

Criminal Responsibility / Criminal Liability

Introduction

English law sets the age of criminal responsibility, the lowest age at which a person may be criminally liable,^[1] at ten years old.^[2] This is controversial for being the lowest in Europe (where most countries set the age at fourteen or higher^[3]) after a successful bid to raise the Scottish age of criminal responsibility from eight to twelve.^[4] Justifying this low threshold is important because of the severe impact on a child's life the label and consequences of criminality have.^[5] Several commentators and politicians have argued that English law should follow Scotland's lead and raise the threshold.^[6]

These bids to raise the age of criminal responsibility in the UK raise the issue of whether the current age at which children can be labelled criminals under English law too low. This essay will explore this issue. After an examination of theories of criminal responsibility and their application to children, it will argue that many children over ten years old lack the qualities required to justifiably label them criminals. It will discuss how the law might be improved through reform in this regard.

Justifying Criminal Liability

Criminal liability is distinct from other forms, as reflected in the heightened consequences of stigma, the label of 'criminal' and potential loss of liberty.^[7] This difference is because criminal liability reflects a moral judgement; that what the defendant did was seriously morally wrong.^[8] Moral judgment of this kind requires the defendant to be sufficiently 'culpable' that they can reasonably be blamed for their actions.^[9] As such, a child should be capable of criminal liability only if they demonstrate the requisite culpability.

What does it mean to be culpable? Two theories of criminal culpability have traditionally been deployed to explain culpability: character and choice theory.^[10] Character theory posits that criminal judgement is only warranted where the person's behaviour indicates a moral defect in their character.^[11] For example, a person acting involuntarily due to a reflex or without knowledge of consequences which would have deterred them is not culpable.^[12] Some, such as Brudner, have argued that this theory unfortunately characterises mental disorders with character-based symptoms as a 'defect' rather than ground for exculpation or mitigation, putting it out of step with modern thought.^[13] This is not a necessary feature of the theory, however. Bayles, a leading proponent of the theory, argues that 'defects' of character are limited to those within

the defendant's voluntary control.[14] A mental disorder is not normally within the defendant's control, and so not a defect.

In this sense, character theory overlaps with choice theory. Choice theory posits that blame can only be ascribed to a person who has moral agency. This requires both 'capacity' and 'freedom' to make moral decisions.[15] Capacity requires the defendant to be sufficiently capable of certain cognitive functions: commonly identified as the ability to understand, remember and properly evaluate information.[16] These functions allow the defendant to consider their desires and beliefs and deliberate on the value actions accordingly.[17] Freedom, meanwhile, is the absence of external duress, coercion or unreasonable influence.[18]

This essay does not propose to evaluate which theory is 'correct'. Rather, the next section will demonstrate that ascribing criminal blame to many children is problematic under *both* theories.

Children and Blame

Brain-development in children is incomplete, and areas associated with decision-making (moral and otherwise) are ongoing until their late teens.[19] Children are also less socially and emotionally mature than adults, both as a matter of their physical development and because of the unique social dynamics which are imposed upon them within the family and their peer groups.[20]

The combination of these two factors means that children's capacity is impaired. Research by Cauffman and Steinberg indicates that this is particularly true in three areas. The first is 'responsibility', which they define as the ability to develop independence and 'clarity of identity'.[21] The second is 'temperance', which they define as the ability to evaluate situations, weigh-up relevant information before acting and fighting impulsiveness.[22] The third is perspective, which is the ability to consider '*situations from different viewpoints and placing them in broader social and temporal contexts*' (itself part of the function of weighing-up relevant information).[23] These deficiencies can lead to children being unable to easily consider the justifications for their actions, prioritising irrational considerations or being unduly influenced by external circumstances (such as peer pressure or abuse). An example of such warped reasoning can be seen in the *JM* case, where a child refused life-saving bone grafting treatment because he found the idea of 'his foot being in his mouth' unpalatable.[24] According to Cauffman and Steinberg's research, most cognitive and psychosocial development in decision-making occurs between sixteen and nineteen years.[25]

How are these deficiencies to be evaluated under choice and character theories? The implications for choice theory are relatively obvious: children are deficient in several crucial functions for having 'capacity', particularly the ability to understand and properly evaluate information. Their lack of psychosocial maturity and the heightened risk of coercive social relationships also have significant implications for their freedom of action. This can be seen from cases where an abusive parent orders the child to commit a crime. Typically, the child's motivation is fear of disobedience,[26] which is not a motivation a free person would have or consider particularly weighty. It is for these reasons that other laws concerning consent and capacity presume its absence in children below a certain age.[27]

At first brush character theory seems to condemn children, since their lack of capacity is a matter of biological and psychological characteristics which form their character. However, as Bayles stresses, involuntary character traits should not be deemed defects in this sense. Since the deficiencies which might lead them to criminal action are normal and unavoidable, they should not be characterised as defects. As such, the child who commits a crime because of his underdevelopment has not done something indicating a defective character; moral judgement is unwarranted.

This leads to the conclusion that many children, particularly those under sixteen, do not meet the conditions for moral blame under either theory of criminal culpability. The implications of this for the age of criminal responsibility will be discussed in the next section.

Implications for the Age of Criminal Responsibility

The analysis of the previous section indicated that children may fail to meet the capacity and freedom requirements for criminal culpability. This leads to the conclusion that these children should not be capable of criminal liability, because liability without culpability is inappropriate. Given that significant development does not occur in most children until the age of sixteen, setting the age of criminal responsibility at ten seems obviously too low.

As Sutherland points out, however, increasing the threshold to sixteen is unlikely to be politically feasible.[28] In addition, children mature and develop at different rates: raising the age of criminal responsibility too high will result in culpable children escaping liability. As such, there is a strong case for raising the age of responsibility to one where children are very unlikely to have the necessary development (perhaps fourteen to reflect common practice in Europe[29]) and finding an alternative solution for excusing incapable older children while still allowing capable children to be prosecuted.

Previously, the law provided an alternative solution: *doli incapax*. This defence presumed that children aged thirteen or younger did not have the capacity for criminal responsibility, which could be rebutted by evidence that the child knew their actions were 'seriously wrong.'^[30] This could not be presumed from the fact that they committed the offence, ran away when caught, or the obvious seriousness of the behaviour from an adult perspective.^[31] The defence was abolished in 1998.^[32]

The broad approach of the defence of *doli incapax* would be desirable for protecting non-culpable minors. However, it had problems and so would require modification if reintroduced. Firstly, given that significant development does not usually occur until the age of sixteen and even seventeen-year-olds can be insufficiently developed, the threshold for the defence was too low. A reintroduced defence would need to apply to anyone under the age of eighteen. To increase the political palatability of the defence, perhaps the burden of proof could be on the prosecution for children under sixteen and on the defence for children over the age of sixteen. Secondly, any reintroduction of the defence would need to rectify its incomplete view of children's capacity. As explained above, the deficiencies which children have are not merely a reduced ability to understand right and wrong, but an inability to properly prioritise and weigh-up information. A child may conclude that the action is seriously wrong if asked to think about it, but still be non-culpable because they fail to realise this is relevant at the time of acting or over-prioritise a coercive social influence or some other irrational factor. A better defence would arguably require proof not only that the child knew that the action was seriously wrong, but that they had sufficiently developed reasoning skills and psychosocial maturity to assign proper weight to this consideration relative to other factors.

Conclusion

In conclusion, an analysis of the choice and character theories of culpability and research on the development of children, leads to the conclusion that ten is too low an age of criminal responsibility. This is because significant development necessary for culpability does not occur until a much later age in most children. This leads to the conclusion that the age of criminal responsibility should be raised. Nevertheless, there is still a need to distinguish between capable and incapable children over the age of criminal responsibility to ensure that children who have matured particularly quickly can still be prosecuted without criminalising those who have not. To this end, the law should reintroduce a modified defence of *doli incapax*, requiring proof that the child is capable of evaluating the morality of their actions before deciding to act and ascribes proper relative weight to morality (perhaps with a reversed burden for children over sixteen).

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