



Article

The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective

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Enys Delmage

Abstract

The minimum age of criminal responsibility is set in England and Wales at 10 years of age (Children and Young Persons Act 1963), whilst the effective age of most civil responsibilities is 16. Research allows us to consider the speed of development of key brain structures in terms of decision-making and this in turn aids in discussion of where the minimum age should be set. This article reviews the evolution of the minimum age of criminal responsibility and examines the setting of this age in light of both civil attainment ages and the current scientific understanding of brain development.

Keywords

capacity, minimum age, neuroimaging, neuroscience, responsibility

Origins and Evolution of the Minimum Age of Criminal Responsibility

The evolution of the minimum age of criminal responsibility in England began with pre-Norman Laws of Ine, dating from the eighth century, which provided that 10 year-old children could be held to be criminally responsible for their actions. Children below the age of 10 years were considered to lack *mens rea* according to de Bracton's 13th century treatise. This text does not specify a minimum age of criminal responsibility but it does refer to children being protected from the criminal law by virtue of their 'harmlessness of intention', equating a child's 'innocence of purpose' with a 'lack of intention to harm' (Woodbine, 1910). By the 15th century the age of criminal responsibility had been lowered to seven. However, since the time of Edward III (1312–1377), the principle of *doli incapax* – the notion that at certain ages children are incapable of distinguishing between right and wrong and, more latterly, 'seriously wrong' (R v Gorrie, 1918) – provided additional legal protection.

Corresponding author:

Enys Delmage, Lowther Building, St Andrew's Healthcare, Billing Road, Northampton NN1 5DG, UK.
Email: ejd delimage@standrew.co.uk

The 1778 edition of Hale's History of the Pleas of the Crown – where the defence of *doli incapax* is considered under the heading of 'touching the defect of infancy and nonage' – describes the defence as a 'privilege of infancy' and states that it is justified on the ground that a child may not have the 'discretion to discern between good and evil' (Hale, 1778). The *doli incapax* individual is contrasted with the *doli capax* individual, who can 'discern between good and evil at the time of the offence committed'. Hale stated that children under seven years of age could not be guilty of a felony and those aged between seven and 14 should be subject to the protections of *doli incapax* (as a rebuttable presumption). However, if *doli capax* could be proved by the prosecution the same group of children could potentially be subject to the death penalty.

The next pertinent development occurred in 1845 when, in *R v Smith*, a Crown Court dealt with a case where a 10 year-old boy stood charged with arson of a haystack. In this case the judge directed the jury that the defendant's criminal intent had to be proved and could not be inferred simply from the commission of the act. This subsequently became an established principle of law. More than 80 years later the Molony Committee attempted to clarify the position of those children between the ages of seven and 14. The Report of the Departmental Committee on the Treatment of Young Offenders (Molony, 1927) stated that:

... no act done by a person over 7 and under 14 is a crime unless it be shown affirmatively that such a person had sufficient capacity to know that the act was wrong. The age of 7 was adopted hundreds of years ago... (w)e think the time has come for raising the age of criminal responsibility, and we think it could safely be placed at 8.

The minimum age of criminal responsibility was indeed raised to eight by Section 50 of the Children and Young Persons Act 1933. Almost 30 years later the Report of the Committee on Children and Young Persons (Ingleby Committee, 1960) recommended raising the minimum age of criminal responsibility to 12 (and possibly 13 or 14) but Section 16 of the Children and Young Persons Act 1963 served to raise the age to 10.

The murder of James Bulger on 12 February 1993 and the subsequent conviction of two 10 year-old boys of his murder drove a change in the prevailing mood regarding the management of child offenders towards a more punitive response expressed in a White Paper aptly entitled *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (Home Office, 1997). The White Paper was soon followed by the Crime and Disorder Act 1998 which gave statutory licence to the 'new approach'. Of particular relevance to the minimum age of criminal responsibility Section 34 of the Act provided: '(t)he rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'. The abolition of the principle of *doli incapax* placed England and Wales within a very small group of jurisdictions with low minimum ages of criminal responsibility and no *doli incapax* protection (Bandalli, 2000).

Despite a wide range of recent recommendations to raise the minimum age of criminal responsibility – including the Centre for Crime and Justice Studies (2006), the United Nations Convention on the Rights of the Child's Committee (2007), the Centre for the

Prison Reform Trust (2009), Barnardos (2010), the Royal Society (2011a), the Child Rights International Network (2012) and the Centre for Social Justice (2012) – there does not appear to be any political will to act on them.

Tensions between Civil and Criminal Law: 'Competence' and 'Capacity'

A core dilemma faced by professionals working with children lies in recognizing their autonomous rights on the one hand, whilst simultaneously seeking to 'safeguard' or protect them on the other. This tension is also evident with regard to the age at which criminal responsibility is set and the age at which civil responsibilities are attained. The concepts of 'competence' and 'capacity' are of key importance here. Legal professionals variously use the words 'capable' and 'competent', both of which carry specific meanings in a mental health setting – whilst 'capacity' is understood and applied in accordance with the provisions of the Mental Capacity Act 2005, 'competency', from a clinical standpoint, points towards the issues laid out in the Gillick case (*Gillick v West Norfolk and Wisbech Area Health Authority*, 1985). But perhaps our vernacular, in relation to criminal responsibility, is not that different? After all, what we are ultimately aiming to establish is the ability of the child to fully appreciate the nature of their action and their ability to assume responsibility for it. The alignment of the ages of civil and criminal responsibilities is an approach that might be endorsed.

One point of note is that the term 'capacity' is not applicable, in a strict civil sense, to any person under the age of 16. Below this age one must refer to competency (there is also a 'burden of proof' shift – a 16 year-old is capacitated until proven otherwise, whilst those under 16 are presumed not to be competent until proven otherwise). So, one could argue, if extrapolating directly from the civil notion of competence, that children under the age of 16 should also be viewed as lacking competence to commit offences until proven otherwise. Equally noteworthy is that both competence and capacity are decision-specific. Again, if we extrapolate from the civil position, the threshold for deciding whether or not a young person is competent to make, or capacitated in making, a particular decision varies depending on the nature and perceived gravity of that decision. To give an example from medicine: the threshold (and therefore the 'standard of evidence' required) for being able to consent to major surgery is higher than the threshold to consent to, for example, a simple check of blood pressure, because the potential outcome is more serious. Perhaps in the criminal sense then, the threshold (and again the 'standard of evidence' required) for being imputed with 'responsibility' for more serious offences (murder, manslaughter, rape, arson and so forth) should be higher than that of less serious offences (such as shoplifting or criminal damage).

In a civil sense there is no lower age limit for competency, but the younger a child is, the less likely they are to be considered 'competent'. Even for 16 and 17 year-olds, limitations exist – young people of such ages cannot, for example, make lasting power of attorney decision or advanced decisions related to treatment. Also inherent in the Mental Capacity Act 2005 are added protections unrelated to pathology (16 and 17 year-olds cannot, for instance, be admitted to secure conditions amounting to a deprivation of

liberty which is not the case for those aged 18 and older). Whilst 16 and 17 year-olds may be judged to lack capacity due to an impairment of, or a disturbance in, the functioning of the mind or brain (for example secondary to an episode of acute mental illness), the Mental Capacity Act 2005 states (at paragraph 12.13) that the same young people may also lack capacity due to being 'overwhelmed by the implications of the decision'. This underlines the degree to which the law is protective in relation to *civil* responsibilities and developmental immaturity in stark contrast to the imposition of responsibility under *criminal* law.

One might reasonably ask why the civil conceptualization of competence/capacity is so complicated and complex. The answer lies in the need to recognize and fully consider the differing levels of developmental ability within young people. It follows that one might – just as reasonably – ask why, when recognizing that 17 year-olds may be too developmentally immature to make a decision in relation to, for instance, medical treatment, we simply assume that at 10 years of age children are sufficiently competent and capacitated to make decisions in relation to offending (in the absence of a medical disorder impairing this). Both the civil and the criminal scenarios may have life-changing consequences, both often involve a series of complex moral and legal judgements, and both require a high level of understanding of alternatives, immediate consequences, and long-term implications. So why the difference?

The Clinical Picture: Messages from Neuroscience

The work of the psychologist Jean Piaget (1932; 1952) provided one of the first comprehensive accounts of child developmental stages ('sensorimotor', 'preoperational', 'concrete operational' and 'formal operational'), the last two stages of which, broadly speaking, cover ages 7–16 and were deemed to encompass the development of logical thought and the beginnings of abstract reasoning (which can help with consequential thinking and judgment). More than half a century later, scientists are now able to provide detailed images of the developing brain using complex scanning techniques which allow tentative links to be drawn between developmental theory and brain structure (Paus et al., 1999), as well as other biological factors such as the interplay of hormones and behaviour (testosterone in boys, for instance, which is much higher in adolescence than at other times in life, is associated with increased aggression (Adams et al., 1996) as are blunted cortisol responses (McBurnett, 2000).

It is important to remember that most neuroimaging work has demonstrated associations (not causality), and scientists remain well-advised to exercise caution in extrapolating terms such as 'empathy' and 'consequential thinking' into legal constructs such as 'responsibility' or 'culpability'. Scientific absolutes do not always translate into legal absolutes, and it behoves the scientific community to remain clear about the boundary limitations between science and law to avoid erroneous oversimplification and over-reach (Morse, 2005). What follows is a schematic review of some of the areas of the brain that might be most relevant to the notion of criminal responsibility, namely those that impact upon decision-making, morality and judgment. Traditionally such processes have been assigned to the frontal lobes of the brain, which

are thought to shape social behaviour responses, personality and planning (so-called ‘executive functioning’).

Historically scientists learnt about such phenomena via cases where the lobes of the brain had sustained damage (the case of Phineas Gage being an early example).¹ More recently, with advances in neuroimaging researchers have been able to understand the functioning of areas of the brain via techniques such as examining blood flow, oxygen and glucose uptake whilst the subject is asked to engage in specific cognitive tasks and thought processes. Neuroimaging is also beginning to assist scientists in developing nuances understanding of the areas of the brain associated with empathy, working memory, consequential thinking, reasoning and judgment, planning, and inhibition of behaviour, which may also have resonance with regard to conceptualizing criminal responsibility.

We know that physical brain development and cognitive functioning continues before and after puberty, into the early twenties (Blakemore and Choudhury, 2006; Sowell et al., 2001). The brain of the child changes in significant ways during the course of their development. The teenage years see a proliferation of grey matter (thought to be involved in processing) followed by a period of attrition whereby the brain loses the same matter, to be replaced by the so-called white matter (thought to be involved in transmitting information between different parts of the brain). The frontal lobe, with which we are primarily concerned here, is subject to greater change during adolescence than at any other time (Sowell et al., 1999). Executive functioning, as part of this frontal lobe development, increases over the course of adolescence (Anderson et al., 2001) (this has also been linked specifically to prefrontal cortex development (Blakemore and Choudhury, 2006) and into adulthood (Sowell et al., 2003) in tandem with an ability to engage in consequential thinking (Steinberg, 2009).

The capacity to form judgment also develops incrementally continuing into the early twenties (Cauffman and Steinberg, 2000). As commented on by the Royal Society (2011a) the frontal lobe area of the brain is actually the slowest to develop (see also, Gogtay, 2004) in contrast with the amygdala (the area associated with reward and emotion-processing), the imbalance of which is thought to account for increased arousal and risk-taking behaviour in adolescence (Royal Society, 2011b). Adolescence represents a phase of increased impulsivity, sensation-seeking and risk-taking behaviour (Baird et al., 2005; Steinberg, 2007; Van Leijenhorst et al., 2010), a developing ability to empathize (Strayer, 1993) and a heightened vulnerability to peer influence (Steinberg and Monahan, 2007) all of which might affect decision-making in both a criminal and civil sense (Farmer, 2011). Broader differences have also been demonstrated with those aged 11 to 13 showing markedly poorer reasoning skills than those aged 16 to 17 (Scott and Grisso, 2004) as well as poorer consequential thinking in comparison to adults (Baird and Fugelsang, 2004).

It is also worth noting that young offenders may have a different pattern of brain function compared with their non-offending peers (Fallon, 2006). Maltreatment in childhood, common in offending groups (Cellini, 2004), is associated with both psychological problems (Teicher, 2002) and changes in the hypothalamic-pituitary-adrenal axis (which can be over- or under-responsive as a result); overactivity can result in an increase in impulsive aggression whilst underactivity can result in a lack of empathy, non-responsiveness

to punishment, and increased instrumental aggression (Kiehl et al., 2001). Research also demonstrates differences in brain grey matter volumes in the brains of children with conduct disorder versus those without (Fairchild et al., 2011).

The Challenge – An Age or a Continuum?

Development theory would suggest that defining a specific and comprehensively applicable age – especially for something as important as criminal responsibility – is difficult given the significant variation between people in acquiring developmental skills. In civil statute and common law allowances are made for this continuum. Gillick competence, for example, has no lower age limit but it is taken as given that the likelihood of a young person being deemed competent to make decisions increases as they approach 16 years of age. Similarly and as stated, the Mental Capacity Act 2005 provides that some 16 and 17 year-olds might lack capacity owing to developmental immaturity (Department of Health, 2008: para. 36.37).

So should there be an age below which children might conclusively be presumed not to be able to commit crimes, or should the law, consistent with developmental science, take a position of testing each individual case on its own merits? The latter position could perversely lead to prosecution of children under the age of 10 years. Besides, international human rights standards provide that a minimum age of criminal responsibility should be specified and it also seems appropriate in order to avoid the prospect of such perverse outcomes, however rare they might be. What this leaves us with – in terms of bringing developmental science and criminal law closer together – is the potential for a rebuttable presumption for those above the specified age of criminal responsibility (whatever that might be), the presumption being that the individual lacks the competence/capacity/developmental maturity to commit an offence until proven otherwise.

So what would a defence of developmental immaturity look like? Essentially, it would not equate to a mental disorder defence since being developmentally immature is a ‘normal’ part of childhood unlike a mental disorder. Where development is thought not to be progressing normally, clinicians might begin to consider cognitive delays in the context of learning disabilities. A commonly discussed paradox is that an adult offender who, due to a learning disability, is functioning at the level of a ten year-old would, in all likelihood, have a defence available to him or her, whereas a child offender of ten in all likelihood would not.

To be more consistent with developmental science, a defence of developmental immaturity might be made available to those aged 14 and 15 as a presumption to be dealt with by the prosecution, and for those aged 16 and 17 to be dealt with by the defence. The assessment of maturity is something that could be undertaken by a range of professionals much as capacity assessments are with regard to civil and/or medical matters. Structured questions can be helpful in these circumstances, but for serious offences an expert witness may be commissioned. Essentially, from a medical point of view, the questions would revolve around executive function at the time of the offence and a capacity/competence framework could be incorporated into this.

Conclusions

In order to bring the minimum age of criminal responsibility more into line with current developmental research and civil legislation, a minimum age of 14 might be sought, whilst children aged 14 and 15 could reasonably be subject to the aforementioned rebuttable presumption of developmental immaturity (similar to the Gillick position) with the burden of proving competence resting with the prosecution. For complete alignment with civil circumstances, one could argue that young people aged 16 and 17 should be presumed to have capacity to commit offences until proven otherwise, meaning that a defence of developmental immaturity would be available and the burden of disproving capacity would lie with the defence.

Neuroscience faces many challenges in its quest to associate between brain regions with the developing cognitive functions of adolescents and one must always be careful not to assume a causal relationship (false localization is a challenge that should encourage caution in terms of interpreting results). In addition to this, medico-legal experts face the challenge of translating neuroscientific research and knowledge into legally meaningful testimony. However, if we accept the axiom that biology impacts upon behaviour, it follows that the more we learn about biology, the better we might understand the relational behaviour. Research reveals that human development is non-linear, which is consistent with the spectrum or continuum model highlighted above, under which each individual could be assessed in accordance with their unique abilities. Nevertheless, there is a strong base of emerging evidence highlighting consistent and universal differences in the judgment and consequential thinking processes between children and young people and adults. Legal and medical absolutes are often uncomfortable bedfellows, but neuroscientific and behavioural research may help in bringing them together in a way that illuminates our understanding of criminal capacity.

Whilst the central argument of this paper might pass unheard in the current political climate, the scientific research position has to be reflected in a clear and bounded manner in the formulation of coherent law-making. There also exists a sizeable disparity in England and Wales between civil and criminal responsibilities. There are sociological, economic and moral implications in criminalizing young people, many of whom would meet the 'Child in Need' standard of Section 17 of the Children Act 1989 and who may also be victims of crime themselves. Whilst advocating a minimum age of criminal responsibility of 14 years, a focus on a welfare-based system (be that health or social care) and a developmental immaturity defence for those aged 14–17 years inclusive might appear optimistic in terms of where the law in England and Wales currently stands, it is certainly more coherent with what we know of children's neural development and behaviour. It remains the duty of clinicians working with children and young people to refer to developmental research in order that those responsible for the formulation of statute can be fully informed in their practices of determining law reform.

Note

1. Phineas Gage was a railway worker who, in 1848, via an accidental discharge of explosives, had an iron rod driven through the frontal lobe of his brain. He survived, but with reported changes to his personality, notably reduced inhibition and a lack of empathy as well as some loss of social skills.

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Author biography

Dr Enys Delmage is a consultant in adolescent forensic psychiatry at St. Andrew's Healthcare, Northampton, UK.