, 2014)
[183] Ibid.
[184] Ibid.
[185] Chis Jenks *Childhood* (Routledge 1996) 57
[186] Harry Hendrick, *Child Welfare: England 1872–1989* (Longman 1994).
[187] Clark Nardinelli 'Child Labor and the Factory Acts' (1990) 40(4) The Journal of Economic History 739.
[188] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014).
[189] Clark Nardinelli 'Child Labor and the Factory Acts' 1990 The Journal of Economic History 40(4) 739.
[190] Harry Hendrick, *Child Welfare: England 1872–1989*. (Longman 1994).
[191] Ibid.
[192] John Muncie *Youth & Crime (*4th edn, Sage Publishing 2014).
[193] John R Gillis *Youth and History: Tradition and Change in European Age Relations 1770–Present* (Academic Press 1974) 56
[194] Clark Nardinelli 'Child Labor and the Factory Acts' (1990) 40(4) The Journal of Economic History 739, 739-755.
[195] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014).

was driven, at least in part, by middle-class intellectuals and humanitarians who were appalled at the exploitation and working conditions of child workers.[196]

2.8 The Factory Acts of 1819 and 1833: Children as subjects of social concern

The mounting pressure for reform resulted in two important pieces of legislation being passed: the Factory Act 1819 and the Factory Act 1833. The Acts are the first examples of child-specific legislation to appear on the statute books. They were particularly significant because they acknowledged that children, by virtue of their age and corresponding vulnerability, required special legal recognition and treatment. The legislation was also important because it represented the first step to acknowledging that all children were entitled to a universal childhood irrespective of their social or economic status.[197] The primary purpose of the Factory Acts was to regulate child labour. They prohibited children under the age of nine from being employed in mills and factories and limited the number of hours that older children could work in such environments. Children under the age of 13 were not permitted to work more than eight hours per day and children between the ages of 13 and 18 could not work more than 12 hours per day.[198]

The Factory Acts were regularly contravened but when the law was enforced, parents were often compelled to seek additional employment in order to compensate for their children's lost income.[199] An unintended but important side-effect of the Factory Acts was that children were often left unsupervised or were neglected while their parents worked more hours to compensate for the loss of, or decrease in, their children's earnings.[200] Consequently, a growing number of children were displaced, and against the backdrop of adverse social and economic conditions, they often drifted into delinquent activities and petty crime. Hendrick therefore argues that the concept of the 'factory child' was eventually replaced with the 'delinquent child'.[201] The prevalence of delinquent children in newly developed cities came to be a major cause of public concern and this, in essence, was the reason that child delinquency was perceived to be a distinct social problem which required a distinct legal response.[202]

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[196] Harry Hendrick, *Children, Childhood and English Society, 1880–1990* (Cambridge University Press 1997) 40 and Hugh Cunningham, *The Children of the Poor: Representations of Childhood since the Seventeenth Century* (Blackwell 1991)138-45.
[197] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014)
[198] UK Parliament 'The 1833 Factory Act' (UK Parliament, 2024) <https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/factoryact/> accessed 18 October 2024.
[199] Harry Hendrick *Children, Childhood and English Society, 1880–1990* (Cambridge University Press 1997).
[200] Clark Nardinelli 'Child Labor and the Factory Acts' (1990) 40(4) The Journal of Economic History 739.
[201] Harry Hendrick *Children, Childhood and English Society, 1880–1990* (Cambridge University Press 1997).
[202] John Muncie, *Youth Justice* (4th edn, Sage Publishing 2014).

2.9 The problem of delinquency and the reformist movement

At the same time that child delinquency was identified as a distinct social problem, the idea of a distinct type of offender, the juvenile offender, had also emerged. The juvenile offender was thought to be different to the adult offender and was thought to need different treatment. This reinforced the view that child delinquency required a discrete legal response. Specifically, there was a growing desire to *reform*, rather than merely punish, juvenile offenders. The reformist ideology had already begun to take hold, and this had resulted in various child-specific initiatives being implemented. As early as 1756, the Marine Society had established a system whereby delinquent children of criminal parents and children who had been deserted could avoid institutional confinement by being sent to sea.[203] It is, however, worthwhile noting that this initiative has been described as 'more a sweeping of the gutters, of flushing out, than of reintegrating the poor, the unemployed and the depraved into society'.[204] The London Refuge for the Destitute was also used to house young convicts in cases where the sentencing judge felt that the child would be corrupted by being sent to prison.[205]

A philanthropic society founded in 1788 later established a shelter designed to reform destitute and delinquent children.[206] It aimed to provide, as far as possible, a normal home life for the children residing there.[207] It is believed to be Europe's first centrally funded juvenile 'reformatory'.[208] The children living at the shelter were assigned to local manufacturers for industrial training.[209] In 1792 additional property, complete with dormitories and workshops, was acquired and it became the first full-scale institution for delinquent children.[210] The institution had three sections; the reformatory was a prison school for young delinquents, the manufactory was for the employment of partially reformed delinquent boys, and the training school was for delinquent girls.[211] Children in groups of around 45 were supervised by a house master.[212] Girls were employed in making, repairing and cleaning theirs and the boys' clothes and keeping the house clean.

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[203] Leon Radzinowicz and Roger Hood *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990,) 134.
[204] Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990) 134.
[205] Old Bailey Proceedings Online (version 9.0, Autumn 2023) <https://www.oldbaileyonline.org/static/Linked-records.jsp> accessed October 2024.
[206] Barry Godfrey *Crime and Justice 1750-1950* (Taylor and Franis 2005) 135
[207] Peter King '*Crime and Law in England' 1750–1840: Remaking Justice from the Margins'* (Cambridge University Press 2006) 154.
[208] Ibid.
[209] Ibid.
[210] Ibid.
[211] Ivy Pinchbeck and Margaret Hewitt, *Children in English Society Volume II: From the Eighteenth Century to the Children Act 1948* (Routledge 1973) 419-30.
[212] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014).

They were also sent out as menial servants for domestic labour.[213] Boys were employed in crafts like shoemaking and ropemaking and were apprenticed to local employers.[214] The distinguishing feature of the shelter was the underlying ethos of self-instruction under supervision.[215] The underlying philosophy of the reformatory was that discipline and structure were the means by which self-improvement and reform could be achieved.[216]

In 1849 the Philanthropic Society established a reformatory, an agricultural farm in Surrey, where delinquents and young vagrants were 'rescued' through a strict regime of religious practices and exercise.[217] Its regime was inspired by France's 'most venerated carceral institution', the Mettray reformatory, which followed a strict routine of religious education and physical exercise.[218] According to King, by the early 19th century a series of complex and informal alliances between philanthropists, 'liberal' judges and the government had evolved.[219] These initiatives reflected a growing belief that young offenders should be reformed and that this could be achieved through the implementation of youth-specific penal policy. The reformist ideology gathered momentum and was firmly established by the early part of 19th century.

The Society for the Improvement of Prison Discipline and the Reformation of Juvenile Offenders was convinced that there was a need to separate juveniles from hardened adult criminals in order to avoid the 'moral contamination' of the former.[220] It advocated the establishment of separate, highly controlled institutions in which young offenders could be 'reformed and reclaimed'.[221] Eventually, in 1938 the first penal institution solely for juveniles was opened at Parkhurst.[222] However, as Weiner explains, its regime was hardly less brutal than the penal regime applied to adults.[223] Whilst Parkhurst was specifically designed for children, it was 'decidedly penal in character'.[224] Prisoners were shackled and confined to their cells except for brief periods of exercise and religious

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213 Peter King, *Crime and Law in England 1750–1840: Remaking Justice from the Margins* (Cambridge University Press 2006) 154.
214 Ibid.
215 Ivy Pinchbeck and Margaret Hewitt, *Children in English Society Volume II: From the Eighteenth Century to the Children Act 1948* (Routledge 1973) 419-30.
216 John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014).
217 Barry Godfrey and Paul Lawrence, *Crime and Justice 1750-1950* (Willan Publishing 2005) 135.
218 Stephen Toth, *Mettray: A History of France's Most Venerated Carceral Institution* (Oxford University Press 2019).
219 Peter King, *Crime and Law in England: 1750–1840: Remaking Justice from the Margins* (Cambridge University Press 2006) 154.
220 Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders *Report of the Committee* (London, England, 1818).
221 John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014) 55.
222 Ibid.
223 Martin Weiner, *Reconstructing the Criminal: Culture, Law and Policy' 1830 – 1914* (Cambridge University Press 1990) 132
224 Ibid.

education.[225] Its founder assured the Home Office that there was 'no reason to doubt that a strict system of penal discipline is quite compatible with the means requisite for the moral and religious improvement of the offender'.[226] Nevertheless, at the time the regime was regarded as a humanitarian project.[227] Influential philanthropists such as Mary Carpenter later developed and advanced the reformist movement. Carpenter was a forceful critic of penal regimes such as at Parkhurst and was convinced that the successful reformation of young offenders was dependent on meeting the needs of children as well as administering punishment.[228] This view stemmed from the fact that reformists believed that the root causes of delinquency resulted from the deficiencies of working-class family life.[229]

The reformist ideology tended to emphasise the vital role that parents ought to play in ensuring their children developed into obedient law-abiding citizens. Reformists viewed delinquency as a consequence of inadequate parenting and the deficient moral standards of the poorer classes.[230] They viewed inadequate parental supervision and control and the failure to imbue children with proper moral habits as parental failings which caused delinquency.[231] Because of this, reformists believed that the state had a duty to intervene in family life in order to compel parents to fulfil their parental obligations.[232] As a result it was deemed appropriate for the state to intervene in working-class life in order to ensure that children were properly educated, moralised and disciplined.[233] Reformists believed that such interventions would break the chain that linked 'the deprived child of today to the criminal of tomorrow'.[234]

The perceived correlation between deprivation and depravation was an important feature of the reformist movement. In Carpenter's view, 'depraved' children were those who were 'dangerous' and had been convicted of crime whereas 'deprived' children were those 'who have not yet fallen into actual crime, but who are almost certain from their ignorance,

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[225] Martin Weiner, *Reconstructing the Criminal: Culture, Law and Policy' 1830 – 1914* (Cambridge University Press 1990) 133
[226] Martin Weiner, *Reconstructing the Criminal: Culture, Law and Policy' 1830 – 1914* (Cambridge University Press 1990) 132
[227] Martin Weiner, *Reconstructing the Criminal: Culture, Law and Policy' 1830 – 1914* (Cambridge University Press 1990) 133
[228] Barry Godfrey and Paul Lawrence, *Crime and Justice 1750-1950* (Willan Publishing 2005) 135
[229] John Muncie *Youth & Crime* (4th edn, Sage Publishing, 2014) 56
[230] Barry Godfrey and Paul Lawrence, Crime and Justice 1750-1950 (Willan Publishing 2005) 135
[231] Harry Hendrick, *Children, Childhood and English Society, 1880–1990* (Cambridge University Press 1997).
[232] Ibid. See also Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990).
[233] Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990) 180. See also Barry Godfrey and Paul Lawrence, *Crime and Justice 1750-1950* (Willan Publishing 2005) 136.
[234] Susan Margery 'The Invention of Juvenile Delinquency in Early Nineteenth-Century England' (May 1978) 34 Labour History, 11, 11.

destitution, and the circumstances in which they are growing up, to do so, if a helping hand is not extended to them'.[235] The reformist movement therefore focused on both reforming convicted offenders *and* preventing deprived children from falling into crime. This meant that state intervention in the lives of deprived children was deemed to be legitimate irrespective of whether such children had committed any criminal offence. Carpenter therefore advocated sending deprived children who were deemed to be at risk of offending to 'industrial schools.'[236] These schools were designed to help prevent neglected children from falling into crime by removing them from their undesirable living conditions and teaching them industry skills which would improve their chances of securing employment. Reformatories were very similar in nature but were specifically for children who had been convicted of a criminal offence.

2.10 Youthful Offenders Act 1854 and Industrial Schools Act 1857: The legislative basis for the reformatories and industrial schools system

Eventually, the Youthful Offenders Act 1854 and the Industrial Schools Act 1857 were passed. The Acts provided a legislative basis for the use of reformatories and industrial schools. Under the 1854 Act courts were permitted to sentence any child convicted of an indictable or summary offence to a reformatory for between two and five years.[237] Under the 1857 Act any children found begging or who appeared to lack an obvious means of subsistence and were deemed beyond parental control could be sent indefinitely to an industrial school. These legislative developments clearly reflected the reformist ideology outlined above. It is, however, worthwhile noting that the enthusiasm for reforming young offenders was not shared by all.[238] May explains that in contrast to the reformist discourse of welfare and treatment, the view that the punishment should 'fit the crime' and not be mitigated by personal circumstances or age endured and remained influential.[239] This 'sharp division of opinion' meant that the reformist proposals were subject to legislative compromise.[240] The cost of this compromise was that any child being sent to a reformatory was required to first serve a 14 day prison sentence and the parents of convicted juvenile offenders were required to make monetary contributions towards the upkeep of reformatories.[241] Furthermore the sentencing powers contained within the Youthful Offenders Act 1854 were advisory in nature which meant that courts

[235] Mary Carpenter, *Reformatory Schools for the Children of the Perishing and Dangerous Classes and for Juvenile Offenders* (Routledge 1851) 2.
[236] Ibid. See also Phyllida Parsloe, *Juvenile Justice in Britain and the United States: The Balance of Needs and Rights* (Routledge 2017) 121.
[237] Barry Goldson and John Muncie '*Youth Crime and Justice'* (Sage Publishing 2006) 59.
[238] Barry Godfrey and Paul Lawrence, *Crime and Justice 1750-1950* (Willan Publishing 2005) 136
[239] Margaret May *Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century (*1973) 18(1) Victorian Studies 7, 25.
[240] Ibid.
[241] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014) 60.

retained the power to send young offenders to prison if they felt it was appropriate to do so. The consequences of these legislative developments had a far-reaching impact on the way that youth justice policy developed and will be discussed in more detail in the sections that follow.

By 1860, there were 48 certified reformatories in England and Wales, holding around 4000 young offenders.[242] The development of industrial schools was slower but by the end of the 19th century reformatories and industrial schools held more than 30,000 children.[243] According to Radzinowicz and Hood, by the end of the century the state had come to assume responsibility for every one in 230 of the juvenile population.[244] The fact that so many children were housed in reformatories and industrials schools, particularly when many of them had not broken the law, represented a level of state intervention in family life that many regarded as wholly unacceptable. The result of conflating two distinct social problems, delinquency and destitution, was that youth justice policy barely distinguished between children who had offended and children who were deemed to be at risk of offending because of their socio-economic background. Crofts explains that the reason for a child being subject to state intervention in this period was essentially a 'matter of accident'.[245] Furthermore, the discretionary nature of sentencing powers meant that the practice of detaining young offenders in prisons that housed adult offenders persisted. For these reasons, the legal response to youth crime was widely regarded as unsatisfactory and there was a continuing pressure for law reform.

2.11 The Gladstone Report 1895: The need for a separate penal regime for adolescents

Around this time, social perceptions of childhood were also changing. In particular, the concept of adolescence had gained prominence by the late 19th century.[246] Adolescence depicted a period in life between childhood and adulthood which was characterised by the distinct challenges of emotional adjustment and physical development.[247] The rapidly developing psycho-medical disciplines of social psychology and child psychology gave conventional concern about young people 'both a more profound substance and a new legitimacy'.[248] Furthermore, as a result of developments in penology there was also a

[242] Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990) 180.
[243] Ibid.
[244] Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990) 181.
[245] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 15.
[246] Richard J. Bonnie and Emily P. Backes (Eds) '*The Promise of Adolescence: Realizing an Opportunity for All Youth' (*The National Academies Press 2019). Ch 1.
[247] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014) 60
[248] Harry Hendrick *Children, Childhood and English Society, 1880–1990* (Cambridge University Press 1997)

desire to overhaul the prison system more generally. This reflected a changing perception of the role of the prison as a penal institution. This enthusiasm for reform was captured in the Gladstone Report of 1895, a report by a government committee, which concluded that the purpose of imprisonment should be to *reform* as well as punish prisoners. The Report asserted that imprisonment should improve prisoners, and that people should leave prison in a better state than they entered it.[249] This represented a shift away from a purely retributivist model of criminal justice.

Some of the Report's key recommendations were implemented by virtue of the Prisons Act 1898, the statute often credited with laying the foundations of the modern prison system. Importantly, the Report recommended that young offenders and adult offenders be detained in separate institutions to ensure the successful reform of the former. The underlying rationale was that young offenders were thought to be more amenable to change because their character was not fully formed. The committee viewed adolescence as a period in life in which criminal tendencies could be either corrected or confirmed.[250] It therefore recommended the creation of a penal reformatory which would, in effect, be a 'half-way house between prison and a reformatory'.[251] The first institution of this kind was created in the then village of Borstal in Kent in 1901. Shortly afterwards, the Prevention of Crime Act 1908 established specialist detention centres for young offenders, which later became known as 'borstals'. These detention centres were essentially educational establishments for young boys aged 16 to 20. Courts were able to send boys to borstals for periods between one and three years to 'learn new skills and receive moral training and discipline'.[252] This represented another step towards the development of a distinct youth justice system and a positive step towards the decarceration of young offenders.

2.12 The Children Act 1908: The birth of a distinct juvenile justice system

The Children Act 1908 created the first distinct juvenile court, although some districts had already started to operate separate systems for dealing with young offenders.[253] The Act is said to mark the 'real birth' of the youth justice system.[254] Garland states that the development of a juvenile court acknowledged 'the child or juvenile as a special category'

[249] Report from the Departmental Committee on Prisons (Gladstone Committee Report) (1895) reproduced in Victor Bailey, *Nineteenth Century Crime and Punishment Volume IV Prisons and Prisoners* (Routledge 2020).
[250] Ibid.
[251] Ibid.
[252] Julia Fionda, *Legal concepts of childhood* (Hart Publishing 2001) 79.
[253] Leon Radzinowicz and Roger Hood, *The Emergence of Penal Policy in Victorian and Edwardian England* (Clarendon Press 1990) 618-624, 629 and 633.
[254] Julia Fionda, *Legal concepts of childhood* (Hart Publishing 2001) 81.

of people with distinct needs.[255] The creation of separate juvenile courts had already occurred in several other countries. The sense at the time was that examples from 'dominions across the seas is worth following' because 'the effect of separate treatment of the children under more sympathetic conditions, apart from the ordinary grimy surroundings of a Criminal Court, has been wholly helpful … the result has been a very large diminution of youthful crime'.[256] The 1908 Act embodied a widespread belief that young offenders required different treatment if they were to be successfully reformed and diverted from a life of crime. The decarceration of children was also at the forefront of the legislature's aims because it believed that '[P]rison left a stigma on [children] and, furthermore, short terms of imprisonment were the very worst things possible for children, because after the first term the other terms did not act as a deterrent in any way, and they familiarised a child with prison life'.[257] For that reason, a policy aim was 'to shut the prison door and to open the door of hope'.[258]

The juvenile court had jurisdiction over all young people between the ages of seven and 16 charged with offences other than murder.[259] The age of seven reflected the lower limit of criminal responsibility which had been established at common law. The juvenile court operated in a manner similar to the adult courts but there were some important differences that were designed to reflect the fact that the court dealt with young offenders. For example, the public were excluded from the juvenile court[260] and the range of sentences included a variety of juvenile-specific measures to deal with offending behaviour.[261] The 1908 Act prohibited imprisonment of children under the age of 14 and set up specialist detention centres, known as remand homes, to avoid any child being kept in prison before trial. Imprisonment for 14 to 16-year-olds was only sanctioned for children deemed 'so unruly' that reformatory detention would be unsuitable.[262] Importantly, the Act also aimed to 'get some unity of treatment of children who had fallen into crime' by establishing a principled and cohesive policy for dealing with young offenders.[263]

Prior to the introduction of the Children Act 1908 the reformatory and industrial school system had been an adjunct to the existing criminal justice system and juvenile sentencing powers were discretionary in nature, consequently the administration of youth justice was both inconsistent and unpredictable. This was thought to represent an

[255] David Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot 1985) 22-23.
[256] Hansard, HC Deb, 24 May 1908, vol 186, cc1251 – 300.
[257] Ibid.
[258] Ibid.
[259] Children Act 1908, Part V.
[260] Children Act 1908, s111(4).
[261] Phyllida Parsloe, *Juvenile Justice in Britain and the United States: The Balance of Needs and Rights* (Routledge 1978) 134.
[262] Children Act 1908, s95, s97 and s102.
[263] HC Deb 24 March 1908, vol 186, col 1271.

unacceptable lack of a coherent policy for dealing with juvenile offenders. The excerpt below, which is taken from Hansard records from the passage of the Children Bill, clearly illustrates the lack of a coherent policy for dealing with young offenders.

> The Metropolitan magistrates, whatever their merits might be, and they were very great, had no certain unity of principle in dealing with the questions which affected juvenile criminals. One magistrate would be very anxious to send boys to industrial schools, and another would think it almost wicked to shut them up for years in an industrial school. Another magistrate might be very fond of using the birch. In one Court, for example, thirteen children in one week divided ninety-eight strokes of the birch between them. The birch might be an excellent thing for some of those children, but he could not believe that it was an equally good thing for the whole of the thirteen. Other magistrates thought a great deal of the ratepayers' pocket, and for that reason refused to send boys to the industrial schools. [264]

The 1908 Act sought to address this issue by establishing a consistent and principled system for dealing with young offenders. It aimed to treat young offenders in a manner which would be effective in both reducing rates of juvenile offending *and* successful in meeting the needs of young offenders. The Act therefore marked a significant step forward in the development of a distinct strategy for dealing with juvenile offenders.

The development of a distinct youth justice system appears to have been underpinned by two important ideas. The first was the perception of a causal relationship between the socio-economic status and family life of young offenders and their tendency to commit crime. Because children had little or no control over their social, economic and family circumstances, they were thought to be less responsible for their criminal conduct and therefore less deserving of punishment. It was children's inability to control the factors which caused them to offend which rendered them less culpable for their actions, rather than a lack of capacity to understand that their actions were wrong. Because of this, youth justice policy aimed to address the underlying root causes of juvenile offending by addressing the needs of juvenile offenders. The second idea was that juveniles were not fully formed human beings so their personality and character could be reformed through appropriate intervention and treatment. An important aim of youth justice policy was therefore to reform, rather than punish, young offenders. Furthermore, because young offenders were not fully formed, they were also thought to be at risk of moral corruption if they were detained alongside adult offenders so there was also a perceived need to deal with young offenders and adult offenders separately. These ideas clearly indicated a need for a juvenile-specific strategy to effectively tackle juvenile offending. Furthermore, they

[264] HC Deb 24 March 1908, vol 186, col 1271.

both pointed in the direction of the need for a less punitive range of sentences that would address the root causes of delinquency and help to address the needs of juvenile offenders. The overarching idea was that the effective reformation of juvenile offenders would reduce the prevalence of juvenile offending.

2.13 The Children Act 1908: Growing support for welfarism

In the years leading up to the Children and Young Persons Act 1933, the rate of youth crime appeared to have increased, and the Home Office even warned of a 'juvenile crime epidemic'.[265] The Great War was also thought to have had a negative impact on rates of juvenile offending. In particular, the absence of fathers and the employment of women in munitions factories were identified as causes of youth offending.[266] Juvenile crime was largely thought to be a consequence of a lack of opportunities for healthy recreation.[267] By the 1920s, the subject of juvenile delinquency had become an established topic for British academics. The earlier concern about children's economic circumstances persisted but there was also a growing concern about the impact of home and family life. During this period, the apparent solution to youth crime was to improve home conditions and family life. Cyril Burt, a prominent applied psychologist dealing with referrals from magistrates courts, commented that delinquency 'is nothing but an outstanding sample - dangerous perhaps and extreme, but non the less typical - of common child naughtiness'.[268] He concluded that delinquency was multi-causal and complex but identified deficient character and broken homes as important causative factors.[269] To tackle delinquency, he recommended intervention by parents in the pre-school period, by teachers' reports at school and by supervision of school-leavers by after-care workers. It is also worthwhile noting that Cyril Burt was one of the 99 witnesses who contributed to the Enquiry into the Treatment of Young Offenders between 1925 and 1927.[270] Similar medico-psychological ideas were also gaining prominence in the emerging field of British positivist criminology.[271]

In the early part of the 20th century, the social problems of neglect and delinquency were conflated to such an extent that the problem of juvenile delinquency was viewed as 'but

[265] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014) 77.
[266] David Smith, *Juvenile delinquency in Britain in the First World War* (1990) 11 Criminal Justice History 119.
[267] Victor Bailey *Delinquency and Citizenship: Reclaiming the Young Offender, 1914-48* (Clarendon Press 1987).
[268] Cyril Burt *The Young Delinquent* (University of London Press 1925) 600.
[269] Ibid.
[270] Home Office, *Report of the Departmental Committee on the Treatment of Young Offenders* (Cmd 2831, 1927).
[271] David Garland 'British Criminology before 1935' (Spring 1988) 28(2) The British Journal of Criminology, 1.

one inseparable portion of the larger enterprise for child welfare'.[272] In 1925 the Maloney Committee was set up to review the juvenile court. The Committee carefully considered, but ultimately rejected, a move to a purely welfare-based system.[273] It did, however, conclude that:

> [N]eglect and delinquency often go hand in hand and experience shows that the young offender is only too often recruited from the ranks of those whose home life has been unsatisfactory. The legislature draws a distinction between the two classes, but in many cases the tendency to commit offences is only an outcome of the conditions of neglect, and there is little room for discrimination in the character of the young person concerned or in the appropriate method of treatment …there is little or no distinction in the character or needs between the neglected and the delinquent child. It is often a mere accident whether he is brought before the court because he is wandering or beyond control or because he has committed some offence. Neglect leads to delinquency and delinquency is often the direct outcome of neglect.[274]

The Committee therefore recommended that the juvenile court should have primary regard to the welfare of the child, whether that child was brought before the court for offending or for welfare reasons.[275] The view that delinquency and neglect were essentially two sides of the same coin was remarkably similar to the reformist ideology discussed earlier in this chapter. The conflation of these two distinct social problems resulted in the development of youth justice policy that aimed to tackle both issues, and this is clearly reflected in the legislative developments that occurred in the early part of the 20th century. It was against this backdrop that the Children and Young Persons Act 1933 was passed. Industrial schools and reformatories were amalgamated and reconstituted as 'approved schools'.[276] These schools were residential establishments for children who had been convicted of crime and children who were deemed to be beyond parent control. The merging of reformatories and industrial schools further compounded the amalgamation of welfare and criminal justice initiatives.

Section 44 of the 1933 Act placed the Maloney Committee's recommendation on a statutory footing. It states that '[e]very court in dealing with a child or young person who is brought before it, either as […] an offender or otherwise, shall have regard to the welfare of the child or young person and shall in a proper case take steps for removing him from

[272] Cyril Burt, *The Young Delinquent*'(University of London Press 1925) 610.
[273] Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 222.
[274] Home Office, *Report of the Departmental Committee on the Treatment of Young Offenders* (Cmd 2831, 1927). 71
[275] Ibid.
[276] Children and Young Persons Act 1933, s79.

undesirable surroundings, and for securing that proper provision is made for his education and training'.[277] Section 44 clearly confirmed that state intervention was justified irrespective of whether the child was an 'offender' or 'otherwise'. As Muncie explains '[t]he juvenile courts were empowered to act upon both the criminal offender and the child who may have been found begging, vagrant, in association with thieves or whose parents were considered unworthy. The categories of criminal (the troublesome) and destitute (the troubled) were conflated'.[278] The juvenile court's dual jurisdiction represented a clear amalgamation of welfare and justice initiatives. Juvenile justice policy was, once again, regarded as the vehicle through which both youth crime and child neglect could be addressed. The 1933 Act signalled a clear step towards a welfarist response to youth crime. Its welfare-oriented approach was designed to acknowledge that young people typically committed crime because they had been subjected to bad parenting, a lack of education, unemployment and poor living conditions.[279] To reflect the fact that young offenders were less culpable for their offending behaviour, the Act also aimed to reduce the punitive nature of the juvenile justice system. To this end, section 59 substituted labels such as 'conviction' and 'sentence' with 'finding of guilt' and 'order made on a finding of guilt'. It also made provision for specially trained magistrates to be appointed to consider cases brought before the juvenile court and abolished the death sentence for children under the age of 18. However, section 53 stipulated that offenders aged under 18 could, if convicted in a Crown Court for 'grave crimes', be detained for lengthy periods and in effect treated as if they were adults.

2.14 Section 50 of the Children and Young Persons Act 1933: Putting the age of criminal responsibility on a statutory footing and raising it to eight

Section 50 increased the age of criminal responsibility from seven to eight. This change appears to have been uncontroversial because it did not feature heavily in the debates during the passage of the Bill. The change was in response to a recommendation of the Maloney Committee Report which stated that:

> As the law stands at present no act done by any person under seven years of age is a crime and no act done by any person over seven and under 14 is a crime unless it be shown affirmatively that such person had the capacity to know that the act was wrong. The age of seven was adopted hundreds of years ago and the whole attitude of society towards offences committed by children has since been revolutionised. We think the time has come for raising the age

[277] Children and Young Persons Act 1933, s44.
[278] John Muncie, *Youth & Crime* (4th edn, Sage Publishing 2014).
[279] Julia Fionda, *Devils and Angels: Youth, Policy and Crime* (Cambridge University Press 2005) 35.

> of criminal responsibility, and we think it could be safely placed at eight.[280]

The Report gave no further rationale for recommending the age be raised to eight. During the Bill's passage through Parliament, the increase in the age of criminal responsibility was discussed, albeit very briefly. Mr. Rhys Davies MP welcomed the increase and suggested raising it further to the age of nine.

> Another provision which gives those who are interested in this problem great pleasure is that it is proposed to raise the age of criminal responsibility from seven years to eight years. I am in favour of raising it a little further, and I will tell the House why. As we have extended the average age of life of the individual in this country by ten or 12 years, so we ought to regard the child as being a child longer than we used to do when the average age was about 40 instead or 50 years. I wonder whether any one of us at nine years of age could have told whether when we were committing an offence we were doing right or wrong? I should like to see the age of criminal responsibility raised one year more, to nine years.[281]

In response, another MP stated that:

> I also approve of the raising of the age of criminal responsibility from seven to eight, but I would not go so far as the hon. Member for Westhoughton (Mr. Rhys Davies) who desired to raise it still further. Children are much more precocious now than they were in the old days. We have infant schools and nursery schools, and my own experience in education work is that children of five and six know very much more than we did when we were children of ten and eleven. A child of seven or eight years is quite able to know the difference between right and wrong just as well as a child of 12.[282]

During the Bill's second reading in the House of Lords, Lord Stonham stated that 'We welcome also … the raising of the age of criminal responsibility from seven to eight, though we should, of course, have preferred it to be nine, which we think would have been young enough'.[283]

The precise justification for raising the age to eight is therefore unclear. It seems to have a combination of the fact that the minimum age of criminal responsibility had been fixed

[280] Home Office, *Report of the Departmental Committee on the Treatment of Young Offenders* (Cmd 2831, 1927) para 21.
[281] HC Deb 12 February 1932 vol 261, col 1190.
[282] HC Deb 12 February 1932 vol 261, col 1224.
[283] HC Deb 12 February 1932 vol 261, col 1224.

hundreds of years earlier when attitudes towards children and their behaviour were very different, and the fact that there was a perception that children aged eight were likely to know the difference between right and wrong. The reluctance to increase the age of responsibility to nine appears to be rooted in the belief that the establishment of a universal education system had significantly improved children's ability to understand right from wrong. In any event no detailed examination of the age of criminal responsibility was undertaken before or during the passage of the Bill and the increase seems to have been uncontentious. It is worthwhile noting that in addition to the minimum age of criminal responsibility, the rebuttable presumption of *doli incapax* was still in operation at this time. The presumption of capacity which was embodied in section 50 was, therefore, not absolute and children were only conclusively presumed to have capacity from the age of 14.

2.15 The Report of the Ingleby Committee 1960

The welfare-oriented system established by the 1933 Act increased, rather than decreased, formal intervention in the lives of children.[284] 'The sudden steep rise in the official figures in the mid-thirties was thought to have been due largely to a greater willingness on the part of all concerned to prosecute under the Children and Young Persons Act of 1933 and not necessarily to indicate a real increase in juvenile crime'.[285] It seems that because the Act signalled a clear shift towards a less punitive, welfare-oriented system for dealing with children, there was less concern about subjecting children to it. The earlier perception that children needed to be protected from the full extent of the law is likely to have diminished. It is also likely that many believed that contact with the juvenile court would be beneficial because the new legislative framework allowed for appropriate welfare-based interventions in cases where the child had engaged, or was at risk of engaging, in delinquent behaviour because of their socio-economic or family circumstances. This seems to have resulted in an increased willingness to prosecute children for 'being beyond parental control' or 'being in need of care and protection'.[286] This contention is supported by the fact that the 1933 Act resulted in many more children coming into contact with the juvenile justice system.[287] As Springhall explains, there is an 'abundance of evidence' to show that the effect of the 1933 Act was not to divert children from court, but to actively encourage formal intervention.[288] Retributivists believed that the welfare approach was ineffective and had resulted in a notable increase in juvenile offending and advocated a return to a

[284] John Muncie *Youth & Crime* (4th edn, Sage Publishing 2014) 79
[285] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 4.
[286] Edward Smitzies, *Crime in Wartime - A Social History of Crime in World War II (*Allen and Unwin 1982) 175.
[287] Pamela Cox, *Gender, Justice and Welfare in Britain,1900-1950* (Springer 2003) 163.
[288] John Springhall, *Coming of Age: Adolescence in Britian* (Gill and MacMillan 1986) 186.

punishment-oriented model. Because of this, the use of the more punitive and severe punishments available increased. For example, in 1939 50 birchings were imposed on boys under the age of 14. Just two years later, in 1941, over 500 birchings were ordered.[289]

In the years that followed, it became clear that the competing aims of the juvenile court were incoherent. It also became increasingly obvious that there was a stark division of opinion concerning the most appropriate way to respond to youth offending. On the one hand, many believed that a welfare-based response which focused on addressing the root causes of offending behaviour was most suitable, whereas others believed the welfare approach was largely ineffective and favoured a return to a penal-oriented approach. These conflicting views later came to be known as the 'penal-welfare complex'.[290] The tension between these approaches and their impact on the effectiveness of the juvenile court was examined in detail by the Ingleby Committee, which was established in 1956 to investigate the processes for dealing with youth offenders in the juvenile court. The investigation was comprehensive and involved consideration of oral and written evidence from 93 interested organisations, associations and individuals and examination of 151 witnesses over the course of 49 meetings.[291]

The Ingleby Report, published in 1960, concluded that the 'big rise' in rates of juvenile offending during and after World War II was alarming because 'in spite of fluctuations, they had remained well above the 1938 figure'.[292] It stated that 'the last of the four peaks, that of 1951, had been the highest ever reached'.[293] The view of the Committee was that whilst rates of juvenile offending had stabilised in the years that followed World War II they remained at a high level. It found that by 1958 there had been a significant increase in rates of offending generally, but it was particularly concerned by the fact that the statistics showed that the number of offences committed by offenders aged 14 to 21 had made the biggest contribution to this increase. The number of males found guilty of indictable offences for this age group was higher than it had ever been, and for offenders aged 17 to 21 the figure was just over double what it had been in 1938. Whilst the total number of offences committed by children aged eight to 14 represented a much smaller proportion of the total number of offences, the total number of offences committed by children in this age group was still more than two and a half times the equivalent 1938

[289] Edward Smithies, *Crime in Wartime - A Social History of Crime in World War II (*Allen and Unwin 1982) 175.
[290] David Garland, *Punishment and Welfare: History of Penal Strategies* (Ashgate Publishing 1985) 262.
[291] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960. Appendix VI and para 2
[292] Ibid.
[293] Ibid.

figure.[294] The Committee believed that the statistics made it 'difficult to believe that most of the problems which have arisen since 1938 have been entirely due to the disruptions of the war … and that once the generation affected had grown up things would improve again'.[295] It believed that the situation was 'more serious than it has ever been' and as a result it was no longer possible 'to feel sure that … our methods of dealing with the problems of children in trouble (whether actually delinquent or not) are generally sound and sufficient and are necessarily developing along the right lines'. It therefore 'felt it necessary' to reconsider the legal response to juvenile offending.[296]

The Report concluded that a significant proportion of offences committed by children were committed by offenders aged 14 and over. Furthermore, it found that the offences committed by children aged eight to 14 were generally less serious than those committed by offenders over the age of 14.[297] The Committee believed that the piecemeal development of juvenile justice policy had resulted in a confused system which was underpinned by inconsistent principles. Because of this it seriously contemplated overhauling the system entirely and setting up a welfare tribunal system, but ultimately it recommended keeping the juvenile court. It did, however, recommend that the juvenile courts move away from their traditional role as criminal courts towards an agency-based system which focused on determining what help and support would best address the needs of the children before it.

It is clear that the Ingleby Committee favoured a welfare orientated response to youth offending. For this reason, it recommended that young offenders be subject to a new procedure which it believed would 'be more appropriate and better fitted to deal with these young children whose problems are essentially family ones from which the child cannot be isolated'.[298] The proposed procedure would have applied to young offenders below the age of 12 and would have focused on identifying and addressing the needs of such children. As such, children below the age of 12 would not have been prosecuted and sentenced in the usual way, except in cases of homicide. The Committee believed that the primary responsibility for raising law-abiding citizens lay with the parents of children and whilst the new procedure would 'not necessarily' relieve such 'children of some responsibility for their actions' it would clearly recognise 'the responsibility of the parents' who would be 'summoned to appear before the court with their children'.[299] Because the

[294] 1974 offenders per 100,000 of the population (Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960).
[295] Ibid.
[296] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) Appendix VI and para 2 and para 6.
[297] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 13.
[298] Ibid.
[299] Ibid.

Committee recommended that the new procedure would apply to all children under the age of 12, it also recommended that the government increase the age of criminal responsibility from eight to 12, with the possibility of it being increased to 13 or 14 should the new procedure be extended to children of those ages.[300] The Committee's examination of the minimum age of criminal responsibility appears to be the most comprehensive review undertaken to date.

Growing support for raising the age of criminal responsibility

The Report clearly states that '[n]early all the evidence' the Committee received 'was in favour of raising the age of criminal responsibility'.[301] Despite this, the evidence also clearly demonstrated a widespread perception that children under the age of criminal responsibility were not held to account for their offending behaviour. Those who opposed law reform generally did so because they believed that older children knew 'right and wrong' and should not 'get off' and some witnesses believed that the age of criminal responsibility 'was essentially a line below which no legal proceedings could be brought in respect of the commission of offences'.[302] Many of the witnesses who were in favour of raising the age had expressed concern about the long-term implications of children being labelled as criminals. They believed that 'an age line, by determining whether there can be conviction for an offence or not, automatically determines whether there is an item of "criminal record"'.[303] Those witnesses were in favour of raising the age of criminal responsibility because they believed that welfare-based interventions would address the offending behaviour without young offenders being 'labelled for life' as criminals.[304]

The Report clarified that the idea of 'a particular age giving a dividing line between "getting off" and suffering penalties' no longer represented the legal position.[305] Put simply, the view of the Committee was that 'the age of a person determines the kind of legal proceedings that may be taken, but it never gives a total exemption from any proceedings'.[306] It is therefore clear that it believed that children both below and above the minimum age of criminal responsibility were held to account for their offending behaviour; the minimum age of criminal responsibility simply determined the *type* of legal proceedings that children of different ages could be subject to. It explained that '[i]n the

[300] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 93.
[301] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 78.
[302] Ibid.
[303] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960).
[304] Ibid.
[305] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 78.
[306] Ibid.

case, for example, of stealing, a child under eight cannot be prosecuted but the circumstances may enable him to be brought before a juvenile court as being in need of care or protection or as being beyond control'.[307]

The Committee also believed that the significance of the age of criminal responsibility had diminished over the course of time because the development of a distinct youth justice system meant that children above the age of eight were subject to the youth justice system, rather than the full extent of the criminal law (as had been the case when the *doli incapax* rules first developed). It explained that '[a]fter eight there can be a prosecution but special provisions as to courts and procedure govern the next stages of eight to fourteen and fourteen to seventeen. The age also determines the kinds of punishment or other forms of treatment that the court may order'.[308] The Report explained that '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 eight.[309] It therefore believed that the 'true' age of criminal responsibility, which marked the point at which children were deemed to be fully responsible for their offending behaviour and were therefore exposed to the full extent of the law, was much higher than eight.

Whilst the Ingleby Committee believed that it was more appropriate to deal with children below the age of 12 through a purely welfare-based system, it also seems to have viewed the youth justice system as a vehicle through which the welfare needs of older children could be addressed. Its recommendations appear to reflect a belief that the development of distinct processes and policies for dealing with young offenders, which focused on addressing the child's needs rather than punishment, had reduced the need to protect older children from the criminal justice system. The evolution of a discrete youth justice system therefore seems to have impacted the perceived significance of the minimum age of criminal responsibility. Furthermore, the conflation of welfare and justice initiatives, particularly the emergence of a system to deal with both troubled children and children in trouble, seems to have resulted in a belief that contact with the youth justice system was likely to be beneficial for children above the age of 12. This view also underpinned the Committee's rationale for recommending that the rebuttable presumption of *doli incapax* be abolished (discussed below).

The rebuttable presumption of doli incapax

[307] Ibid.
[308] Ibid.
[309] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) paras 78 – 80.

Under the Committee's proposals, the age of criminal responsibility would have been increased to 12 so the rebuttable presumption of *doli incapax* would only have applied to children aged 12 and 13 in any event. The view of the Committee was that '[a]s the law stands the presumption has been held by the High Court to weaken as the child approaches the age of fourteen and it cannot usually be strong when the child is over twelve', as such it felt that the presumption was unlikely to provide children in this age group with any real benefit.[310] It also believed that the presumption had two harmful effects. The first was that the law had been interpreted and applied inconsistently, and this meant that the law was unpredictable and unfair. The Committee explained that:

> Apparently, courts find it difficult to decide how they should apply the presumption and differ in the degree of proof they require of guilty intention so that there is inconsistency in the administration of the law, a child being found guilty in one court who would have been found not guilty if, in precisely similar circumstances, he had appeared before a court in another place.[311]

Furthermore, it believed that '[w]here the presumption is strictly honoured, it appears that many prosecutions are not brought because guilty intention cannot be proved; and some of the prosecutions that are brought fail for that reason'.[312] The Committee felt that this resulted in many children 'not receiving the treatment they need or not receiving it soon enough'.[313] It also stated that the presumption had survived 'from the times when it was more necessary to protect children from the full rigours of the law'.[314] The view of the Ingleby Committee clearly reflected a belief that contact with the youth justice system was likely to be beneficial for older children because it would ensure that they received appropriate treatment when they most needed it. Because young offenders were considered to be less responsible for their conduct and were therefore protected from the full extent of the criminal law, the need for the protection afforded by the *doli incapax* rule had also diminished.

2.16 The Children and Young Persons Act 1963: Minimum age of criminal responsibility raised to 10

The reaction to the Ingleby Report, and its recommendations, revealed a stark division in political opinion. The Conservative Party viewed youth crime as a serious issue that

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[310] Ibid.
[311] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 94.
[312] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 13, paras 78 – 80.
[313] Ibid.
[314] Committee on Children and Young Persons, *Report of the Committee on Children and Young Persons* (Chairman Viscount Ingleby, Cmnd 1191, 1960) para 94.

warranted a criminal justice response while the Labour Party viewed it as a consequence of social deprivation and believed it necessitated a welfare response.[315] The Report therefore 'unearthed the conflict between the criminal and welfare systems and split the political parties on the issue of the juvenile justice system'.[316] These opposing policy positions were reflected in law in the Children and Young Persons Act 1963. The Act, which represented a legislative compromise between the Conservative Party and Labour Party, did not give effect to many of the recommendations of the Ingleby Committee. Importantly, it did not include any measures to implement the proposed welfare procedure for children under the age of 12. It did, however, place local authorities under a duty to promote the welfare of children by reducing the need to receive them into care. This was to be achieved through the exercise of new powers to provide preventative assistance to families.[317]

Crucially, the original version of the Children and Young Persons Bill did not include any clause to increase the age of criminal responsibility.[318] The House of Lords adopted an amendment by the Opposition to amend section 50 and increase the minimum age of criminal responsibility to 12. 'Then there was an immediate whip round of some of the backwoodsmen and the age was put back from 12 to ten'.[319] This 'more or less forced' the Conservative government to compromise and increase the age of criminal responsibility from eight to 10.[320] As one MP explained 'it became plain during the debates in another place that there was a widespread feeling that the age should be raised, and the Government, on reflection, decided that it would be right to meet that desire'.[321] Section 16 of the 1963 Act amended section 50 and increased the age of criminal responsibility to 10, where it has remained since. The decision to raise the minimum age of criminal responsibility to 10 was, therefore, simply a consequence of political compromise between two parties with opposing opinions on how best to respond to youth offending.

The view of the Labour Party was that the Government's attitude towards the age of criminal responsibility 'over the last few years has been absolutely extraordinary'.[322] It believed that the Conservative government had been 'stringing the House along' and had repeatedly stalled attempts to raise the age of criminal responsibility.[323] In a debate in

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[315] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 25.
[316] Ibid.
[317] Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 223.
[318] HL Deb 27 Feb 1963 vol 672, cols 1286-1287.
[319] HL Deb 27 Feb 1963 vol 672, col 1287.
[320] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 25, Also Miss Bacon (Hansard) Col 1287.
[321] HL Deb 27 Feb 1963 vol 672, col 1274.
[322] HL Deb 27 Feb 1963 vol 672, col 1287.
[323] Ibid.

the House of Commons, an MP explained that the government had resisted calls to raise the age of criminal responsibility on the basis that 'the Ingleby Committee would shortly report and would be dealing with the matter'. 'The Committee reported and recommended that the age of criminal responsibility should be 12 and should eventually rise to 13 or 14'. Despite those recommendations, there had been no proposals to raise the minimum age of criminal responsibility when the Criminal Justice Bill, which gave effect to some of the recommendations of the Ingleby Committee, was debated in 1960 and 1961. The MP went on to explain that:

> My Hon. Friend the Member for Widnes moved a new Clause which would have raised the age to 12, but the then Attorney-General, who is now Lord Chancellor, resisted it on the grounds that there would have to be a new procedure for those under that age and that we should wait for another Bill. He also said that there should be a careful survey of the whole field, in conjunction with consultations about an alternative procedure which would have to be adopted. That was two years ago … When it first appeared, this Bill contained nothing about the age of criminal responsibility. It was still left at 8, and had it not been for action in another place the age would not have been raised to ten.[324]

Analysis of the relevant Hansard records clearly illustrate that the age of 10 was selected as a compromise between raising the age of 12 and keeping it at eight. Importantly, the debates demonstrate that the age of 10 was not selected because it represented a particularly notable point in childhood or because it marked the point at which children could be safely presumed to have the capacity to be deemed criminally responsible. Instead, the debates clearly show that discussions about whether to raise the age of criminal responsibility were primarily concerned with whether criminal proceedings were the most appropriate way of dealing with young offenders. Some excerpts from the passage of the Bill clearly demonstrate that those who favoured raising the age did so because they believed that non-criminal proceedings were a more appropriate means of addressing youth offending.

> [I]n our evidence to the Ingleby Committee we recommended that the age when it should be conclusively presumed that a child cannot be guilty of an offence should be raised from under eight years to below the upper limit of the compulsory school age, which is fifteen. The Association's representatives who gave oral evidence before the Committee referred to the rebuttable presumption of innocence for children between the ages of eight and fourteen and to the wider understanding in recent years of the

[324] Ibid.

> psychological and environmental factors contributing to delinquency in children. The Association did not suggest that children of, say, thirteen, fourteen and fifteen did not know right from wrong; their view was that children of those ages and younger should not be treated as criminals if they did wrong. That was why they suggested they should be dealt with outside the criminal code. Training and education rather than punishment was needed.

A similar sentiment was expressed by Mr Charles Mapp, who explained that 'I myself would be prepared to accept the school-leaving age as the minimum age of criminal responsibility… Most experienced people in the social services … those who are dedicated to the job of reforming or rehabilitating boys and girls who have stepped over the line do not want the law to take them into its clutches at such an early age. They want them to be dealt with by some vehicle of education'.[325] These excerpts are just some of many which demonstrate that those who favoured raising the age of criminal responsibility did so because of a clear preference for a welfare-based response to youth offending.

There is no evidence to suggest that any detailed consideration was given to the question of whether children at the age of 10 were sufficiently mature to be deemed to be criminally responsible for their behaviour. In fact, there seems to have been underlying agreement that the age of criminal responsibility did not, and would not, accurately mark the point at which children could be presumed to have criminal capacity. Both sides of the debate seemed to acknowledge and accept that it would be 'wholly artificial' to state that the age of criminal responsibility actually represented the point at which children could be presumed *doli capax*.[326] Lord Woodhouse, for example, explained that the 'presumption that a child below, say, 12 years of age could not be guilty of an offence would be only a legal fiction and a fiction which would be obviously more at variance with the facts than the present assumption'.[327] Similarly Mr Edward Gardner MP stated that '[t]he rule that a child is incapable of forming a guilty intent until he reaches the age of 8 is wholly artificial and, for most children, wholly unreal'. He went on to say that '[t]hose of us who are parents and those of us who have any dealings at all with children know full well that at a very early age the average child has a very full and dramatic appreciation of what a crime is'.[328] The parliamentary debates from the passage of the Children and Young Persons Bill are highly significant to this thesis because they clearly demonstrate that policymakers viewed the age of criminal responsibility as the age at which it was appropriate to subject children to criminal proceedings rather than the point at which children were deemed to have criminal capacity.

[325] HL Deb 27 Feb 1963 vol 672, col 1338.
[326] HL Deb 27 Feb 1963 vol 672, col 1319.
[327] HL Deb 27 Feb 1963 vol 672, col 1274.
[328] HL Deb 27 Feb 1963 vol 672, col 1319.

Together with the Report of the Ingleby Committee, the parliamentary debates demonstrate that the decision to increase the age of criminal responsibility was principally motivated by a desire to implement a welfare-based response to crime committed by younger children. It was not driven by concern that younger children might lack criminal capacity. The age of criminal responsibility was raised to 10 because there was sufficient support for moving towards a welfare-based response to youth crime. It is for this reason that the age would most likely have been raised to 12 had it not been for the Conservative Government's clear reluctance to move towards a welfare-oriented system for children above the age of 10. The position of the Conservative Party was neatly summarised by Lord Woodhouse who argued that raising the age of criminal responsibility would mean that children 'between 8 and 12 years of age would inevitably … go on doing wrong things. They would even do them knowing that they were wrong, such as taking other people's property or breaking their windows. They would have to be effectively dealt with in some way both in their own interests and other people's interests'.[329] The reason that the Government was persuaded to raise the age to 10 was because it believed that offences committed by children aged between eight and 10 were 'much fewer in number' and 'of a less serious kind'. As such, young offenders below the age of 10 were perceived to represent less of a serious social problem than older offenders. Importantly, the Government also believed that children under 10 were 'more open to the influence of the social services and the schools' than older offenders.[330] The view of the Government was therefore that it was possible to justify a tougher response to crime committed by children over the age of ten. Consequently, it accepted that the minimum age of criminal responsibility could 'safely and reasonably be raised to ten'.[331] As Crofts has observed, this rhetoric revealed a tendency to deal 'with young persons in the criminal system when their offences are perceived to be a social problem'.[332]

In respect of the Ingleby Committee's proposal to implement a welfare-based procedure for dealing with children under the age of 12, Lord Woodhouse stated that:

> We cannot believe that it would be right to accept a scheme which, from the point of view of the child and the child's parents, has all the effects of a finding of guilt except in name, but, at the same time, deprives him of the present safeguards against his being found guilty of a criminal offence without full and formal proof beyond reasonable doubt of all the necessary ingredients in the offence. In fact, the very feature of the scheme which

[329] HL Deb 27 Feb 1963 vol 672, cols 1273-1277
[330] HL Deb 27 Feb 1963 vol 672, cols 1273-1277
[331] HL Deb 27 Feb 1963 vol 672, cols 1273-1277
[332] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 25.

> commended it to the Ingleby Committee, the greater ease of establishing what has to be established without technical formality, appears to us to be a fatal defect.
>
> We do not believe that either the child or his parents will think of the consequences of a finding as being other than, partly at any rate, punishment for an offence. However excellent the intention of the court, and however desirable in the child's interests the consequences may be, we consider that if either the child or the parents consider the proceedings which establishes his eligibility for that treatment have been less than fair, the treatment itself is unlikely to succeed…children may not understand legal proceedings, but they have a strong sense of justice and fair play.[333]

The Government's reluctance to adopt the new welfare procedure recommended by the Ingleby Committee was therefore partly attributable to concerns about a lack of due process rights and partly because of concerns about the efficacy of welfare-oriented interventions.

It is reasonable to conclude that the minimum age of criminal responsibility set out in section 50 is arbitrary. The Government would have been content to leave the age of criminal responsibility at eight but was 'more or less forced' to raise it to 10 years of age.[334] It clearly believed that raising the age to 10 was more palatable than raising it to 12 because younger children generally committed fewer and less serious offences. There is a distinct lack of evidence to demonstrate that the decision to raise the age to 10 was a result of a carefully considered policy development. The Children and Young Persons Act 1963 simply represented yet another legislative compromise between two parties with strong opposing views on how best to respond to crime committed by children. Because of this, the Act was not considered to be satisfactory for either side and youth justice policy remained a popular theme in political discourse in the years that followed.

2.17 The Children and Young Persons Act 1969: The peak of welfarism

The Labour Party was underwhelmed by the 1963 Act and saw it as a 'missed opportunity' to implement more radical proposals.[335] As a result

> [s]ubsequent reports of the Labour Party continued the critical theme with

[333] HL Deb 27 Feb 1963 vol 672, col 1275.
[334] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 25.
[335] Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 223.

> the claim, amongst other things, that juveniles had no personal responsibility for their offences. There was a clear aspiration to take juveniles out of the criminal courts and the penal system and to treat their problems in a family setting, through the establishment of family advice centres, a family service and, for a minority, a family court.[336]

The Labour Party therefore instigated a review of criminal justice policy, chaired by Lord Longford. The subsequent report, 'Crime – A Challenge to Us All', was published in 1964 the year that the Labour Party came to power.

The observations and recommendations of the Longford Report went substantially further than those of the Ingleby Committee. The Report recommended that young offenders should be removed from the jurisdiction of the criminal courts altogether. The Longford Committee felt that criminal proceedings were not an appropriate way to deal with young offenders because the causes of youth crime lay in neglect and in complex family circumstances. Thus, the Committee's view that was if youth crime was to be tackled, the causes of youth crime needed to be addressed. The Committee did not believe that the criminal justice system was able to deal with such issues and felt it was not well equipped to effectively tackle the root causes of youth offending. The Report therefore recommended abolishing the juvenile court and replacing it with a welfare agency called 'the Family Service'. The idea was that the Family Service would allow children to receive the treatment they required without the need to come into contact with the criminal justice system. This was deemed to be a preferrable approach because the Committee felt that contact with the criminal justice system was stigmatising and damaging for children.

In 1965, shortly after assuming power, the Labour Government issued a White Paper called 'The Child, the Family and the Young Offender'. The White Paper incorporated many of the radical recommendations of the Longford Report, including a proposal to abolish the juvenile court and to replace it with a non-judicial 'family council', that would be an integral component of a unified 'family service'. Because the proposals were radical, the White Paper 'sparked inter-agency/inter-professional power struggles.[337] In particular, magistrates, legal professionals and the police objected to what they believed to signal a significant diminution of their power and influence'.[338] The Labour Party, no doubt mindful of its modest parliamentary majority, withdrew their proposals for reform. Interestingly, in Scotland very similar proposals were endorsed, rather than rejected, and were ultimately enacted by virtue of the Social Work (Scotland) Act 1968. The Kilbrandon

[336] Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 223.
[337] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 323.
[338] Ibid.

Committee published its report on youth justice in 1964. The Kilbrandon Report strongly endorsed a completely new approach to youth justice and recommended a new system which aimed to achieve 'social education'.[339] These recommendations were given effect in the 1968 Act which established the Children's Hearings system, which is still in operation today.

In 1968, a new, less radical White Paper, 'Children in Trouble', was presented to Parliament.[340] The new proposals sought to transform youth justice policy without abolishing the juvenile court. Because the proposals were less radical, they 'were largely acceptable to political, administrative and professional constituencies'.[341] The White Paper therefore managed to 'draw the competing political, administrative, and professional constituencies into a manageable consensus'.[342] The proposals were put on a statutory footing by virtue of the Children and Young Persons Act 1969.

Although the 1969 Act did not incorporate many of the radical recommendations of the Longford Report, it did nevertheless propose fundamental changes to the youth justice system and youth justice policy. It aimed to replace criminal proceedings with care proceedings, phase out custody in borstals and detention centres, increase the age of criminal responsibility to 14, place the use of cautioning on a statutory footing, and expand the use of community-based, therapeutic methods for preventing offending and reoffending.[343] The proposed increase to the age of criminal responsibility was again justified on the basis that welfare proceedings were a more appropriate mechanism for dealing with younger offenders. The increase from 10 to 14 was to be gradual in order to allow the relevant welfare agencies time to ensure they had the resources and experience required to meet their new responsibilities. Section 5 of the Act also aimed to restrict the prosecution of children above the age of criminal responsibility to ensure that criminal prosecution of young offenders was a measure of last resort.

The 1969 Act is often thought to represent 'the high-water mark of reform in the field of juvenile delinquency'.[344] It marked a clear policy shift to a welfare-oriented response to youth offending. It was, in part, influenced by the radical liberal reforms to youth justice policy in Scotland, where the recommendations of the Kilbrandon Committee had resulted

[339] Home Office, *Report of the Committee on Children and Young Persons* (Cmnd 2306, 1964) paras 35-39.
[340] Home Office, *Children in Trouble* (Cmnd 3601, 1968).
[341] Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 223.
[342] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 323.
[343] Julia Fionda '*Legal Concepts of Childhood'* (Hart Publishing 2001) 81.
[344] Harry Blagg and David Smith, *Crime, Penal Policy and Social Work: Issues in social welfare* (Longman publishing 1989) 99.

in a significant overhaul of Scottish youth justice law and policy. The Kilbrandon Committee had recommended that the juvenile justice process be viewed as an educational process with less emphasis on blame and punishment. Although the 1969 Act did not aim to imitate the system in place in Scotland, it did aim to ensure that criminal proceedings were a measure of last resort and that welfare-based interventions were used to deal with the majority of children and young people who had engaged in offending behaviour.

In 1970, the Conservative Party won the general election and replaced the Labour Government. An important consequence of the change in government was that many of the important provisions in the 1969 Act were never brought into force. Crucially, the age of criminal responsibility was not increased, the restriction on prosecuting older children never came into effect, and the juvenile court was never transformed into a welfare tribunal. Because key elements of the new system were never implemented, the system was deemed to be unsatisfactory on all fronts. Consequently, when the Labour Party regained power in 1974, the full implementation of the 1969 Act was not politically feasible. The welfare-oriented system was deemed to have failed, but as Gelsthorpe points out 'in reality, it had never been tried'.[345]

Throughout the 1970s, there was growing concern about the net widening effect of the new system. Because the system had only been partially implemented, the criminal system and welfare system operated alongside each other and this resulted in a substantial increase in the number of children being removed from their families and placed either in residential care or custodial detention.[346] 'By the end of the 1970s, the concepts of 'welfare' and 'treatment' in respect of youth justice had become almost synonymous with excessive intervention'.[347] It was the apparent failure of the 1969 Act that paved the way for a new response to youth offending.

2.18 Conclusion

The research presented in this chapter explains why the minimum age of criminal responsibility was established and why it came to be set at 10 years of age. It therefore partially addresses research question 1 (although it is worthwhile noting that the research presented in chapter 3 provides further commentary on why, despite the mounting pressure for law reform, the age of criminal responsibility has not changed since 1963.

[345] Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 225.
[346] Lorraine Gelsthorpe and Allison Morris. 'Juvenile justice 1945–1992' in: Mike Maguire, Rod Morgan and Robert Reiner (Eds.), *The Oxford Handbook of Criminology* (Clarendon Press 1994).
[347] Barry Godfrey, 'Can History Make a Difference? The Relationship Between the History of Crime and Criminal Justice Policy' (2020) 59(3) Howard J Crim Just 317, 332.

This additional commentary therefore explains why the minimum age of criminal responsibility is still set at 10).

The purpose of this chapter was to provide a detailed explanation of how and why a minimum age of criminal responsibility was established and to critically examine why it was increased from seven to eight and then from eight to 10. The research presented in this chapter directly addresses research question 1; why was a minimum age of criminal responsibility established and how did it come to be set at 10 years of age? The research demonstrates that the doctrine of *doli incapax* first developed in order to protect children from the full extent of the criminal law. When the rules were established, there was little to distinguish children from adults and children were generally viewed and treated as 'small adults'.[348] An important consequence of this was that the use of child labour was common and socially and legally acceptable. Despite the fact the concept of childhood was 'peripheral'[349] to the law there still seems to have been an underlying sense that subjecting children to the same brutal punishments imposed on adults was inappropriate, particularly in the case of very young children. The purpose of the *doli incapax* rules was, therefore, to afford children who did not understand the wrongfulness of their conduct protection from the full force of the criminal law. Over the course of time, social perceptions of children changed, and this resulted in the introduction of child-specific legislation which aimed to recognise the special status of children. The Factory Acts introduced in the early part of the 19th century restricted the number of hours children could work in factories and mills and prevented very young children from being employed in such industries altogether.[350] An unintended consequence of the legislation was that parents were forced to work longer hours to compensate for the loss of, or decrease in, their children's earnings and this caused a sudden increase in the number of children who were neglected or unsupervised. This, in turn, resulted in an increase in the number of children who drifted into delinquency.

Over the course of time, delinquency came to be viewed as a serious social problem that needed to be addressed. Delinquency was thought to be caused by deprivation, destitution and inadequate parenting and children were, therefore, considered to be less blameworthy for their offending behaviour than adult offenders. There was, therefore, a widespread belief that delinquent children needed to be removed from the care of the parents so that they could receive training and instruction which would ensure they could be reformed and successfully reintegrated into society. The reformist movement had a significant impact on the development of youth justice policy because it stressed the need for young offenders to be dealt with separately from adult offenders and it emphasised

[348] Margaret May 'Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century' (1973) 18(1) Victorian Studies 7, 8.
[349] Allison Morris, Henri Gellar, Elizabeth Szwed and Hugh Geach, *Justice for Children* (Palgrave MacMillan, 1980) 1
[350] John Clarke 'Histories of Childhood' in Dominic Wyse *Childhood studies: an introduction* (Blackwell Publishing 2004) 7.

the need for a less punitive response to youth crime. This paved the way for the establishment of a distinct youth justice system which focused on addressing the underlying causes of delinquent behaviour. Importantly, reformists also believed that it was necessary to target and treat children who were at risk of becoming delinquent and this meant that state intervention into the lives of children was deemed to be justified whether they had engaged in offending behaviour or not.

The widespread support for the reformist movement eventually transformed into a belief that the most effective way to reform young offenders was to address the root causes of youth crime through welfare-based interventions. Proponents of welfarism believed that young offenders should be dealt with outside of the criminal justice system. This resulted in the minimum age of criminal responsibility being raised from seven to eight and then eight to 10. The research presented in this chapter demonstrates that these legislative developments were driven by a clear policy preference for a welfare-based response to youth offending, rather than any concern that children towards the bottom end of the scale might lack capacity to be criminally responsible. Although support for welfarism was widespread, many continued to oppose the notion that children should be absolved from criminal responsibility. The continued support for a traditional criminal justice response to youth offending hampered the development of a purely welfare-based system for dealing with young offenders and this meant that youth justice law and policy developed in a haphazard manner. Ultimately, all concerned were dissatisfied with the way that the law had developed and there was continued pressure for law reform. By the end of the 1960s, the Labour Party were of the view that it was necessary to implement radical reforms which would establish a welfare system for dealing with young offenders. On the other hand, the Conservative Party strongly advocated a return to traditional ‘law and order’ response to youth crime.

The research findings presented in this chapter are important for a number of reasons. The research demonstrates that the significance of the minimum age of criminal responsibility has changed over the course of time. It illustrates that the age of criminal responsible is a legal construct which is capable of meaning different things in different points in history and in different contexts. This provides an important basis for the recommendations set out in chapter 5. Furthermore, it proves that past reforms of section 50 were driven by a wider policy preference of dealing with young offenders outside of the criminal justice system, rather than concern that children at the lower end of the age group might lack capacity to be criminally responsible. Put simply, policymakers seem to have viewed the age of criminal responsibility from a ‘policy’ rather than ‘legal’ perspective. Indeed, by the 1960s there seems to have been a broad consensus that the age of criminal responsibility is an artificial threshold for determining criminal responsibility. This finding is important because it demonstrates that debates concerning the development of youth justice policy, including reform of section 50, generally centred around how best to respond to youth offending rather than when children can legitimately

be deemed to be criminally responsible for their behaviour. This proves that the age of criminal responsibility was reformed because of a widespread belief that it was best to deal with younger children outside of the criminal justice system, even though they had the capacity to understand that their actions were seriously wrong. The age of criminal responsibility was not increased because of concern that children lacked the capacity to be considered criminally responsible. Finally, it proves that the current age of criminal responsibility was not selected because it marked a noteworthy point in childhood. The research outlined in this chapter demonstrates that the decision to set the age of criminal responsibility at 10 was a consequence of political compromise. Welfarists, who were keen to divert as many children as possible from the criminal justice system, proposed raising the age to 12 but political compromise resulted in the age being set at 10 because fewer and less serious crimes tended to be committed by children below the age of 10.[351] The ensuing chapter critically examines how the retreat from welfarism in the years that followed the 1969 Act shaped the evolution of the youth justice system and reshaped the debate surrounding the minimum age of criminal responsibility.

[351] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 25.

Chapter 3: The retreat from welfarism and its impact on the age of criminal responsibility

3.1 Introduction to chapter 3

The research presented in the preceding chapter demonstrated that the age of criminal responsibility was incrementally raised from seven to 10 because policymakers favoured a welfare-based response to crime committed by younger children. Proponents of welfarism advocated raising the age further to 12 or 14 but such reform was not politically viable. The thesis submits that for a significant proportion of the 20th century, the age of criminal responsibility represented the point at which policymakers believed a criminal justice response to youth offending was appropriate, rather than the point at which children were deemed to have capacity to be criminally responsible. Put simply, policymakers viewed the age of criminal responsibility from a 'policy' perspective.

The purpose of this chapter is to explain how the retreat from welfarism resulted in a drastic 'punitive turn' in youth justice policy and a corresponding shift in political discourse. It therefore completes the research involved to fully answer research question 1. It provides a critical examination of the social, economic and political factors which influenced key policy developments, particularly the abolition of the rebuttable presumption of *doli incapax* in 1998. The chapter aims to explain the reasons why section 50 has attracted such widespread criticism in recent years and why, despite such criticism, there seems to be a distinct lack of political appetite for raising the age of criminal responsibility. It addresses research question 1 by outlining the reasons why section 50 has not been the subject of reform since 1963. It also explains how the abolition of the rebuttable presumption impacted the presumption of capacity embodied in section 50, thereby addressing research question 2.

3.2 The turning of the tide: The beginning of the end of welfarism

In 1979 the Conservative Party was elected on the basis of a manifesto that was decidedly in favour of advancing law and order. It is described by Newburn as the 'the most avowedly "law and order" manifesto in British political history'.[352] To this end, the Government promised to strengthen sentencing powers with respect to young offenders.[353] As discussed in chapter 2, the apparent failure of the Children and Young Persons Act 1969 (and of welfarism more generally) meant that the political rhetoric in

[352] Tim Newburn 'Youth, Crime and Justice' in Mike. Maguire, Rod Morgan and Robert Reiner (Eds.), *The Oxford Handbook of Criminology* (2nd edn, Clarendon Press 1997) 42.
[353] Conservative Party (1992) *Conservative Party General Election Manifesto* (London: Conservative Party).

the early 1970s was firmly in support of a return to a punishment-oriented system. Despite this backdrop, the way that youth justice policy developed over the course of the 1980s was actually 'remarkably progressive'.[354] This appears to be because there was a 'fragile consensus' that youth justice policy should be underpinned by diversion, decriminalisation and decarceration and this meant the practice of diverting children and young people from formal criminal proceedings was commonplace.[355] It is, however, worthwhile highlighting that one of the key reasons for trying to reduce the number of children in penal detention was to reduce overall expenditure, a key aim of the Thatcher government.[356] As Pratt explains '[d]iverting petty child/young offenders from the formal youth justice process and supervising more serious child/young offenders within their working-class communities – at a fraction of what it would cost to send them to court and custody respectively – carried obvious fiscal appeal'.[357] The economic appeal of alternatives to penal custody and formal court proceedings helped to ensure that diversion and decarceration initiatives were generally welcomed.[358] Additionally, wider factors such as the political desire to reduce the rate of youth crime and the fact that academic research strongly indicated that youth crime was generally both trivial and transitory, also translated into support for such initiatives.[359]

In 1985 and 1990 two Home Office circulars specifically promoted the use of police cautions and informal warnings as diversionary strategies to reduce the numbers of young people being prosecuted through the youth court.[360] Additionally, subsequent legislative developments, most notably the Criminal Justice Act 1982, the Criminal Justice Act 1988 and the Criminal Justice Act 1991, incrementally restricted the courts' power to sentence children to imprisonment. The Children Act 1989, which came into effect in 1991, also formally separated care proceedings and criminal proceedings, uncoupling welfare and justice initiatives. The use of diversion and decarceration measures appear to have had

[354] Andrew Rutherford 'Signposting the future of juvenile justice policy in England and Wales' in Howard League for Penal Reform (Ed.), *Child Offenders UK and International Practice* (Howard League 1995) 322.
[355] John Muncie *Youth and Crime* (4th edn, Sage publishing 2014)
[356] Julia Fionda *Legal Concepts of Childhood* (Hart Publishing 2001) 81. See also Barry Godfrey, 'Can History Make a Difference? The Relationship Between the History of Crime and Criminal Justice Policy' (2020) 59(3) Howard J Crim Just 317, 323.
[357] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 323.
[358] John Pratt 'A revisionist history of intermediate treatment' [1987] 17(4) British J Soc Work 417, 429.
[359] Ibid.
[360] Home Office (1985) The Cautioning of Offenders (Circular14/1985) (London: Home Office) and Home Office (1990) The Cautioning of Offenders (Circular 59/90) (London: Home Office). See also: Barry Godfrey, 'Can History Make a Difference? The Relationship Between the History of Crime and Criminal Justice Policy' (2020) 59(3) Howard J Crim Just 317 and Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 323-324.

a positive impact of youth offending rates.[361] Yet despite this fleeting period of progressive youth policy development, the last decade of the 20th century marked the 'beginning of the end' of a liberal response to youth offending.[362] As Goldson explains '[n]otwithstanding the success of the reforms … by 1993 the policies and practices of diversion and decarceration were about to be abandoned as youth justice entered a highly-politicised and distinctively populist and punitive phase'.[363]

By the early part of the 1990s the impact of the recession had reduced the public's trust in the Conservative government. In an effort to restore public confidence ahead of the general election, the Conservative Party refocused its attention on law and order and vowed to 'protect law-abiding people from crime and disorder'.[364] At the same time, the Labour Party's failure to regain power prompted it to also shift towards a more punitive response to crime. Tony Blair, then the opposition Home Secretary, promised that the Labour Party would be 'tough on crime, tough on the causes of crime'.[365] During the 1990s the political rhetoric surrounding youth justice swung firmly back towards to retributivism. As Godfrey describes, the 'changing social, economic, and political conditions, together with an extraordinary event, conjoined to produce a backlash to the youth justice reforms that had been introduced throughout the previous decade'.[366] The extraordinary event in question was the murder of James Bulger.

On 12 February 1993, two-year-old James Bulger was brutally murdered by two 10-year-old boys. The boys, who were truanting from school, abducted the toddler from a shopping centre while his mother was being served at a butcher shop.[367] As Green explains '[t]hey led James on a two-and-a-half mile journey, battering him along the way' until eventually they took him to a railway line 'where they brutally kicked and beat him to death with bricks and an iron bar, leaving his partially stripped body on the tracks to be severed later by a train'.[368] The abduction was caught on the shopping centre's CCTV system, which meant that 'chilling images' of the two boys abducting James could be 'widely circulated'

[361] Julia Fionda *Legal Concepts of Childhood* (Hart Publishing 2001) 82. See also Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 323-324.
[362] Julia Fionda *Legal Concepts of Childhood* (Hart Publishing 2001) 82.
[363] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 324.
[364] Conservative Party (1992) *Foreword to Conservative Party General Election Manifesto: The Best Future for Britain* (London: Conservative Party).
[365] Tony Blair '*Oxford Essential Quotations'* (6th ed, Oxford University Press 2018) See also Barry Loveday 'Tough on Crime or Tough on the Causes of Crime? An Evaluation of Labour's Crime and Disorder Legislation'(1999) Crime Prev Community Safety 1, 7-24.
[366] Barry Godfrey, 'Can History Make a Difference? The Relationship Between the History of Crime and Criminal Justice Policy' (2020) 59(3) Howard J Crim Just 317, 325.
[367] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 1
[368] Ibid.

in the media.[369] As Green explains, '[p]ress interest in the case was high to begin with, and the lead investigator further raised its profile and the concern associated with by appearing on the BBC's Crimewatch programme. After several false accusations and arrests, the police finally identified and arrested two young boys on 18 February'.[370] The two boys, Jon Venables and Robert Thompson, were interviewed separately by police on the day of the arrest and for the two days that followed, until they were formally charged on the evening 20 February.[371] The murder shocked the nation and was reported extensively in the media. This was, in part, because of the brutal nature of the murder but also because the accused were so young at the time that the offence was committed.[372] This tragic event added significant weight to the claim that a stronger and tougher response to youth crime was needed. In the days following the murder, Prime Minister John Major famously stated that 'we should condemn a little more and understand a little less'.[373]

The boys' first appearance at South Sefton Magistrates Court on 22 February was 'marked by mob violence as a crowd of hundreds turned out to condemn the accused, some pelting the windowless transport vehicle with rocks and eggs', resulting in six people being arrested.[374] The boys were then held in secure custody for nine months until they were tried for abduction and murder in a specially adapted (adult) Crown Court in November 1993. Both were found guilty of both offences and were sentenced to be detained for 'the mandatory equivalent of an intermediate life sentence for those aged 10 and 18 who commit murder'.[375] The trial judge later set the minimum term to be served before parole could be considered at eight years. In December 1993 the tariff was increased to 10 years by the then Lord Chief Justice, Lord Taylor. In July 1994 the Home Secretary, Michael Howard, increased the tariff to 15 years to take account of 'the judicial recommendations as well as all other relevant factors including the circumstances of the case, public concern about the case and the need to maintain public confidence in the criminal justice system'.[376] It is worthwhile noting that he had received 'a petition with 278,300 signatures demanding the two boys never be released under any circumstances, and 22,638 other items of correspondence, including 21, 281 clip-out coupons from the

[369] Ibid.
[370] Ibid.
[371] Ibid.
[372] Gerry Rice and Terry Thomas, 'James Bulger – A Matter of Public Interest?' (2013) 21(1) Int J Child Rights 1
[373] Quote reproduced in Barry Goldson 'Children in trouble: state responses to juvenile crime', in: Peter Scraton (Ed.) '*Childhood' in 'Crisis'?* (UCL Press 1997) 130.
[374] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 2.
[375] Ibid.
[376] Home Office (1994) *News Release: The James Bulger Murder* (22 July 1994, London: Home Office).

Sun Newspaper demanding a 'whole life tariff''.[377]

The trial of Venables and Thompson was later subject to scrutiny by the European Court of Human Rights (ECtHR) in the case of *T and V v United Kingdom* (2000).[378] The case considered whether their trials had been conducted in a manner which safeguarded the defendants' right to a fair trial, as guaranteed by the European Convention on Human Rights 1950 ('ECHR'), and whether it was lawful for government ministers to set tariffs. The ECHR, which was given domestic effect by virtue of the Human Rights Act 1998, does not deal specifically deal with human rights in the context of youth justice but the ECtHR has confirmed that the right to a fair trial extends to children.[379] Furthermore, it has confirmed that the right to a fair trial encompasses 'the right of an accused to participate effectively in a criminal trial.'[380] This right helps to 'ensure that the defendant is treated as the autonomous subject of the proceedings, and not simply as an object for the imposition of conviction and punishment'.[381] Put simply, 'a defendant cannot have a fair trial if they cannot participate effectively.'[382] Although the right to effective participation is 'implicit in the very notion of an adversarial procedure'[383] and is an intrinsic element of procedural justice, the precise scope of the right to effective participation is not clearly defined.[384] In England and Wales courts can utilise a range of special measures and modifications to facilitate a young defendant's effective participation in proceedings.[385]

In *T and V* the ECtHR confirmed that subjecting the two 10-year-old defendants to a criminal trial did not in itself constitute a breach of Article 6.[386] This aspect of the judgment is highly significant because it established that it is not unlawful *per se* to subject young children to criminal proceedings and this, in effect, confirmed that section 50 was compatible with Article 6.[387] The court did, however, explicitly acknowledge that children are prone to experience participatory issues and stressed that it is therefore 'essential that a child charged with an offence is dealt with in a manner which takes full account of

[377] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 2.
[378] *T and V v United Kingdom (2000) 30 EHRR 121.*
[379] *SC v United Kingdom (2005) 40 EHRR 10.*
[380] *Stanford v UK [1994] ECHR 6* at [26].
[381] A Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) Int J Evid & Proof 321, 323.
[382] Ibid.
[383] *Stanford v UK* [1994] ECHR 6, at [26].
[384] A Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) Int J Evid & Proof 321, 323.
[385] Youth Justice and Criminal Evidence Act 1999. See also Judicial College, 'Equal Treatment Bench Book' (Courts and Tribunals Judiciary, 2024) Ch 2.
[386] *T and V v United Kingdom* (2000) 30 EHRR 121 at para [86].
[387] *T and V v United Kingdom* (2000) 30 EHRR 121 *and SC v United Kingdom (Application No 60958/00)* [2005] 1 FCR 347

his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.'[388] The lawfulness of any criminal proceedings involving young defendants is therefore determined by whether they are able to effectively participate in proceedings, rather than by their age.

The trials of Thompson and Venables took place in the Crown Court rather than a youth court (which are specifically designed to accommodate the needs of young defendants). The judge and counsel wore wigs and gowns, and because of the significant public and media interest in the case, the courtroom, press benches and public gallery were full. In his summation, the trial judge specifically acknowledged that the public interest in the case had caused the defendants considerable distress and requested that the jury take this into account when evaluating the evidence presented to it. In many respects, the trials were indistinguishable from a typical adult trial. Nevertheless, some modifications were in place to account for the defendants' young ages. Hearing times were shortened, and regular breaks were scheduled, to help to take account of the defendants' reduced capacity to focus for long periods of time. A play area was also set up to allow the defendants to play during breaks. The defendants were seated close to social workers and their parents, and a raised dock was used to enable the boys to see the proceedings. Despite these modifications, the ECtHR held that the two defendants had not been able to participate effectively in their trials and held that this constituted a breach of Article 6. The Court felt that insufficient accommodations had been put in place to account for the defendants' level of understanding and maturity. It therefore determined that the trial conditions, together with the defendants' disturbed emotional states, prevented them from participating effectively in the proceedings. In response to the judgment, a Consolidated Criminal Practice Direction (2010) was issued, which make clear that the normal trial process should be adapted to assist young defendants in understanding and participating in proceedings.[389] The ECtHR also ruled that it was unlawful for government minister to set tariffs as this was a judicial function.[390]

As Gillen observes, youth justice policy in England and Wales has 'attracted much international and domestic criticism for its failure to fulfil its obligations under international law'. Nevertheless, the judgment in *T and V* confirms that the minimum age of criminal

[388] Gerry Rice and Terry Thomas, 'James Bulger – A Matter of Public Interest?' (2013) 21(1) Int J Child Rights 1, 1.

[389] Consolidated Criminal Practice Direction 2007.
[390] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 2. Note this practice is now unlawful under the Criminal Justice Act 2003.

responsibility set out in section 50 does not violate the ECHR.[391] This position has subsequently been affirmed in *SC v United Kingdom* [2005] where the ECtHR held that the attribution of criminal responsibility to, or the trial and criminal charges of, an 11-year-old child does not in itself give rise to a breach of the Convention as long as the child is able to participate effectively in the trial.'[392] These decisions do, however, confirm that appropriate accommodations must be put in place to ensure that children are treated in a manner commensurate with their age and corresponding levels of developmental maturity. This illustrates the importance of utilising special measures and modifications, particularly when a child is tried in an adult court.

The murder of James Bulger sparked fierce debate about a range of social issues in Britain, particularly in respect of the legal response to crime committed by children.[393] As Green explains 'the concern catalysed by the Bulger case was evidenced in the general tide of condemnatory attitudes toward offenders evident in rhetoric at the October 1993 Conservative Party conference, as well as the increasingly punitive New Labour 'law and order' platform of the time'.[394] The event marks a significant juncture in the political discourse concerning youth justice. As Green describes 'discourses 'began to merge along two corridors. In the first, the Conservative and Labour Parties arrived at consensus on issues of law and order, one that Downes and Morgan contend made it difficult to recognize any real difference between their approaches … The second, like the first, was dictated largely by the political necessity to engage with … the press that 'really matter''.[395] It seems clear that the Bulger case played an important role in bringing Labour, Conservative, and tabloid discourse together, although the Labour Party had already set out its renewed approach to law and order.[396] 'Labour's new embrace of a willingness to punish offenders allowed it to engage in debates on ground previously controlled by the Conservatives'.[397] The scene was therefore set for a convergence of political will and public concern about the need to be tough on crime, particularly youth crime.[398]

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[391] John Gillen, 'The Age of Criminal Responsibility: "The Frontier between Care and Justice"' (2006) 12(2) Child Care Prac 129, 129.
[392] *SC v United Kingdom (Application No 60958/00)* [2005] 1 FCR 347.
[393] Lorraine Gelsthorpe 'Recent Changes in Youth Justice Policy in England and Wales' in Ido Weijers and Anthony Duff (eds) *Punishing Criminals: Principle and Critique* (Hart 2002).
[394] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 3.
[395] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 190.
[396] Ibid.
[397] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 191.
[398] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 195.

The prevailing retributivist ideology which dominated in the years that followed the Bulger murder was clearly reflected by legislative developments such as the Criminal Justice Act 1993 and the Criminal Justice and Public Order 1994. These Acts introduced new privately managed secure training centres for the imprisonment of children aged 12–14 years,[399] introduced Secure Training Orders for persistent offenders aged 12–14,[400] and doubled the maximum period of detention in young offender institutions for 15 to 17-year-olds.[401] Section 16 of the 1994 Act also extended s53(2) of the Children and Young Persons Act 1933 Act to allow children aged 10 or above to be tried in a Crown Court if they were charged with a serious offence.[402] These legislative developments illustrate a clear ideological shift to a punitive response to youth crime. 'The Bulger murder appears as well to have influenced the striking increases in adult prison admissions that immediately followed it'.[403] It was against this backdrop that the seminal case of *C v Direction of Public Prosecutions* [1995] 3 WLR 383 was decided.

3.3 *C v Director of Public Prosecutions* [1995] 3 WLR 383: An extraordinary act judicial activism

The case of *C v Director of Public Prosecutions* [1995] 3 WLR 383 concerned a boy aged 12 who had been seen by the police tampering with a motorcycle with a crowbar. When challenged, he ran away but was subsequently pursued, caught and arrested. He was charged with interfering with a motor vehicle with intent to commit theft contrary to s 9(1) of the Criminal Attempts Act 1981. Because the boy was aged 12, the rebuttable presumption of *doli incapax* applied and this meant that in addition to proving the elements of the offence, the prosecution was also under a legal obligation to show 'by positive proof … that in fact he knew full well that what he did was seriously wrong'.[404] Such evidence would prove that the defendant was *doli capax* and rebut the presumption. The justices found that there was sufficient evidence to rebut the presumption of *doli incapax* and 'were of the opinion that the [defendant] knew what he had done was seriously wrong' because the damage done to the bike was substantial and the defendant and his accomplice ran from the police officers leaving the crowbar behind. 'The inference from these two facts [was] that he knew he was in serious trouble because he had done something seriously wrong.'[405] The defendant was convicted accordingly but appealed by way of case stated.

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[399] Criminal Justice and Public Order Act 1994, s5.
[400] Criminal Justice and Public Order Act 1994, s1.
[401] Criminal Justice and Public Order Act 1994, s16-18.
[402] Criminal Justice and Public Order Act 1994, s16(1).
[403] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 4-5
[404] *C v Director of Public Prosecutions* [1996] A.C. 1, 5.
[405] Ibid.

The question stated for the Divisional Court was whether there was sufficient evidence to rebut the presumption of *doli incapax* to justify the finding that the defendant knew that what he was doing was seriously wrong. The court held that there was insufficient evidence to rebut the presumption but dismissed the appeal on the basis that the rebuttable presumption of *doli incapax* was outdated and should no longer be regarded as part of the law.[406] Although the presumption had been the subject of some judicial criticism, as outlined in chapter 2, it is difficult to believe that the wider post-Bulger 'penal climate'[407] in the early part of the 1990s did not influence this exercise of 'judicial activism'.[408] Indeed, as Chief Justice William Rehnquist has pointed out 'Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs'.[409] It is for this reason that Green argues that 'the Bulger case and the massive outpouring of press and public concern that followed in its wake had something to do with the rapid change in the penal climate, and things have not been the same since'.[410]

Laws J, the presiding judge, felt that the decision was justified on the basis that the *doli incapax* presumption was a 'serious disservice to our law'.[411]

> Whatever may have been the position in an earlier age, when there was no system of universal compulsory education and when, perhaps, children did not grow up as quickly as they do nowadays, this presumption at the present time is a serious disservice to our law. It means that a child over ten who commits an act of obvious dishonesty, or even grave violence, is to be acquitted unless the prosecution specifically prove by discrete evidence that he understands the obliquity of what he is doing. It is unreal and contrary to common sense … Aside from anything else, there will be cases in which in purely practical terms, evidence of the kind required simply cannot be obtained. But, quite apart from such pragmatic considerations, the presumption is in principle objectionable. It is no part of the general law that a defendant should be proved to appreciate that his act is 'seriously wrong.' … in a case where the presumption applies, an additional requirement, not insisted upon in the case of an adult, is imposed as a condition of guilt, namely a specific understanding in the mind of the child

[406] *C v Director of Public Prosecutions* [1994] 3 All ER 190.
[407] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 190
[408]Brice Dickson (ed.), 'Judicial Activism in the House of Lords 1995–2007' in Brice Dickson (ed.) *Judicial Activism in Common Law Supreme Courts* (Oxford University Press 2009).
[409] Chief Justice William Rehnquist quoted in David Pritchard 'The News Media and Public Policy Agendas' in David Kennamer (eds) *Public Opinion, the Press, and Public Policy'* (Westport, Praeger 1992).
[410] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 5
[411] *C (A Minor) v Director of Public Prosecutions* [1994] 3 W.L.R. 888, 893.

> that his act is seriously wrong…The requirement is also conceptually obscure. What is meant by 'seriously wrong?' … But that is by no means the end of the disturbing, even nonsensical, implications of this presumption. The cases indicate … that the presumption may be rebutted by proof that the child was of normal mental capacity for his age…If that is the state of the law, we should be ashamed of it.[412]

It is clear that Laws J's view was that the presumption of *doli incapax* was outdated and placed an unfair burden on the prosecution to provide additional evidence to demonstrate that the defendant understood that their actions amounted to serious wrongdoing. He also believed that the presumption was 'unreal and contrary to common sense' because the commission of the offence itself was often a clear indication of the child's appreciation of the seriousness of their behaviour. Furthermore, he believed that because children benefitted from a universal education system, they matured much more quickly than they had done in the past and no longer needed the protection afforded by the presumption.

The case was appealed to the House of Lords, who agreed that there were issues with the way that the presumption operated in practice but felt that the matter was one which could 'only be considered in the context of wider issues of social policy respecting the treatment of delinquency in this age group'.[413] The House of Lords confirmed that the decision in *C v Director of Public Prosecutions* went beyond judicial law-making powers and stressed that 'whatever change is made, it should come only after collating and considering the evidence and after taking into account of the effect which a change would have on the whole law relating to children's anti-social behaviour. This is a classic case for parliamentary investigation, deliberation and legislation.'.[414]

In 1995, in response to the decision in *C v Director for Public Prosecutions*, the Penal Affairs Consortium[415] published a paper entitled 'The Doctrine of 'Doli Incapax''.[416] The Consortium was a collaborative venture of over 40 organisations concerned with penal reform.[417] The paper considered the Divisional Court and House of Lords judgments in

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[412] *C (A Minor) v Director of Public Prosecutions* [1994] 3 W.L.R. 888, 894
[413] *C v Director for Public Prosecutions* [1996] A.C. 1 per Lord Bridge at [21]
[414] *C v Director for Public Prosecutions* [1996] A.C. 1 per Lord Lowry at [40]
[415] Now the Criminal Justice Alliance, see https://www.criminaljusticealliance.org/about-the-cja/ accessed 25 March 2025.
[416] Penal Affairs Consortium 'The Doctrine of 'Doli Incapax'' (November 1995, London).
[417] At the time of the publication of the 'Doctrine of 'Doli Incapax'' paper, the Penal Affairs Consortium represented the views of the following individual organisations: Apex Trust, Association of Chief Officers of Probation, Association of Members of Boards of Visitors, Bourne Trust, Federation of Prisoners' Families Support Groups, Howard League of Penal; Reform, Inquest, Inside Out Trust, Institution of Professionals, Managers and Specialists, Justice, Liberty, National Association for the Care and Resettlement of Offenders, National Association for Youth Justice, National Association of Probation Officers, National

C v Director of Public Prosecutions and argued that the 'welfare argument overlooks the fact that very substantial penalties were available for ten – thirteen year olds found guilty of criminal offences'.[418] Put simply, the Consortium believed that children still needed to be protected from the full extent of the law, particularly in light of the changes to sentencing powers that were introduced by virtue of the Criminal Justice and Public Order Act 1994 (discussed earlier in this chapter). In light of its analysis, it cautioned against abolishing the doctrine and argued that:

> In this country, the doli incapax rule provides at least some recognition that children of this age should not be considered as fully criminally responsible as adults. It should not be abolished unless this is accompanied with a substantial raising of the age of criminal responsibility – and, even if this were done, there would still be a case for adopting an approach similar to the doli incapax presumption when dealing with offences above the age of criminal responsibility but within the youth court age.[419]

The view of the Consortium appears to have been that children deemed *doli capax* were considered as 'fully criminally responsible adults', despite the fact that a distinct system for dealing with young offenders was well-established by this point in time. It therefore supported retaining the rebuttable presumption or raising the minimum age of criminal responsibility. The Consortium also considered evidence concerning child development and concluded that:

> Far from being an outmoded survival from an earlier era, the doli incapax rule is fully consistent with our increasing knowledge of child development and learning, which tells us that children mature and learn over different time spans. A presumption of this kind acknowledges that there are variations in the speed of the maturation process…The doli incapax rule recognises that using criminal penalties to punish a child who does not appreciate the wrongfulness of his or her actions lacks moral justification.[420]

The view of the Penal Affairs Consortium was therefore clearly in favour of retaining the rebuttable presumption of *doli incapax*. It believed that despite the development of a distinct youth justice system, children who lacked the capacity to appreciate the wrongfulness of their actions should not be subject to criminal proceedings of any sort.

Forum of Care Trusts, The New Bridge, Prisoners Abroad, Prisoners' Advice Service, Prisoners' Families and Friends Service, Prisoners' Resource Service, Prison Governors' Association, Prison Officers' Association, Prison Reform Trust, Release, Royal Philanthropic Society, Society of Voluntary Associates, and Women in Prison.

[418] Penal Affairs Consortium 'The Doctrine of 'Doli Incapax'' (November 1995, London) 6.

[419] Penal Affairs Consortium 'The Doctrine of 'Doli Incapax'' (November 1995, London) 7.

[420] Penal Affairs Consortium 'The Doctrine of 'Doli Incapax'' (November 1995, London) 5.

Importantly, it also believed that the presumption helped to account for the fact children mature and develop at different rates and therefore felt that it should remain in operation. The sentiment and conclusions of the paper were in stark contrast to the political rhetoric at the time and, unsurprisingly, the strong warning to exercise caution when reforming this area of law was ignored by policymakers.

In May 1996 the Labour Party launched a consultation 'Tackling Youth Crime: Reforming Youth Justice'.[421] The paper concluded that 'the youth justice system in England and Wales is in disarray. It simply does not work. It can scarcely be called a system at all because it lacks coherent objectives. It satisfies neither those whose principal concern is crime control, nor those whose principal priority is the welfare of the young offender'.[422] Although the paper recognised that measures which diverted less serious offenders from the criminal justice system were valuable, it stated that repeat cautioning was an ineffective tool to deal with persistent offenders. It also stressed that the Home Office Circular 18/1994 seemed to have failed to introduce national standards for the use of repeat cautioning and felt that this had resulted in inconsistent practices across different age groups and different geographical areas. Furthermore, it found that '[r]igorous community supervision' was 'a cheaper and more effective way' for dealing with most young offenders who do not respond to cautioning. It stated that 'intensive programmes are much more successful at changing behaviour than simply locking up youngsters'.[423] It concluded that the 'short sharp shock' approach adopted by the Conservative Party had 'failed miserably' and set out the Labour Party's plans to 'nip offending in the bud and reduce the appalling rates of recidivism associated with the existing facilities'.[424]

One of the proposed 'solutions' was to 'reform' the *doli incapax* rule. The paper concluded that 'Responding effectively to a pattern of offending behaviour has been made more difficult by the doli incapax rule that presumes that young people under 14 may not know that what they are doing is wrong'.[425] It is, however, worthwhile noting that no evidence to support this claim was cited.

> The law on the extent of criminal responsibility for their actions by young people under 14 years (doli incapax i.e. "incapable of evil") should be reformed. In our view most young people aged ten-thirteen are plainly

[421] Labour Party 'Road to the manifesto 'Tackling Youth Crime: Reforming Youth Justice. A Consultation paper on an agenda for change' (Labour Party, May 1996).
[422] Ibid. See also Paul Dugmore, Jane Pickford, Jane and Sally Angus, *Youth justice and social work* (Learning Matters Ltd 2006) 1
[423] Labour Party 'Road to the manifesto 'Tackling Youth Crime: Reforming Youth Justice. A Consultation paper on an agenda for change' (Labour Party, May 1996) 6.
[424] Ibid.
[425] Labour Party 'Road to the manifesto 'Tackling Youth Crime: Reforming Youth Justice. A Consultation paper on an agenda for change' (Labour Party, May 1996) 5.

> capable of differentiating between right and wrong, especially where the issue is one of theft or damage to the property of others.
>
> The current legal position is most unsatisfactory, as was recognised by the Judicial Committee of the House of Lords in a 1996 judgement. The House of Lords overturned a divisional court ruling that the doli incapax doctrine should no longer be regarded as part of the law but did so on the grounds that the court has strayed into lawmaking rather than confining itself to interpretation. They considered that the law on this issue was unsatisfactory and invited Parliament to clarify it through new legislation.[426]

The 'summing up' section of the paper confirmed that 'The legal presumption that children under the age of 14 do not know the difference between right and wrong (doli incapax) will be modernised'. These 202 words are the extent of the discussion of the *doli incapax* doctrine.

The paper, like many earlier governmental reports, failed to correctly explain the legal presumption. It claimed that the law operated on the basis that children under the age of 14 do not know the difference between right and wrong. In fact, as Bandalli has noted, the rebuttable presumption of *doli incapax* could only be rebutted by clear evidence to prove that the child knew that their actions were 'seriously wrong', knowledge of mere wrongdoing was insufficient.[427] The presumption was, therefore, that children under the age of 14 lacked the capacity to understand that their actions were seriously wrong. This distinction is important since the paper justified the abolition of the presumption on the basis that most young people are 'plainly capable of differentiating between right and wrong'.[428] Furthermore, the paper failed to consider whether it was appropriate to deem children to be criminally responsible from the age of 10 and did not consider the option of raising the age of criminal responsibility, as had been advised by the Penal Affairs Consortium.

3.4 No More Excuses: A New Approach to Tackling Youth Crime in England and Wales

In May 1997, the first New Labour government came to power and swiftly introduced a White Paper entitled 'No More Excuses: A New Approach to Tackling Youth Crime in

[426] Labour Party 'Road to the manifesto 'Tackling Youth Crime: Reforming Youth Justice. A Consultation paper on an agenda for change' (Labour Party, May 1996) 11
[427] Sue Bandalli, 'Abolition of the Presumption of Doli Incapax and the Criminalisation of Children' (1998) 37 How J Crim Just 114, 116.
[428] Labour Party 'Road to the manifesto 'Tackling Youth Crime: Reforming Youth Justice. A Consultation paper on an agenda for change' (Labour Party, May 1996) 11

England and Wales'.[429] It reflected the mood for significant reform of youth justice policy, which was neatly captured in the preface.

> Today's young offenders can too easily become tomorrow's hardened criminals. As a society we do ourselves no favours by failing to break the link between juvenile crime and disorder and the serial burglar of the future. For too long we have assumed that young offenders will grow out of their offending if left to themselves. The research evidence shows this does not happen. An excuse culture has developed within the youth justice system. It excuses itself for its inefficiency, and too often excuses the young offenders before it, implying that they cannot help their behaviour because of their social circumstances. Rarely are they confronted with their behaviour and helped to take more personal responsibility for their actions. The system allows them to go on wrecking their own lives as well as disrupting their families and communities. This White Paper seeks to draw a line under the past and sets out a new approach to tackling youth crime. It begins the root and branch reform of the youth justice system that the Government promised the public before the Election.

The No More Excuses paper placed the idea of enforcing personal responsibility at the forefront of the youth justice agenda. It recognised that there were many risk factors associated with youth offending but argued that while '[c]rime does not happen in a social vacuum … a simplistic, deterministic view of the causes of crime is not supported by the facts and risks both insulting those in deprived circumstances who do not commit offences and making excuses for those who do'.[430] This statement encapsulated the underlying ideology of the proposed strategy for tackling youth crime; making children take responsibility for their actions, whatever their welfare needs may be. The paper also recognised the importance of early intervention and emphasised the role of parents in combatting youth crime. It proposed making the prevention of offending the primary aim of the youth justice system, and suggested that the aim be achieved through promoting the following objectives:

- The swift administration of justice so that every young person accused of breaking the law has the matter resolved without delay;
- Confronting young offenders with the consequences of their offending, for themselves and their family, their victims and their community;
- Punishment proportionate to the seriousness and persistence of offending;

[429] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office).
[430] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office), para 1.4.

- Encouraging reparation to victims by young offenders;
- Reinforcing the responsibilities of parents; and
- Helping young offenders to tackle problems associated with their offending and to develop a sense of personal responsibility.

The paper claimed that the proposals would mark 'a new start for youth justice agencies in England and Wales, providing the opportunity for a clear focus on preventing offending'.[431] They were designed to draw a line in the sand and mark a move towards the 'responsibilisation' of children and young people.[432] To this end, it proposed introducing a range of orders, including the Child Safety Order, the Child Curfew Order and the Parenting Order. These orders targeted both young offenders and young children who were at risk of becoming offenders, including children below the age of criminal responsibility. They were viewed by many to represent an unacceptable level of state intervention that, in effect, allowed punitive measures to be imposed on children below the age of criminal responsibility and children who had not committed criminal offences. For example, Keating argues that in the context of the reforms 'the concept of the age of criminal responsibility has been rendered meaningless'.[433]

The Child Safety Order was designed to target children under the age of 10 who were deemed to be 'at risk of becoming involved in crime or who have already started to behave in an anti-social or criminal manner'.[434] The order would allow a court to place significant restrictions on children below the age of 10. For example, it could require to be home at specified times or to stay away from certain people or places. The order could also prohibit certain conduct, such as truanting from school. Non-compliance with the terms of the order would allow local authorities to commence care proceedings in respect of the child. Child Curfew Orders would allow police and local authorities to implement local child curfew schemes to prevent unsupervised children under the age of 10 from being at specified public locations after a specified time [435] and Parenting Orders were designed to strengthen parental responsibility for children.[436] Parenting Orders could be made alongside a Child Safety Order or made in respect of parents of convicted young offenders, children who have been made the subject of an anti-social behaviour order,

[431] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office), para 2.11.
[432] Heather Keating 'The 'Responsibility' of Children in the Criminal Law' (2007) 19(2) CFLQ 191. See also Charlotte Walsh, 'Imposing Order: Child Safety Orders and Local Child Curfew Schemes' (1999) 21(2) J Soc Welfare & Fam Law 135.
[433] Heather Keating 'The 'Responsibility' of Children in the Criminal Law' (2007) 19(2) CFLQ 191, 191.
[434] Charlotte Walsh, 'Imposing Order: Child Safety Orders and Local Child Curfew Schemes' (1999) 21(2) J Soc Welfare & Fam Law 135, 149. See also Hilaire Barnett, *Children's Rights and the Law: An Introduction* (1st edn, Routledge 2022) 191.
[435] Charlotte Walsh, 'Imposing Order: Child Safety Orders and Local Child Curfew Schemes' (1999) 21(2) J Soc Welfare & Fam Law 135, 137.
[436] Hilaire Barnett, *Children's Rights and the Law: An Introduction* (1st ed., Routledge 2022) 191 -193.

sex offender order and for parents who have been convicted of failing to send their children to school. The order would require the parent to attend counselling or guidance sessions and, if courts think it necessary, may also impose additional requirements on parents such as ensuring regular attendance at school. Additionally, the White Paper also proposed a 'Final Warning Scheme' to limit the use of repeat cautions for children.[437]

3.5 No More Excuses: Abolition of the rebuttable presumption of *doli incapax*

Part III Chapter 4 of No More Excuses was entitled 'Reinforcing Responsibility'. In this section, the paper claims that 'to respond effectively to youth crime, we must stop making excuses for children who offend. Of course there are social, economic and family factors which affect the likelihood and the nature of youth crime. But understanding this helps us to comprehend, not to condone, youth crime'.[438] It went on to say that '[a]s they develop, children must bear an increasing responsibility for their actions, just as the responsibility of parents gradually declines but does not disappear - as their children approach adulthood'.[439] It is therefore clear that New Labour believed that the most effective way to deal with youth offending was to hold children personally responsible for their offences. Although the paper acknowledged that the root causes of youth crime were often factors outside of the control of children, it clearly rejected any notion that they reduced children's responsibility for their criminal behaviour. The excerpts illustrate the seismic shift in the political ideology of the Labour Party, which had abandoned the welfarist ethos in favour of making young offenders take responsibility for their offending behaviour.

In a section entitled 'Are children 'incapable of evil?' the White Paper set out proposals to abolish the rebuttable presumption of *doli incapax*.[440] This reference to the old 'good' and 'evil' test not only mispresented the law, but it also appealed to media portrayals of 'evil' children in conflict with the law.[441] The paper argued that

> the prosecution must rebut the presumption of doli incapax as well as prove the offence … To rebut the presumption, the prosecution must adduce evidence separate from the facts of the alleged offence, to show the young person knew the act in question was seriously wrong … This can lead to real practical difficulties, delaying cases or even making it impossible for the prosecution to proceed.

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[437] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office).
[438] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office) Chapter 4.1.
[439] Ibid.
[440] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office) chapter 4.3.
[441] Julia Fionda, *Devils and Angels: Youth, Policy and Crime* (Hart Publishing, 2005).

To support this assertion, the paper cited the following evidence:

> The presumption of doli incapax gives rise to genuine difficulties in practice. In a recent case a boy who had first been cautioned at the age of twelve embarked on a spree of offending over the next twelve months, resulting in his eventual conviction for offences including criminal damage, arson, robbery, witness intimidation, common assault, assault occasioning actual bodily harm, theft from a vehicle, theft of a vehicle and driving whilst disqualified. The prosecution of these offences was hampered by the need, in each case, to rebut the presumption of doli incapax. The boy attended a special school and the prosecution relied on the headmaster, who had known the boy for 5 years, to give evidence rebutting the presumption. Rather than allow the prosecution in subsequent cases to present this evidence in writing, the defence insisted that the headmaster be called in person in every contested case. He thus had to attend court on a number of occasions and gave evidence in at least two trials. The defence appealed against conviction, arguing among other things that the headmaster should not have been called to give evidence to rebut the presumption, because he was himself a victim of the offender. The appeal was rejected and sentence finally passed one year after the cases had first come to court.

No further evidence was provided to support the claim that the presumption precluded or hampered the prosecution of young offenders. It is also worthwhile highlighting that in the example provided, the defendant was successfully prosecuted. Although some sources, including the judgment in *C v Director of Public Prosecutions*, claimed that the presumption caused practical difficulties, there is a lack of evidence to support this assertion. Given that rates of convictions for young offenders had been regarded as high for many years, it is difficult to see how the presumption could have impeded the prosecution of children in any significant way.[442] There is also a lack of academic commentary to support the claim that the presumption caused significant difficulties in practice. The extent of any practical difficulties was therefore somewhat overstated.[443]

The White Paper clearly set out the Government's position on the presumption. It confirmed that:

> The Government believes that in presuming that children of this age generally do not know the difference between naughtiness and serious

[442] Paul Cavadino, 'Goodbye Doli, Must We Leave You?' (1997) 9 Child & Fam Law Q 165, 169.
[443] Lorraine Gelsthorpe and Allison Morris, 'Much Ado about Nothing - A Critical Comment on Key Provisions relating to Children in the Crime and Disorder Act 1998' (1999) Child & Fam Law Q 209, 213 see also Paul Cavadino, 'Goodbye Doli, Must We Leave You?' (1997) 9 Child & Fam Law Q 165, 169.

> wrongdoing, the notion of doli incapax is contrary to common sense. The practical difficulties which the presumption presents for the prosecution can stop some children who should be prosecuted and punished for their offences from being convicted or from even coming to court. This is not in the interests of justice, of victims or of the young people themselves. If children are prosecuted where appropriate, interventions can be made to help prevent any further offending.

It is therefore clear that the Government believed that the prosecution of young offenders was the most effective way of tackling youth crime and did not feel that children needed to be protected from criminal proceedings. It considered whether the difficulties associated with presumption could be dealt with by reversing the presumption, but ultimately believed abolition was necessary.[444] It did not, however, consider whether the age of criminal responsibility should be increased if the presumption was abolished. The Crime and Disorder Act 1998 gave effect to the proposals set out in the No More Excuses White Paper. Importantly, section 34 of the Act abolished the rebuttable presumption of *doli incapax.* Some commentators have argued that the effect of this provision was to reduce the age of criminal responsibility from 14 to 10 overnight.[445] The Act created the anti-social behaviour order, which was designed to prohibit individuals from engaging in activities that are deemed to be anti-social. The threshold for imposing an ASBO was that the individual had behaved in a manner 'that caused or was likely to cause harassment, alarm or distress'. The Act also introduced Child Safety Orders[446] and Parenting Orders[447], discussed above, and placed a statutory duty on those working in the youth justice system to observe a principal aim of preventing offending by children and young people.[448]

The impact of the legislative developments in the 1990s, and particularly the 1998 Act, was 'frenzied criminalisation of children'.[449] Bateman argues that the 'abandonment of pre-court diversion' resulted in a 'mushrooming in the use of child imprisonment'.[450] This led to a significant increase in the number of children receiving custodial sentences and an increase in the number of children being drawn into the criminal justice system as first

[444] Home Office (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: The Stationery Office) Ch 4.5
[445] Paul Cavadino, 'Goodbye Doli, Must We Leave You?' (1997) 9 Child & Fam Law Q 165, 165.
[446] Crime and Disorder Act 1998, s11.
[447] Crime and Disorder Act 1998, s8.
[448] Crime and Disorder Act 1998, s17.
[449] Tim Bateman, *The state of youth justice 2020: An overview of trends and development* (National Association for Youth Justice, 2020) 28.
[450] Tim Bateman, *The state of youth justice 2020: An overview of trends and development* (National Association for Youth Justice, 2020) 26.

time entrants.[451] There is strong evidence to support this claim. For example, between 1992 and 2001 the total number of custodial sentences imposed on children rose by around 90%, from approximately 4000 to 7600.[452] Furthermore, in 2006/7 the number of first time entrants peaked at 110,784.[453] Goldson therefore describes this phase, which is now commonly referred to as to as the 'punitive turn' in youth justice policy, as 'an exceptionally punitive period in the history of youth justice reform'.[454]

3.6 Current youth justice law and policy: A 'pragmatic' approach to youth justice?

The current youth justice framework was established by the Crime and Disorder Act 1998, which places a statutory obligation on all local authorities to ensure that youth justice services are available in their area.[455] To discharge this duty, local authorities must establish multi-disciplinary youth offending teams (YOTs). YOTs co-ordinate the provision of youth justice services in their area and are an integral part of the youth justice system.[456] They run local crime prevention programmes, provide assistance to young people if they are arrested or have to appear at court, and supervise young people serving community sentences.[457] YOTs also implement crime prevention schemes at a local level. Such schemes are directed at children who have not committed offences but show an increased likelihood of engaging in criminal behaviour.[458] In 2016, the Review of the Youth Justice System in England and Wales found that such preventative work varied considerably between different areas of the country.[459] Nevertheless the Review found some evidence that preventative work was having a positive impact on reducing the incidence of youth

It is now widely agreed that formal involvement with the justice system can have long-

[451] Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (National Association for Youth Justice Campaign Paper 2012) 4-5.
[452] Nacro (2003) 'A Failure of Justice: Reducing Child Imprisonment' (London: Nacro). and Nacro (2005) 'A Better Alternative: Reducing Child Imprisonment' (London: Nacro). See also Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 326.
[453] Alex Sutherland, Emma Disley, Jack Cattell and Stefan Bauchowitz 'An Analysis of Trends in First Time Entrants to the Youth Justice' (Ministry of Justice 2017) 1
[454] Barry Goldson 'The sleep of (criminological) reason: knowledge-policy rupture and New Labour's youth justice legacy' [2010] 10 Criminology & Criminal Justice, 155. See also Stephen Case and Tim Bateman 'The punitive transition in youth justice: Reconstructing the child as offender' (2020) 34(6) Children and Society 475 and John Muncie 'The `punitive turn' in juvenile justice: cultures of control and rights compliance in Western Europe and the USA' (2008) 8(2) Youth Justice 107.
[455] Crime and Disorder Act 1998, s38.
[456] Crime and Disorder Act 1998, s39(7).
[457] Gov.co.uk 'Youth offending teams' (Young people and the law) <https://www.gov.uk/youth-offending-team>last accessed 07 August 2024.
[458] Ibid.
[459] Ministry of Justice (Charlie Taylor), *Review of the Youth Justice System in England and Wales* (Cm 9298, 2016) 18, para 59. See also Criminal Justice Joint Inspection *Out-of-court disposal work in youth offending teams* (Her Majesty's Inspectorate of Probation, 2018). para 1.1

lasting implications for young offenders and this can, and often does, result in the child reoffending.[460] As such, it is now generally accepted that the most effective way to prevent children from reoffending is to divert them from the formal criminal justice system.[461] This ideology is reflected in Article 40(3)(b) of the United Nations Convention on the Rights of the Child ('UNCRC') which places a duty on domestic governments to promote measures for dealing with children who commit criminal offences 'without resorting to judicial proceedings.'[462] Diversionary measures are also clearly embedded in the National Strategy for the Policing of Children and Young People which states that 'It is crucial that in all encounters with the police for those below the age of 18 should be treated as children first … Policing supports YJB's evidence-based practice by keeping children and young people out of the criminal justice process unless necessary'.[463] Current youth justice policy therefore places a much greater emphasis on diverting children from the criminal justice system.[464]

Diversionary measures, as distinct from preventative measures, are now administered through the out-of-court disposals scheme. Diversion schemes have also been set up around the country between the police and YOTs. Such schemes aim to deal with children outside of the criminal justice system whenever possible. Charlie Taylor, who led the 2016 review of the youth justice system, concludes that this is 'undoubtedly the right approach'.[465] This framework was introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which replaced the reprimand and final warning system implemented by the Crime and Disorder Act 1998. The old framework was much more rigid and left little scope for the police to exercise their discretion as to which type of disposal was appropriate. The new system is designed to be much more flexible and encourages joint decision making between the police and youth offending teams. Out-of-court disposals are either informal or formal.

Informal disposals are typically used in cases where no further action is being taken against the child, and they are offered on an entirely voluntary basis. Such disposals allow the investigating police officer to deal with minor or low-level offending, such as anti-social behaviour, without any formal intervention. This may involve, for example, the offender

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[460] Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) Eur J Criminol 315, 315. Note that research suggests that around 75 percent of children diverted from the criminal justice system do not go on to reoffend. See also *Youth Justice Diversion Strategy: Prevention Is Better Than Court* (2019, Home Office) Cm 1234. page 1

[461] Bill Whyte, *Youth Justice in practice Making a difference* (Bristol University Press 2007).

[462] United Nations Convention on the Rights of the Child 198, Article 40(3)(b)

[463] National Police Chief's Council (2015) '*National Strategy for the Policing of Children & Young People'* 8 (available at https://news.npcc.police.uk/resources/1dsjb-ev5io-h11wq-9xkdk-0g2zu)

[464] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 326.

[465] Ministry of Justice (Charlie Taylor), *Review of the Youth Justice System in England and Wales* (Cm 9298, 2016) 18

being dealt with through a community resolution (such as the offender agreeing to apologise to the victim(s) or helping to repair or clean up damage they have caused).[466] Informal disposals therefore allow the police to use their professional judgement to deal informally with a child who has, or is suspected to have, committed an offence.[467] A major benefit of informal disposals is that they can be delivered promptly and directly by the investigating police officer, without the child being arrested. Furthermore, receipt of a community resolution is recorded in local police systems but is not recorded on the Police National Computer, so it does not form part of the child's formal criminal record. Nevertheless, informal disposals may be disclosed on enhanced Disclosure and Barring Service checks. Informal disposals can, however, only be used where the offender admits responsibility for the offence(s) and the victim agrees not to pursue formal criminal action.[468]

There are two forms of formal out-of-court disposals: youth cautions and youth conditional cautions.[469] These types of formal disposals are available as an alternative to charging a child with a criminal offence. Their use should be reserved for children who would otherwise receive a court sentence. They should not, therefore, be routinely used in cases concerning first time offenders or low-level offending.[470] 'This is to ensure that all responses to children that offend are aimed towards achieving the lowest possible level of criminal justice intervention, appropriate in the circumstances'.[471] Youth cautions and youth conditional cautions are, therefore, most likely to be used in cases where an informal disposal is not deemed to be appropriate but the offending behaviour can be addressed without resorting to criminal proceedings.

Youth cautions are available in cases where the child is aged 10 to 17 and has committed a first-time summary or either-way offence.[472] Any cases involving indictable-only offences must be referred to the Crown Prosecution Service ('CPS') who may authorise a youth caution. Interventions can be, and often are, attached to a youth caution and aim

[466] Youth Justice Board for England and Wales, *Case management guidance* (January 2024) available at <https://www.gov.uk/guidance/case-management-guidance/how-to-use-out-of-court-disposals> last accessed 13 August 2024
[467] Ibid.
[468] His Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 'Glossary', available at: https://hmicfrs.justiceinspectorates.gov.uk/glossary/community-resolution/#:~:text=A%20type%20of%20out%2Dof,the%20traditional%20criminal%20justice%20process. <last accessed 1 8 August 2024.
[469] Legal Aid, Sentencing and Punishment of Offenders Act 2012, s1235.
[470] Youth Justice Board for England and Wales, 'Case management guidance' (January 2024) available at <https://www.gov.uk/guidance/case-management-guidance/how-to-use-out-of-court-disposals> last accessed 13 August 2024
[471] Ibid.
[472] Crime and Disorder Act 1998, s66ZA and s66ZB. See also: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/354050/yjb-youth-cautions-police-YOTs.pdf, accessed 13 August 2024.

to address the child's needs and the underlying causes of their offending behaviour. However, the child's participation in any interventions is voluntary and there is no separate penalty for failing to comply with them. A child is not required to consent to the caution (as is the case for adult cautions). Youth conditional cautions are different from youth cautions because they involve compulsory assessment and intervention.[473] The conditions attached youth conditional cautions can be rehabilitative, reparative or punitive in nature.[474] This type of disposal can be given for any type of offence, but the CPS must authorise the issuing of a youth conditional caution for indictable-only offences. The child must also consent to the youth conditional caution and the attached conditions to it. If the child fails to comply, without reasonable excuse, with any of the conditions attached to the youth conditional caution then they may face criminal charges relating to the original offence. [475] There are no statutory restrictions on the number of youth conditional cautions a child can receive.

In circumstances where diversion is not deemed to be appropriate, young defendants who are prosecuted will typically appear before the Youth Court, which is specifically designed to take account of the fact the defendants appearing there are children. Proceedings conducted in the Youth Court are 'closed' and are less formal than those conducted in the traditional criminal courts. In limited circumstances a young defendant charged with a grave offence may be tried in the Crown Court rather than the Youth Court, but additional special measures and modifications must be put in place to ensure that the young defendant is able to effectively participate in proceedings.[476] A young defendant should be tried in the Crown Court where they are charged with a grave crime and there is a real prosect that, if convicted, they would receive a custodial sentence of substantially more than two years.[477] 'A trial in the Crown Court with the inevitably greater formality

[473] Youth Justice Board for England and Wales 'Case management guidance' (January 2024) available at <https://www.gov.uk/guidance/case-management-guidance/how-to-use-out-of-court-disposals> last accessed 18 August 2024

[474] Crime and Disorder Act 1998, s66A(3).

[475] Crime and Disorder Act 1998, s66E.

[476] *T and V v United Kingdom* (2000) 30 EHRR 121

[477] A 'grave crime' is defined by the Sentencing Council's *Sentencing Guidelines for children and young people* as follows: 'Where a child or young person is before the court for an offence to which section 250 Sentencing Code applies and the court considers that it ought to be possible to sentence them to more than two years' detention if found guilty of the offence, then they should be sent to the Crown Court. The test to be applied by the court is whether there is a real prospect that a sentence in excess of two years' detention will be imposed. An offence comes within section 250 where it is punishable with 14 years imprisonment or more for an adult (but is not a sentence fixed by law); it is an offence of sexual assault, a child sex offence committed by a child or young person, sexual activity with a child family member or inciting a child family member to engage in sexual activity; or it is one of a number of specified offences in relation to firearms, ammunition and weapons which are subject to a minimum term but, in respect of which, a court has found exceptional circumstances justifying a lesser sentence' (available at https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/ , paras 2.8-2.10). It is also worthwhile highlighting that the maximum sentence in the youth

and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases'.[478]

It is also important to emphasise that specific sentencing principles apply to all young defendants, even when they are tried in the Crown Court.[479] When sentencing any defendant under the age of 18 the court must have regard to the principal aim of the youth justice system and the welfare of the child or young person.[480] Although the seriousness of the offence will be the starting point, the approach to sentencing should be 'individualistic' and focused on the child/young person. Wherever possible, the sentence should focus on rehabilitation and the court should also consider the effect the sentence is likely to have on the defendant as well as any underlying factors contributing to the offending behaviour. Custodial sentences are always deemed to be a measure of last resort and may only be imposed when the offence is 'so serious that no other sanction is appropriate'.[481]

The purpose of the youth justice system is to 'encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish'.[482] The sentencing court must also take into account any factors that 'may diminish the culpability of a child or young person'. The guidance specifically acknowledges that children are 'not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk-taking behaviour'.[483] It is therefore important that the court considers:

> the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure

court is a 2 year Detention and Training Order (DTO) (See Magistrates' Courts Act 1980, s24A and Crime and Disorder Act s51A(3)(b) 1998).

[478] Sentencing Council, '*Sentencing Guidelines: Sentencing Children and Young People'*, para 1.5. Available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/, accessed 10 February 2024.

[479] Ibid.

[480] Aged 18 years or under at the date of the finding of guilt.

[481] Sentencing Council, '*Sentencing Guidelines: Sentencing Children and Young People'*, para 1.5. Available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/, accessed 10 February 2024.

[482] Ibid.

[483] Sentencing Council '*Types of Sentences for Young People'* available at: https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/types-of-sentences-for-young-people/, accessed 10 February 2024.

> and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).[484]

The sentencing principles are clearly designed to ensure that, where possible, children are given the opportunity to address their behaviour without 'undue penalisation or stigma'.[485] The guidance also explicitly states that youth offending 'is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the child or young person from society if that can be avoided … In addition, penal interventions may interfere with a child or young person's education, and this should be considered by a court at sentencing'.[486] The legal framework discourages the use of custodial and punitive sentences. The most recent Youth Justice Statistics for 2023-2024 confirm that there were just under 12,900 sentencing occasions, and of those 660 were custodial sentences.[487] This represents a decrease of 71% over the last decade.[488] The proportion of custodial sentences has remained 'broadly stable, varying between 5% and 7% of all sentences over the last 10 years'.[489] A much larger proportion of sentences are community sentences (9,200) which represent 72% of all sentences. The remaining sentences include absolute and conditional discharges, fines and other less common disposals.

Since 2009 'there has been a steady decrease in both the number of children receiving custodial sentences and the number of children entering the criminal justice system as first-time entrants'.[490] As Goldson observes 'the punitive emphasis was quite dramatically ramped down'.[491] For example, by 2014/15 the number of first-time entrants to the youth justice system had fallen from 110,784 (in 2006/7) to 20,544.[492] At around

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[484] Sentencing Council, '*Sentencing Guidelines: Sentencing Children and Young People'*, para 1.5. Available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/, accessed 10 February 2024.
[485] Ibid.
[486] Ibid.
[487] Youth Justice Board for England and Wales, 'Youth Justice Statistics: 2023 to 2024' (30 January 2025) https://www.gov.uk/government/statistics/youth-justice-statistics-2023-to-2024/youth-justice-statistics-2023-to-2024#sentencing-of-children accessed 19 March 2025.
[488] Ibid.
[489] Ibid.
[490] Tim Bateman, 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (National Association for Youth Justice Campaign Paper 2012) 4–5. See also Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317.
[491] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 326.
[492] Alex Sutherland, Emma Disley, Jack Cattell and Stefan Bauchowitz 'A*n Analysis of Trends in First Time Entrants to the Youth Justice*' (Ministry of Justice 2017) 1

the same time the number of children in penal detention also reduced by around a third.[493] The most recent statistics available show that this downward trend has continued, with just under 8,300 first time entrants to the youth justice system in the year ending in December 2023.[494] Interestingly, compared with the previous year, the number of child first time entrants aged 10 to 14 increased by 7 percent to around 2,300.[495] This represents the first year-on-year increase in the last 10 years. In the same period, the number of first-time entrants aged 15 to 17 decreased by 1 percent to around 2,100.[496]

The statistics demonstrate that since the high watermark in 2006/7 the number of children dealt with by the youth justice system has reduced drastically.[497] This downward trend 'simply cannot be accounted for by any singular reference to the volume or nature of youth crime over the same period'. [498] Goldson argues that it is:

> implausible to suggest that either 'practitioner activism', of which there are 'few signs', or any deliberative actions taken by the Youth Justice Board have imposed any determinative bearing on such trends … Furthermore, despite the best efforts of academic researchers, non-governmental organisations, and authoritative human rights agencies, to influence government policy in the direction of penal reduction …there are few, if any, grounds to suggest that the combined effect of such interventions have, in and of themselves, realised significant purchase.[499]

As such, Goldson argues that, just as cost effectiveness was a key driver behind reducing penal detention of children in the 1980s, it appears that 'the global financial crisis of 2008 and the severe period of austerity that followed, triggered a discernible shift in political mood with regard to youth justice reform'.[500] The pressing need to reduce overall expenditure resulted in a significant reduction in the juvenile secure estate, the

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[493] Rob Allen, *Last Resort? Exploring the Reduction in Child Imprisonment 2008–11* (Prison Reform Trust 2011) 3.
[494] Youth Justice Board for England and Wales 'Youth Justice Statistics 2023 to 2024' (Youth Justice Board, January 2024) available at: https://www.gov.uk/government/statistics/youth-justice-statistics-2023-to-2024/youth-justice-statistics-2023-to-2024 , accessed 19 March 2025.
[495] Ibid.
[496] Ibid.
[497] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 327.
[498] Ibid. See also Rob Allen, *Last Resort? Exploring the Reduction in Child Imprisonment 2008–11* (Prison Reform Trust 2011) 3 and Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' (National Association for Youth Justice Campaign Paper 2012). Available at: https://thenayj.org.uk/campaigns-and-publications/ accessed 25 February 2025.
[499] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 327.
[500] Ibid.

downsizing of the Youth Justice Board and the closure of half of all magistrates courts.[501] It therefore appears that the fiscal appeal of reducing the number of children coming before the courts or receiving custodial sentences has translated into widespread support for preventative and diversionary practices, leading to a reduction in the number of children facing formal criminal proceedings. Goldson therefore describes the current period as the 'pragmatic' phase of youth justice law and policy.[502]

3.7 Age of Criminal Responsibility Bills (2013-14, 2015-16, 2017-19, 2020-21)

Despite the fact that section 50 has been subject of considerable criticism, recent attempts to introduce legislation to increase the age of criminal responsibility have failed to gain any traction. Lord Dholakia, a member of the House of Lords, has introduced numerous Private Members' bills to increase the age of criminal responsibility from 10 to 12. None of the eight Bills he has introduced, which are substantially identical, have progressed beyond the Second Reading.[503] In fact, the Bills introduced in the 2016–17 and 2020-21 sessions did not even progress beyond the First Reading stage.

Lord Dholakia's view is that the minimum age of criminal responsibility in England and Wales is 'unusually low'.[504] He argues that although children aged 10 and 11 are capable of telling right from wrong there is 'overwhelming' evidence from international research which demonstrates that children have 'less ability to think through the consequences of their actions, empathise with other people's feelings and control impulsive behaviour' than older adolescents or adults.[505] In his view, it is therefore 'not right to deal with such young children in a criminal process based on ideas of culpability that assume a capacity for mature, adult-like decision-making'.[506] These arguments are remarkably similar to those advanced in the extant scholarship and will be considered in detail in chapter 4. He also argues that there is no other area of the law where children are regarded as fully competent to take informed decisions until later in adolescence. Lord Dholakia's view is that dealing with offenders below the age of 12 through welfare-based interventions 'would be more effective' because evidence indicates that children dealt with through the criminal justice process are 'more likely to reoffend than those who are diverted from the

[501] Ibid.
[502] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 326.
[503] Age of Criminal Responsibility Bill [HL] Session 2012-13, Age of Criminal Responsibility Bill [HL] Session 2013-14, Age of Criminal Responsibility Bill [HL] Session 2015-16, Age of Criminal Responsibility Bill [HL] Session 2016-17, Age of Criminal Responsibility Bill [HL] Session 2017-19, Age of Criminal Responsibility Bill [HL] Session 2019-19, Age of Criminal Responsibility Bill [HL] Session 2019-21 and Age of Criminal Responsibility Bill [HL] Session 2021-22.
[504] HL Deb 29 January 2016, vol 768, col 1554.
[505] HL Deb 29 January 2016, vol 768, col 1555.
[506] HL Deb 29 January 2016, vol 768, col 1556.

criminal justice process and dealt with in other ways'.[507] Furthermore, he argues that welfare interventions are also more likely to lead to 'far better' outcomes for children because they have the potential to address issues arising from dysfunctional family life, physical and sexual abuse, substance abuse and mental health issues.[508] His firmly held belief is that increasing the age of criminal responsibility would 'be an important step towards dealing with vulnerable, difficult and disturbed children in a way that is befitted our civilised society'.[509]

The fact that none of the Bills progressed any further clearly indicates there is a lack of political appetite for reforming this area of youth justice policy. This view is supported by the fact that successive governments have explicitly stated that they have no plans to increase the age of criminal responsibility.[510] It is therefore reasonable to conclude that, despite the mounting pressure for raising the minimum age of criminal responsibility, there appears to be little prospect of law reform in the foreseeable future.[511] As Bateman observes '…the UK government has refused to countenance reforming MACR. This has resulted in stalemate and 'to all extents and purposes political deadlock'.[512] The position of the Conservative Party was, for example, clearly stated by Lord Faulks during the Second Reading of Lord Dholakia's Age of Criminal Responsibility Bill in 2016. He stated that 'children aged 10 and above are, for the most part, able to differentiate between bad behaviour and serious wrongdoing and should therefore be held accountable for their actions'.[513] He went on to explain that 'where a young person commits an offence, it is important they understand that it is a serious matter. The public must also have confidence in the youth justice system and know that offending will be dealt with

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[507] Ibid.
[508] Ibid.
[509] Ibid.
[510] See for example: House of Commons 'Age of Criminal Responsibility Briefing Paper' (7687, 15 August 2016) 14-15.
[511] See for example: Sue Bandalli, 'Abolition of the Presumption of Doli Incapax and the Criminalisation of Children' (1998) 37 How J Crim Just 114, Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145, Heather Keating 'The 'Responsibility' of Children in the Criminal Law' (2007) 19(2) CFLQ 183, Hea(2007) Children's Commissioner, 'One million voices: The Big Ambition calls for children's solutions to be at the heart of election manifestos' https://www.childrenscommissioner.gov.uk/blog/one-million-voices-the-big-ambition-calls-for-childrens-solutions-to-be-at-the-heart-of-election-manifestos accessed 08 July 2024, The Association of Youth Offending Team Managers 'Where we stand statements' < https://aym.org.uk/about-us/where-we-stand/> accessed 08 July 2024, Helen Pidd et al 'Age of criminal responsibility must be raised, say experts' *The Guardian* (London, 04 November 2019) <https://www.theguardian.com/society/2019/nov/04/age-of-criminal-responsibility-must-be-raised-say-experts> United Nations Committee on the Rights of the Child (2019) 'General Comment No. 24: On children's rights in the child justice system' < https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child> accessed on 08 July 2024
[512] Aaron Brown and Anthony Charles 'The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach' [2019] 21(2) Youth Justice 153
[513] House of Commons, *Age of Criminal Responsibility Briefing Paper* (7687, 15 August 2016). 14-15

effectively'.[514] He therefore clarified that the Conservative Party was 'not able to accept' that there should be a change to the age of criminal responsibility.[515]

It is noteworthy that Lord Faulks made explicit reference to the murder of James Bulger when he explained why the Conservative Party did not believe that the age of criminal responsibility should be raised. This lends credence to the claim that the Bulger case is 'still frequently invoked in Parliament',[516] particularly when policymakers are seeking to justify retaining the current age of criminal responsibility. Lord Faulks explicitly acknowledges that '[t]he Jamie Bulger case casts a shadow over all our considerations in this area', and although he admitted that the case was 'very unusual', he argued that policymakers 'have to bear in mind that this was an issue of national concern and, of course, an absolute tragedy for those connected to Jamie Bulger'.[517] On this basis, he argues that setting the age of criminal responsibility at 10 years 'allows flexibility to deal with young offenders'.[518] On the one hand it allows serious and persistent offenders to be prosecuted and punished accordingly, whilst on the other hand it allows first time and low-level offenders to be diverted from formal proceedings through informal and out-of-court disposals.[519] The implication appears to be that it is justifiable to resist reform of the age of criminal responsibility so that very serious cases involving young children can be dealt with through the criminal justice system. Put simply, the suggestion is that should a situation akin to the James Bulger case ever arise again, the defendant(s) would not escape prosecution and punishment.

3.8 Conclusion

This chapter has completed the research involved in addressing research question 1 by explaining why, in the face of significant pressure for law reform, the minimum age of criminal responsibility has remained at 10 years of age since 1963. The chapter also provided a detailed overview of the various political, economic and social factors that influenced the legislature's decision to abolish the longstanding rebuttable presumption of *doli incapax* in the late 1990s, and to explain how this has impacted the debate surrounding reform of section 50.

The research presented in this chapter demonstrates that the retreat from welfarism, which began in the 1970s, had a significant and long-lasting impact on the development of youth justice law and policy in England and Wales. It is clear that the earlier focus on addressing the welfare needs of young offenders was gradually replaced by a focus on

[514] Ibid.
[515] Ibid.
[516] David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 6
[517] House of Commons 'Age of Criminal Responsibility Briefing Paper' (7687, 15 August 2016) 14-15
[518] Ibid.
[519] Ibid.

reinforcing the idea of personal responsibility. Whilst commentators agree that this attitudinal shift 'was a wider phenomenon affecting jurisdictions across much of the Western industrialised world, the catalyst that triggered increasingly harsh treatment of children who broke the law in England and Wales is frequently understood to have been the murder of two year-old James Bulger'.[520] It is submitted that the research presented in this chapter strongly suggests that the Bulger case had an immediate and drastic impact on the development of youth justice policy and continues to influence the debate surrounding the minimum age of criminal responsibility.

The evidence demonstrates that the Bulger case sparked widespread debate about how the law should deal with young offenders and 'undoubtedly reinforced and fuelled' the perceived need to implement a much tougher response to youth crime.[521] In its aftermath, the Labour Party seized the opportunity to restate and strengthen its position on law and order and made it very clear that it believed that the enforcement of responsibility should be at the forefront of any future policy developments. The Labour Party's abandonment of its earlier welfarist philosophy meant that 'the Conservative and Labour Parties arrived at consensus on issues of law and order' and this paved the way for a period of 'frenzied criminalisation of children' widely referred to as the 'punitive turn' in youth justice law and policy.[522] In the decade that followed the murder, policymakers introduced an array of legislation which reflected 'hardening attitudes' toward young offenders and an ethos of reinforcing personal responsibility. [523] Legislative developments such as the Criminal Justice and Public Order 1994 contributed to a significant increase in both the number of children being drawn into the criminal justice system and the proportion of those children receiving custodial sentences.[524]

The research also strongly suggests that the decision in *C v Director of Public Prosecutions* [1995] was influenced by the wider social and political attitudes towards young offenders during this period. Although the House of Lords determined that the trial judge had acted outside of his judicial law-making capacity, it also acknowledged that there were issues with the way that the presumption had been interpreted and applied in practice and stated that the matter was one for 'parliamentary investigation, deliberation and legislation.'[525] Despite the fact that the Consortium of Penal Affairs had urged

[520] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 26.
[521] Ibid.
[522] John Muncie, 'The `punitive turn' in juvenile justice: cultures of control and rights compliance in Western Europe and the USA' (2008) 8(2) Youth Justice 107-121. See also David A Green, *When Children Kill Children. Penal Populism and Political Culture* (Oxford University Press 2008) 6
[523] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020). 28
[524] Ibid.
[525] *C v Director for Public Prosecutions* [1996] A.C. 1 per Lord Lowry at [40]

policymakers to retain the rebuttable presumption unless it intended to raise the age of criminal responsibility, the presumption was abolished by virtue of section 34 of the Crime and Disorder Act 1998. It seems highly likely that this policy development also reflected the general appetite for a tougher response to youth crime which prevailed at the time.

The chapter has also critically examined why the minimum age of criminal responsibility, which has been set at 10 since 1963, has only relatively recently become the subject of widespread criticism. The research presented in this chapter demonstrates that the effect of section 34 of the Crime and Disorder Act 1998 was to lower the age at which the presumption of capacity applies to children. The thesis submits that the abolition of the rebuttable presumption of *doli incapax* is particularly significant to the overarching research question because it altered the nature of the presumption of capacity embodied in section 50. The conclusive presumption of *doli capax* which had applied to children from the age of 14 now applies to children from the age of 10 (The nature and scope of the presumption embodied in section 50 is discussed in more detail in chapter 4). It was this sudden change in the legal position of children that sparked widespread concern about the minimum age of criminal responsibility being set at 10 years of age. Irrespective of whether this change has had any discernible effect on the number of children being drawn into the criminal justice system, it was, at the very least, important from a symbolic perspective.[526] The research presented in this chapter also shows that the decision to abolish the rebuttable presumption of *doli incapax* was justified on the basis that children above the age of 10 are generally able to understand the difference between naughty or mischievous behaviour and seriously wrong behaviour. The research suggests that the earlier 'policy view' of the age of criminal responsibility, which centred on the efficacy of dealing with youth crime through criminal interventions, has been replaced with a 'legal view' which hinges on notions of capacity and personal responsibility. The research therefore provides an explanation for why so much of the scholarly literature concerning section 50 focuses on whether children have the capacity to be considered criminally responsible.

Finally, the chapter addresses research question 3 by providing an overview of the modern youth justice system. Together with the research concerning the evolution of a distinct youth justice system presented in chapter 2, this research demonstrates that children are subject to a distinct youth justice system which, it is submitted, is designed to take account of their status as children. This argument is discussed in more detail in chapter 5. Research concerning the modern youth justice system revealed that since 2008 there has been a fairly consistent downward trend in the number of children being

[526] Lorraine Gelsthorpe and Allison Morris, 'Much Ado about Nothing - A Critical Comment on Key Provisions relating to Children in the Crime and Disorder Act 1998' (1999) 11 Child & Fam Law Q 209, 213.

processed through the criminal justice system and a corresponding decrease in the number of children receiving custodial sentences.[527] Scholars agree that there is no singular explanation for this downward trend.[528] Bateman, for example, points out that 'the tenor of government policy continued to be punitive for some time' after 2007.[529] Whilst it is 'irresistible' to conclude that recent youth crime statistics reflect a genuine downward trend in rates of youth crime, Bateman argues that there are 'considerable difficulties' in ascertaining with any degree of certainty the true extent of crime committed by children.[530] Furthermore, he argues that the increased use of preventative and diversionary measures has been directly impacted by changes to sanction detection targets. The targets which applied during the 1990s had a 'net-widening effect' because they 'promoted the criminalisation of minor delinquency' whereas the target indicator which replaced it encouraged 'the police to respond in an informal manner to children who had not previously attracted a substantive disposal, whether or not they had previously come to police attention'.[531] He therefore argues that the 'earlier commitment to formal early intervention, which had characterised youth justice policy for more than a decade, was thus suddenly replaced by a drive to divert from the formal mechanics of the criminal justice system children with no formal antecedent history'. The apparent reduction in youth crime therefore appears to be, at least in part, attributable to the increased use of preventative and diversionary measures, such as informal disposals.

It is 'hard to ignore the financial context' in which the shift away from formal proceedings occurred, and commentators generally agree that 'whatever other influences are at play ... it is the pragmatic economic imperatives of cost reduction that ultimately provide the key for comprehending the nature of youth justice reform in the most recent period'.[532] As Pitts points out 'the last period in which youth diversion received such high level

[527] Youth Justice Board for England and Wales 'Youth Justice Statistics 2023 to 2024' (Youth Justice Board, January 2024) available at: https://www.gov.uk/government/statistics/youth-justice-statistics-2023-to-2024/youth-justice-statistics-2023-to-2024 , accessed 19 March 2025. See also: Alex Sutherland, Emma Disley, Jack Cattell and Stefan Bauchowitz '*An Analysis of Trends in First Time Entrants to the Youth Justice'* (Ministry of Justice 2017) 1 and Youth Justice Board for England and Wales 'Youth Justice Statistics 2023 to 2024: First Time Entrants to the Youth Justice System', available at https://www.gov.uk/government/statistics/youth-justice-statistics-2023-to-2024/youth-justice-statistics-2023-to-2024#first-time-entrants-to-the-youth-justice-system , accessed 19 March 2025.
[528] See for example: Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317 and Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020).
[529] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 28.
[530] Tim Bateman 'Trends in detected youth crime and contemporary state responses' in Barry Goldson and John Muncie (Eds.) *Youth Crime and Justice* (2nd edn, Sage 2015).
[531] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 26.
[532] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 327.

political backing was during the 1980s, under Margaret Thatcher's administration, a period that also coincided with the onset of austerity.'[533]. The evidence presented in this chapter therefore suggests that dealing with less serious young offenders through formal criminal proceedings was, and still is, an 'unaffordable expense'.[534] In terms of the minimum age of criminal responsibility, the apparent success of current youth justice policy has enabled policymakers to resist reform of section 50 on the basis that low-level and first time offenders are typically diverted from formal proceedings, while serious, persistent offenders can be punished accordingly.

[533] John Pitts *The New Politics of Youth Crime: Discipline or Solidarity?* (Palgrave Macmillan, 2001) See also Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice, 2020) 26.
[534] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice, 2020) 26.

Chapter 4: Does existing scholarship demonstrate that the presumption of criminal responsibility embodied in section 50 is flawed?

4.1 Introduction to Chapter 4:

The purpose of this chapter is to directly address the first hypothesis of this thesis, by completing the research involved to fully address research question 2 and directly answering research question 3. It does so by critically evaluating whether existing scholarship demonstrates that children above the age of 10 lack capacity to be criminally responsible and establishing whether it has been conclusively shown that the section 50 presumption, that children above the age of 10 have the capacity to be deemed criminally responsible, is flawed.

As discussed in chapter 1, a substantial proportion of the extant literature surrounding reform of the age of criminal responsibility argues that scientific evidence demonstrates that children above the age of 10 may lack the capacity to be deemed criminally responsible. Scholars often claim that the minimum age of criminal responsibility in England and Wales is at odds with such evidence and ought to be the subject of reform. The purpose of this chapter is to critically evaluate whether such scholarship demonstrates that children lack the capacity to be deemed criminally responsible. It will, therefore, begin by providing an overview of the concept of criminal responsibility before moving on to discuss the nature of the presumption embodied in section 50. The chapter will build on the research presented in the preceding chapter, concerning the development of the doctrine of *doli incapax,* and address research question 2 by providing an explanation of the nature of the presumption of capacity embodied in section 50.

4.2 The concept of criminal responsibility: An overview

The precise justifications underpinning the attribution of criminal responsibility are contested. For this reason, criminal responsibility has been described as 'the Gordian knot' in both the practice and theory of criminal law.[535] There is, however, a widely held belief that moral blameworthiness justifies the imposition of criminal responsibility. The concept of criminal responsibility is therefore said to reflect the normative belief that people should be held to account if they act, or omit to act, in a way that violates the criminal law.[536] It is generally accepted that there are circumstances in which it would be unjust to punish a person even though they have seemingly acted in a way that

[535] Stefano Manacorda, 'The Principle of Individual Criminal Responsibility: A Conceptual Framework' (2007) 5(4) J Int Crim Just 913, 913.
[536] H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) 36.

contravenes the law.[537] This reflects a widespread belief that people who are not blameworthy for their conduct do not deserve to be blamed for it.[538] This is because 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'.[539]

English law operates on the basis that defendants are criminally responsible for their conduct unless the contrary is established through the trial process. This is because 'one of the fundamental presumptions of the criminal law and criminal liability is that the defendant is 'normal', that is, is able to function within the normal range of mental and physical capabilities'.[540] As Cane observes '[i]t 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'.[541] 'Having sufficient physical and rational 'capacity' is therefore a precondition of criminal liability.[542]

The law recognises a limited range of circumstances in which a defendant may be excused or exempt from criminal responsibility because they lack capacity to be deemed criminally responsible. There are, for example, a number of defences which, if successfully pleaded, reduce or eliminate a defendant's criminal responsibility for the offence(s) in question. The availability of such defences reflects the fact that moral culpability is widely considered to be the basis of criminal responsibility.[543] For instance, a defendant charged with murder may be able to rely on the partial defence of diminished responsibility if at the time of the offence they were suffering from a medically recognised condition which caused an abnormality of mental functioning that substantially impaired their ability to understand the nature of their conduct, or to form a rational judgment, or to exercise self-control.[544] This defence recognises that the defendant's lack of cognitive ability to understand and appreciate the consequences of their actions renders them less blameworthy for their conduct and their culpability is adjusted accordingly.

A defendant's criminal liability for their conduct is determined by the criminal trial process. This process is concerned with establishing whether, on the specific facts of the case, the

[537] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edition, Oxford University Press 2019) 130.
[538] Michael Allen and Ian Edwards, *Criminal Law* (16th edition, Oxford University Press 2021) 152.
[539] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 308.
[540] Jeremy Horder *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019).
[541] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 65.
[542] Jeremy Horder *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019) 98. See also Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 293.
[543] H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008)
[544] Homicide Act 1957, s2, as amended the Coroners and Justice Act 2009, s52.

attribution of criminal responsibility would be legitimate.[545] Criminal liability is determined by whether the specific elements of the offence have been satisfied (e.g. the relevant *actus reus* and *mens rea* for the offence(s) in question) and whether the defendant is able to rely on a legally recognised defence to reduce or eliminate their liability for the offence(s) in question.[546] As Duff explains 'if the prosecution prove that those conditions of liability are satisfied, the defendant should be convicted; if not, he should be acquitted'.[547] The key point to note is that the law operates on the basis that *all* defendants are criminally responsible for their conduct *unless* the contrary can be proven. Importantly, a defendant can only challenge the presumption that they are criminal responsible within the confines of established defences (such as automatism, intoxication, mistake, insanity, duress, necessity, self-defence and so on). English law operates on the presumption that a person has the capacity to be criminally responsible once they reach a specified age; the age of criminal responsibility.[548] This is an example of what Tadros describes as 'status-responsibility'.[549] Once a person reaches the specified age, they can be subject to criminal proceedings because they are presumed to be criminally responsible for their conduct.

4.3 Status-responsibility

Status-responsibility holds particular groups or classes of people criminally responsible because, by virtue of their status, they are presumed to have capacity.[550] According to Tadros, the capacities required to have status-responsibility are '[c]omplex epistemic, evaluative and volitional capacities'.[551] Adults are deemed to have status-responsibility and are therefore presumed to have the capacity to be deemed criminally responsible. Conversely, young children are generally presumed to lack status-responsibility and are therefore exempt from criminal responsibility without any further consideration of their actual capacities.[552] In England and Wales, children below the age of 10 are presumed to lack status-responsibility by virtue of section 50. As Tadros explains, 'exemption by general category is a technique long known to English law'.[553] This thesis argues that, at its most basic, the function of a minimum age of criminal responsibility is to specify the age at which children are presumed to be criminally responsible and are, therefore,

[545] Anthony R Duff 'Law, Language and Community: Some Preconditions of Criminal Liability' (1998) 18(2) Oxf J Leg Stud 189
[546] Ibid.
[547] Ibid.
[548] Thomas Crofts, *The Criminal Responsibility of Children and Young Persons. A Comparison of English and German Law* (2002 Ashgate) 37
[549] Victor Tadros, *Criminal Responsibility* (Oxford University Press 2005) 21
[550] Ibid.
[551] Ibid.
[552] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge 2016).
[553] H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) 229

presumed to have 'status-responsibility'. It is submitted that this is what Fionda describes as the 'legal view' of the age of criminal responsibility.[554] The thesis submits that the under this view, the age of criminal responsibility marks the point at which children are, as a class, presumed to have status-responsibility.

4.4 Does section 50 embody a conclusive presumption of capacity?

Section 50 states that: 'It shall be conclusively presumed that no child under the age of ten years can be guilty of any offence'.[555] The effect of this provision is that children below the age of 10 are presumed to lack status-responsibility and cannot be considered to be criminally responsible for their conduct under any circumstances.[556] Crofts therefore describes this as a presumption of 'absolute incapacity'.[557] As outlined in chapters 2 and 3, children between the ages of 10 and 14 also used to be presumed to be *doli incapax* but this presumption was rebuttable.[558] This meant that until children reached the age of 14 their liability was 'conditional' on the presumption of incapacity being rebutted.[559] The age at which children were *conclusively* presumed to have status-responsibility was therefore 14.

The rebuttable presumption is thought to have offered a 'benevolent safeguard' for children who had yet to develop into rational or moral agents.[560] In theory, it ensured that only children who had capacity to be criminally responsible were convicted. However, as Cavadino points out, the presumption did not prevent thousands of children being convicted of offences each year.[561] It therefore seems that the presumption had limited impact in practice. For this reason, Morris and Gelsthorpe argue that 'the importance of the presumption lay in its *symbolism*: it was a statement about the nature of childhood, the vulnerability of children and the appropriateness of criminal justice sanctions for children'.[562] In any event, the position of children changed when the rebuttable presumption of *doli incapax* was abolished by section 34 of the Crime and Disorder Act 1998.[563] The effect of section 34 is highly significant because children are now presumed to have status-responsibility from the age of 10 rather than from the age of 14. Furthermore, children no longer have the benefit of a period of conditional liability and are

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[554] Julia Fionda, *Devils and Angels: Youth Policy and Crime* (Hart 2005) 17
[555] Children and Young Persons Act 1933, s50.
[556] Children and Young Persons Act 1933, s50. See also Michael Allen and Ian Edwards *Criminal Law* (16th edn, Oxford University Press 2021) 152
[557] Thomas Crofts, *The Criminal Responsibility of Children and Youngs Persons: A Comparison of English and German Law* (Ashgate 2002) 37
[558] Ibid.
[559] Ibid.
[560] *C v Director of Public Prosecutions* [1996] AC 1, at [33] (per Lord Lowry).
[561] Paul Cavadino, 'Goodbye Doli, Must We Leave You?' (1997) 9 Child & Fam Law Q 165, 169.
[562]Lorraine Gelsthorpe and Allison Morris, 'Much Ado about Nothing - A Critical Comment on Key Provisions relating to Children in the Crime and Disorder Act 1998' (1999) 11 Child & Fam Law Q 209, 213.
[563] Crime and Disorder Act 1998, s34.

presumed to have capacity from the age of 10. It is for this reason that commentators such as Smith argue that English law 'holds that a person is completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day'.[564] The sudden change in the legal position of children attracted considerable academic criticism and prompted many scholars to question whether the conclusive presumption of status-responsibility embodied in section 50 is defensible. This helps to explain why, despite the fact that the age of criminal responsibility has been set at 10 since 1963, it has only recently been the subject of widespread academic criticism.

Hollingsworth argues that it is justifiable on a conceptual level to presume that children have capacity to be criminally responsible and then to take account of 'actual competency' once within the system.[565] She argues that a child's actual competency can be accounted for when assessing whether the *mens rea* requirements of a particular offence are met, how a trial should be conducted, and the appropriate level of sanction to impose.[566] The thesis submits that there is little scope to take account for a child's lack of competency once in the system (although, it is important to highlight that the thesis asserts that children's reduced *culpability* can be, and is, recognised in law. This idea is explored in more detail later in this chapter and in chapter 5).

The thesis argues that it is necessary to distinguish between the presumption that children aged 10 and above have the capacity to be criminally responsible and the presumption that defendants above the age of criminal responsibility are able to effectively participate in criminal proceedings. This is because fitness to plead concerns whether a defendant can understand and participate in the trial process, rather than whether the defendant has capacity to be criminally responsible for the offence(s) in question.[567] It is submitted that whilst these presumptions are related, they are ultimately distinct issues. Whilst a child's ability to effectively participate in proceedings can be evaluated when determining how, if at all, the trial process can be modified to meet their individual needs, this does not alter the presumption that the child is criminally responsible for their offending behaviour. The question of whether a young defendant is able to effectively participate in their trial is therefore distinct from the question of whether the child is, by virtue of their status, presumed to be criminally responsible for their conduct. Similarly, judges may exercise discretion when determining what level of sentence to impose on a young defendant, but they must still act within the scope of the relevant sentencing guidelines and do not have the power to determine that a child *lacks* the capacity to be criminally responsible (unless the child can rely on a legally recognised defence, discussed below). Judges are required

[564] A.T.H. Smith, 'Doli Incapax under Threat' (1994) 53 Cambridge L J 426, 427.
[565] Kathryn Hollingsworth, 'Responsibility and Rights: Children and Their Parents in the Youth Justice System' [2007] 21(2) Int J Law Pol Fam 190.
[566] Ibid.
[567] Kate Aubrey-Johnson, Shauneen Lambe and Jennifer Twite, *Youth Justice Law and Practice* (Legal Action Group 2019) Ch4

to consider a child's 'emotional and developmental age' at the sentencing stage because such factors are deemed to be 'of at least equal importance to their chronological age (if not greater)'.[568] A judge may, therefore, impose a more lenient sentence to reflect a child's 'emotional and developmental age', but a judge cannot determine that a child lacks criminal responsibility because of such factors. The thesis therefore submits that there is limited scope to recognise a young defendant's 'actual capacity' once they are subjected to the criminal justice system.

This thesis asserts that the only way that a young defendant can demonstrate that they lack capacity to be criminally responsible is by pleading a legally recognised defence to the offence(s) that they have been charged with.[569] In this sense, young defendants are in the same position as adult defendants. This is because, at the time of writing, there is no defence which is capable of recognising that a young defendant's capacity to understand or appreciate the wrongfulness of their actions was impaired by a natural lack of capacity (e.g. their developmental immaturity). Scholars such as Wake et al argue that 'extant criminal law defences are ill-equipped to adequately address the circumstances of young offenders' because capacity-related defences, such as insanity and diminished responsibility, rely on the defendant establishing, on the balance of probabilities, that s/he suffered from a "disease of the mind", or "a recognised medical condition", and the diminished responsibility defence applies to murder only.[570] Such defences are therefore not designed to apply to circumstances where the defendant's lack of capacity is a 'normal' part of their development, as in the case of children. As the Law Commission highlights, there is 'an important difference between a recognised medical condition and developmental immaturity: youth is not a pathological condition equivalent to a medical condition'.[571]

The current legal position is therefore that 'an adult of 40 years with the emotional maturity of a 10 year old can claim diminished responsibility (providing they have been diagnosed as having a 'recognised medical condition') yet a 'normal' 10 year old cannot succeed with the plea as their development has not been arrested'.[572] It is therefore submitted that a young defendant cannot challenge the presumption of status-responsibility embodied in section 50. This presumption is, therefore, conclusive. A young defendant may, however, be able to demonstrate that they lacked capacity at the time of the offence

[568] Sentencing Council, *Sentencing Guidelines: Sentencing Children and Young People*, para 1.5. Available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/ (Accessed February 2024).
[569] Heather Keating 'The 'Responsibility' of Children in the Criminal Law' (2007) 19(2) CFLQ 183
[570] Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145, 160.
[571] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO 2013) 190 [9.2].
[572] Ministry of Justice, *Murder, manslaughter and infanticide: Proposals for reform of the law Summary of responses and Government position* (The Stationary Office, 2009) para.98, available at: https://webarchive.nationalarchives.gov.uk/20100512140907/http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf accessed 21 August 2024.

by proving that a legally recognised defence is applicable to their case (e.g. by relying on a capacity-related defence such as diminished responsibility or insanity).

It is important to highlight that this does not necessarily mean that English law 'holds that a person is completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day'.[573] The thesis argues that whilst there is limited scope for a young defendant to claim that they lack capacity to be criminally responsible, children aged 10 and above are not 'treated as *fully* responsible'[574], as is often claimed. The thesis argues that children's diminished culpability can be, and already is, recognised in law. This argument is explored in more detail later in this chapter and in chapter 5. In order to test the first hypothesis and determine whether proponents of law reform have proven that the presumption of capacity embodied in section 50 is flawed, it is necessary to first determine what the term 'capacity' means in the context of the minimum age of criminal responsibility.

4.5 What does capacity mean in the context of section 50?

It is important to note that the meaning of the term capacity varies depending on the legal context in which it is used. For example, in the context of medical law, the term capacity refers to a person's ability to understand information and make decisions about medical treatment and care.[575] A person is deemed unable to make a decision for themselves if, at the material time, they are unable to understand information relevant to the decision, retain that information, use or weigh that information as part of the process of making the decision, or are unable to communicate their decision.[576] Adults are presumed to have capacity unless the contrary can be proven.[577] Children below the age of 16 are presumed to lack capacity unless they can demonstrate that they are competent to make the decision in question.[578] In the context of contract law, the term capacity generally refers to a person's ability to enter into legally binding commitments. In this context, capacity refers to a person's ability to understand, fulfil and appreciate the significance of legal obligations.[579] In family law, the law presumes that adults have capacity to consent to marriage unless it can be shown that a person is unable to understand the duties and

[573] A.T.H. Smith, 'Doli Incapax under Threat' (1994) 53 Cambridge LJ 426, 427.
[574] Ibid.
[575] See for example Anne-Maree Farrell and Edward S. Dove, *Mason and McCall Smith's Law and Medical Ethics* (12th edn, OUP 2023) ch 8
[576] Mental Capacity Act 2005, s3(1).
[577] Mental Capacity Act 2005, s1(2).
[578] *Gillick v Wisbech Area Health Authority* [1987] AC 112. The Family Law Reform Act 1969, s8 states that 'The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian'
[579] See for example Ruth Atkins, Koffman, *Macdonald & Atkins' Law of Contract* (10th edn, Oxford University Press 2022) ch 22

responsibilities typically associated with marriage.[580] The notion of legal capacity is therefore inextricably linked to mental competence. In many instances the law presumes that a person lacks capacity until they reach a specified age, and this is often the age of majority.[581]

In the context of criminal responsibility, the meaning of capacity is contested. Goldson therefore argues that the question of capacity is 'vexed'.[582] As outlined in chapter 2, from a historical perspective, a defendant's capacity to be criminally responsible was determined by the *doli incapax* rules. Section 50 simply states that '[I]t shall be conclusively presumed that no child under the age of ten years can be guilty of any offence'. It does not make reference to 'capacity' or the concept of *doli incapax.* Nevertheless, it is generally agreed that the minimum age of criminal responsibility marks the point at which children are presumed to be *doli capax* (they are presumed to have capacity to be criminally responsible). As such, it is submitted that section 50 presumes that young defendants are capable of understanding that their conduct amounted to serious wrongdoing (the *doli capax* threshold was discussed in detail in chapter 2). It is submitted that, from a legal perspective, the threshold for criminal responsibility appears to be relatively low. The section that follows argues that this interpretation of the law is consistent with the way that capacity-related defences, like diminished responsibility and insanity, operate in English law.

What degree of physical and mental capacity is sufficient for the attribution of criminal responsibility?

Criminal law defences essentially recognise that there are circumstances in which internal or external factors impact the extent to which a defendant is blameworthy for their offending behaviour. The importance of such defences 'is derivative, and it derives from the more fundamental requirement that for criminal responsibility there must be 'moral culpability', which would not exist where the excusing conditions are present'.[583]For example, the defence of automatism recognises a defendant's lack of blameworthiness in circumstances 'where they were unable to control the movement (or non-movement)' of their body at the time of the offence.[584] Examples of automatism include sleepwalking, convulsions, and muscle spasms.[585] The defence has been very narrowly construed and the threshold for establishing automatism is very high.[586] It is therefore possible to

[580] *Bennett v Bennett* [1969] 1 All ER 539. See also Andy Hayward, 'Relationships between Adults: Marriage, Civil Partnership, and Cohabitation' in Ruth Lamont (ed), *Family Law* (2nd edn, Oxford University Press 2022) 48
[581] Family Law Reform Act 1969, s1. The age of majority is 18.
[582] Barry Goldson 'Unsafe, unjust and harmful to wider society: Grounds for raising the age of criminal responsibility in England and Wales' (2013) 13(2) Youth Justice 111, 116.
[583] H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law (*Oxford University Press 2008) 35.
[584] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn Oxford University Press 2019) 103.
[585] Jeremy Horder *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019) 101.
[586] Ibid.

deduce that criminal law requires a defendant to possess only a basic level of control over one's body. It is therefore not surprising that those who argue that the age of criminal responsibility should be raised do not argue that children over the age of 10 lack *physical* capacity to be presumed criminally responsible. Instead, proponents of law reform tend to claim that children lack the *mental* capacity required to be criminally responsible.

English law has long recognised that mental disorder may impede a person's ability to understand the quality of their actions or form rational judgements. To establish a defence on the ground of insanity, 'it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know that it, that he did not know what he was doing was wrong'.[587] As Horder explains, it is 'the defendant's inability to meet 'normal' standards of mental capacity that renders it unfair to hold him responsible for his actions'.[588] The threshold for establishing insanity is therefore very high. Although the defence of insanity has traditionally been classified as an excuse, it is 'an excuse that denies responsibility'.[589] Duff states that:

> a person who offers an excuse admits responsibility, but seeks to block the transition from responsibility to liability by explaining her action and her reasons for action in a way that, without showing it to have been right or permissible (for that would amount to a justification), shows that it did not display a kind of fault that merits blame or a criminal conviction … By contrast, an exemption exempts the person from having to answer for her conduct altogether. [590]

It is for this reason that the insanity defence is now widely understood to be an exemption from criminal responsibility rather than an excusatory defence.[591] Put simply, a defendant who successfully pleads insanity is deemed to *lack* the mental capacity required to be held criminally responsible for their actions and is, therefore, exempt from criminal responsibility altogether.

The law also recognises that in limited circumstances a defendant's mental disorder may *reduce* their culpability for their criminal conduct. As Tadros explains 'there are cases of mental disorder which ought to ground a defence, but which do not undermine the status of the accused in total'.[592] He therefore asserts that such 'mental disorder defences ought to be categorised as excuses rather than exemptions'.[593] In such cases, the defendant

[587] *R. v M'Naghten* [1843] 8 E.R. 718.
[588] Jeremy Horder, *Ashworth's Principles of Criminal Law* (9th edn, Oxford University Press 2019) 102.
[589] John Gardner, 'The Mark of Responsibility' (2003) 23(2) Oxford J Leg Stud. 157, 161.
[590] Anthony Duff, *Answering for Crime: responsibility and liability in the criminal law* (Hart Publishing 2007) 289.
[591] Ibid.
[592] Victor Tadros, *Criminal Responsibility* (Oxford University Press 2005) 127
[593] Ibid.

is not exempt from liability altogether, but rather their liability is reduced to reflect their diminished mental capacity. For example, the defence of diminished responsibility recognises that the defendant is less blameworthy because a medically recognised condition caused, or was a substantial contributing factor in causing, the defendant's conduct. In order to rely on this defence, the defendant must have suffered from a recognised medical condition which substantially impaired their capacity to understand their conduct, form a rational judgment, or exercise self-control.[594] It is important to note that the defence of diminished responsibility, which is only available in homicide cases, is a partial defence only. This means that the defendant will still be deemed to be criminally responsible for their conduct even though a medical condition caused, or was a substantial contributing factor in causing, their offending behaviour. In such cases, the defendant is not completely absolved of responsibility for their criminal conduct, but the defendant's lower level of culpability is reflected by the fact that their conviction is 'downgraded' to one of voluntary manslaughter, which means that the judge is not required to impose a mandatory life sentence (as is the case for murder convictions) and can exercise discretion at sentencing stage. The key distinction between these two capacity-related defences is the extent to which the defendant's mental capacity affects their culpability/responsibility for their criminal conduct. The analysis above strongly suggests that a defendant will only be *exempt* from criminal responsibility where they were incapable of understanding what they were doing or that what they were doing was wrong. The fact that a defendant's mental capacity was *substantially impaired* by a medically recognised condition at the time of the offence does not appear to be enough to justify an exemption from criminal responsibility, but it does render them less culpable for their offending behaviour.

Most commentators agree that having 'sufficient physical and rational 'capacity'' is a precondition to criminal liability.[595] The difficulty lies in determining what degree of rational capacity is sufficient to justify the attribution of criminal responsibility. The thesis submits that some proponents of reforming section 50 claim or imply that the degree of capacity required to be criminal responsible is higher than the law actually requires (discussed in the section below). For example, as outlined in chapter 2, at common law a person was presumed *doli capax* if they had the capacity to understand that their conduct was 'seriously wrong' as opposed to merely mischievous or naughty.[596] This arguably requires a relatively low level of mental capacity (e.g. a basic capacity to understand the nature and significance of the conduct in question).

Cane argues that 'it is generally agreed that a minimum level of mental and physical

[594] Homicide Act 1957, s2 (as amended by Coroners and Justice Act 2009, s52).
[595] Jeremy Horder, *Ashworth's Principles of Criminal Law,* (9th edition, Oxford University Press 2019) 98. See also Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 289.
[596] *R v Gorrie* (1919) 83 J.P and *IPH v CC of South Wales* [1987] Crim LR 42

capacity is a precondition of culpability'.[597] He states that this reflects the widely held belief that a defendant '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'.[598] According to Cane, the law requires only a *basic* level of understanding and a *basic* level of self-control. It is submitted that Cane's interpretation of the law is consistent with the Law Commission's view of the law, which is that a person may lack capacity 'by being *incapable* of practical reasoning, and/or by being *incapable* of controlling his or her actions'.[599] The Law Commission further explains that in circumstances 'where there is such a complete breakdown of the normal human capacities of rationality and self-control for reasons which are not the accused's fault, then the accused should not be held criminally responsible for what he or she is alleged to have done'.[600] It is submitted that the Law Commission's statements supports the argument that only a basic level of understanding and self-control is required for criminal responsibility.

At this juncture it is worthwhile highlighting that the Law Commission has recommended that a separate limb of 'developmental immaturity' be added to the defence of diminished responsibility.[601] The effect of the proposal would have been to extend the partial defence to cases where the defendant's ability to understand the nature of his conduct, form a rational judgment, or exercise self-control were, at the time of the homicide, substantially impaired by their developmental immaturity.[602] The Law Commission believes that this would help to recognise that in limited circumstances developmental immaturity could 'significantly impair' a young person's capacity in the same way as a medically recognised condition.[603] Although some commentators welcomed the Law Commission's proposal and felt it represented 'a significant step forward',[604] the Government was not persuaded that there was a need for separate limb because it believed that 'deserving cases' would be caught by the existing defence.[605] It explained that it did not receive any evidence that the absence of a developmental immaturity provision in the existing law was causing 'any significant difficulties in practice or causing injustice in specific cases'.[606] It did, however,

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[597] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 65
[598] Ibid.
[599] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO, London, 2013) para 9.3 and 9.4. Emphasis added.
[600] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO, London, 2013) para A.117
[601] Law Commission, *Partial Defences to Murder: Final Report* (HMSO, London, 2004).
[602] Ibid.
[603] Ibid.
[604] Andrew Ashworth, 'Child Defendants and the Doctrines of the Criminal Law' in James Chalmers, Fiona Leverick, Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010) 38-41.
[605] Hansard, House of Commons, Column 418, 4 March 2009 (available at <https://publications.parliament.uk/pa/cm200809/cmpublic/coroners/090303/am/90303s03.htm>)
[606] Ibid.

believe there was 'a serious risk of opening up the defence too widely and catching inappropriate cases'.[607]

The Law Commission has also indicated that it believes that consideration of a new separate defence 'not criminally responsible by reason of developmental immaturity' warrants further consideration in a separate paper.[608] It considered developmental immaturity in the context of its Discussion Paper on Insanity and Automatism but did not feel it was possible to fully consider the merits of such a defence within the scope of the project. It is important to highlight that the Law Commission stressed that should such a defence be introduced, it should only be available in circumstances where the defendant '*wholly* lacked the relevant capacities by virtue of developmental immaturity'.[609] The Commission posited that relevant capacities could include the ability to form a rational judgement, to appreciate the wrongfulness of the conduct in question and the ability to control his or her physical acts.[610] The Commission's view seems to be that a developmentally immature defendant would only be *exempt* from criminal responsibility if, at the time of the offence(s), they were *incapable* of rational decision-making and/or *incapable* of controlling his or her actions. It is submitted that this supports the argument that, from a legal perspective, the threshold for criminal responsibility is relatively low.

It is worthwhile noting the Law Commission did not feel that a developmental immaturity defence could justifiably be limited to defendants under the age of 18 because severe developmental immaturity could affect adults as well as children.[611] It is submitted that the Law Commission's proposals suggest that a defendant may, by virtue of severe developmental immaturity, lack the basic level of mental capacity required to be criminally responsible. However, the Commission indicated that such a defence would only be available where a defendant *wholly* lacked the relevant capacities and this suggests that the threshold for such a defence would be high.[612] The implication is, therefore, that most young defendants would still be regarded as having sufficient capacity to be deemed criminally responsible, even though they are developmentally immature when compared to adults. As outlined at the outset of this section, the thesis submits that the extant scholarship often claims or implies that the degree of capacity required from criminal responsibility requires more than a basic ability to understand the nature and significance of one's actions and a basic ability to exercise self-control. This, it is submitted, is problematic because it seems to have resulted in erroneous inferences being drawn from

[607] Ibid.
[608] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO 2013) 185 – 191.
[609] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO 2013) 185. Emphasis added.
[610] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO 2013) para 9.4, 185.
[611] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO 2013) 187.
[612] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO 2013) 185. Emphasis added.

scientific research concerning young defendants' mental capacity. The thesis submits that evidence which indicates that children are less adept at decision-making and less able to exercise self-control is sometimes presented as evidence which demonstrates that young defendants *lack* the capacity to be criminally responsible. This is discussed in the section that follows and in chapter 5.

4.6 Capacity, criminal responsibility and children

Proponents of capacity-based arguments often contend that children above the age of criminal responsibility lack the capacity to be considered criminal responsible. This section provides an overview of the capacity arguments which have been advanced in existing scholarship and then directly addresses research question 3 by determining whether the evidence proffered by proponents of law reform proves that the presumption of capacity embodied in section 50 is flawed.

Many scholars believe that children 'should not be subject to criminal conviction unless, factually, they committed the conduct with capacity'.[613] As previously discussed, this reflects a widely held belief that 'criminal responsibility should be imposed on people who deserve to be punished' and those who lacked capacity when they committed the offence do not deserve to be blamed for it.[614] The concept of criminal responsibility is, therefore, inextricably linked to notions of capacity. It is widely accepted 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'.[615] Proponents of capacity arguments essentially claim that children, by virtue of their developmental immaturity, lack the capacities that are required to be deemed criminally responsible for their offending behaviour.

Legal theorists often claim that defendants must be able to exercise moral reasoning and judgement, and self-control'.[616] These are all capacities which are thought to be underdeveloped in children because they have not yet attained physical and mental maturity. Although proponents of capacity arguments acknowledge that there is no single age at which children can be said to have attained physical or mental maturity,[617] they

[613] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546, 546.
[614] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 308.
[615] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1968) 152.
[616] Victoria Stachon, 'The Principles of Punishment Applied to Children within the Juvenile Justice System' (2007) UCL Juris. Rev. 57.
[617] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' [2018] 82 J Crim L 311. See also Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145 and David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546

often claim that 'children and young people are not yet grown up and fully developed either physically, emotionally or cognitively'.[618] Commentators often claim that this view is supported by research which shows that adolescence is a period of significant 'intellectual, emotional and social development'.[61] Such research demonstrates that adolescence is a period in which children undergo important and substantial development.[619] Commentators claim that during this period, children may lack the degree of maturity required to be criminally responsible. Proponents of law reform argue that scientific research, particularly in the emerging field of neuroscience, now proves that children are developmentally immature when compared to adults and claim that such research demonstrates that children lack the degree of physical, intellectual, emotional and social development that is necessary to exercise moral reasoning and judgement, and self-control. For instance, proponents of law reform often claim that scientific evidence shows that key areas of the brain, which are associated with self-control and impulsivity, are underdeveloped during adolescence and argue that children's capacity for rational decision-making is inhibited by the fact that they are less able to exercise self-control and less able to understand and weigh the consequences of their actions.[620]

Proponents of capacity arguments contend that children 'are still in the process of maturing at this stage of life and may not yet be developed enough to understand the wrongfulness of what they do'.[621] This is because they are 'different from adults, both in their ability to reason and to foresee consequences and in the fact that they are subject to maturation and significant change'.[622] Furthermore, they are also 'less mature than adults in terms of their judgement and sensation-seeking and experience difficulties in weighing and comparing consequences when making decisions and contemplating the

[618] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, (2006) 31.
[619] Laurence Steinberg and Robert G Schwartz, 'Developmental Psychology Goes to Court' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000).
[620] See for example: Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145, Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' [2018] 82 J Crim L 311, Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) NILQ 269, Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (2007) UCL Jurisprudence Review 57, Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86 and Oskar Sherry, 'Responsible, but not Criminal: A Response to States' Normative Justifications for a Minimum Age of Criminal Responsibility (MACR) Below the Age of 12' [2018] Oxford Univ Undergrad LJ 7.
[621] Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] Northen Ireland Law Quarterly 67(3) 269, p
[622] Justice *Children and Homicide: Appropriate Procedures for Juveniles in Murder and Manslaughter Cases* (London: JUSTICE, 1996)

meaning of long-range consequences'.[623] This reduced ability to foresee and weigh consequences of actions is, it is claimed, relevant when determining children's culpability.[624] Stachon argues that children's limited life experience negatively impacts their capacity to reason, self-reflect and foresee long-term consequences.[625] She argues that whilst children's 'intellectual capacities may be well developed … they lack much of the experience on which the exercise of those capacities depends'.[626] Proponents of capacity arguments claim that these reduced capacities render children less blameworthy for their actions.[627]

Scholars also highlight that children are particularly prone to sensation-seeking and risk-taking behaviours and are much more susceptible to the influence of others, especially their peers.[628] Academics such as Wortley argue that during adolescence children are much more likely to engage in certain behaviours, particularly sexual experimentation.[629] They claim that children are therefore biologically predisposed to engage in risky and sensation-seeking behaviours and may find it difficult to avoid offending behaviours. Wake et al argue that children are innately vulnerable because of their developmental immaturity.[630] They also argue that children are also situationally vulnerable because of the external factors they are exposed to.[631] For example, there is a 'strong correlation' between youth offending and external factors such as 'poor parenting, poverty and

[623] Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) NILQ 67(3) 269, 269.
[624] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86. 88–89 , Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (20087) UCL Juris. Rev. 57, and Paul Catley and Lisa Claydon, Lisa 'Why neuroscience changes some things but not everything for the law' in Hanna Swaab Hanna and Gerben Meynen (eds) *Handbook of Clinical Neurology* (Elsevier 2023) 251–264.
[625] Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (2007) 13 UCL Jurisprudence Review 57, 57.
[626] Ibid.
[627] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, Paul Catley and Lisa Claydon, Lisa 'Why neuroscience changes some things but not everything for the law' in Hanna Swaab Hanna and Gerben Meynen (eds) *Handbook of Clinical Neurology* (Elsevier 2023), Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' [2018] 82 J Crim L 311 and Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (2007) 13 UCL Jurisprudence Review 57, Oskar Sherry, 'Responsible, but not Criminal: A Response to States' Normative Justifications for a Minimum Age of Criminal Responsibility (MACR) Below the Age of 12' [2018] Oxford Univ Undergrad LJ 7, 60, Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) NILQ 269 and David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546.
[628] Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (2007) 13 UCL Jurisprudence Review 57.
[629] Natalie Wortley, 'Merely Naughty or Seriously Wrong? 'Childish Sexual Experimentation' and the Presumption of Doli Incapax: *R v PF* [2017] EWCA Crim 983' (2017) 81 J Crim L 346.
[630] Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145
[631] Ibid.

abuse'.[632] This has led scholars such as Arthur to argue that the low age of criminal responsibility in England and Wales 'fails to account for the innate vulnerabilities of children' because 'it hinges on a conception of children as rational agents carrying full responsibility'.[633] He argues that 'this conception does not account for the failures of the state, parents, and society which may render children situationally vulnerable, and therefore at greater risk of child offending behaviours'.[634] This view is shared by Elliott who draws attention to the fact that 'children who go through the criminal process at a young age are often young people from chaotic, dysfunctional and traumatic backgrounds involving some combination of poor parenting, physical or sexual abuse, conflict with families, substance abuse or mental health problems'.[635] For these reasons, Arthur argues that the age of criminal responsibility ignores the 'connections between the child's actions and the wider socio-economic and cultural contexts of their lives and their experiences of vulnerability and powerlessness'.[636] As such he argues that it fails 'in both its protective function towards young people, and in its important communicative function regarding how we treat the youngest and some of the most vulnerable within our society'.[637]

Many legal theorists contend that the attribution of criminal responsibility can only be justified where a defendant has made a choice to behave in the offending way. This is 'because the exercise of choice is evidence that the person was acting as an autonomous individual'.[638] The choice theory states that an intellectual knowledge of rules and a capacity to understand their content, is sufficient to render the defendant a moral agent. Under this theory, 'there is no additional requirement that the agent has any sense of moral obligation or a capacity for identifying with the concerns of others'.[639] The idea that criminal responsibility should be premised on an individual's free choice was emphasised by Hart, who argued that 'unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him.'[640] Applying the choice theory, a defendant will be culpable if 'at the time of acting reprehensibly he

[632] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 65
[633] Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales' [2016] NILQ 67(3) 269, 272.
[634] Ibid.
[635] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289. See also G Van Bueren, 'Child-Oriented Justice—An International Challenge for Europe' (1992) 6 Int J Law & Fam 381, 381-2 and Paul Cavadino "Goodbye doli, must we leave you?' (1997) 9 CFLQ 165.
[636] Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales' [2016] NILQ 67(3) 269, 273.
[637] Ibid.
[638] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1968).
[639] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 388.
[640] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Clarendon Press 1968) 152.

had the 'capacity' to choose and a 'fair opportunity' to avoid acting as he did'.[641] Elliott submits that although few adult offenders will lack the capacity to exercise choice 'emotionally immature children over the age of ten may well lack such capacity'.[642]

Some proponents of law reform claim that children lack the autonomy to be deemed criminally responsible. Elliott, for example, argues that criminal responsibility should only be imposed on individuals who have the capacity and freedom to choose how they behave.[643] She believes that the legal test for capacity which developed at common law was fundamentally flawed because it focused exclusively on a child's ability to understand that their actions amounted to a serious wrongdoing. She argues that whilst 'moral awareness might be symptomatic of children's capacity in terms of their intellectual development' the concept of *doli incapax* totally ignores other consequences of a child's immaturity.[644] She argues that because children only have limited personal autonomy, they lack the capacity and freedom to make a genuine choice about their behaviour and should not be considered criminally responsible.

In essence, Elliott's contention is that children often lack the ability to exercise genuine choice because they 'are very much under the influence of the adults and peers around them'.[645] She therefore argues that children lack the degree of autonomy to be criminally responsible. 'The impact of parental care and the social conditions in which they live are too strongly determinative of their 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'.[646] She argues that the age of criminal responsibility should be increased to take account of this 'temporary state of incompetence'.[647] Similarly, Cane believes that external factors such as bad parenting, poverty and violence adversely affect children's ability to make act as autonomous individuals.[648] He argues that because of their 'limited capacity' children do not have 'a genuine opportunity to make a choice as to how they behave'.[649] In his view, the impact of external factors 'become determinative of their behaviour since children are not autonomous individuals'.[650] He claims that '[t]his lack of autonomy is reflected in the striking research results showing the strong correlation between poor parenting, poverty, abuse and youth offending'.[651] Those

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[641] Ibid.
[642] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 388.
[643] Ibid.
[644] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 290.
[645] Ibid.
[646] Ibid.
[647] Ibid.
[648] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 65.
[649] Ibid.
[650] Ibid.
[651] Ibid.

who believe children lack autonomy argue that it is 'fundamentally unjust and inappropriate' to regard them as criminally responsible because they do not have the ability to exercise genuine choice.[652]

Those who subscribe to the 'character theory' of criminal responsibility believe that it is a defendant's character that causes him/her to carry out blameworthy conduct. Put simply, 'a defendant should be blamed for those of his acts that demonstrate undesirable character traits'.[653] Under this theory, blameworthiness is directly related to the defendant's character. Some character theorists believe that 'a moral agent must have the capacities necessary for moral decision-making' if they are to be fairly considered to be criminally responsible. Consequently, 'a moral agent must have an ability to be self-critical and develop morally'.[654] Some commentators, such as Sherry and Elliott, argue that children lack the capacity for self-reflection and moral reasoning.[655] Sherry argues that even when children have this capacity, they are likely to lack the life experience to be able to use this capability in a meaningful way.[656] She therefore believes that children have limited capacity to 'apply internally grounded moral reasoning to their actions' and have 'underdeveloped reasoning' capacities.[657]

Finally, many proponents of law reform believe that the current legal position is unsatisfactory because the law fails to recognise the fact that children develop and mature at different rates. Cavadino, for example, argues that the rebuttable presumption of *doli incapax* 'recognised that using criminal penalties to punish a child who does not appreciate the wrongfulness of his or her actions lacks moral justification'.[658] He argues that since the presumption was abolished, the law fails to account for the fact that there are 'variations in the speed of the maturation process'.[659] He believes that the period of conditional liability provided by the rebuttable presumption was 'fully consistent with our increasing knowledge of child development and learning which tells us that children mature and learn over differing time spans'.[660] Similarly, Hamer and Crofts argue that for 'a defendant to be convicted of a criminal offence, they must have criminal capacity'. They

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[652] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.
[653] Ibid.
[654] Ibid.
[655] Oskar Sherry, 'Responsible, but not Criminal: A Response to States' Normative Justifications for a Minimum Age of Criminal Responsibility (MACR) Below the Age of 12' [2018] Oxford Univ Undergrad LJ 7, 60.
and Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.
[656] Oskar Sherry, 'Responsible, but not Criminal: A Response to States' Normative Justifications for a Minimum Age of Criminal Responsibility (MACR) Below the Age of 12' [2018] Oxford Univ Undergrad LJ 7, 60.
[657] Ibid.
[658] Paul Cavadino 'Goodbye doli, must we leave you?' (1997) 9 CFLQ 165.
[659] Ibid.
[660] Ibid.

argue that the defendant, at the time of the charged conduct, must have understood that their conduct was seriously wrong'.[661] They argue that this capacity develops 'over time and may be significantly affected by many genetic and environmental' factors.[662] Consequently, they argue that children 'do not uniformly gain criminal capacity on their 10th birthday, nor on their 14th birthday' and argue that 'a more individualised approach is required, differentiating between children according to their level of development'.[663] In their view, even if the age of criminal responsibility was raised, it would still be desirable to reinstate and extend the rebuttable presumption of *doli incapax* because a 'one-size-fits-all approach is ill-equipped to address the capacity issue'.[664] Like Cavadino, they reject the proposition that all children above the age of 10 are 'moral agents and, thus, eligible for blame' and believe that a period of conditional liability is necessary to account for the fact that children develop and mature at different rates.[665]

4.7 What evidence has been proffered to support claims that children lack capacity?

Wake, like many other commentators, claims that the 'arguments in favour of raising the age of criminal responsibility are well known and are increasingly science-based'.[666] Some scholars, like Elliott, go further and claim that '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.[667] This section of the thesis directly addresses the first limb of the primary research question and research question 3 by examining the scientific evidence that has been proffered by proponents of law reform and determining whether it proves that children lack capacity to be criminally responsible.

Child Defendants Report

Much of the extant scholarship relies on scientific findings published in a report by the Royal College of Psychiatrists to support claims that children lack capacity to be deemed criminally responsible. The Report, entitled 'Child Defendants', details the findings of a Working Group that was set up by the Royal College of Psychiatrists to 'present a balanced appraisal of the current situation involving the needs of child defendants aged 10 years and upwards who appear before criminal courts on a range of charges'.[668] The

[661] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546.
[662] Ibid.
[663] Ibid.
[664] Ibid.
[665] Ibid.
[666] Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145. 145-162.
[667] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289
[668] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006).

Report is broad ranging but specifically considers whether the age of criminal responsibility is consistent with research concerning child development. Although the Report does not 'set out to campaign to change the law or to promote a particular position in relation to children who offend', it asserts that legislators 'need to be familiar with the developmental changes that occur during childhood and adolescence … in order to create age related laws and statutes that are developmentally appropriate and scientifically reasonable'.[669] The Report therefore provides an overview of research concerning child development so that policymakers are equipped to make 'well informed decisions' about the treatment of children who engage in offending behaviour.[670] It states that it is necessary to establish 'the basic facts about normative child development across populations of children since policy changes affecting large groups of children need to be based on scientific findings with accepted, universal validity'.[671] It is important to note the Report clearly states that child development is multifaceted and encompasses physical, intellectual, emotional and social development.[672] It sets out research concerning each aspect of development and considers its relevance in the context of the criminal justice system. The key findings of the Report are outlined in the sections that follow.

Physical development

Physical development in children is 'closely intertwined' with other aspects of their development but children reach 'physical developmental stages at widely differing ages and there is no reliable correlation between the physical and psychological development of children'.[673] Research clearly shows that children's psychological development is heavily dependent on biological maturation.[674] This is because the functioning of the mind is necessarily influenced to a major extent by the structure and organization of the brain.[675] The Report also confirms that development occurs 'as a result of biological forces (maturation), environmental forces (learning) or usually from a combination of both these factors'.[676] The Report makes clear that it is 'inappropriate' to draw inferences about a child's 'psychological development or social maturity from his or her physical appearance' because there is not a 'reliable connection between externally visible signs

[669] Laurence Steinberg and Robert G Schwartz, 'Developmental Psychology Goes to Court' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 20.
[670] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 31.
[671] Ibid.
[672] Ibid.
[673] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 32.
[674] Michael Rutter and Marjorie Rutter, *Developing Minds: Challenge and Continuity across the Lifespan* (Penguin 1993) 13 cited in Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 32.
[675] Ibid.
[676] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 31.

of puberty and the stages of psychological development'.[677] This means that it is not possible to gauge a child's psychological development by reference to their physical appearance or age. These findings are important because they support the claim that childhood and adolescence are periods of significant physical and psychological development. The research findings also demonstrate that children's development is impacted by a range of internal (biological) and external (environmental) factors and this supports the claim that children develop and mature at different rates. This, in turn, supports the claim that a 'one-size-fits-all approach is ill-equipped to address the capacity issue'.[678] It is submitted that this does not, however, necessarily mean that the presumption of capacity embodied in section 50 is flawed. Furthermore, cases of 'incapacity' could be dealt with by the introduction of a developmental immaturity defence, such as the one posited by the Law Commission, rather than raising the age of criminal responsibility.

Intellectual development

Intellectual development is 'a changing, dynamic process which is affected by other aspects of the child's development and which can be helped or hampered by environmental and other factors in the child's life'.[679] Substantial developmental changes occur in the intellectual capacities of children between birth and late adolescence.[680] Intellectual development includes the development of 'cognitive and thinking capacities' but these are 'only one aspect of the maturational and learning processes which need to occur to turn the naturally impulsive, self-centred, short-term thinking toddler into a reasonably self-controlled, reflective young adult, able to take a long-term view'.[681] This means that although adolescents may have the 'intellectual equipment to attempt adult reasoning', they often lack the experience on which to base rational judgements.[682] Adolescents 'by dint of their immaturity, may be more susceptible to external social and environmental factors' and this may mean that their intellectual capacity is not used to make sensible judgements, such as refraining from criminal behaviour.[683] It is also important to note that the 'intellectual functioning a young adolescent may be very different from that of a late teenager'.[684] These findings are important because they confirm that intellectual capacity develops over the course of time and is 'helped or hampered' by environmental factors. They also confirm that adolescents may be more

[677] Laurence Steinberg and Robert G Schwartz, 'Developmental Psychology Goes to Court' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 25.
[678] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546.
[679] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 33.
[680] Ibid.
[681] Ibid.
[682] Ibid.
[683] Ibid.
[684] Ibid.

susceptible to social factors, such as peer pressure. However, the research findings do not suggest that adolescents lack the basic ability to exercise self-control which, it is submitted, is all that is necessary to meet the threshold for criminal responsibility.

Emotional development

Emotional development is also impacted by both external and internal factors. For example, emotional development is dependent on cognitive development.[685] Understanding concepts such as guilt improve a child's ability to self-reflect and consider the consequences of their actions for themselves and others.[686] Similarly, the capacity to monitor one's behaviour and to alter it accordingly plays an important role in regulating behaviour and making rational choices.[687] The capacity to control impulsivity and exercise self-control are also important aspects of emotional development which play a significant role in shaping the behaviour of the normally developing child.[688] These capacities 'increase gradually' from an early age and continue into adulthood.[689] These findings prove that emotional development is key to a child's ability to understand the consequences of their actions and is, therefore, likely to be relevant when determining whether children have the capacity to understanding the wrongfulness of their conduct. The findings demonstrate that, like physical and intellectual development, emotional development occurs gradually over the course of childhood and adolescence and continues into adulthood. The Report does not, however, identify an age at which children are likely to have acquired the degree of emotional development needed to exercise a basic level of rational decision-making.

Biological factors, such as the functioning of the frontal lobes of the brain, are thought to play an important role in the development of self-control and of other abilities, particularly the ability to plan actions and control impulses.[690] As previously outlined, these capacities are often thought to be relevant to the capacity to be criminally responsible. The frontal lobes are thought to mature at approximately 14 years of age.[691] Generally speaking, children are more likely to have an impaired ability to understand human relationships and an impaired capacity to feel guilt, remorse or empathy.[692] This is particularly true of children who have experienced neglect, abuse or trauma.[693] This is because children's emotional development can be adversely impacted by external factors, including abusive or neglectful parenting. Research also shows that 'the psychosocial patterns of

[685] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 38
[686] Ibid.
[687] Ibid.
[688] Ibid.
[689] Ibid.
[690] Ibid.
[691] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 40
[692] Ibid.
[693] Ibid.

attachment laid down in early infancy have a lasting effect on the development of the child's brain, and if the child has been subjected to trauma or abuse there may be lasting effects on the way in which the child's brain subsequently responds to human relationships'.[694] These findings are significant because research clearly demonstrates that many of the 'deprived and disturbed children' who tend to be drawn into the criminal justice system have suffered child abuse, neglect or have had very disrupted patterns of care.[695] This may, and arguably should, provide a strong justification for dealing with crime committed by children through other mechanisms (e.g. non-criminal interventions designed to address the root causes of the child's offending behaviour). The research findings also suggest that children, particularly those below the age of 14, are more likely to act impulsively. They do not, however, suggest that such children lack the basic ability to control their impulses or behaviour.

Social development

Social development is also impacted by internal and external factors. There is also a close connection between social development and moral development. For instance, a child's moral development is dependent on both cognitive and emotional maturity. In this context, emotional maturation involves a developing capacity for empathy and the ability to feel guilt and shame.[696] These capacities are necessary for the child to be able to understand that certain behaviours are 'wrong'.[697] Research has demonstrated that some young people may have a 'reduced capacity for emotional awareness of right and wrong' and may not be able to experience or acknowledge feelings of guilt or shame. This helps to explain why some children who offend 'appear indifferent to the consequences of their behaviour'.[698] It is submitted that this research suggests that children's capacity for distinguishing between right and wrong may be underdeveloped, but not that children generally lack the ability to understand that their conduct was wrong or seriously wrong.

The Report states that models of normal child development tend to assume that children 'can rely on the constant presence of a responsible, caring parent or parents who will protect the child from adversity and who will also provide a good developmental role model'.[699] Research demonstrates that positive parental encouragement plays an important role in the acquisition of moral development and is 'much less likely to occur in the climate of inconsistent or punitive parenting' that many young offenders

[694] Ibid.
[695] Ibid.
[696] Alex Alper, 'Moral Understanding and Criminal Responsibility of Children' in Sue Bailey and Mike Dolan (eds), *Forensic Adolescent Psychiatry* (Arnold Publishers 2004) 54, cited in Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 41.
[697] Ibid.
[698] Ibid.
[699] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 40.

experience.[700] Research also shows that children who lack the positive influence of good role models are more likely to have impaired social and moral development.[701] For example, children who grow up in environments where criminality or social deviance is condoned are more likely to go on to offend.[702] This is also true of children who are deprived of caring supervision in early life or who are raised in homes with high levels of conflict.[703] Other social factors, such as peer-group pressure and substance abuse, have also been linked to increased rates of offending behaviour.[704] It is submitted that these findings indicate that environmental factors, such as quality of parenting, may impair a child's social and moral development. However, the research does not demonstrate that such children lack the basic level of moral development required for criminal responsibility.

It is 'well established in the literature that children under the age of 18 years account for approximately a quarter to a third of all offences in England and Wales' but the majority of these children will not progress to patterns of adult offending and will, 'in a sense grow out of the delinquent behaviour'.[705] Research shows that children who engage in low-level offending will often progress to a stage of natural recovery and desistance.[706] Nevertheless a 'much smaller subgroup of offending youths' will show early indications of later criminality and become persistent adult offenders.[707] This subgroup is less likely to be part of a typical developmental process and are more likely to exhibit signs of emerging personality disorder.[708] It is therefore possible to distinguish between those children who are involved in 'less serious offending within an unacceptable social context and those more disturbed, callous or unemotional children who commit more serious offences for reasons that might be more internally driven'.[709] These findings are important for two reasons. Firstly, the findings strongly indicate that most young offenders will naturally grow out of their offending behaviour, and this should arguably inform the development of youth justice policy. It does not, however, support the claim that adolescents lack capacity to be deemed criminally responsible and does not, therefore, prove that the

[700] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 41.
[701] Ibid.
[702] Ibid.
[703] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 42.
[704] Ibid.
[705] Ibid.
[706] Ibid.
[707] Terrie E Moffitt, 'Adolescence-Limited and Life-Course-Persistent Anti-Social Behaviour: A Developmental Taxonomy' (1993) 100 Psychol Rev 674, cited in Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 42.
[708] Ibid. See also Elizabeth S Scott, 'Criminal Responsibility in Adolescence: Lessons from Developmental Psychology' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 314. See also Elaine E Sutherland, 'Raising the Minimum Age of Criminal Responsibility in Scotland: Law Reform at Last?' (2016) 67(3) NILQ 387, 400.
[709] Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 43.

presumption embodied in section 50 is flawed.

Rates of maturity and the age of criminal responsibility

The Report clearly confirms that the maturation process is progressive in nature. It demonstrates that children develop at different speeds and that rates of development may be impacted by a range of both internal (biological) and external (environmental) factors. The research cited in the Report also shows that adverse childhood experiences, such as abuse, neglect and poor parenting, may hamper 'normal' development, which may help to explain why children who have been, or are, classified as looked after are overrepresented in the youth justice system.[710] It is submitted that such findings support the claim that current policy ignores the 'connections between the child's actions and the wider socio-economic and cultural contexts of their lives and their experiences of vulnerability and powerlessness', and may indicate a need for a more compassionate response to crime committed by children. [711] However, the thesis argues that these findings do not prove that the presumption of capacity embodied in section 50 is flawed. It is important to acknowledge that the maturation process can be disrupted by both internal and external factors and in some cases, this may render a young defendant severely developmentally immature when compared to other children in the same age group. Such findings indicate that there may be a strong basis for introducing a defence which is capable of recognising cases where a child is, by virtue of severe impairment of their development, unable to understand that their actions were seriously wrong or unable to make rational decisions. This argument is explored in more detail in chapter 5.

Importantly, the research presented in the Report clearly demonstrates that 'there is no single age at which it can be said that physical and mental development has reached maturity'.[712] It therefore found that 'the arbitrary fixation of an 'age of criminal responsibility' at age 10 years in England has no obvious grounding in developmental psychology and takes no account of the wide variation in cognitive abilities and moral understanding of 10-year-old children'.[713] This finding is consistent with the research presented in chapter 3 of this thesis, which demonstrated that the age of criminal responsibility was selected because of political expediency rather than because the age of 10 is considered to be particularly noteworthy in terms of child development. However, the thesis submits that the fact that the age of criminal responsibility has no grounding in

[710] See also Kate Aubrey-Johnson Shauneen Lambe and Jennifer Twite J, *Youth Justice Law and Practice* (Legal Action Group 2019) 61 -90.
[711] Raymond Arthur, 'Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales' [2016] NILQ 67(3) 269, 273.
[712] JUSTICE *Children and Homicide. Appropriate Procedures for Juveniles and Murder and Manslaughter Cases* (JUSTICE 1996) 9.
[713] Alex Alper, 'Moral Understanding and Criminal Responsibility of Children' in Sue Bailey and Mike Dolan (eds), *Forensic Adolescent Psychiatry* (Arnold Publishers 2004) 52 cited in Royal College of Psychiatrists, *Child Defendants* (Occasional Paper No 56, 2006) 61.

research concerning child development does not in itself prove that it should be subject to reform.

The Report concludes that the 'sharp boundary of responsibility' created by the age of criminal responsibility is inconsistent with what is known about child development, namely that it is 'progressive and variable' and is subject to 'biological and environmental determinants'.[714] However, the thesis argues that the 'sharp boundary of responsibility' could be softened by the introduction of a defence of developmental immaturity, without raising the minimum age of criminal responsibility. Such a defence, which could be relied on by defendants who are incapable of rational decision-making or self-control (e.g. who lack capacity for criminal responsibility), would ensure the law provided exemptions from criminal liability for those above the age of criminal responsibility, where appropriate. It is submitted that such law reform would be consistent with the research presented in the Report, which confirms that it is not possible to identify an age at which children are sufficiently mature to be deemed criminally responsible because 'the capacity of children to appreciate consequences of their behaviour and act intentionally through an exercise of free choice is still developing at a rate different for each individual'.[715] The introduction of such a defence would arguably address concerns about the fact that the age of criminal responsibility 'takes no account of the wide variation in cognitive abilities' but would also provide protection to older defendants who would be unlikely to benefit from any reform of section 50. The research findings in the Report confirm that physical and mental development continues throughout adolescence and sometimes continues into adulthood; the introduction of a defence would, arguably, better reflect the way that humans develop and mature. Furthermore, the thesis argues that the Report fails to acknowledge that the 'sharp boundary of responsibility' created by the age of criminal responsibility is, at least to some extent, mitigated by the fact that young defendants are subject to a youth justice system which was, and still is, designed to reflect their reduced culpability. This argument is discussed in more detail later in this chapter and is also discussed in chapter 5.

4.8 Neuroscientific research findings

Neuroscience is 'the study of the cognitive processes that underlie human behaviour'.[716] Many scholars believe that neuroscientific research helps to explain why people think and act in specific ways.[717] This is because neuroscientists posit a direct correlation between brain structure, brain activity and human behaviour.[718] Cognitive neuroscience, an

[714] Ibid.
[715] Ibid.
[716] Elaine E Sutherland, 'Raising the Minimum Age of Criminal Responsibility in Scotland: Law Reform at Last?' (2016) 67(3) NILQ 387, 397
[717] Martha J Farah 'Neuroethics: The Ethical, Legal, and Societal Impact of Neuroscience '(2012) 63 Annu. Rev. Psychol, 571, 572-573.
[718] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86.

interdisciplinary field that draws together research from the social sciences, psychiatry, psychology, biology and political sciences, focuses on 'the biological mechanisms underlying cognition, with a specific focus on the neural substrates of mental processes and their behavioural manifestations'.[719] Sutherland argues that such research has 'significantly contributed to understanding cognitive development by revealing the mechanisms underpinning behavioural observations psychologists and psychiatrists make'.[720] For this reason, Catley argues that whilst 'neuroscience and the cognitive sciences more generally have enriched our understanding of the way brains develop' to a large extent such research has simply 'reinforced and helped explain lessons from the behavioural sciences'.[721]

Because of advances in neuroimaging technologies, neuroscientists are now able to chart cortical growth and development throughout childhood and adolescence.[722] There is, therefore, a rapidly growing body of neuroscientific research concerning brain development in children and adolescents. Such research is often believed to provide a scientific explanation for why children and young people exhibit certain behavioural traits and is therefore thought to be particularly relevant to debates about children's legal responsibility. As Walsh notes, such research has even influenced important legal developments in the United States of America.[723] For example, in the seminal case of *Roper v Simmons* 543 U.S. 551 (2005) neuroscientific research, in the form of an affidavit submitted by the American Psychological Association and American Medical Association, which confirmed that adolescents are 'less able to control their impulses than adults' because 'the prefrontal cortices of adolescents are underdeveloped' persuaded the Supreme Court to abolish the death penalty for juveniles convicted of murder.[724] The decision in *Roper* essentially recognised that adolescents are less culpable for their criminal conduct than adults and are therefore less deserving of severe punishments, such as the death penalty. The United Nations Committee on the Rights of the Child, the body responsible for monitoring compliance with the UNCRC, also refers to neuroscientific research to justify its view that the lowest acceptable age of criminal responsibility is 14 years of age.[725] It states that its position is based on 'developmental and neuroscience evidence [which] indicates that adolescent brains continue to mature

[719] Elaine E Sutherland, 'Raising the Minimum Age of Criminal Responsibility in Scotland: Law Reform at Last?' (2016) 67(3) NILQ 387, 400.
[720] Ibid.
[721] Paul Catley, 'The Need for a Partial Defence of Diminished Capacity and the Potential Role of the Cognitive Sciences in Helping Frame That Defence' in Sjors Ligthart and others (eds*), Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021) 51–75.
[722] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311
[723] Charlotte Walsh, 'Youth Justice and Neuroscience: A Dual-Use Dilemma' (2011) 51(1) British Journal of Criminology 21, 23.
[724] *Roper v Simmons* 543 U.S. 551 (2005)
[725] UN Committee on the Rights of the Child (2019), *General Comment No. 24*, para 22.

even beyond the teenage years, affecting certain kinds of decision-making'.[726] It is therefore clear that neuroscientific is widely believed to be of particular relevance to discussions about youth justice law and policy. It is therefore unsurprising that much of the extant literature concerning reform of the minimum age of criminal responsibility cites neuroscientific research findings to support claims that the presumption of capacity embodied in section 50 is flawed and ought to be subject to reform. This section of the thesis will examine the scientific evidence which has been proffered to support claims that children lack capacity to be criminally responsible and will critically evaluate whether such evidence, and the inferences drawn from it, prove that the presumption of capacity embodied in section 50 is flawed. This section directly addresses research question 3.

Incomplete organisational, structural and functional development

Neuroscientific research demonstrates that the human brain undergoes significant organisational, structural and functional changes throughout childhood and adolescence.[727] As Catley explains such research, together with research from the cognitive sciences more generally, has 'enriched our understanding of the way brains develop, the typical roles of different parts of the brain and given us more insight into what can go wrong with the workings of the brain'.[728] Research of this nature is important because brain development is believed to be inextricably linked to cognitive development.[729] Such research is often thought to prove that 'adolescents' behavioural immaturity mirrors the anatomical immaturity of their brains'.[730] For this reason, many believe that to 'a degree never before understood, scientists can now demonstrate that adolescents are immature not only to the observer's naked eye, but in the very fibres of their brains'.[731]

Many researchers believe that the brain must reach 'a level of structural and organisational maturity in order to lay the groundwork' for advanced functional maturation to take place.[732] Like many other commentators, Farmer argues that neuroscientific research is relevant when considering the culpability of children and young people for the

[726] Ibid.
[727] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311.
[728] Sjors Ligthart et al *Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021)
[729] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311, 311.
[730] American Medical Association APA, American Academy of Psychiatry and the Law, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association '*Brief of amicus curiae supporting respondent'* in *Roper v. Simmons,* 543 U.S. 551 (No. 03-633). 2005.
[731] Ibid.
[732] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311.

unlawful behaviour they engage in.[733] Wishart argues that neuroscientific research demonstrates that children's brains are underdeveloped from a structural point of view and because synaptic pruning has not yet taken place.[734] She explains that during adolescence 'large and deep structural pathways' of white matter (brain tissue) develop which enable information to be shared more smoothly, quickly and efficiently.[735] Studies show that 'there is a steady increase of white matter volume in early adolescence and, as white matter increases, there is a corresponding decrease in grey matter, although this process occurs at different times in different regions of the brain'.[736] This process is associated with general maturity of mental function because it enables the brain 'to receive, respond and transfer information'.[737] Furthermore 'grey matter reduction is integral to the process of brain maturation' because it prepares the brain for the synaptic pruning, 'the process of internal refinement of the elimination of surplus synapses'. Synaptic pruning is believed to be essential for 'fine-tuning of functional networks and improving the overall efficiency of synapsis circuitry across the brain'.[738]

The prefrontal cortex is thought to be the 'central hub' of high-order mental functioning.[739] Research suggests this level of development is not likely to be complete until a person reaches 20 to 30 years of age.[740] The amygdala, the region that is thought to regulate emotion and self-control, generally matures at around 15 to 18 years of age,[741] and the hippocampus, which is the region thought to be responsible for long and short term memory recall, generally matures at around 17 years of age.[742] Wishart argues that this research demonstrates that children are 'incapable of satisfying capacity standards of legal responsibility' because they are 'yet to develop the mental functions' that legal subjects are expected to possess.[743] However, as outlined earlier in this chapter, it is submitted that the mental functions required for criminal responsibility are the capacity to form a rational judgement, to appreciate the wrongfulness of the conduct in question and

[733] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 88.
[734] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311. See also Charlotte Walsh, 'Youth Justice and Neuroscience: A Dual-Use Dilemma' (2011) 51(1) British Journal of Criminology 21, 22.
[735] Ibid.
[736] Ibid.
[737] Ibid.
[738] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311.
[739] Ibid.
[740] Peter J Uhlhaas, 'The Adolescent Brain: Implications for the Understanding, Pathophysiology, and Treatment of Schizophrenia' (2011) 37(3) Schizophrenia Bulletin 480, 480-483.
[741] Jay Giedd et al, 'Brain Development During Childhood and Adolescence: A Longitudinal MRI Study' (1999) 2(10) Nat Neurosci 861, 861–863.
[742] Ibid.
[743] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311.

the ability to exercise self-control; it is submitted that most humans are likely to have developed such capacities before 'advanced functional maturation' has taken place.

Neuroscientific research proves that the brain is 'highly malleable' during adolescence and does not fully mature until early adulthood.[744] Farmer explains that there are three areas of the brain that undergo substantial development during adolescence; executive functioning, emotional processing and social cognition.[745] Executive functioning skills are typically associated with controlling and coordinating thoughts and behaviour. These skills are thought to include working memory, selective attention and the ability to control emotional responses. Such skills are utilised in everyday tasks such as decision-making, problem-solving, long-term planning and social interaction. They develop over the course of adolescence and appear to be connected to dramatic changes in the prefrontal cortex.[746]. The thesis submits whilst neuroscientific research illustrates the adolescent brain is developmentally immature when compared to the adult brain, it does not necessarily demonstrate that 'young people bear no responsibility for their behaviour'.[747] Put simply, the fact that adolescents are developmentally immature does not in itself demonstrate that adolescents' mental functioning is so limited that they lack capacity to be considered criminally responsible. It does, however, indicate that they should be considered less culpable for their behaviour. This is because, as outlined above, the threshold for criminal responsibility appears to be lower than the threshold for being regarded as fully responsible for one's criminal conduct.

Increased risk-taking and impulsivity

Like many other proponents of law reform, Crofts claims that 'research into neuroscience is helping to explain children's capacity to understand the wrongfulness of behaviour and to control themselves at the time and in the circumstances of the commission of an offence'.[748] He argues that it is now 'well-established' that children are 'less psychologically mature than adults in ways that affect their decision-making in antisocial situations'.[749] Children are 'in a period of neurodevelopmental immaturity where they are prone to impulsive, sensation-seeking behaviour, with an underdeveloped capacity to

[744] Elaine E Sutherland, 'Raising the Minimum Age of Criminal Responsibility in Scotland: Law Reform at Last?' (2016) 67(3) NILQ 387, 401.
[745] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 87.
[746] Ibid.
[747] Ibid.
[748] Thomas Crofts 'Will Australia Raise the Minimum Age of Criminal Responsibility?' (2019) 43 Criminal Law Journal 26, 30-31.
[749] Elizabeth S Scott, 'Criminal Responsibility in Adolescence: Lessons from Developmental Psychology' in Thomas Grisso and Robert G Schwartz (eds), *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 744-45

gauge the consequences of actions'. [750] Crofts cites research from the Centre for Social Justice and a paper by Farmer to support these claims. The same research is also cited by Wake et al, who also claim that 'neurodevelopmental immaturity means that children tend to be impulsive and engage in risky, sensation-seeking behaviour while lacking the capacity to consider longer term consequences of actions'. [751] They also cite research quoted in a paper by Wishart to support the claim that 'neuroscientific developments demonstrate that children possess some degree of mental capacity but have not reached complete cognitive maturity. [752] They argue that such research shows that the 'process of neurodevelopment' renders children 'prone to impulsive, sensation-seeking behaviour, with an under-developed capacity to gauge the consequence of actions'. [753]

Neuroscientific research posits that children are more likely to act on impulse because their brains are, from a biological and structural perspective, underdeveloped. Arthur argues that 'developments in neuro-imaging technology have allowed for a more detailed understanding of the adolescent brain which has found that there are developmental differences in the brain's biochemistry and anatomy that may limit adolescents' ability to perceive risks, control impulses, understand consequences and control emotions'. [754] He argues that children are 'still developing in terms of their cognitive capacity and emotional maturity and are often much more impulsive than adults'. [755] Brown argues that 'advances in developmental neuroscience have provided clear evidence that a young adolescent brain, especially one as young as 10, is structurally and functionally different to an adult brain, raising questions regarding the extent to which young children should be held culpable for their actions'. [756] Furthermore, research concerning the development of the prefrontal lobe is widely believed to prove that children are less capable of exercising self-control because they are prone to impulsivity and risk-taking behaviours. Arthur argues that neuroscientific research proves that the prefrontal lobe is 'involved in behavioural facets germane to many aspects of criminal culpability' including 'the control of aggression and other impulses'. [757] Similarly, McDiarmid argues that 'children's reasoning and risk assessment will be more impulsive than adults' reasoning' until the

[750] Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (London: CSJ 2012) 201- 202.
[751] Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145, 148.
[752] Hannah Wishart, 'Young Minds, Old Legal Problems: Can Neuroscience Fill the Void? Young Offenders & The Age of Criminal Responsibility Bill—Promise and Perils' (2018) 82(4) J Crim L 311, 311-312.
[753] Thomas Crofts, "Will Australia Raise the Minimum Age of Criminal Responsibility?" (2019) 43 Criminal Law Journal 26, 30-31. See also Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (London: CSJ, 2012) 201.
[754] Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) 269.
[755] Ibid.
[756] Penelope Brown, 'Reviewing the Age of Criminal Responsibility' (2018) Crim L Rev 904, 906.
[757] Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) 269.

frontal lobes mature.[758] Similarly, Sherry argues that 'neuroscientific studies of children suggest that the frontal lobe development of children is such that full cognitive reasoning capabilities do not usually appear until late adolescence'.[759] Research illustrates that this area of the brain does not fully develop until around 14 years of age.[760] Farmer argues that adolescents are therefore 'predisposed neurologically to risk-taking behaviours that break legal norms and rules because of underdeveloped frontal lobes'.[761] Furthermore, she argues that adolescents' capacity for 'moral decision making is impaired', in part, because of 'increased motivational salience of rewards and value of peer acceptance'.[762]

Neuroscientific research has reinforced the view that adolescence 'is a period of immaturity, diminished capacities and behavioural problems where children are less able to control their actions in response to external stimuli due to reduced impulse control'.[763] For this reason, many scholars believe that adolescent children are 'predisposed' to engage in sensation-seeking and risk-taking behaviours.[764] Brown cites research which shows that adolescents are less able to consider the perspective of others when making decisions and less able 'to inhibit inappropriate actions'.[765] She concludes that the 'way their brains develop leads them to prioritise immediate rewards over long-term consequences'.[766] Furthermore, she notes that children are particularly susceptible to the influence of peers and tend to make riskier decisions when in the company of friends than when alone.[767] She also highlights research that shows an 'increase in impulsive, risk-taking and sensation-seeking behaviour, peaking in late adolescence before decreasing'.[768] Research clearly indicates that during adolescence 'the likelihood of engaging in 'impulsive, sensation-seeking and risk-taking' behaviours is 'greatly increased'.[769]

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[758] Claire McDiarmid 'An age of complexity: children and criminal responsibility in law' [2013] 13(2) Youth Justice 145-160.
[759] Oskar Sherry, 'Responsible, but not Criminal: A Response to States' Normative Justifications for a Minimum Age of Criminal Responsibility (MACR) Below the Age of 12' [2018] Oxford Univ Undergrad LJ 7, 69
[760] See Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) 269, Royal College of Psychiatrists '*Child Defendants'* (Occasional Paper No 56, (2006), Claire McDiarmid 'An Age of Complexity: Children and Criminal Responsibility in Law' [2013] 13(2) Youth Justice 145 and Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86.
[761] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 87.
[762] Ibid.
[763] Hannah Wishart 'Developmentally Immature Children and Young People: Understandings, Neuroscience & Criminal Responsibility' (PhD thesis, University of Manchester 2023) 80.
[764] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387, 406.
[765] Penelope Brown 'Reviewing the age of criminal responsibility' Crim L Rev 906.
[766] Ibid.
[767] Ibid.
[768] Ibid.
[769] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86.

Furthermore, the capacity to accurately gauge the consequences of actions is developing, as is the ability to empathise.[770] Cauffman and Steinberg argue that adolescents 'are in a period of neurodevelopmental immaturity, where they are prone to impulsive, sensation-seeking behaviour'. [771] The Changing the Heart of Youth Justice Report argues that research demonstrates that young people are generally much more susceptible to the influences of others, particularly their peers.[772] These findings are consistent with the Child Defendants Report discussed above, which confirms that 'early to mid-adolescence is a period during which the domains that control and coordinate thoughts, behaviours and emotional responses undergo significant development'.[773] Neuroscientific research has therefore 'reinforced the message from the behavioural sciences that some people have reduced impulse control and impaired capacity for rational thought and reasoned judgement' and this may be the result of brain injury, brain abnormality or, in the case of children, developmental immaturity.[774] Many scholars therefore believe that 'adolescents simply do not have the same physiological capacity as adults to exercise judgment, to make legal decisions, or to control impulses'.[775]

The research outlined above clearly indicates that children are, when compared to adults, more prone to impulsivity and are more likely to engage in risk-taking behaviours. Furthermore, the research indicates that this may be, at least in part, attributable to the way that the human brain develops. The thesis argues that the research does not, however, demonstrate that adolescents are *incapable* of exercising a basic level of self-control, thus it does not demonstrate that the presumption of capacity embodied in section 50 is flawed. The thesis posits that the extant literature does not adequately distinguish between research which indicates that adolescents are, by virtue of their developmental immaturity, more prone to engage in risk-taking and impulsive behaviour, and research which suggests that adolescents are incapable of exercising a basic level of self-control (e.g. they are unable to act on their own volition). It is submitted that evidence of the former lends credence to the argument that the law should recognise an intermediate period in which adolescents are considered to be less culpable for their actions, whereas

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[770] See for example: Mark H. Davis and Sherry L. Franzoi, 'Stability and Change in Adolescent Self-Consciousness and Empathy' (1991) 25 Journal of Research in Personality 70, Robert H. Aseltine, 'A Reconsideration of Parental and Peer Influences on Adolescent Deviance' (1995) 26 Journal of Health and Social Behavior 103 and Patrick H. Tolan, David Gorman-Smith, and Diane Henry, 'The Developmental Ecology of Urban Males' Youth Violence' (2003) 39 Developmental Psychology 274.
[771] Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults' (2000) 18 Behavioral Sciences & the Law 741, 759.
[772]Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 86.
[773] Ibid.
[774] Paul Catley 'The Need for a Partial Defence of Diminished Capacity and the Potential Role of the Cognitive Sciences in Helping Frame That Defence' in *Neurolaw: Advances in Neuroscience, Justice and Security (eds S*jors Ligthart, et al) (Springer International Publishing AG 2021) 51-75.
[775] Stephen J Morse and Adina L. Roskies (eds), *A Primer on Criminal Law and Neuroscience: A contribution of the Law and Neuroscience Project* (Oxford: Oxford University Press 2013) 204

evidence of the latter would support the claim that adolescents may lack the capacity to be deemed criminally responsible. The thesis argues that the research cited in the extant scholarship supports the argument that children should not be considered *fully* responsible for their offending behaviour because they are *less* capable of exercising self-control. It does not, however, appear to provide a basis for exempting adolescents from criminal responsibility altogether.

The ability to foresee and weigh risks and rewards

Some scholars also claim that in addition to being particularly susceptible to impulsivity and risk-taking behaviours, adolescents are also less adept at foreseeing and weighing risks. Neuroscientific research proves that the amygdala and the ventral striatum, which is thought to be associated with risk and reward, undergo rapid development and become 'hyperresponsive in adolescence'.[776] McDiarmid argues that this 'combination of rapid development of "reward systems" alongside the slow development of the "control system" can be viewed as simply an explanation for behaviour in adolescence that had previously been observed'.[777] However, Lighart argues that 'it adds to the picture and assists in understanding to what extent adolescents can control their behaviour'.[778] Cauffman and Steinberg argue that children 'are less psychosocially mature than adults in ways that affect their decision-making in antisocial situations'.[779] Furthermore, they have 'an underdeveloped capacity to gauge the consequences of actions'.[780] 'Compared to adults, children tend to be less future-orientated with their decisions, give more weight to gains than to losses and have a heightened vulnerability to peer influence'.[781]

Farmer's research states that 'the way that the brain develops throughout childhood and adolescence is thought to partly explain why children between the ages of ten and 14 are particularly vulnerable to peer pressure'.[782] Furthermore, she argues that adolescents' 'moral decision making is impaired' by limits in areas such as 'executive function, future orientation, and social cognition, as well as the increased motivational salience of rewards

[776] Parliamentary Office of Science and Technology (POST). '*Age of criminal responsibility'* (POSTNote 577, 2018) <https://researchbriefings.files.parliament. uk/documents/POST-PN-0577/POST-PN-0577.pdf> accessed 10 October 2024.
[777] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' [2013] Youth Justice 13(2) 106, 145-160.
[778] Sjors Ligthart et al *Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021)
[779] Elizabeth Cauffman and Laurence Steinberg, '(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable than Adults' (2000) 18 Behavioral Sciences & the Law 741, 759.
[780] Ibid.
[781] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387.
[782] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) Journal of Child Services 6(2) 86, 87.

and value of peer acceptance'.[783] Like the authors of the Changing the Heart of Youth Justice paper, she argues that research concerning child development 'does not mean that young people bear no responsibility for their behaviour, but rather that they may be less responsible'.[784] The thesis argues that the research proffered by proponents of law reform clearly demonstrates that children should not be considered to be fully responsible for their behaviour, but it does not prove adolescents lack capacity to be criminally responsible.

Capacity for moral reasoning

As outlined earlier in this chapter, some scholars believe that children have a limited capacity for moral decision making. Elliott cites research that shows that over the course of childhood children undergo 'significant changes in the cognitive and social development' and argues that this research demonstrates that it is 'only during the onset of early adolescence that young people become competent to think in abstract terms'.[785] She claims that this corresponds with when children acquire the ability to feel guilt and shame. Furthermore, she argues that this is linked with an increased 'awareness of the implications for others of the offender's wrongful actions'.[786] Similarly, Fortin argues that research concerning child development 'suggests that the intellectual competence of young children aged up to about 11 or 12 is far less sophisticated that than of adolescents between the ages of 12 and 18'.[787] She argues that this is the consequence of significant cognitive and social development which occurs as children grow older.[788] It is submitted that while such research indicates that children below the age of 12 are less adept at moral reasoning, it does not suggest that they are incapable of understanding the difference between behaviour which is wrong and conduct which is 'seriously wrong'. As such, it is submitted that such research does not demonstrate that children below the age of 12 lack capacity to be criminally responsible.

Impact of external/environmental factors on brain development

The Child Defendants Report, discussed above, clearly shows that development can be impeded by environmental factors such as abuse, neglect and trauma. These findings are consistent with neuroscientific research which suggests that experience of child abuse and/or neglect may impair brain development, and this is likely to be 'particularly true of children who have grown up in highly dysfunctional family circumstances and not

[783] Ibid.
[784] Ibid.
[785] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 294.
[786] Ibid.
[787] Jane Fortin, *Children's Rights and the Developing Law* (Butterworths, 1998) 444.
[788] Ibid.

learned law abiding behaviour in the home.'.[789] There is also some research to suggest that children who have experienced abuse may learn 'that aggressive behaviour is linked to attention and status … leading them to emulate such behaviour themselves'. [790] Sherry argues that 'the way in which psycho-social factors influence decision-making, and the kinds of choices adolescents make depend in part on the social and family context in which young people find themselves'. He highlights that 'children involved in crime, particularly where that involvement is persistent, have often had difficult, deprived backgrounds and serious multiple problems in terms of their school achievement, psychological health, alcohol and drug abuse and family life'[791]. These findings are consistent with research which indicates that children 'with care experience are greatly over-represented in youth justice populations'.[792] Recent research suggest that 33 percent children with care experience received a youth justice caution or Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289experience.[793] The thesis argues that this research supports the argument that current policy disregards the 'connections between the child's actions and the wider socio-economic and cultural contexts of their lives and their experiences of vulnerability and powerlessness', and may indicate a need for a more compassionate response to crime committed by children. [794] However, the thesis argues that these findings do not prove that the presumption of capacity embodied in section 50 is flawed because it does not demonstrate that adolescents generally lack the degree of capacity required for criminal responsibility. Nevertheless, the research indicates that it is conceivable that the development of some children's brains, particularly those who have experienced abuse or trauma, may be so adversely impacted by environmental factors (such as serious abuse) that they may lack the capacity to be criminally responsible. As such, there appears to be a basis for arguing that a defence should be introduced to recognise individual cases of severe developmental immaturity.

Adolescence as a period of marked neurodevelopmental immaturity

Overall, neuroscientific research indicates that children are less responsible, and

[789] Eileen Vizard 'How do we know if young defendants are developmentally fit to plead to criminal charges – the evidence base' (Michael Sieff Foundation, Report on Young Defendants Conference, 2009) available at http://www.michaelsieff-foundation.org.uk/content/Report%204%20-20Eileen%20Vizard%27s%20presentation.pdf, accessed 09 July 2024.
[790] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 88.
[791] Raymond Arthur, *Family Life and Youth Offending: Home is Where the Hurt Is* (Routledge 2007).
[792] HM Inspectorate of Probation '*Children with Care Experience'* (July 2024) available at <https://www.justiceinspectorates.gov.uk/hmiprobation/research/the-evidence-base-youth-offending-services/specific-sub-groups/children-with-care-experience/> accessed 01 August 2024.
[793] Ibid.
[794] Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) 269, 273.

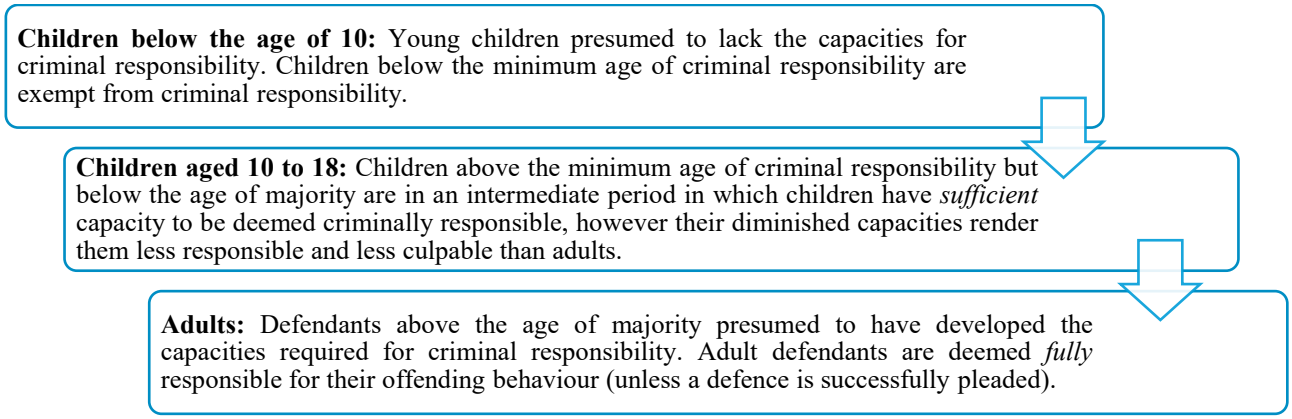
therefore less culpable, for their offending behaviour. The 'emerging picture of adolescence is of a period in which individuals may be near mature levels of competency in some areas while far from these in others'.[795] For example, research demonstrates that 'the maturation of the prefrontal cortex occurs gradually over adolescence and is near completion by 18 years'.[796] Because this 'protracted development occurs alongside greater reactivity of the socioemotional systems of the brain and a general increase in dopaminergic activity associated with heightened sensitivity to reward' there is 'a window of potential vulnerability in the early to mid-adolescent period during which the likelihood of impulsivity, sensation-seeking and risk-taking behaviours is raised'.[797] Research examining brain development and cognitive functioning in adolescents has found that 'those parts of the brain that deal with judgement, impulsive behaviour and foresight develop in the twenties rather than the teen years'.[798] The result of this is that 'teens are almost inevitably overly emotional, more prone to risk-taking and subject to wide mood swings, immature judgement, decreased risk perception and impaired future-time perspective'.[799] Such findings are consistent with the research presented in the Child Defendant's Report, discussed above, which concluded that children are generally less able to resist peer pressure and are more likely to behave impulsively. Wake et al conclude that adolescence is therefore a period of 'marked neurodevelopmental immaturity.[800]

McDiarmid argues that neuroscientific research 'provides some support' for 'delaying the assumption of criminal responsibility until the onset of adulthood'.[801] Whilst she acknowledges that this is a somewhat 'radical' solution to the anxieties raised by a low age of criminal responsibility of 10, she argues that it would be consistent with research which confirms that the brain does not fully mature until people reach their early 20s.[802] However, the thesis submits that the threshold for the attribution of criminal responsibility is lower than the threshold for being deemed *fully* responsible for one's criminal conduct. As such, the attribution of criminal responsibility does not need to align with full maturity. To satisfy the threshold for criminal responsibility, a defendant need only have *sufficient* capacity to make rational decisions, understand the wrongfulness of one's conduct and

[795] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 87.
[796] Ibid.
[797] Emma Farmer, 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives' (2011) 6 J Child Serv 86, 88.
[798] Raymond Arthur 'Exploring childhood, criminal responsibility and the evolving capacities of the child: the age of criminal responsibility in England and Wales' [2016] 67(3) 269
[799] Ibid.
[800] Lord Dholakia 'Age of Criminal Responsibility' cited in Nicola Wake, Raymond Arthur and Thomas Crofts (eds) 'The Age of Criminal Responsibility' (2016) 67(3) NILQ 263, 263.
[801] Claire McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' [2013] Youth Justice 13(2) 106, 145-160.
[802] Ibid.

be able to exercise a basic level of self-control. However, to be considered fully responsible, and therefore eligible to be subject to the full extent of the criminal law, a defendant must have attained adulthood. This argument is illustrated in Figure 1.1 below.

Figure 1.1.



McDiarmid's argument raises an important point, which is that neuroscientific research suggests that the human brain develops throughout the course of childhood and adolescence and does not fully mature until the early stages of adulthood. Such research clearly illustrates that the capacities which are typically associated with notions of criminal responsibility (for example rational decision-making and self-control) develop gradually and improve as the child matures. However, neuroscientific research does not indicate that adolescents *lack* such capacities altogether. Furthermore, because the research suggests that different areas of the brain mature at different rates, it is difficult to identify an alternative age at which adolescents could be said to have acquired sufficient capacity to be criminally responsible.

Several scholars have relied on research published in a policy report entitled 'Rules of Engagement: Changing the Heart of Youth Justice' to support claims that children lack capacity to be deemed criminally responsible. The Report argues that the minimum age of criminal responsibility has 'arguably, become increasingly questionable as our neuropsychological understanding of child development has advanced considerably'.[803] It claims that there is now a 'significant body' of research indicating that 'early adolescence (under 13-14 years of age) is a period of marked neurodevelopmental immaturity, during which children's capacity is not equivalent to that of an older adolescent or adult'.[804] The Report argues that such findings 'cast doubt on the culpability' of children below the age of 14 and 'raises the question of whether the current

[803] Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (London: CSJ, 2012), p.201.
[804] Ibid.

age of criminal responsibility at ten, is appropriate'.[805] Furthermore, it concludes that the research 'does not mean that children bear no responsibility for their behaviour, but that they may be less responsible'.[806] The thesis submits that these findings are significant because they support the claim that adolescence should be regarded as an intermediate period in which children are considered to be *less* responsible than adults. It does not, however, support the claim that children *lack* responsibility for their offending behaviour. As such, it does not demonstrate that the presumption of criminal responsibility embodied in section 50 is flawed. It is submitted that whilst the findings of the Report lend credence to the claim that such children should be deemed to be less culpable for their offending behaviour, they do not support the claim that such children should be *exempt* from criminal responsibility altogether.

Some commentators argue that neuroscientific research demonstrates a need to introduce a functional assessment of children's capacity, such as the rebuttable presumption of *doli incapax* which used to operate at common law, to recognise the fact that children mature at different rates.[807] Elliott argues that it is **'**undesirable to have a flexible age limit' because 'in law, consistency and clear rules are important'.[808] She therefore argues that 'a fixed year needs to be chosen which will be applied to all children' and recommends the introduction of a defence which exempts children from criminal responsibility on the basis of their lack of autonomy. She argues that the logical upper limit for such a defence would be 16 since children can leave school and marry at this age. However, it is worthwhile noting that the age at which a person can get married has recently been raised to 18.[809] The UN Committee on the Rights of the Child strongly discourages the use of 'individualized assessment of criminal responsibility' because, in its view, they rely too heavily on the exercise of judicial discretion which results 'in discriminatory practices'.[810] It therefore recommends a single minimum age of criminal responsibility.[811] Hamer and Crofts, however, argue that scientific research demonstrates that 'this one-size-fits-all approach is ill-equipped to address the capacity issue', particularly because such research demonstrates that children develop and mature at different rates and because their development is impacted by a wide range of internal and external factors.[812] The thesis submits that whilst such research demonstrates children mature and develop at widely different rates, it does not

[805] Ibid.
[806] Ibid.
[807] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546.
[808] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 301.
[809] Marriage and Civil Partnership (Minimum Age) Act 2022.
[810] UN Committee on the Rights of the Child, 'General Comment No 24' (2019) UN Doc CRC/C/GC/24 (UN Committee (2019)) para 26
[811] Ibid.
[812] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546, 550.

demonstrate that children lack the degree of capacity required to be criminally responsible. As Catley explains a child above the age of 10 may know that she has 'done something which is seriously wrong and she may be capable of being described as rational … that does not mean that her judgement is not, at times, impaired. Her ability to make decisions, to plan, to resist peer pressure and to assess risk are all in a state of flux during her adolescence.'[813] Catley argues that such findings indicate that 'an alternative system is required to recognize that some young offenders are not criminally responsible, and others have diminished capacity rendering them less responsible and less blameworthy'.[814] It is submitted that this could be achieved through the introduction of a defence to recognise cases of severe developmental immaturity which operates within a youth justice system which recognises that young defendants are, when compared to adults, less culpable for their offending behaviour.

It is important to note that some scholars have highlighted the limitations of neuroscientific research.[815] Commentators such as Walsh, Morse and Wishart have cautioned against 'embracing these lines of argument too enthusiastically' and have argued that neuroscientific research is limited in terms of what it can tell us about why children behave in the ways they do.[816] Morse, for example, argues that whilst 'neuroscience research provides hard science' which supports social scientists' general observations about adolescents' behaviour and self-control … adolescents' immature brains do not provide a biological deterministic excuse for criminal behaviour or poor decisions'.[817] He explains that neuroscientific research 'has not established a direct link between immature brain structure and function and its impact on real-life decisions and behaviour'.[818] Furthermore, he points out that the 'vast majority of juveniles do not commit heinous crimes despite their immature brains and some youths who commit horrific crimes do so cooly and rationally, rather than impulsively or impetuously'.[819] Morse argues that such research supports the claim that children are less blameworthy than adults and their actions 'warrant less severe punishment'.[820]

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[813] Paul Catley, 'The Need for a Partial Defence of Diminished Capacity and the Potential Role of the Cognitive Sciences in Helping Frame That Defence' in Sjors Ligthart and others (eds*), Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021) 51–75.
[814] Ibid.
[815] Stephen J Morse, Stephen J., and Adina L. Roskies (eds), *A Primer on Criminal Law and Neuroscience: A contribution of the Law and Neuroscience Project* (Oxford University Press 2013). See also Charlotte Walsh, 'Youth Justice and Neuroscience: A Dual-Use Dilemma' (2011) 51(1) British Journal of Criminology 21.
[816] Charlotte Walsh, 'Youth Justice and Neuroscience: A Dual-Use Dilemma' (2011) 51(1) British Journal of Criminology 21, 22.
[817] Stephen J Morse, Stephen J and Adina L. Roskies (eds), *A Primer on Criminal Law and Neuroscience: A contribution of the Law and Neuroscience Project* (Oxford University Press 2013) 204.
[818] Ibid.
[819] Ibid.
[820] Stephen J Morse, Stephen J and Adina L. Roskies (eds), *A Primer on Criminal Law and Neuroscience: A contribution of the Law and Neuroscience Project* (Oxford University Press 2013) 186.

It is submitted that the neuroscientific research cited in the extant literature supports the claim that adolescence is a period of immaturity and diminished capacities in which children are less able to control their actions. [821] This supports the argument that adolescence is an intermediate period between childhood and adulthood in which adolescents are much more developed than young children but are not yet fully developed and are therefore less adept at exercising capacities such as rational decision-making, judgement and self-control. As such, the research cited in existing scholarship clearly provides a strong basis for arguing that adolescents are less responsible and less culpable for their criminal conduct and should not, therefore be regarded as fully responsible for their offending behaviour and subject to the full force of the criminal law. The evidence cited in the extant scholarship strongly indicates that children have diminished mental capacities compared to adults, but it does not prove that children lack the degree of capacity to be criminally responsible. The thesis argues that claims that adolescents completely lack responsibility for their actions ignores the extent to which they have developed and matured. [822]

4.9 To what extent does the proffered evidence demonstrate that children lack capacity to be criminally responsible?

This section of the thesis directly addresses the first limb of primary research question. It will critically evaluate whether claims that the presumption of capacity embodied in section 50 is flawed are supported by the evidence proffered by proponents of law reform.

The evidence examined in this chapter illustrates that 'adolescence is a phase of life between childhood and adulthood; it is defined broadly as a time-limited period of biological growth, and cognitive and psychosocial development that affects a young person's behaviour'. [823] It shows that researchers in modern disciplines such as psychology, neuroscience, sociology, criminology, behaviour and education agree that

> adolescence is a period of physical maturity (e.g., sexual maturity and increased height); brain development (e.g., structure and function of the brain); cognitive development (e.g., logic and reasoning); emotion (e.g., impulse control and decreased mood swings); maturation of psychosocial orientation and skills (e.g., effective communication and develop a personal identity, gain awareness of gender and sexual orientation); morality (e.g., a period to learn about social and legal norms). [824]

[821] Hannah Wishart 'Developmentally Immature Children and Young People: Understandings, Neuroscience & Criminal Responsibility' (PhD thesis, University of Manchester 2023) 80
[822] Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (2007) UCL Juris. Rev. 57
[823] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387
[824] Ibid.

It is, therefore, clearly a period in which children undergo significant development as they transition to adulthood. It is typical for children to be less developed than adults in terms of their physical and mental development. In respect of physical development, it is clear that children are less developed than adults and evidence clearly shows that the child's brain is underdeveloped when compared to the adult brain. This is important because cognitive development and functionality is closely intertwined with physical development, particularly the way in which the brain is structured and organised. Evidence clearly shows that the brain undergoes considerable change throughout adolescence. What is defined as 'normal' brain development depends on the researcher's focus,[825] but abnormal brain development is generally considered as atypical variation and growth in children and young persons.[826] It is important to note that the evidence illustrates that the start and endpoints of this period are 'ambiguous'.[827] There is also a clear consensus that the available evidence does not identify an age at which neurodevelopmental immaturity ends.[828] The evidence examined clearly demonstrates that some children 'mature faster than others'.[829] It is therefore not possible to identify a single age at which children can be said to have achieved physical or mental maturity.[830]

The research also demonstrates that 'normal' development during adolescence involves typical changes and growth, but it is also entirely 'normal' for children to develop at differing rates.[831] Importantly, the evidence also shows that all aspects of child development are influenced by both internal (biological) and external (environmental) factors. External factors can adversely impact a child's emotional and social development and hamper their moral development. This is particularly true of children who are exposed to poor quality parenting, trauma, abuse or neglect.

The evidence proves that adolescence 'is a period of immaturity, diminished capacities and behavioural problems' and this appears to be linked to the fact that children are generally less able to exercise rational decision-making skills, are less able to foresee and weigh risks, and are less able to exercise self-control. Children are more susceptible to the influence of others, particularly their peers, and are more likely to act impulsively.[832] In this sense, they appear to be predisposed to engage in 'sensation-seeking and risk-

[825] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387, 486.
[826] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387, 485.
[827] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387, 387.
[828] Hannah Wishart, "Young minds, old legal problems: can neuroscience fill the void? Young offenders and the Age of Criminal Responsibility Bill—promise and perils" (2018) 82(4) J. Crim. L. 311
[829] Ibid.
[830] Royal College of Psychiatrists, '*Child Defendants'* (Occasional Paper 56, March 2006).
[831] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387, 484.
[832] Kevin Haines et al 'Children and Crime: In the Moment' [2021] Youth Justice 21(3) 275.

taking activities'.[833]

The research also demonstrates that as children mature, the majority will naturally 'grow out of offending behaviour' without the need for significant intervention. The evidence suggests that the majority of crime committed by children 'is carried out by youths in mid to late adolescence who do not proceed to a career in crime'.[834] This is a 'universally recognised pattern of offending' known as the 'age-crime curve'.[835] This pattern shows that criminal behaviour in children peaks in late adolescence and then declines throughout adulthood.[836] There is, however, a small subset of children who engage in much more serious offending behaviour in the early stages of adolescence and children in this group are much more likely to become persistent adult offenders.

The evidence examined in this chapter demonstrates that children are developmentally immature when compared to adults. Research concerning the physical and neurological development of the brain shows that it undergoes significant development throughout adolescence and does not fully mature until the early stages of adulthood.[837] For this reason, there are marked physical differences between the child and the adult brain. Many believe that neuroscientific research helps to explain why children are more likely to exhibit certain behavioural traits, such as engaging in risk-taking behaviours. Research also shows that it is entirely normal for children to develop and mature at different rates. Furthermore, it demonstrates that the rate at which a child develops can be hampered by a wide range of factors, including trauma, abuse and neglect. The evidence cited in the extant literature strongly suggests that, when compared to adults, children are generally underdeveloped in most, if not all, aspects of their development. Whilst the evidence strongly indicates that children are less equipped to make rational decisions, particularly when acting 'in the moment' or with peers, the evidence does not establish a direct causal relationship between developmental immaturity and offending behaviour.[838] Put simply, the fact that children are developmentally immature when compared to adults does not in itself explain why some children commit crime. Children's developmental immaturity does, however, appear to render them less capable of making rational decisions, particularly

[833] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387, 457.
[834] Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, 300.
[835] Ben Matthews and Jon Minton 'Rethinking one of criminology's 'brute facts': The age–crime curve and the crime drop in Scotland' (2018) 15(3) European Journal of Criminology, 296-320.
[836] Penelope Brown 'Reviewing the age of criminal responsibility' (2018) Crim. L.R. 906
[837] See for example American Medical Association APA, American Academy of Psychiatry and the Law, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Association '*Brief of amicus curiae supporting respondent'* in *Roper v. Simmons,* 543 U.S. 551 (No. 03-633). 2005.
[838] Kevin Haines et al 'Children and Crime: In the Moment' [2021] 21(3) Youth Justice 275.

when they act 'in the moment' or with their peers.[839]

The thesis submits that the proffered evidence strongly indicates that children should be considered to be *less* responsible for their actions than adults. This is because, when compared to adults, children are less able to make rational decisions, control their impulses and resist the influence of others. However, the thesis argues that the evidence put forward by proponents of law reform does not demonstrate that children above the age of criminal responsibility lack the degree of *capacity* to be deemed criminally responsible. The basis of this contention is that the proffered evidence shows that such children are *less* developed than adults, and are therefore *less* responsible for their actions, but it does not demonstrate they lack the degree of capacity necessary to be deemed criminally responsible.

The evidence supports the view that children are *less* able to make rational choices, because they are *less* able to appreciate long-term consequences, *less* able to control their impulses and *less* able to resist the influence of others, and this lends credence to the view that such children should be deemed *less* responsible for their conduct than adults, but it does not demonstrate that young defendants are 'incapable of practical reasoning' or 'incapable of controlling his or her actions'.[840] As such, the thesis argues that proponents of law reform have not proffered evidence which proves that the presumption of status-responsibility embodied in section 50 is flawed. The thesis asserts that it is vital to acknowledge that there is an important distinction between evidence which indicates that children are, as a class, generally *less* responsible for their behaviour and evidence which demonstrates that children *lack* responsibility for their behaviour. In the context of this thesis, this distinction is critical because evidence which demonstrates that children lack responsibility for their actions would prove that the presumption of capacity embodied in section 50 is flawed. The evidence proffered in the extant scholarship provides a clear basis for regarding young defendants as less culpable for their offending behaviour, but it does not appear to support the claim that children lack the degree of mental capacity required to be criminally responsible.

4.10 Conclusion

It is submitted that the presumption of capacity embodied in section 50 is that children above the age of 10 have status-responsibility and are presumed to have sufficient capacity to be deemed criminally responsible. The extent to which this presumption is defensible depends on whether children aged 10 and above typically have sufficient capacity to be presumed criminally responsible. In order to evaluate whether the evidence proffered by proponents of law reform have demonstrated that the presumption embodied in section 50 is flawed, it was necessary to first determine what the threshold for criminal

[839] Ibid.
[840] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO, London, 2013) para 9.3 and 9.4

responsibility is. It was then necessary to critically consider whether the evidence put forward in the extant scholarship does, as it is often claimed, demonstrate that there is a need to reform section 50.

The threshold for criminal responsibility

It is submitted that the evidence examined in this chapter strongly indicates that it is only in circumstances where a defendant is '*incapable* of practical reasoning' or '*incapable* of controlling his or her actions' that they are deemed to lack the capacity for criminal responsibility.[841] It is therefore submitted that the threshold for criminal responsibility is actually lower than many commentators suggest. The law only appears to require that defendants have the degree of mental capacity necessary to be able to form a *basic* understanding of the nature and significance of their conduct and possess a *basic* ability to exercise self-control. The thesis argues that there is a lack of evidence to support claims that the law requires defendants to exercise more complex capacities such as the ability to foresee and appreciate the long-term consequences of their decisions. It is therefore submitted that the presumption of capacity embodied in section 50 is that defendants aged 10 and above have sufficient capacity to be able to form a basic understanding of the nature and significance of their conduct and exercise a basic level of self-control. Furthermore, it is submitted that this interpretation of the law is consistent with the way in which the concept of *doli incapax* was interpreted and applied at common law (the presumption could be rebutted where evidence demonstrated that a young defendant understood that their actions were seriously wrong rather than naughty or mischievous) and is consistent with how other criminal law defences operate (e.g. diminished responsibility). The thesis argues that this conclusion is important because many proponents of law reform claim that section 50 wrongly presumes that children have 'adult-like' capacities but this does not appear to be the case.[842] It is submitted that children, like adults, are presumed to have status-responsibility (and are therefore presumed to satisfy the threshold for criminal responsibility) but they are not deemed to be *fully* responsible for their actions and this is why children are subject to distinct policies and procedures designed to reflect their lower level of culpability. This is discussed in more detail below.

To what extent does the evidence proffered by proponents of law reform support claims

[841] Ibid.

[842] See for example, Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289, Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' [2012] National Association for Youth Justice Campaign Paper. Available at: https://thenayj.org.uk/campaigns-and-publications/, accessed 03 March 2025), Kathryn Hollingsworth 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76(6) Modern Law Review 1046, ATH Smith, 'Doli Incapax under Threat' (1994) Cambridge LJ 426, 427 and Nicola Wake, Ray Arthur, Thomas Crofts and Sara Lambert, 'Legislative Approaches to Recognising the Vulnerability of Young People and Preventing Their Criminalisation' (2021) PL (Jan) 145.

that children lack capacity to be criminally responsible?

It is submitted that the evidence advanced in the extant scholarship does not demonstrate that children lack the mental capacity to form a *basic* understanding of the nature and significance of their conduct. Furthermore, it does not demonstrate that children above the age of 10 lack a *basic* ability to exercise self-control. Whilst there is a considerable body of evidence concerning the mental capacity of children, the inferences being drawn from such evidence are sometimes erroneous. This seems to be attributable to the fact that many commentators presume that law requires a higher level of capacity than it actually does. The thesis therefore contends that the evidence proffered to support claims that children lack the capacity to be deemed criminally responsible does not appear to provide an objective basis for raising the age of criminal responsibility.

This thesis submits that the scientific evidence proffered by proponents of law reform does not demonstrate that children above the age of 10 are *incapable* of a basic level understanding, rationality or self-control. As such, it is submitted that such children satisfy the preconditions of criminal responsibility, despite the fact that they have not yet acquired the same degree of capacity as adults. Put simply, children above 10 have *sufficient* capacity to be criminally responsible, even though they have reduced capacity when compared to adults. It is submitted that whilst this reduced capacity ought to render young defendants less culpable for their criminal conduct, it does not provide a strong basis to argue that they should be absolved of criminal responsibility altogether.

It is important to emphasise that the evidence cited in the extant literature clearly suggests that children are less capable of making rational decisions and exercising self-control than adults. They are also less adept at moral reasoning and making informed judgements. It is therefore argued that they should not be considered to be fully responsible for their criminal conduct. The extant scholarship clearly demonstrates that there is widespread support for the proposition that children should not be held as responsible for their crimes as adults. Many scholars argue that children should be protected from the full force of the criminal law. Howard, for example, has argued that '[N]o civilised society regards children as accountable for their actions to the same extent as adults. The wisdom of protecting young children against the full rigour of the criminal law is beyond argument'.[843] The thesis agrees with this proposition and argues that recognition of a period in which children are deemed to be less culpable for crime would ensure that children are not regarded as fully responsible for their offending behaviour. To reflect their reduced culpability, it is therefore necessary to ensure that children are protected from the full force of the criminal law until they reach adulthood. As commentators such as Howard and Atler observe, the difficulty lies in determining 'when and how to remove the protection afforded by childhood'.[844] Although proponents of capacity arguments claim

[843] Colin Howard, *Criminal Law* (4th edn, Law Book Co, 1982) 343.
[844] Ibid.

that it is necessary to absolve such children of criminal responsibility, whether that be through raising the age of criminal responsibility or through some form of defence, this thesis argues that protection from the full extent of the criminal law can be gradually removed. For example, children can be subject to distinct processes and policies which are specifically designed to reflect their reduced culpability. It is, however, important to stress that this does not necessarily mean that the view of the author is that children above the age of 10 *should* be subject to criminal proceedings, but rather it is not unjust to subject such children to criminal proceedings providing that appropriate modifications are made to reflect their reduced levels of culpability.

The evidence examined in this chapter also clearly demonstrates that child development is progressive in nature. Such research is significant because many proponents of law reform have argued that the age of criminal responsibility fails to account for the fact that children do not uniformly acquire capacity at the same time.[845] As has been noted above, it is widely agreed that rates of maturation amongst children vary significantly; it is therefore typical for some children to develop and mature more quickly than others. This indicates that there is a need for a more flexible and nuanced approach to the assessment of capacity of young defendants. Put simply, a conclusive presumption of status-responsibility which applies to all children at a specified age appears to be inconsistent with evidence which proves that there is a significant degree of divergence in rates of maturity amongst children. The research demonstrates that child development is 'progressive and variable' and is subject to 'biological and environmental determinants'.[846] It is submitted that the extant criminal law defences are 'ill-equipped' to deal with circumstances where a defendant's lack of capacity is attributable to developmental immaturity. As such, the evidence proffered by proponents of law reform does appear to provide a strong basis for introducing a developmental immaturity defence, such as the one proposed by the Law Commission.[847]

The case for a defence to recognise lack of capacity in cases of severe developmental immaturity

The research examined in this chapter demonstrates that a person's emotional, social and intellectual capacity can be impeded by a range of internal/biological and external/environmental factors. The evidence clearly shows that 'the processes of intellectual, emotional, social and physical development of children are highly complex, multi-faceted and uneven'.[848] It is for this reason that commentators such as Hamer and

[845] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546, 546.
[846] Royal College of Psychiatrists '*Child Defendants'* (Occasional Paper No 56, 2006)
[847] Law Commission, *Criminal Liability: Insanity and Automatism Discussion Paper* (HMSO, London, 2013) 185-191.
[848] Sjors Ligthart et al, *Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021) 61

Crofts advocate for a functional assessment of young defendants' capacity to reflect the fact that 'children do not uniformly gain criminal capacity on their 10th birthday, nor on their 14th birthday'.[849] Commentators such as Elliott, Howard and Bowen suggest that a defence which is capable of acknowledging the fact that the maturation process can be stunted by internal and external factors, including adversity, abuse and neglect, would be desirable.[850] It is submitted that the evidence strongly indicates that there may be some circumstances in which a person's mental capacity is so significantly affected by developmental immaturity that they lack the capacity to be deemed criminally responsible. The thesis argues that whilst such instances of severe developmental immaturity are likely to be rare, the evidence proffered by proponents of law reform appears to provide a sound basis for recommending that a defence be introduced to recognise circumstances where a defendant, by virtue of severe developmental immaturity, is incapable of practical reasoning or controlling his or her actions. Whilst such evidence does not appear to provide a strong basis for raising the age of criminal responsibility, it does appear to demonstrate that there are circumstances in which severe developmental immaturity may render a defendant incapable of satisfying the threshold for criminal responsibility. It is submitted that the introduction of a defence of 'not criminally responsible by reason of developmental immaturity', such as the one posited by the Law Commission in 2013, would be consistent with current the research explored in this chapter.

Although the thesis asserts that there is an objective basis introducing such a defence, any detailed consideration of how such a defence might operate is outside the scope of this thesis. As the Law Commission put it, consideration of such a defence 'merits separate, full, consideration' which is not possible within the constraints of the thesis (and was not possible within the confines of the Law Commission's research project). It is submitted that the introduction of such a defence may help to allay concerns about the minimum age of criminal responsibility because it would allow a young defendant to be absolved of responsibility where, by virtue of their developmental immaturity, they lack the capacity to be criminally responsible.

Finally, it is important to note that the evidence shows the process of maturation occurs gradually over the course of childhood and adolescence. The evidence clearly demonstrates that adolescence is a transitional period which entails significant development. During this period, children are more developed than very young children but less developed than adults; they are in an *intermediate* period. The evidence demonstrates that during this period children are generally less able to make rational

[849] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546, 548.
[850] Helen Howard and Michael Bowen, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) Journal of Criminal Law 75(1) 38 and Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289

decisions, exercise self-control, control impulsivity, resist peer pressure and understand the consequences of actions. It is therefore submitted that these diminished capacities render children *less* responsible for their behaviour. The thesis therefore contends that during this intermediate period children should be regarded as *less* responsible and *less* culpable for their offending behaviour.

The thesis disagrees with the proposition that the available evidence demonstrates that because children are less developed than adults they should be absolved of responsibility for their offending behaviour; to claim that such children completely lack responsibility for their actions is to deny the extent to which have developed and matured.[851] Conversely, to hold them to account to the same extent as adults would also be unjust because it would disregard the fact that they have not yet fully matured. Ultimately, it is submitted that it is not necessary or desirable to view responsibility as a binary construct e.g. children either lack responsibility or they are considered to be fully responsible. Such an approach is inconsistent with evidence concerning the way in which humans develop and mature, as has been demonstrated in this chapter. For this reason, the thesis submits that children above the age of criminal responsibility but below the age of majority should be viewed as less responsible and less culpable for their offending behaviour.

[851] Victoria Stachon 'The principles of punishment applied to children within the juvenile justice system' (2007) UCL Juris. Rev. 57

Chapter 5: Summary, conclusions and recommendations

5.1 Introduction

The purpose of this research has been to critically examine the hypotheses that proponents of law reform have demonstrated that the presumption of capacity embodied in section 50 is flawed and in need of reform or have demonstrated that English law treats children as fully responsible for their offending behaviour. In order to test these hypotheses, a number of research questions were posed in chapter 1 and subsequently addressed in chapters 2, 3 and 4. The purpose of this chapter is to summarise the conclusions reached in those chapters and to outline the recommendations advanced by the thesis. The conclusions from chapters 2, 3 and 4 , in answer to the research questions, are summarised below.

5.2 Purpose and objectives of the thesis and research methodology (chapter 1)

Chapter 1 provided important context to the research project and sets out the aims and objectives of the study. It explained that the majority of legal jurisdictions around the world specify a minimum age of criminal responsibility which determines the age at which a person may be prosecuted for committing a criminal offence.[852] Importantly, it also explained that the function that a minimum age of criminal responsibility serves within each justice system is determined by a wide range of factors, but particularly the ways in which children both below and above the age are treated when they engage in criminal behaviour. In England and Wales section 50 sets the minimum age of criminal responsibility at 10 years of age, which is lower than most minimum ages of criminal responsibility worldwide.[853] Chapter 1 identified that an aim of the research study was to critically examine why the age of criminal responsibility was established and why it was, and still is, set at 10 years of age. This aim is encapsulated in research question 1, which is one of the research questions posed in chapter 1.

The chapter also explained that section 50 has been the subject of significant criticism in recent years and outlined the reasons why many scholars have argued that it should be raised. It explains that the extant scholarship argues that the minimum age of criminal responsibility is much lower than the median age of criminal responsibility internationally[854] and is at odds with internationally acceptable standards and scientific research concerning the capacity of children. It explained that despite the growing pressure for law reform, recent attempts to raise the age of criminal responsibility have

[852] Cipriani D *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge 2016). Ch 1
[853] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge 2016) Ch 5.
[854] The median is now 14 years of age (Ibid).

failed to gain any traction.[855] An important aim of the thesis was, therefore, to ascertain the reasons why policymakers are reluctant to reform this area of law.

The chapter also explained that there is a significant gap in existing scholarship because there is no singular body of research which critically considers whether the extant literature demonstrates that the presumption of capacity embodied in section 50 is flawed. Chapter 1.1 and 1.2 explained that the primary purpose of the research study was to make an original, significant and valuable contribution to the extant literature by critically evaluating whether proponents of law reform have, as is often claimed, demonstrated that the presumption of capacity embodied in section 50 is flawed. Furthermore, the thesis aimed to challenge the claim that English law regards children above the age of criminal responsibility as fully responsible for their offending behaviour. These hypotheses are outlined in chapter 1.3.

Chapter 1.6 provided a comprehensive justification for why the researcher adopted the socio-legal research method for this research study and set out the limitations of the study. A socio-legal research method was identified as the most appropriate method because it would enable the researcher to provide a comprehensive examination of the historical development of the law, which was necessary to address research question 1, whilst also enabling the researcher to address research questions 2, 3, and 4. Although this study sought to evaluate whether proponents of law reform have demonstrated that the presumption of capacity embodied in section 50 is flawed, it was outside its scope to consider whether raising the age of criminal responsibility might be justified for other reasons (e.g. on the basis that research suggests that welfare interventions are more likely to be effective in reducing both rates of offending and recidivism). Furthermore, it was outside the scope of the thesis to conduct primary research in, and analysis of, scientific research. It explained that secondary analysis of such data was appropriate since the overarching purpose of the thesis is to critically consider whether proponents of law reform have demonstrated that the presumption embodied in section 50 is flawed. It therefore argued that it was neither necessary or appropriate for the researcher to undertake empirical research or to attempt to critically evaluate research in other disciplines since this is beyond the scope of the project and the researcher's expertise.

Once the parameters of the thesis had been framed, the research hypotheses and questions had been set out, and a justification a socio-legal research approach had been provided, the thesis then turned to considering the research to actually test the hypotheses and answer the research questions. The section that follows provides a summary of the conclusions reached, in response to the research questions posed. The recommendations advanced in the thesis are then set out at the end of the chapter.

[855] HL Deb 29 January 2016, vol 768, col 1555-1556. See also Lord Dholakia 'Age of Criminal Responsibility' in Nicola Wake, Raymond Arthur and Thomas Crofts (eds) 'The Age of Criminal Responsibility' (2016) 67(3) NILQ 263, 263.

5.3 Conclusions

5.3.1 Why was a minimum age of criminal responsibility established and how did it come to be set at 10 years of age?

In order to test the hypotheses, chapters 2 and 3 of the thesis critically examined the historical development of the minimum age of criminal responsibility to determine why a minimum age of criminal responsibility was established and to ascertain why it was, and still is, set at 10 years of age. There are three limbs to this question: why was a minimum age of criminal responsibility established, why was it set at 10 years of age, and why is it still set at 10 years of age. Each limb of the question will be answered in turn below.

Why was the minimum age of criminal responsibility established?

The research examined in chapter 2 illustrates that until the early part of the 19th century, children were essentially viewed and treated as 'small adults' and this was reflected in law by a distinct absence of child-specific legislation.[856] Nevertheless, there appears to have been a longstanding belief that subjecting children to the full force of the criminal law was not always justifiable. For this reason, age-based thresholds were established at common law to afford some children protection from the full force of criminal law. It is important to highlight that when these rules developed, children were subject to the same processes and punishments imposed on adults. They were, it is submitted, considered to be fully responsible for their offending behaviour. Over time, those rules evolved and eventually came to be known as the *doli incapax* rules. All children below the age of eight were presumed to lack the capacity to be deemed criminally responsible and were absolved of criminal responsibility. This was, in effect, the first age of criminal responsibility in English law. However, children aged eight – 14 were also presumed to be *doli incapax* unless there was clear evidence to the contrary. This meant that only children aged 14 and above were conclusively presumed to have capacity to be criminally responsible. These rules remained constant until the early part of the 20th century.

Why was the age of criminal responsibility set at 10 years of age?

The belief that the most effective way of dealing with youth crime was to address the welfare needs of young offenders subsisted and was reflected in the passing of the Children and Young Persons Acts of 1933 and 1963. Section 50 of the 1933 Act placed the age of criminal responsibility on a statutory footing and raised it to eight. It was then raised to 10 by the 1963 Act. The evidence shows that the age of criminal responsibility would have been raised to 12 but this was not politically feasible because of opposition from the Conservative Party (which favoured a traditional 'law and order' response to youth crime). The age of 10 is therefore arbitrary because it was the result of political compromise. It was not selected because it represented a significant juncture in child

[856] John Clarke 'Histories of Childhood' in Dominic Wyse D *Childhood studies: an introduction* (Blackwell Publishing 2004) 7.

development or childhood. The reason that it was raised at all was because there was widespread belief that it was better to deal with younger offenders outside of the criminal justice system.

The research presented in chapter 2 demonstrates that past reforms of section 50 were driven by a wider policy preference of dealing with young offenders outside of the criminal justice system, rather than concern that children at the lower end of the age group might lack capacity to be criminally responsible. This suggests that, historically legislators tended to view the age of criminal responsibility from a 'policy' perspective rather than 'legal' one. In fact, the evidence suggests that by the 1960s there was a broad consensus amongst policymakers that the age of criminal responsibility was an artificial means of determining when children could be subject to criminal proceedings. This finding is important because it demonstrates that key policy decisions, including reform of section 50, were concerned with implementing an effective response to youth crime rather than consideration of whether children had capacity to be criminally responsible. Put simply, the age of criminal responsibility was raised to 10 because there was widespread support for dealing with young offenders through welfare-oriented interventions instead of criminal proceedings, even though such children had the capacity to understand that their actions were seriously wrong.

Why is the age of criminal responsibility still set at 10 years of age?

It is important to highlight that many people continued to believe that welfarism was not an effective way of dealing with youth crime and this meant that reform of the youth justice system was consistently subject to legislative compromise. Ultimately, this meant that the youth justice system was considered to be incoherent and all concerned were dissatisfied with the way that the law had evolved. There was, therefore, continuing pressure for reform of the law dealing with young offenders. By the end of the 1960s, the Labour Party were of the view that it was necessary to implement radical reforms to establish a welfare system for dealing with young offenders. The Conservative Party, on the other hand, strongly advocated a return to a traditional 'law and order' response to youth crime. The Children and Young Persons Act 1969, which represents the high-water mark of welfarism, included provisions to raise the age of criminal responsibility to 14 and limit the circumstances in which children above the age of 14 could be prosecuted. However, these provisions (and many others) were never implemented by the newly elected Conservative Government. When the Labour Party regained power in 1974, the full implementation of the 1969 Act was not politically viable and the welfare-oriented system was deemed to have failed, despite the fact that 'in reality, it had never been tried'.[857] The Labour Party therefore gradually shifted its focus to a 'law and order' response to youth justice.

[857] Lorraine Gelsthorpe 'Recent Changes in Youth Justice Policy in England and Wales' in Weijers and Duff (eds) *'Punishing Criminals: Principle and Critique* (Oxford, Hart 2002).

The murder of James Bulger in 1993 had an immediate and drastic impact of the way that youth justice policy developed in the 1990s. It sparked widespread debate about how the law should deal with young offenders and 'undoubtedly reinforced and fuelled' the perceived need to implement a much tougher response to youth crime.[858] In its aftermath, the Labour Party seized the opportunity to restate and strengthen its position on law and order and made it very clear that it believed that young offenders should be made to take responsibility for their conduct. This meant that 'the Conservative and Labour Parties arrived at consensus on issues of law and order' and this paved the way for a period of 'frenzied criminalisation of children', widely referred to as the 'punitive turn' in youth justice law and policy.[859] In the decade that followed James' murder, policymakers introduced an array of legislation which reflected a less sympathetic attitude toward young offenders, causing a significant increase in both the number of children being drawn into the criminal justice system and the proportion of those children receiving custodial sentences.[860] Against this backdrop, the rebuttable presumption of *doli incapax,* which had been the subject of judicial criticism in the case of *C v Director of Public Prosecutions* [1995] 3 W.L.R 383, was abolished by section 34 of the Crime and Disorder Act 1998. It seems highly likely that this policy development reflected the general appetite for a tougher response to youth crime which prevailed at the time. The impact of section 34 was significant because it meant that the presumption of capacity that had previously applied from the age of 14 and had done so since the early part of the 19th century, now applied to children from the age of 10. This is why the minimum age of criminal responsibility, which has been set at 10 since 1963, has only relatively recently become the subject of widespread criticism.

The research examined in chapter 3 indicates that youth justice is now in a 'pragmatic' phase, in which children are routinely diverted from criminal proceedings through informal and formal out-of-court disposals. It is 'hard to ignore the financial context' in which the shift away from formal proceedings occurred, and commentators generally agree that 'whatever other influences are at play ... it is the pragmatic economic imperatives of cost reduction that ultimately provide the key for comprehending the nature of youth justice reform in the most recent period'.[861] '[T]he last period in which youth diversion received such high level political backing was during the 1980s, under Margaret Thatcher's

[858] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 26.
[859] John Muncie, 'The `Punitive Turn' in Juvenile Justice: Cultures of Control and Rights Compliance in Western Europe and the USA' (2008) 8(2) Youth Justice 107. See also David A Green '*When Children Kill Children. Penal Populism and Political Culture'* (Oxford University Press 2008) 6.
[860] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 28.
[861] Barry Goldson, 'Excavating Youth Justice Reform: Historical Mapping and Speculative Prospects' [2020] 59(3) Howard J Crim Just 317, 327.

administration, a period that also coincided with the onset of austerity.'[862]. Dealing with less serious and first time young offenders through formal criminal proceedings was, and still is, an 'unaffordable expense'.[863] The thesis posits that the apparent success of the current legal response to youth crime has enabled policymakers to resist reform of section 50 on the basis that the current approach provides the flexibility needed to divert low-level and first time offenders from formal criminal proceedings, while allowing serious, persistent offenders to be held to account. Furthermore, policymakers have implied that the degree of flexibility afforded by having a low age of criminal responsibility is desirable because it allows very serious cases involving young children to be dealt with in a manner that in commensurate to the graveness of the offence(s). The implication is that, should a case akin to the James Bulger murder ever arise again, the defendant(s) would be held to account. The Bulger case therefore continues to cast a long shadow on the debate surrounding the age of criminal responsibility in England and Wales. The lack of political appetite for raising the age of criminal responsibility is demonstrated by the fact that recent attempts to introduce legislation to reform section 50 have failed to gain any traction. None of the eight Bills introduced by Lord Dholakia between 2013 and 2021 progressed beyond the Second Reading stage.[864] This clearly illustrates that the prospects of law reform in the foreseeable future are 'bleak'[865].

5.3.2 What presumptions are embodied in section 50 of the Children and Young Persons Act 1933?

The first research hypothesis is that existing scholarship does not demonstrate that children above the age of 10 lack capacity to be criminally responsible, and it therefore cannot be conclusively shown that the section 50 presumption, that children above the age of 10 have the capacity to be deemed criminally responsible, is flawed. In order to test this hypothesis, it was necessary to first determine what presumption(s) of capacity is/are embodied in section 50. The research examined in chapter 4 directly addressed research question 2 by examining the capacity requirements for criminal responsibility.

The thesis asserts that section 50 now embodies a conclusive presumption that all children below the age of 10 lack capacity to be criminally responsible and a corresponding presumption that all children aged 10 and above have status-responsibility and are, therefore, presumed to have sufficient capacity to be deemed criminally

[862] John Pitts *The New Politics of Youth Crime: Discipline or Solidarity?* '(Palgrave Macmillan 2001) See also: Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 26.
[863] Tim Bateman 'The state of youth justice 2020: An overview of trends and development' (National Association for Youth Justice 2020) 26.
[864] Age of Criminal Responsibility Bill [HL] Session 2012-13, Age of Criminal Responsibility Bill [HL] Session 2013-14, Age of Criminal Responsibility Bill [HL] Session 2015-16, Age of Criminal Responsibility Bill [HL] Session 2016-17, Age of Criminal Responsibility Bill [HL] Session 2017-19, Age of Criminal Responsibility Bill [HL] Session 2019-19, Age of Criminal Responsibility Bill [HL] Session 2019-21 and Age of Criminal Responsibility Bill [HL] Session 2021-22.
[865] Heather Keating 'Reckless Children' (2007) Crim LR 546, 555.

responsible. The presumption of status-responsibility is conclusive because it cannot be challenged, but a young defendant may, in limited circumstances, be able to rely on a defence to reduce or eliminate their responsibility/culpability for the offence(s) in question (in the same way that an adult defendant can). It is, however, worthwhile noting that the extant criminal law defences are not designed to recognise circumstances in which a defendant lacks capacity because of their developmental immaturity, and this is, arguably, problematic (this is discussed in more detail in section 5.3.3 below).

The research presented in chapter 4 strongly indicates that it is only in circumstances where a defendant is *incapable* of practical reasoning or self-control that they are deemed to lack the capacity for criminal responsibility. This is because all defendants above the minimum age of criminal responsibility are deemed to be criminally responsible for their offending behaviour unless they successfully plead a legally recognised defence which reduces their responsibility for the offence(s) in question. The importance of such defences 'is derivative, and it derives from the more fundamental requirement that for criminal responsibility there must be 'moral culpability', which would not exist where the excusing conditions are present'.[866]

There are two defences which recognise that a defendant's blameworthiness is reduced by their impaired mental capacity. The first is the defence of insanity which recognises a defendant's *lack of culpability* in circumstances where 'the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was going; or, if he did know that it, that he did not know what he was doing was wrong'. A defendant who successfully pleads insanity is *exempt* from criminal responsibility. The second is the partial defence of diminished responsibility which provides an *excuse* for a defendant's conduct but does not *exempt* them from criminal responsibility. The defence is available in homicide cases where the defendant was suffering from a recognised medical condition which significantly impaired their capacity to understand their conduct, form a rational judgment, or exercise self-control. The thesis argues that it is essential to recognise that this defence does not provide an *exemption* from criminal responsibility, even though the defendant's medical condition *significantly impaired* their capacity to understand their conduct, form a rational judgment or exercise self-control. The thesis therefore submits that it reasonable to conclude that an *exemption* from criminal responsibility is only available where a defendant *lacks* the capacity to understand the nature and quality of their actions. It is submitted that the research examined in chapter 4 strongly suggests that a defendant only needs to be able to form a basic understanding of the nature and significance of their conduct and possess a basic ability to exercise self-control to be considered criminally responsible. This interpretation of the law is consistent with the Law Commission's view that a person lacks capacity

[866] H.L.A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press 2008) 35.

where they are 'incapable of practical reasoning' and/or are 'incapable of controlling his or her actions'. It is therefore respectfully submitted that the threshold for criminal responsibility is actually lower than many proponents of reforming the age of criminal responsibility claim it is.

The thesis asserts that the presumption of capacity embodied in section 50 is that defendants aged 10 and above have *sufficient* capacity to be deemed criminally responsible. Such defendants are, it is submitted, presumed to have the degree of capacity required to be able to form a *basic* understanding of the nature and significance of their conduct and exercise a *basic* level of self-control. It is submitted that this interpretation of the law is consistent with the way in which the concept of *doli incapax* was interpreted and applied at common law. This research presented in chapter 2 illustrates that a young defendant would be considered *doli capax* if evidence demonstrated that they had understood that their actions were seriously wrong rather than naughty or mischievous. Put simply, a young defendant would be deemed to have capacity to be criminally responsible if they had the capacity to understand the nature and significance of their offending behaviour. The thesis therefore asserts that children, like adults, are presumed to have status-responsibility (and are therefore presumed to satisfy the threshold for criminal responsibility) but this does not mean that they are presumed to have the same degree of mental capacity as adults (children's lower levels of mental capacity do, it is submitted, render them less blameworthy and this is why the law does not treat children in the same way as adult defendants. This is discussed in section 5.3.4 below).

5.3.3 What evidence, if any, has been proffered to support claims that children aged 10 and above lack the capacity to be deemed criminally responsible?

The first research hypothesis is that existing scholarship does not demonstrate that children above the age of 10 lack capacity to be criminally responsible, and it therefore cannot be conclusively shown that the section 50 presumption, that children above the age of 10 have the capacity to be deemed criminally responsible, is flawed. In order to test this hypothesis, it was necessary to determine what evidence, if any, proponents of law reform have proffered to support claims that children aged 10 and above lack the capacity to be deemed criminally responsible. Research question 3 is addressed directly in chapter 4.

The evidence examined in chapter 4 demonstrates that mental development encompasses emotional, social, intellectual and moral development. It also clearly shows that 'the processes of intellectual, emotional, social and physical development of children are highly complex, multi-faceted and uneven'.[867] It is widely agreed 'adolescence is a phase of life between childhood and adulthood … defined broadly as a time-limited period

[867] Sjors Ligthart et al, *Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021) 61

of biological growth, and cognitive and psychosocial development that affects a young person's behaviour'.[868] It is a period characterised by

> physical maturity (e.g., sexual maturity and increased height); brain development (e.g., structure and function of the brain); cognitive development (e.g., logic and reasoning); emotion (e.g., impulse control and decreased mood swings); maturation of psychosocial orientation and skills (e.g., effective communication and develop a personal identity, gain awareness of gender and sexual orientation); morality (e.g., a period to learn about social and legal norms).[869]

The evidence shows that during adolescence children are more developed than young children but are less developed than adults: they are in an intermediate period. It is a period in which children undergo significant development as they transition to adulthood. The evidence indicates that during this period children are less equipped to make rational decisions, particularly when acting 'in the moment' or with peers. It does not, however, establish a direct causal relationship between developmental immaturity and offending behaviour. The evidence demonstrates that during this phase of life children are generally less able to make rational decisions, exercise self-control, control impulsivity, resist peer pressure and understand the consequences of actions. The evidence therefore proves that it is typical for adolescents to be less developed than adults in terms of their physical and mental development. The evidence cited in the extant literature therefore strongly suggests that, when compared to adults, children are generally underdeveloped in most, if not all, aspects of their development. Children are therefore developmentally immature when compared to adults.

The neuroscientific research proffered by proponents of law reform clearly shows that the child brain is underdeveloped when compared to the adult brain. This is believed to be important because cognitive development and functionality is closely intertwined with physical development, particularly the way in which the brain is structured and organised. The evidence clearly shows that the brain undergoes considerable change throughout adolescence and does not fully mature until the early stages of adulthood. Many commentators claim that this research explains why children are more likely to exhibit certain behavioural traits, such as engaging is risk-taking behaviours. Several commentators have, however, cautioned against 'embracing these lines of argument too enthusiastically' and have argued that neuroscientific research is limited in terms of what it can tell us about why children behave in the ways they do.[870] It seems that

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[868] Elaine Sutherland 'Raising the minimum age of criminal responsibility in Scotland: law reform at last?' NILQ 67(3) 387

[869] Ibid.

[870] Hannah Wishart, "Young minds, old legal problems: can neuroscience fill the void? Young offenders and the Age of Criminal Responsibility Bill—promise and perils" (2018) 82(4) J. Crim. L. 311, Charlotte

'neuroenthusiasts and neuroskeptics both exaggerate the strength of their positions'..[871] Nevertheless, the research that has been proffered by proponents of law reform does appear to be consistent in terms of confirming that children are developmentally immature when compared to adults.

Importantly, the evidence also shows that the maturation process occurs gradually over time. It proves that it is entirely normal for children to develop and mature at different rates; put simply, some children mature faster than others. Furthermore, the evidence demonstrates that development can be hampered by a wide range of internal and external factors, particularly trauma, abuse and neglect. It is for this reason that the evidence confirms that it is not possible to identify a specific age by which neurodevelopmental immaturity ends, nor it is possible to identify a single age at which children can be said to have achieved physical or mental maturity.

In conclusion, the evidence proves that adolescence 'is a period of immaturity, diminished capacities and behavioural problems'. It proves that adolescents are generally less able to exercise rational decision-making skills, to foresee and weigh risks, and exercise self-control/ resist peer pressure. It also suggests that adolescents seem to be particularly susceptible to the influence of others, especially their peers, and are more likely to act on impulse. The thesis asserts that the research does not, however, demonstrate that adolescents *lack* the ability to make rational decisions or exercise self-control. The research proves that children mature at different rates and that all aspects of child development are influenced by both internal (maturation) and external (environmental) factors. External factors can adversely impact a child's emotional and social development and hamper their moral development. This is particularly true of children who are exposed to poor quality parenting, trauma, abuse or neglect. The evidence also demonstrates that as children mature, the majority will naturally grow out of offending behaviour without the need for significant intervention. There is, however, a small subset of children who engage in much more serious offending behaviour in the early stages of adolescence and children in this group are much more likely to become persistent adult offenders.

5.3.4 Does English law recognise an intermediate period in which young defendants are deemed to be less responsible than adults for their offending behaviour?

The second research hypothesis being tested in the thesis is that English law recognises an intermediate period in which young defendants are deemed to be less responsible

Walsh, 'Youth Justice and Neuroscience: A Dual-Use Dilemma' (2011) 51(1) British Journal of Criminology 21 and Paul Catley and Lisa Claydon, Lisa 'Why neuroscience changes some things but not everything for the law' in Hanna Swaab Hanna and Gerben Meynen (eds) *Handbook of Clinical Neurology* (Elsevier 2023).

[871] Paul Catley, 'The Need for a Partial Defence of Diminished Capacity and the Potential Role of the Cognitive Sciences in Helping Frame That Defence' in Sjors Ligthart and others (eds), Neurolaw: Advances in Neuroscience, Justice and Security (Springer International Publishing AG 2021)

than adults for their offending behaviour. This is addressed directly by research question 4. Chapter 2 provides a detailed overview of the development of the youth justice system and chapter 3 provides an overview of the modern youth justice system. This section of the thesis argues that the research presented in those two chapters demonstrates that English law recognises an intermediate period in which young defendants are deemed to be less responsible than adults for their offending behaviour and, as such, the law does not regard children as fully responsible from the age of 10.

The evidence examined in chapter 2 illustrates that childhood was not always a period 'to which much importance was attached' and this helps to explain why the use of child labour was, from a historical perspective, commonplace and socially and legally acceptable.[872] Young children routinely worked long and laborious shifts on farms and in factories, mines and mills. Over time, as attitudes towards children changed, there was growing pressure to restrain the use of child labour, and this resulted in passing of the Factory Acts of 1819 and 1933. This legislation aimed to recognise the special status of children by restricting the number of hours children could work in factories and mills and prohibiting very young children from being employed in such industries altogether. An unintended but important consequence of the legislation was that many parents were forced to work longer hours to compensate for the loss of, or decrease in, their children's earnings and this caused a sudden increase in the number of children who were neglected or unsupervised. This, in turn, increased the number of children who drifted into petty crime. It was the emergence of the concept of juvenile delinquency, which was perceived to be a distinct social problem which warranted a distinct legal response, that resulted in the development of a distinct youth justice system.

The research presented in chapter 2 demonstrates that the reformist movement had a significant impact on the way development of youth justice law and policy. Reformists believed that it was possible to reform delinquent children into law abiding citizens providing that the root causes of their offending behaviour (deprivation, destitution and inadequate parenting) were addressed. Importantly, reformists also stressed the need for young offenders to be dealt with separately from adult offenders and emphasised the need for a less punitive response to crime committed by children. Over the course of the 19th century, the reformist movement gathered momentum, and this was reflected by the passing of the Children Act 1908, which established the first juvenile court.

It is submitted that the research presented in chapters 2 and 3 is also important because it illustrates that the age of criminal responsibility has been viewed differently at different points in time. Initially, the evidence suggests that it signified the age at which children were presumed to *fully* responsible for their behaviour. Children were therefore subject to the same legal processes and policies that applied to adult defendants. Whilst there was a period of conditional liability, the law presumed all defendants who were *doli capax* to

[872] John Muncie, *Youth and Crime* (5th edn, SAGE Publications Ltd 2021) 48

be *fully* responsible for their behaviour. Over time, as attitudes towards children and their offending behaviour changed, the age of criminal responsibility came to represent the point at which society deemed criminal proceedings to be an appropriate and effective mechanism for dealing with youth crime. Then, as support for welfarism waned and notions of personal responsibility permeated political discourse, it came to mark the point at which children are presumed to have capacity to be criminally responsible. The thesis asserts that it is also important to acknowledge that the practical effect of the age of criminal responsibility has also changed over the course of time. This is because, as discussed in chapter 1, the function that a minimum age of criminal responsibility serves is determined by the legal framework in which it operates.[873]

The practical effect of the age of criminal responsibility is determined by the laws and policies that are in place to deal with crime committed by children both above and below the minimum age of criminal responsibility.[874] For instance some jurisdictions do not operate separate juvenile justice systems so young defendants are subject to the same processes and policies as adult defendants. In such jurisdictions, it is reasonable to presume that children above the age of criminal responsibility are subject to the full extent of the criminal law and are deemed fully responsible for their conduct. In other jurisdictions, including England and Wales, young defendants are subject to distinct youth justice systems which are designed to take account of their status as children. The importance of operating distinct systems to deal with children who commit crime is recognised in various international conventions and is a practice endorsed by the UN Committee on the Rights of the Child. It is also important to highlight that a minimum age of criminal responsibility does not necessarily mean that children above the specified age *will* be subject to criminal proceedings; it merely removes immunity from such proceedings.

The research presented in chapters 2 and 3 demonstrates that although children above the age of criminal responsibility are subject to the same criminal laws that apply to adults, they are no longer subject to the same systems, processes or policies that apply to adult defendants. All defendants under the age of 18 are subject to a distinct youth justice system which, it is submitted, reflects children's reduced responsibility. The primary aim of the youth justice system, as set out in the Crime and Disorder Act 1998, is to prevent young people from offending or re-offending.[875] The court must also have regard to the welfare of the child.[876] As outlined in chapter 3, the majority of young defendants will appear before the Youth Court, which is specifically designed to take account of the fact the defendants appearing there are children. Proceedings conducted in the Youth Court

[873] Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective* (Routledge 2016).
[874] Ibid.
[875] Crime and Disorder Act 1998, s37.
[876] Children and Young Peons Act 1933, s44

are ‘closed’ and are less formal than those conducted in the traditional criminal courts. In limited circumstances a young defendant charged with a grave offence may be tried in the Crown Court rather than the Youth Court, but additional special measures and modifications must be put in place to ensure that the young defendant is able to effectively participate in proceedings.[877] A young defendant should be tried in the Crown Court where they are charged with a grave crime and there is a real prosect that, if convicted, they would receive a custodial sentence of substantially more than two years.[878] ‘A trial in the Crown Court with the inevitably greater formality and greatly increased number of people involved (including a jury and the public) should be reserved for the most serious cases’.[879]

It is also important to emphasise that specific sentencing principles apply to all young defendants, even when they are tried in the Crown Court.[880] When sentencing any defendant under the age of 18 the court must have regard to the principal aim of the youth justice system and the welfare of the child or young person.[881] Although the seriousness of the offence will be the starting point, the approach to sentencing should be ‘individualistic’ and focused on the child/young person. Wherever possible, the sentence should focus on rehabilitation and the court should also consider the effect the sentence is likely to have on the defendant as well as any underlying factors contributing to the offending behaviour. Custodial sentences are always deemed to be a measure of last resort and may only be imposed when the offence is ‘so serious that no other sanction is appropriate’.[882] The purpose of the youth justice system is to ‘encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish’.[883]

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[877] *T and V v United Kingdom* (2000) 30 EHRR 121

[878] Where a child or young person is before the court for an offence to which section 250 Sentencing Code applies and the court considers that it ought to be possible to sentence them to more than two years’ detention if found guilty of the offence, then they should be sent to the Crown Court. The test to be applied by the court is whether there is a real prospect that a sentence in excess of two years’ detention will be imposed. An offence comes within section 250 where it is punishable with 14 years imprisonment or more for an adult (but is not a sentence fixed by law); it is an offence of sexual assault, a child sex offence committed by a child or young person, sexual activity with a child family member or inciting a child family member to engage in sexual activity; or it is one of a number of specified offences in relation to firearms, ammunition and weapons which are subject to a minimum term but, in respect of which, a court has found exceptional circumstances justifying a lesser sentence. It is also worthwhile highlighting that the maximum sentence in the youth court is a 2 year Detention and Training Order (DTO). Section 24A Magistrates’ Courts Act 1980, s 51A(3)(b) Crime and Disorder Act 1998

[879] Sentencing Council, *Sentencing Guideline: Sentencing Children and Young People,* para 1.5. Available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/ (Accessed February 2024).

[880] Ibid.

[881] 18 or under at the date of the finding of guilt

[882] Sentencing Council, *Sentencing Guideline: Sentencing Children and Young People,* para 1.5. Available at: https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/sentencing-children-and-young-people/ (Accessed February 2024).

[883] Ibid.

The sentencing court must also take into account any factors that 'may diminish the culpability of a child or young person'. The guidance specifically acknowledges that children are 'not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk-taking behaviour'.[884] It is therefore important that the court considers:

> the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).[885]

The sentencing principles are clearly designed to ensure that, where possible, children are given the opportunity to address their behaviour without 'undue penalisation or stigma'. The guidance also explicitly states that youth offending 'is often a phase which passes fairly rapidly and so the sentence should not result in the alienation of the child or young person from society if that can be avoided … In addition, penal interventions may interfere with a child or young person's education, and this should be considered by a court at sentencing'..[886]

The legal framework which applies to young defendants makes provision for a range of out of court disposals, including community resolutions, youth cautions and youth conditional cautions. such disposals allow less serious and first-time offenders to be dealt without recourse to formal criminal proceedings. When a young defendant is convicted of a criminal offence, the Youth Court may order a range of sentences including an absolute discharge, a conditional discharge, a referral order or a detention and training order. There is also a general prohibition on imposing custodial sentences on children aged 10 and 11, and children aged 12 -14 who are not persistent offenders. Wherever possible, children and young people who commit offences are diverted from formal proceedings, and where such proceedings are considered appropriate, the legal framework discourages the use of custodial and punitive sentences. In 2022, the majority of the 12,000 young offenders convicted of a criminal offence were issued with a community sentence. 49 percent of those were referral orders. 12 percent of young offenders received a discharge, 11 percent received a fine and 5 percent received an

[884] Ibid.
[885] Ibid.
[886] Ibid.

immediate custodial sentence.[887]

It is for these reasons that the thesis argues that English law recognises that children are generally less responsible for their offending than adults. The thesis submits that it is justifiable, at a theoretical level, to presume that children above the age of 10 are criminally responsible for their offending behaviour and then take account of their diminished responsibility when determining how to respond to that behaviour. It argues that children are not, as was once the case, subject to the same processes and policies that apply to adult defendants and are not considered to be fully responsible for their criminal conduct. The thesis therefore rejects the proposition that children above the age of criminal responsibility but below the age of majority are 'exposed to the full brunt of the criminal law' and submits that it is specious to claim that children are treated like adults once they reach the age of criminal responsibility. It is, however, important to emphasise that the thesis does not seek to evaluate whether the law adequately recognises the diminished responsibility of children, as that falls outside of the scope of this study.

5.3.5 Primary research question

Have proponents of law reform demonstrated that the presumption that children above the age of 10 have the capacity to be deemed criminally responsible, as embodied in section 50, is flawed or that English law treats young defendants as fully responsible for their offending behaviour?

This section of the thesis draws together the conclusions to research questions 1, 2, 3 and 4 in order to answer the overarching research question. There are two limbs to the primary research question, and each will be addressed, in turn, in the section that follows.

In respect of the first limb of the primary research question, the thesis contends that the extant scholarship does not conclusively prove that children above the age of 10 lack the capacity to be criminally responsible. It is submitted that the existing literature is limited in two significant ways. The first limitation is that the scholars tend to assert that the degree of capacity required in law to be considered criminally responsible is higher than it actually is (discussed in section 5.2 above). It is submitted that this is problematic because it means that the threshold against which many scholars are evaluating children's capacity seems to be higher than the law actually requires. The second limitation is that much of the existing scholarship does not adequately distinguish between research which suggests that children are incapable of exercising certain mental capacities (e.g. they lack capacity) and research which indicates that children are less able/less adept at exercising such capacities (e.g. they are less capable when compared to adults and are therefore, it is argued, less responsible for their behaviour). It is submitted that, in the context of this research study, this distinction is critical because evidence which proves that children are incapable of a basic level of rational decision-

[887] Ibid.

making and self-control would prove that the presumption embodied in section 50 is flawed, whereas evidence that demonstrates that children are less responsible would support the claim that children 'deserve to be treated differently by the criminal law'.[888]

It is submitted that the evidence cited in the extant literature shows that capacities which are relevant to criminal responsibility are, when compared to adults, less developed in children aged 10 and above, but it does not prove that such children lack the capacity to be criminally responsible. Although the evidence demonstrates that children are generally underdeveloped in most, if not all, aspects of their development, the evidence suggests that they are sufficiently developed to satisfy the requirements for criminal responsibility (which, from a legal perspective, is a relatively low threshold to meet). Whilst the evidence suggests that adolescents generally find it more difficult to resist peer pressure and are more likely to act on impulse than adults, it does not suggest that they lack the ability to exercise a basic level of self-control. Similarly, although the evidence indicates that adolescents are less equipped to make rational decisions, it does not indicate that they generally lack the ability to form a basic understanding of the nature and significance of their conduct. The thesis therefore submits that the scientific evidence which has been proffered by proponents of law reform does not prove that children above the minimum age of criminal responsibility are *incapable* of rational decision-making or self-control. As such, the thesis contends that proponents of law reform have not proffered evidence which proves that the presumption of status-responsibility embodied in section 50 is flawed. The thesis posits that the existing scholarship does, however, provide a strong basis for arguing that the law ought to recognise an intermediate period in which young defendants are considered to be less culpable for their offending behaviour. It also indicates that it may be necessary to develop a new defence which is capable of recognising circumstances where, by virtue of severe developmental immaturity, a defendant was incapable of rational decision-making and/or self-control at the time the offence was committed. This is discussed in more detail in section 5.4.3 below.

The extant scholarship clearly demonstrates that there is widespread support for the proposition that children should not be deemed to be fully responsible for their offending behaviour. Howard, for example, argues that that 'no civilised society regards children as accountable for their actions to the same extent as adults. The wisdom of protecting young children against the full rigour of the criminal law is beyond argument'.[889] Most, if not all, scholars agree that children should be protected from the full force of the criminal law. The thesis agrees with this proposition. However, as commentators such as Howard and Atler observe, the difficulty lies in determining 'when and how to remove the

[888] Michael Rutter 'Causes of Offending and Antisocial Behaviour 1' in David Smith (Ed) *A New Response to Youth Crime* (1st ed, Willian 2010) Ch6

[889] Helen Howard and Michael Bowen, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 Journal of Criminal Law 38.

protection afforded by childhood'.[890] Proponents of raising the age of criminal responsibility often claim that the 'sharp boundary of responsibility' drawn by the age of criminal responsibility is inconsistent with evidence which demonstrates that child development is 'progressive and variable' and is subject to 'biological and environmental determinants'. For instance, Catley has also pointed out a binary division of criminal responsibility is illogical because a 'child in England is not magically transformed on her 10th birthday … into an adult'.[891] Similarly, Hamer and Crofts advocate a functional assessment of young defendants' capacity to reflect the fact that 'children do not uniformly gain criminal capacity on their 10th birthday, nor on their 14th birthday'.[892] However, the thesis argues that the boundary of responsibility is not a clear-cut as many scholars claim. This is because in English law the protection afforded to children is *gradually* removed as children transition from childhood to adulthood. The law recognises an intermediate period in which children are considered less responsible and less culpable for their offending behaviour. It is therefore submitted that young defendants are not considered to be *fully* responsible once they reach the age of criminal responsibility.

Ultimately, the thesis argues that it is theoretically possible to regard a young defendant as criminally responsible (e.g. presume they have status-responsibility) but account for their reduced culpability/reduced responsibility in other ways (e.g. distinct youth justice policies, processes and systems). It is submitted that this approach is consistent with the way in which the law deals with adult offenders who, by virtue of an abnormality of mental functioning caused by a recognized medical condition, are deemed to have diminished responsibility for their conduct. Such defendants are not absolved from criminal responsibility, despite the fact that their ability to make rational decisions was substantially impaired by a medically recognised condition. The extent of their culpability is, however, reduced accordingly. Such an approach is also consistent with the evidence examined in chapter 4, which demonstrates that humans gradually develop and mature over the course of time, particularly as they transition from childhood to adulthood. To claim that children aged 10 and above completely lack responsibility for their actions is to deny the extent to which they have developed, yet to hold them to account to the same extent as adults would be unjust because it would disregard the fact that they are yet to fully develop and mature.

In respect of the second limb of the primary research question, it is submitted that existing scholarship does not demonstrate that English law treats young defendants as fully responsible for their offending behaviour. The thesis argues that English law already

[890] Colin Howard *Criminal Law* (4th edn Law Book Co 1982) 343.
[891] Paul Catley 'The Need for a Partial Defence of Diminished Capacity and the Potential Role of the Cognitive Sciences in Helping Frame That Defence' in Sjors Ligthart et al (eds) *Neurolaw: Advances in Neuroscience, Justice and Security* (Springer International Publishing AG 2021) 61.
[892] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546, 548.

recognises an intermediate period in which children are considered to be less responsible and less culpable for their criminal conduct. During this period, children are considered to be criminally responsible, but they are not, it is submitted, treated as fully responsible for their conduct. It therefore respectfully challenges the claim that English law 'holds that a person is completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day'.[893] This is because all young defendants are subject to distinct processes and policies which, it is submitted, reflect their reduced culpability. The existence of such processes and policies, such as those outlined in 5.2.4 above, mitigate the sharp boundary of responsibility which is notionally produced by the age of criminal responsibility. The thesis asserts that this intermediate period acknowledges that children above the minimum age of criminal responsibility have sufficient capacity to be considered criminally responsible but are, by virtue of the fact that they are developmentally immature when compared to adults, less culpable for their conduct than adults.

It is important to emphasise that the thesis does not seek to defend the current minimum age of criminal responsibility, nor does it seek to argue that criminal proceedings are the most appropriate or effective method of responding to crime committed by children, consideration of these issues is outside the scope of the research study. The thesis seeks to demonstrate that it is not theoretically inappropriate to subject children above the age of 10 to the criminal justice system providing that appropriate accommodations are made to account for their reduced capacity and culpability. The primary objective of the thesis is to advance the debate surrounding reform of section 50 by demonstrating that it is necessary to adopt a more holistic approach to the assessment of the age of criminal responsibility. The researcher's recommendations for advancing the debate are set out below in the final section of the thesis.

5.4 Recommendations

The overarching aim of the thesis is to advance the debate concerning reform of section 50 by advancing three recommendations as to how limitations of the existing scholarship, outlined above, could be addressed. These recommendations are considered in turn below.

5.4.1 Recommendation 1: Reconceptualising the age of criminal responsibility as the age at which immunity from criminal prosecution ceases.

Ultimately, the core contention of the thesis is that proponents of raising the age of criminal responsibility have not demonstrated that the presumption of capacity embodied in section 50 is flawed. As such, the thesis argues that such scholarship does not provide an objective basis for reforming section 50. However, the research examined in the thesis

[893] Smith A.T.H, 'Doli Incapax under Threat' (1994) Cambridge Law Journal 53, 42

clearly demonstrates that there has long been, and still is, a widely held belief that children should be protected from the full force of the criminal law. It is therefore generally agreed that 'no civilised society regards children as accountable for their actions to the same extent as adults'.[894] The difficulty lies in determining how and when that protection is removed. The position of this thesis, as outlined in 5.2.5 above, is that it is justifiable, at least at a theoretical level, to gradually reduce the amount of protection that is afforded to children as they transition from childhood to adulthood, and this can be achieved by implementing processes and policies which reflect children's diminished culpability during this intermediate period. This approach, it is submitted, is consistent with research concerning the way in which humans develop and mature (e.g. that the maturation process is progressive in nature). However, as outlined above, the thesis does not seek to defend the current policy for dealing with children who engage in criminal behaviour. Indeed, it seeks to argue that there may be other justifications for raising the age of criminal responsibility which should, it is submitted, feature much more prominently in the discourse surrounding reform of section 50. The thesis therefore recommends that the age of criminal responsibility be reconceptualised as the point at which immunity from criminal proceedings ceases because this, it is submitted, would encourage a more holistic debate about how the law responds to children who commit crime.

It is important to highlight that the age of criminal responsibility 'is a social and legal construct which reflects the age at which a particular society deems it appropriate to criminalise children'.[895] As such it is, as the evidence presented in chapters 2 and 3 illustrates, capable of being interpreted in light of changing social and legal contexts. The research presented in those chapters clearly demonstrates that the current focus on notions of capacity is a relatively recent phenomenon. From a historical perspective, important developments in youth justice policy were driven by a more holistic debate about whether criminal proceedings are the most appropriate response to crime committed by children. At present, the debate concerning the age of criminal responsibility in England and Wales is primarily focused on children's capacity to be deemed criminally responsible. The thesis submits that this has limited the extent to which there has been a holistic consideration of how the law responds to crime committed by children. It therefore argues that existing scholarship is somewhat constricted by its focus on the 'capacity view' of the minimum age of criminal responsibility. From a pragmatic perspective, reconceptualising the age of criminal responsibility in the way suggested would be beneficial because the evidence concerning children's capacity is, in the view of the researcher, limited in terms of providing a strong basis for raising the age of criminal responsibility. Reconceptualising the age of criminal responsibility in the way proposed would, therefore, circumvent the difficulties associated with the 'vexed question of

[894] Colin Howard *Criminal Law* (4th edn, Law Book Co 1982) 343.
[895] Lorraine Gelsthorpe and Allison Morris. 'Juvenile justice 1945–1992' in: Mike Maguire, Rod Morgan and Robert Reiner (Eds.), *The Oxford Handbook of Criminology* (Clarendon Press 1994).

capacity'.[896] The thesis asserts that reconceptualising the age of criminal responsibility as the point at which immunity from criminal proceedings ceases, rather than the point at which have capacity to be held criminally responsible, would help to advance the debate surrounding law reform in two important ways.

Firstly, it is submitted that it would acknowledge that any reform of section 50 should be considered in the context of the wider youth justice system. As Brown and Charles observe, 'it would be a mistake' to view any reform of the minimum age of criminal responsibility 'as an isolated legal artefact or a type of sequestered legislative action'.[897] Even at a practical level, raising the age of criminal responsibility would have potentially far-reaching implications which need to be considered. For instance, if the age of criminal responsibility was increased to 14, as suggested by the UN Committee on the Rights of the Child, this would lead to an increase in demand for welfare services which would need to appropriately managed and resourced. Furthermore, as discussed in chapter 1, the level of protection afforded by a minimum age of criminal responsibility is directly impacted by the policies in place to deal with children both below and above the age. It is, therefore, necessary to consider reform of section 50 in the light of the wider system in which it operates, rather than a discrete legislative provision.

Secondly, it is submitted that it would encourage a more holistic appraisal of the age of criminal responsibility which places much greater emphasis on the policy justifications for reforming section 50. Such an approach would enable scholars to determine whether an alternative strategy for dealing with children who offend would be more effective or appropriate (in terms of safeguarding the rights afforded by the UNCRC and in terms of effectively tackling youth offending whilst 'minimising social harm and obtaining the best outcomes for children in conflict with the law').[898] These are, Goldson argues, the primary 'goals' of the youth justice system. This is important because there is a growing body of evidence which suggests that the criminal justice system is often not an effective means to reduce reoffending rates amongst young offenders.[899] For example, there is clear evidence that suggests that system contact is likely to increase the likelihood of

[896] Barry Goldson 'Unsafe, unjust and harmful to wider society: Grounds for raising the age of criminal responsibility in England and Wales' (2013) 13(2) Youth Justice 111, 116.
[897] Aaron Brown and Anthony Charles 'The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach' (2021) 21(2) Youth Justice 153, 153.
[898] Barry Goldson 'Unsafe, unjust and harmful to wider society: Grounds for raising the age of criminal responsibility in England and Wales' (2013) 13(2) Youth Justice 111, 116.
[899] Centre for Social Justice, *Rules of Engagement: Changing the Heart of Youth Justice* (London: CSJ, 2012), 201. See also Lesley McAra and Susan McVie 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315, Vicky Kemp, Angela Sorsby, Mark Liddle and Simon Merrington, *Assessing responses to youth offending in Northamptonshire* (Nacro 2002), Tim Bateman 'Criminalising children for no good purpose: The age of criminal responsibility in England and Wales' [2012] National Association for Youth Justice Campaign Paper. Available at: https://thenayj.org.uk/campaigns-and-publications/ and Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.

reoffending.[900] There is also a wealth of evidence linking youth offending with poverty, complex family life and learning and behavioural difficulties.[901] For this reason, many scholars believe that 'robust welfare-based responses to the offending of less culpable children would be a more effective alternative to criminalisation'.[902] Such research helps to explain why so many other jurisdictions have adopted a policy view of the age of criminal responsibility.[903] It is submitted that reconceptualising the age of criminal responsibility as the point at which immunity from criminal proceedings ends, rather than the point at which children can be deemed criminally responsible for their offending behaviour, would refocus the debate and ensure that other important considerations, including the efficacy of criminal interventions, are subject to academic scrutiny.

As Fionda has explained, many other jurisdictions view the age from a 'policy' perspective and select the age at which it is considered appropriate to deal with young offenders within the criminal justice system.[904] It is submitted that it would be beneficial to adopt a policy view in England and Wales because it would encourage a much wider discussion about when, if at all, it is appropriate to subject children to the criminal proceedings. Adopting this approach would therefore bring English law more in line with other jurisdictions. Furthermore, such an approach would be more closely aligned with the spirit of the UNCRC, which clearly endorses and encourages States to deal with youth offending outside of the criminal justice system and emphasises that States have a duty to ensure that juveniles are treated in a manner commensurate with their age. If the age of criminal responsibility was reconceptualised as the age at which immunity from criminal proceedings ends, then the debate surround law reform would encompass a much wider range of important considerations.

5.4.2 Recommendation 2: The need to consider whether the law adequately takes account of children's reduced responsibility.

The second recommendation advanced in this thesis is that, in light of the body of evidence which shows that children are generally less developed in most, if not all, aspects of their development when compared to adults, it is necessary to consider whether existing youth justice law and policy treats children in a manner commensurate with their reduced culpability. It is submitted that such an approach is necessary because research concerning child development, examined in chapter 4, demonstrates that older adolescents, who would be unlikely to benefit from any increase to the age of criminal responsibility, are also less responsible and less culpable for their offending behaviour. It

[900] Lesley McAra and Susan McVie 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315.
[901] John Gillen 'The Age of Criminal Responsibility: The Frontier between Care and Justice' (2006) 12(2) Child Care in Practice 129.
[902] Lesley McAra and Susan McVie 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) European Journal of Criminology 315.
[903] Julia Fionda *Legal Concepts of Childhood* (Hart Publishing 2001)
[904] Ibid.

is submitted that this evidence supports the view that no young defendants should be held to account to the same extent as adults. Whilst the thesis argues that the law recognises an intermediate period which reflects children's reduced responsibility, it does not argue that existing youth justice law and policy *adequately* reflects children's reduced responsibility; consideration of this question is clearly outside the purview of this thesis.

The UNCRC emphasises the need for States to ensure that children who are subjected to criminal proceedings are treated in a manner commensurate with their age. The evidence examined in chapter 4 demonstrates that physical and mental development continues throughout the course of adolescence and, in some respects, continues into the early stages of adulthood. It is therefore necessary to ensure that appropriate allowances are made for *all* young people who are subject to criminal proceedings. The thesis therefore recommends that proponents of law reform consider how, if at all, existing policy could be improved to ensure that young defendants' reduced capacity and responsibility is properly accounted for.

5.4.3 Recommendation 3: The need to consider how a defence of not guilty by reason of developmental immaturity would operate

The third and final recommendation is for further consideration to be given to the development of a defence of developmental immaturity to recognise circumstances in which an individual's level of developmental maturity is so low that they are incapable of practical reasoning or self-control and therefore lack the capacity to be deemed criminally responsible. The evidence examined in chapter 4 demonstrates that it is normal for children to mature and develop at different rates. It also demonstrates that a child's emotional, social, moral and intellectual development can be impeded by a range of internal/biological and external/environmental factors. It is for this reason that commentators such as Hamer and Crofts advocate a functional assessment of young defendants' capacity to reflect the fact that 'children do not uniformly gain criminal capacity on their 10th birthday, nor on their 14th birthday'.[905] Other commentators, such as Elliott, Howard and Bowen, posit that a defence which is capable of acknowledging the fact that the maturation process can be stunted by internal and external factors is necessary to mitigate the low age of criminal responsibility.[906]

The thesis submits that the evidence examined in chapter 4 shows that it is conceivable that a person's mental capacity may be so significantly impaired by developmental

[905] David Hamer and Thomas Crofts 'The Logic and Value of the Presumption of Doli Incapax (Failing That, an Incapacity Defence)' [2023] 43(3) Oxf J Leg Stud 546, 548.
[906] Helen Howard and Michael Bowen, 'Unfitness to Plead and the Overlap with Doli Incapax: An Examination of the Law Commission's Proposals for a New Capacity Test' (2011) 75 Journal of Criminal Law 38,
Catherine Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' [2011] 75(4) J Crim L 289.

immaturity that they lack the capacity to be deemed criminally responsible (e.g. where it is so severe that it renders them incapable of rational decision-making and/or self-control). The thesis argues that the extant criminal law defences are incapable of accommodating cases of severe developmental immaturity unless the defendant has a recognised medical condition. There does, therefore, appear to be a case for introducing a new defence of 'not criminally responsible by reason of developmental immaturity', such as the one posited by the Law Commission in 2013. Whilst any detailed consideration of how such a defence might operate is not possible within the constraints of the study, and was not possible within the confines of the Law Commission's research project, the thesis asserts that consideration of such a defence 'merits separate, full, consideration'.[907] Furthermore, it is submitted that the development of such a defence may help to allay concerns about the minimum age of criminal responsibility because it would allow young defendants to be absolved of responsibility where, by virtue of their developmental immaturity, they lack the capacity to be criminally responsible. Additionally, it would provide a safeguard against conviction to older defendants, both below and above the age of majority, which would not be provided by raising the age of criminal responsibility to 12 or 14 years of age (as has been proposed). It is therefore arguable that reforming the law in this way may actually provide protection to a greater number of developmentally immature defendants (below and above the age of majority). Furthermore, it is possible that such reform is also more likely to be politically feasible since it would not involve raising the age of criminal responsibility. Ultimately, the thesis recommends that further research concerning how such a defence would operate is required.

[907] Law Commission, '*Criminal Liability: Insanity and Automatism Discussion Paper'* (HMSO, London, 2013).
para 9.24

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