THE SLEEP OF REASON? CHILDHOOD AND CRIMINAL CAPACITY

Claire Robertson McDiarmid LL.B Dip.L.P. LL.M

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Abstract

This thesis is concerned with the response of the criminal law and the criminal justice system in Scotland to children who commit serious crimes. It has two major themes. First, it seeks to reconcile the paradox inherent in the status of "child-criminal" between an individual who is, simultaneously, in need of protection (as a child) and the perpetrator of a seriously wrongful, sometimes violent act (as a criminal). Its second theme, and its main premise, is that the tendency which the criminal law has sometimes shown to respond only to one of the opposing elements of "child" and "criminal" can be rectified by a thorough investigation the child's understanding of his/her criminal act in its context, the results of which are then used to inform decision-making about the child and, in particular, sentencing. The thesis is particularly concerned, therefore, with the child's criminal capacity and his/her criminal responsibility.

The thesis re-examines the mental element in crime where the accused is a child, organising it into three discrete but overlapping constituents. First, there is a threshold (conceived as three preconditions of understanding, empathy and knowledge of criminality) which the court must establish that the child-accused crosses before s/he can be tried at all. Thereafter, assuming the threshold is met, the court must investigate his/her criminal capacity by hearing evidence on the six capacity points set out in thesis (volitional element, distinction between right and wrong, causation,

understanding of criminality and criminal consequences, rationality and *mens rea*-related capacity points). Finally, *mens rea* is defined, in the most pared down fashion possible, so that it is principally a factual issue for the Crown to prove. All elements of understanding which are sometimes subsumed within it are stripped out and become part of criminal capacity.

The thesis then examines the approach taken by Scots criminal law, both historically and in modern times, to the child's criminal capacity and also the role of welfare and the children's hearings system in relation to the child's criminal responsibility.

It concludes first that it is possible to reconcile the welfare and justice approaches to children who offend so that a more holistic picture of the child-criminal emerges and, second, with a plea for the fair, equal and compassionate treatment of child-accused, to be facilitated by changes to existing criminal procedure necessary to accommodate the reconceived mental element.

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Introduction

This thesis is concerned with the response of the criminal justice system in Scotland to children who offend – and, particularly to those who commit serious crimes. The first difficulty for any legal system is that such children are a contradiction in terms. On the one hand, as children, they belong to a group which is generally regarded as vulnerable and in need of protection; on the other, as the perpetrators of seriously wrongful, sometimes violent, acts, they are perceived as deserving of punishment and condemnation. The thesis examines how the law might best respond, so as to accommodate this paradox, by rendering fair and compassionate judgments to child-accused which do not lose sight of the public interest in justice being seen to be done, and the need to retain public confidence in the criminal justice system.

The term "child" is used consciously throughout. Terminology is important in this area. Chapter 1 will demonstrate that legal systems' current responses to "child"-"offenders" sometimes overemphasise one element of their dual status as children and as criminals. In the wake of the Bulger case, which is discussed in detail in chapter 1, this is often the "criminal" element. Using the term "child" even for adolescents, as opposed to the, perhaps more correct and less pejorative, term "young person" serves to focus attention on the youth of those with whom the criminal process is engaging so that this does not disappear from consideration in the decision-making

process. Also, this terminology is technically correct, in a legal sense, because Scots law, as a whole, categorises all young people as "children," this being the only class which it recognises.[1] The category is defined rigidly, by reference to chronological age and, technically, includes those aged seventeen and under.[2] In fact, in the criminal justice context, it is largely limited to those aged fifteen and under. No child aged under sixteen can be prosecuted except on the instructions of the Lord Advocate[3] and, for the purposes of a first referral to the children's hearings system, "child" is defined as "a child who has not attained the age of sixteen years."[4] It might have been appropriate to deal only with children aged between *eight* and fifteen, because the age of criminal responsibility is currently eight[5] and no child aged seven or under is capable, in law, of committing a criminal offence.[6] Nonetheless, because much of the discussion in

[1] English law draws a technical distinction between "children" - those aged 13 and under – and young persons - those aged 14 and over. See, for example, Children and Young Persons Act 1969, s 70(1)

[2] "[A] person attain[s] majority on attaining the age of eighteen": Age of Majority (Scotland) Act 1969, s 1(1). The United Nations Convention on the Rights of the Child states that "[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

[3] Criminal Procedure (Scotland) Act 1995 [hereinafter "CP(S)A 1995"], s 42(1). Even then, prosecution is only possible in the Sheriff and High Courts.

[4] Children (Scotland) Act 1995, s 93(2)(b). In certain limited circumstances, those aged sixteen and over may also referred to a children's hearing and, hence, brought into the category of child. See the discussion of the age of criminal responsibility in chapter 5.

[5] CP(S)A 1995, s 41

[6] See Merrin v S 1987 SLT 193

the ensuing chapters is of relevance to children of any age, the term "child" is used to connote an individual aged fifteen or under.[7]

In a legal sense, then, a child can be defined by reference solely to his/her chronological age. One of the main arguments to be made in the thesis is, however, that fairness to a child-accused requires an individualised assessment of his/her understandings and competences, as these relate to the criminal offence with which s/he is charged. Equally, defining "child" by reference only to age fails to engage with the richness and complexity of the actual lives lived by children. It may allow the law to determine a class of people which requires to be treated in a particular way,[8] but it ignores completely the characteristics, interests and traits which children display or which are sometimes imputed to them. A definition based on age alone is too one-dimensional. Accordingly, the thesis draws on sociology, developmental psychology and philosophy to enhance and enlarge the picture of the child which it presents. The aim is to present children in a rounded, realistic and holistic fashion which does not lose sight of the fact that their immaturity may mean that they still require a degree of protection, particularly when charged with a criminal offence.

One of the primary contentions of the thesis is that dealing thoroughly and appropriately with the child-offender's criminal

[7] Cases involving young people aged sixteen, seventeen and eighteen may, however, occasionally be cited.

[8] I.e. by prosecution on the instructions of the Lord Advocate or by referral to a children's hearing

capacity will, in and of itself, assist in reconciling the statuses of "child" and "criminal". If the court acknowledges that the child may not fully understand his/her act in context, this is an accommodation of the "child". If it is proved that the child committed the criminal offence with a degree of understanding and the court imposes a disposal (or sentence) on that basis, this is an acknowledgment of the public interest. The thesis examines, in some detail, how best to achieve this.

Investigating the child's criminal capacity then, should promote fairness to child-accused within the criminal justice system. This is its main perceived benefit but, alongside that, there is also the possibility that it will reduce the stigma which sometimes attaches to children convicted of serious crimes. It is accepted that one of the purposes of a criminal conviction is to stigmatise, in the sense that it denounces the criminal in the eyes of his/her own community for having breached its norms. If the child is not condemned out of hand by the criminal justice system, but rather treated by it in accordance with his/her actual understandings of his/her action, this type of stigma should be reduced. There is also the possibility that, if the criminal justice system's decision-making is more rational, through being based on capacity, this will serve to diminish the extreme social stigma to which child-criminals are sometimes subject. The Bulger case, which will be discussed in chapter 1, is a good example of such stigma.

Chapter Summary

Overall then, this thesis is concerned with accommodating the paradox inherent in the "child-criminal" in the legal context, and with identifying mechanisms by which to ensure the fair, compassionate and equal treatment of child-accused within the criminal justice system. Each chapter contributes to this enterprise as follows:

Chapter 1 seeks to place the issues to be discussed in the thesis as a whole in a broad social context. In order to do so, it examines four cases of children who committed serious crimes, drawn from Scotland and England and spanning different time periods. Overall, it aims to demonstrate the widely varying treatment accorded to broadly similar acts in order to substantiate the argument that there is a need to provide better mechanisms for responding to children who offend. It also engages directly with the tension at the heart of the status of "child" between autonomy and dependence and, to a lesser extent, between good and evil, examining sociological and philosophical literature which illustrates the difficulty.

Chapter 2 presents a formulation of the mental element in crime which both allows and requires a court to take full account of the child-accused's actual understandings of the nature, purpose and content of the trial itself, and of the crime in context. The assessment of the child's understanding is key to the whole enterprise of reconciling the status of child with the status of criminal so it is

important to provide some explanation of the characteristics of this assessment. This is the role played by this chapter.

Chapter 3 considers the existing position in Scots law in relation to the child's criminal capacity both historically, in the form of the approach taken by the institutional writers, and in contemporary times, considering, as far as possible, the impact of the Human Rights Act 1998. The chapter demonstrates that, while, in the past, issues which would come under the broad heading of capacity were relevant to the decisions taken by the criminal justice system, currently, there is a tendency to ignore these.

Chapter 4 deals expressly with the question of the tension inherent in children generally between autonomy and dependence and with the even greater paradox in the status of "child-criminal," arising from the commission of a criminal offence. It considers particularly the approach of the Scottish children's hearings system to children who offend. Overall, it seeks to reconcile the apparently conflicting "welfare" and "justice" approaches to juvenile justice so that the model which emerges can better serve children who offend by responding simultaneously and appropriately to their opposing, but omnipresent characteristics.

Finally, chapter 5 seeks to draw the arguments made in the rest of the thesis together and to deal with a number of procedural issues which the discussion in other chapters has raised.

Chapter 1

The Social Context And The Bulger Case

Introduction

This thesis is concerned primarily with the child's criminal responsibility within the Scottish legal system. It is necessary, however, to set this issue in a broader social context in order to support the thesis's prior claim that there is, currently, a lack of coherence in the criminal law's, and indeed in the societal, approach to child-criminals which results in outcomes which are not necessarily "fair" to all young children who offend. Some stigmatise the children concerned excessively whilst others respond so strongly to the child's needs that punishment and deterrence are relegated to secondary status.

This chapter examines four separate cases of serious crimes committed by children. Its purpose is to demonstrate the widely varying treatment accorded to broadly similar acts. The argument is that a more coherent treatment of the issue of criminal capacity – and, indeed, the mental element in general - where the perpetrator is a child, will lead to better-reasoned judgments on the important question of the child's actual responsibility for his/her actions.

The criminal law has a tendency to cast issues related to understanding in black and white terms. In relation to children, the

approach of the *doli incapax* presumption,[1] for example, could be summed up in the question – which clearly sought a "yes or no" answer - "did the child-accused know the difference between right and wrong?" Capacity (meaning the child's understanding of the crime and its context) *could*, however be viewed as a more relative concept, taking into account that the child may understand certain issues well (for example, that injuring another person is wrong) but have a limited understanding of other matters (for instance the way in which an initial (wrongful) act *causes* other events, both physically and legally).[2] The advantage of formally investigating the child's understandings of the crime in context in every case is that a child-accused who is deemed to be of limited capacity as a result of that investigation, is not "getting away with" the crime if a "lenient" sentence is imposed. Rather, s/he is bearing the (low) level of responsibility which the criminal process has imputed to him/her. In this way, the level of stigmatisation to which s/he is subject may be

[1] This questioned the child's understanding of the wrongfulness of the act and may have been used historically in Scots law. (This is implicit in the case of Alexander Livingston 1749 Maclaurin No 55). It certainly applied throughout English legal history until its abolition by s 34 of the Crime and Disorder Act 1998. It will be discussed in more detail in chapter 3.

[2] For example, the case of HMA v S (unreported) (5th October 1999) (High Court) (examination of the facts)
(see http://www.scotcourts.gov.uk/opinions/845A_99.html)) which, as will be discussed in chapter 3, did deal effectively with issue of capacity It drew a distinction between the child-accused's (reasonable) understanding of the dangerousness of setting light to petrol and his (lack of) understanding of the volatility of petrol vapour. The court ultimately determined that he lacked the *mens rea* of recklessness.

diminished.[3] By the same token, placing the child's understanding in issue in every case will also ensure that no child-accused is *automatically* processed, sentenced and stigmatised as if s/he were, in fact, an adult, and consequently able to take full, adult responsibility for the crime.[4]

The four cases examined here are presented as examples of varying perceptions of child-criminals and the impact which this has on their processing by the criminal justice system.[5] The cases to be considered are:

(1) the murder, in Liverpool in 1993, of two-year old James Bulger by Robert Thompson and Jon Venables both then aged ten, for which they were both sentenced to detention at Her Majesty's pleasure. Both boys spent a little over seven years in custody;[6]

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[3] Michael King has argued that, because crimes are primarily *legal* events, the way in which the law codes them has implications for the approach taken to them in other areas. This argument draws on the theory of autopoesis or law as "a self-reproducing function system" which operates alongside other such systems such as politics and economics. To allow an otherwise meaningless event to be seen as an event within society, one of these systems attaches meaning to it (eg law calls the infliction of injuries serious assault) and the legal communications on this are interpreted by the other systems in their own terms. See Michael King "The James Bulger Murder Trial: Moral Dilemmas and Social Solutions" 1995 *International Journal of Children's Rights* 3, 167 particularly at pp 168 - 171

[4] This is, of course, a possible, if unlikely outcome, if a very mature child was assessed to be of "full" capacity. The way in which the Scottish legal system has, on occasion, treated children identically to adults in relation to responsibility will be discussed in more detail in chapter 3.

[5] In fact, the likelihood is that investigating the child-accused's understandings of the crime in context on an individualised basis will also lead to widely divergent outcomes, but at least such diversity will then stem from a reasoned legal decision rather than social and historical happenstance.

[6] For an explanation of the reasons for this period being selected, see Re Thompson (Tariff Recommendation); Re Venables (Tariff Recommendation) [2001] 1 Cr App R 25

(2) the 1973 Scottish case of Mary Cairns[7] who pled guilty, at the age of nine, (eight at the time of the crime) to assault to the severe injury, for stabbing a ten-year old neighbour in the back with a bread knife, puncturing a lung. On appeal her original sentence of eighteen months' detention[8] was quashed and a sentence of three years' probation with a condition of attendance as an outpatient at the Department of Child and Family Psychiatry at the Royal Hospital for Sick Children in Glasgow was substituted;

(3) the manslaughter in 1992 of an eighteen-month old baby by his eleven-year old babysitter, who is identified in the case report only as Nicola G.[9] She was sentenced to five years' detention under s 53(2) of the Children and Young Persons Act 1933 and this was upheld on appeal; and

(4) the 1861 case of James Bradley and Peter Henry Barratt[10], both aged eight, who killed a two-year old boy. They were convicted of manslaughter and sentenced to one month in prison and, at the expiry of that period, five years in a Reformatory.

The purpose of considering these cases is to demonstrate the divergent responses to events which are all, at base violent attacks committed against children by other children. It could, of course, be

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[7] 1950 - 1980 (1973) SCCR (Supp) 44

[8] Under the Children and Young Persons (Scotland) Act 1937, s 57(2) as amended by the Social Work (Scotland) Act 1968

[9] (1993) 14 Cr App R (S) 349

[10] See Gitta Sereny "A Child Murdered By Children" *Independent on Sunday* 23 April 1995, p 8 [hereinafter "B and B"]. Also Patrick Wilson *Children Who Kill* (London: Michael Joseph, 1973) pp 78 - 81

argued that four such disparate cases are almost bound to have widely differing outcomes as a consequence of the clear differences in historical, social and legal conditions, applying to each of them. This argument can be countered on two fronts. First there is the narrow point, which is nonetheless significant, that Nicola G and Robert Thompson and Jon Venables committed their crimes only two years apart, in the same legal jurisdiction (England and Wales) yet, as will be discussed more fully, the treatment of the two cases by the legal system and in the social context was very different in terms of punishment, stigma, vilification and the overarching image of the child-offender projected.

The second, more general, counter-argument is that each case discussed here stands as an *example* of a particular approach to serious crime committed by children, of which other examples can be cited. The Bulger case, for instance, as a demonstration of the vilification of the child-criminal, was foreshadowed by the 1968 case of Mary Bell who, at the age of eleven killed two four-year old boys in separate incidents in Newcastle. In Gitta Sereny's comparison of the two offences she notes, "[t]he horror people felt was the same, as was the fear of the unknown. The words which were used – "monster", "evil fiend" – were the same in 1968 to describe Mary, as in 1993 to describe Jonathan and Robert."[11] The Scottish case of

[11] Gitta Sereny *The Case of Mary Bell: A Portrait of A Child Who Murdered* (London: Pimlico, 1972 (1994)) [hereinafter *Mary Bell*]at p 279

Richard Keith[12] taps a similar vein. In 1990, K, then aged eleven killed three-year old Jamie Campbell by hitting his head with stones and then drowning him in a burn. He was convicted of culpable homicide and sentenced to detention without limit of time. As soon as K turned sixteen, the order protecting his anonymity fell and the *Daily Record* identified him under the headline "This Boy is Evil to the Core .. He'll Kill Again"[13] including in its coverage photographs of him, taken at the time of the crime.[14]

The English case of R v Stoner and Gibbens,[15] on the other hand, demonstrates elements of the more child-friendly, welfarist approach discernible in HMA v Cairns and, indeed, in R v Nicola G and B and B's case. Phillip Stoner, aged fourteen and Barry Gibbens, aged fifteen pleaded guilty to robbery. They had entered a bank wearing dark glasses and armed with modelling knives and had obtained £1,000 from the cashier, after telling customers to "get down". Both boys had learning difficulties and the Court of Appeal went to considerable lengths to ensure that the sentences imposed[16] took account of their inherent vulnerability and allowed them to be detained in an institution where the proper support would be

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[12] K v HMA 1993 SLT 237

[13] *Daily Record* 13 May 1996 p 4

[14] See also "Centre Hits Out Over Allegations" *Dunoon Observer and Argyllshire Standard* 18 July 2003, p 3 reporting the outcry surrounding Keith's employment for three weeks to paint the outside of a building at an outdoor centre for children.

[15] (1995) 16 Cr App R (S) 992

[16] 30 months' detention under s 53(2) of the Children and Young Person Act 1933 reduced, on appeal, to 2 years such detention for Stoner and 16 months for Gibbens

available to them. In Gibbens' case this required a departure from an established principle of sentencing law.

The four cases chosen then are representative, in different ways, of two prevailing attitudes to children who commit serious crimes – out-of-hand condemnation and welfarist paternalism. It is necessary now to turn to the cases themselves.

Case (1): Murder of James Bulger by Robert Thompson and Jon Venables, 1993

Although the Bulger case is not the earliest chronologically, it is appropriate to consider it first because of the tendency which it has shown to circumscribe much of the popular debate on children and crime. Indeed it would, arguably, be difficult to contextualise the topic of children who commit serious crimes at all, without alluding to it. It has become the primary point of reference, socially and culturally, for discussions relating to youth crime – and, indeed, in some instances, crime generally - across a wide range of individual topics and different legal jurisdictions. The popular perception of the two child-criminals has been overwhelmingly negative leading to their widespread condemnation and stigmatisation.

This discussion will, first of all, consider the press coverage in an attempt to demonstrate the case's continuing social impact, and to identify mechanisms by which Robert Thompson and Jon Venables

were particularly vilified. The section will include a discussion of possible reasons for its notoriety.

Although it is often presented as such, the Bulger case was neither an aberration[17] nor a part of a growing trend towards greater and greater violence perpetrated by young children.[18] It is, in fact, an example, albeit an extreme example, of one particular type of response to children who commit serious crimes and it is considered here on that basis. It is necessary firstly to set down the facts. On Friday 12th February 1993, Robert Thompson and Jon Venables persuaded James Bulger to leave his mother in the Strand Shopping Centre, Bootle, Merseyside. They then took him on a walk in excess of two miles in length – a considerable distance for such a small child – in the course of which they were seen by a number of witnesses, some of whom challenged the older children about their relationship with James Bulger and the purpose of their journey. There is some evidence that the two-year old was assaulted during the walk.[19] At the murder scene, beside a railway line, T and V[20] repeatedly attacked the

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[17] See, for example, Wilson *supra*, note 10, which records over fifty cases of children who killed between 1743 and 1973.

[18] King *supra*, note 3, at p 186

[19] Alison Young *Imagining Crime: Textual Outlaws and Criminal Conversations* (London: Sage, 1996) at p. 130

[20] It is difficult to find an appropriate way of identifying Robert Thompson and Jon Venables. The other child-offenders whose cases are considered in this chapter are called by their first names. Almost all of the vast discussion about the Bulger case however uses surnames, thereby creating an impression of a lack or loss of childishness as a result of their crime. Using their initials ("T" and "V") is in keeping with the legal commentary and provides some recognition of their status as children, in that children are commonly identified in this way, in case reporting, to preserve their anonymity. Blake Morrison also uses T and V in *As If* (London: Granta Books, 1997).

smaller child with bricks and a metal bar, and threw a tin of enamel paint over him, before finally placing his body on the railway line where it was severed by a train. It has been suggested that they used batteries to penetrate him anally and his body was discovered with the penis exposed and the foreskin drawn back.[21]

The crime, then, was very serious both in terms of the violence employed and the fact that the victim was a very young child. It is not, in fact, unduly sensationalist to characterise it as heinous. Yet the way in which it co-opted the news agenda both at the time and subsequently is exceptional and provides an explanation for its hegemonic grip on the popular debate in this area. Even a snapshot of press commentary serves to confirm this.

In 1993, all national papers, tabloid and broadsheet, provided detailed coverage of the discovery of James Bulger's body, the arrest and detention of T and V and of all stages of the trial. Indeed, Bob Franklin and Julian Petley have described newspaper coverage of the trial itself as "nothing less than phenomenal"[22] supporting their view by reference to the actual number of column inches which the story generated.[23]

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[21] These details are considered in some detail by Gitta Sereny. She argues that they may suggest that Robert Thompson and Jon Venables had themselves suffered sexual abuse and that this provides an explanation for the crime. Sereny, *Mary Bell*, *supra*, note 11, especially at pp 327 – 330

[22] Bob Franklin and Julian Petley "Killing the Age of Innocence: Newspaper Reporting of the Death of James Bulger" in Jane Pilcher and Stephen Wagg (eds) *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (London: Falmer Press, 1996) 134, at p 136

[23] By contrast, in relation to *academic* commentary, one writer noted that, at the time, "the criminological silence over the Jamie [sic] Bulger killing constituted, for

The tabloid press, in particular, revelled in the juxtaposition of innocence (James Bulger's) and evil (T and Vs') presenting these as absolutes. The *Daily Mail*, for example, filled nine pages in the immediate aftermath of the trial under the overall headline of "The Innocent and the Evil" noting, *inter alia*, that "[t]he two boys who murdered James Bulger are evil freaks of human nature who were fixated on killing and causing disaster", a comment attributed to detectives who interviewed the boys.[24] This followed its article, at the time of the murder, by William Golding, author of *Lord of the Flies*, which sought an answer to the question "What Turns Children Into Savages?"[25] It is well known that the *Daily Star* headlined its report on the verdict in the trial "How Do You Feel Now You Little Bastards?"[26] and *The Sun* published a coupon which could be filled in and sent to the Home Secretary in these terms: "Dear Home Secretary, I agree with Ralph and Denise Bulger that the boys who killed their son James should stay in jail for LIFE".[27] A space was left for the sender to fill in his/her name and address.

[him], professional negligence." Tony Jefferson "[Review of] James W Messerschmidt *Masculinities and Crime: Critique and Reconceptualization of Theory* (Maryland:Rowman and Littlefield, 1993)" in 1995 *Brit J Criminol* 35(1), 149, at p 150

[24] *Daily Mail* November 25 1993, p 42

[25] *Daily Mail*, February 17 1993, p 6

[26] *Daily Star*, November 25, 1993. These words were shouted at T and V by James Bulger's uncle, Ray Matthews, after the jury's verdict was announced.

[27] Quoted in Deena Haydon and Phil Scraton "'Condemn a Little More, Understand a Little Less': The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case" 2000 *Journal of Law and* Society 27(3), 416 at p 433

The broadsheet press also devoted large tracts of its content to the case although, in general, its comment was more measured. In the immediate aftermath of the murder, *The Times*, in a leader, was critical of the Home Secretary for rushing out ill-considered measures on secure schools for persistent offenders aged between 12 and 15 because "[o]ne horrific child murder does not make a crime-wave".[28] The *Independent on Sunday* sought to scotch the view that the murder was indicative of a deeper malaise at the heart of British society.[29] In a feature on the trial, the *Guardian* challenged the pervasive ascription of "evil" to T and V noting that "[t]he word evil signals the end of a conversation before it has started".[30] Overall, the *Daily Mail* published 571 articles relating to the case between February 1993 and April 2003, the *Guardian* 535, the *Independent* 590 and the (Sunday) *Observer* 132.[31] The case also provoked the publication of four books.[32]

In the more recent past and, hence, at a greater distance from the offence itself, even a cursory examination of press coverage suggests

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[28] "Panic Over Crime" *The Times* March 3 1993, p 15

[29] "Murder in Liverpool: The Fear, The Shame, The Guilt" *Independent on Sunday* 21 February 1993

[30] *The Guardian* 26 November 1993, p 5. This view is shared by the criminologist Alison Young. See Young *supra*, note 19, at p 111

[31] Figures derived from a Lexis-Nexis search using the key word "James Bulger". See http://web.lexis-nexis.com/professional/?ut=1008147365270. Other papers have also made frequent reference to the case although their online records do not extend as far back as 1993. *The Sun*, for example, published 160 articles in the three-year period from February 2000 to February 2003.

[32] David James Smith *The Sleep of Reason: The James Bulger Case* (London: Arrow, 1994); Mark Thomas *Every Mother's Nightmare: The Killing of James Bulger* (London: Pan Books, 1993); David Jackson *Destroying the Baby in Themselves: Why Did the Two Boys Kill James Bulger?* (Nottingham: Mushroom Publications, 1995); and Morrison *supra*, note 20

that the case is still accorded influence in some debates in the criminal justice field to an extent which its significance as a *legal* precedent would not support. For example, in an article in the *Birmingham Post* in 2002 on CCTV, it is the Bulger case[33] which is cited as having "given CCTV a common sense appeal".[34] At this point, the case was nine years old, albeit that closed circuit television had played a prominent role in it. On the tenth anniversary of the murder in February 2003, a number of newspapers carried lengthy articles revisiting the crime and the circumstances attending it.[35]

A similar tendency, of more relevance to the issue of children's criminal capacity, can be seen in reporting of proposed increases in the age of criminal responsibility in various jurisdictions. In Scotland, for example, in January 2002, the Scottish Law Commission recommended, in effect, that the age of criminal responsibility be raised from eight to twelve.[36] In opposing this proposal, the (Edinburgh) *Evening News,*[37] *Scotland on Sunday*[38] and the *Sunday Times*[39] all noted that such a change would have precluded prosecution of T and V. The *Times Educational*

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[33] Together with the arrest of the Brixton Nail Bomber.
[34] "CCTV Is Not A Cure-All" *Birmingham Post* 21August 2002
[35] "The Bulger Legacy" *Daily Mail* 12 February 2003; "Bulger Killers' Shame is Ours' and Not Theirs'" *Sunday Express* 16 February 2003; "James Bulger: 10 Years On" *Liverpool Daily Echo* 13 February 2003
[36] Although the Commission refused to frame its recommendation in those terms. Scottish Law Commission *Report on Age of Criminal Responsibility* (Scot Law Com No 185) (Edinburgh: TSO, 2002) paras 3.17 and 3. 20
[37] "Anger Over Plans to Take Under-12s Out of Courts" *Evening News* 14 January 2002, p 2
[38] "Care Before Punishment" *Scotland on Sunday* 13 January 2002, p 16
[39] "Criminal Age Limit May Rise" *Sunday Times* 13 January 2002

Supplement quoted the Conservative politician Sir James Douglas-Hamilton commenting that "[s]uch a commission would have allowed the (James) Bulger killers to get off scot-free by asserting that they were too young to be held responsible for their actions. This is a concept that all fair-minded people across the United Kingdom will find deeply offensive."[40] Similarly, the *Belfast Telegraph*'s report of a proposed increase in the age of criminal responsibility from seven to twelve in the Republic of Ireland is introduced with the statement that the new legislation would not permit the prosecution of the killers of James Bulger.[41]

These comments are interesting firstly because they illustrate the extent to which the Bulger case has hijacked the debate on children and crime. In an issue as multi-faceted as the age of criminal responsibility, it is at least surprising that a single case, in another jurisdiction, should be presented as a major stumbling-block to reform. Indeed, one of the reasons given by the Scottish Law Commission in *support* of the proposed increase was that it was implicit in the European Court of Human Rights' judgment in the

[40] "Children 'Escape' Criminal Charges' *Times Educational Supplement* 18 January 2002, p 6

[41] "Republic Draws Up New Laws for Children" *Belfast Telegraph* June 27 2001. On the same point, the Hong Kong Law Commission cites the case in support of the argument that there is a need, *in Hong Kong*, to retain the power to prosecute children aged between 7 and 14 in "exceptional cases": The Law Reform Commission of Hong Kong *Report on the Age of Criminal Responsibility*, (May 2000) para 3.24. See http://www.info.gov.hk/hkreform/reports/rage-e.doc

Bulger case[42] that the criminal process was not a suitable mechanism for dealing with young children.[43]

Secondly, these comments suggest the absence of the concept of capacity from this debate, at least in the popular sphere. There is an underlying assumption that, because T and V committed a heinous act, they must have had understanding of that act and its consequences. This assumption is then imputed to all children of their age so that none should be given the benefit of an age of criminal responsibility preventing his/her prosecution. These arguments are weak in a similar way to those used to underpin the construction of the Bulger case as an "adult crime",[44] which draw on the view that, because the nature and outcome of the criminal act are particularly serious, only an adult, or an individual unacceptably displaying adult characteristics, could have committed them. Where a child commits such a crime, this view is brought to bear and s/he is consequently characterised popularly as if s/he had, by virtue of the act, actually made the transition to adulthood. This then leads to demands that s/he should be processed and sentenced as an adult.[45]

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[42] T v UK; V v UK (2000) 30 EHRR 121

[43] Scot Law Com (No 185), *supra*, note 36, para 3.15

[44] Perhaps unsurprisingly, this is the construction placed on it by James Bulger's mother, Denise. See, for example, "Howard Loses Court Fight Over Jamie's Killers" *Daily Express* 3 May 1996, p 12. Certain American states also utilise this view in their provision of "waiver" procedures whereby juveniles who commit particularly serious crimes can be tried and convicted as adults. See Philip H Witt "Transfer of Juveniles to Adult Court: The Case of HH" 2003 *Psychology, Public Policy and Law* 9, 361

[45] For example, the 21,281 coupons sent to the home secretary by readers of *The Sun* calling for life to mean life for T and V and the more than 270,000 signatures

Michael King frames the issue as a question: "do children exist in a special state, qualitatively different from adulthood, in which they merit unique status and treatment? Or ar [sic] they small adults, as capable of evil as any grown-up and who deserve to be treated with equal severity?"[46]

In fact, it was clear from early in the investigation into James Bulger's death that the perpetrators were children.[47] It was a childish crime. For example, sweets were found at the scene.[48] Neither child had made any effort to remove the physical evidence of the crime from his clothes.[49] So pervasive, however, was the attempt to construct them as non-children, or as adult in relation to the crime, by the constant reiteration of its horrific nature and of the absolute childishness of the victim that it seems difficult – even distasteful – to recall that they were, in fact, exactly the same age, ten, as Holly Wells and Jessica Chapman who were murdered in Soham, Cambridgeshire in August 2002.[50] The two cases illustrate the way

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collected on a petition by Denise and Ralph Bulger making the same request. "Call of The Wild" *The Guardian* 26 July 1994, p T18

[46] King, *supra*, note 3, at p 175

[47] Smith, *supra*, note 32, at p 77; Sereny, *Mary Bell*, *supra*, note 11, at p 316

[48] Smith, *supra*, note 32, at p 65

[49] Six days after the crime, Robert Thompson's shoes were still blood-spattered; Jon Venables' anorak had blue paint on the sleeve. Smith, *supra*, note 32, at pp 79 – 80

[50] The construction of the two girls in Soham places the chronological age of ten firmly in the middle of childhood. See for example, " Holly Wells and Jessica Chapman pose for an angelic photo ... . The ten-year-olds ... look a picture of childhood innocence" "Riddle of Holly and Jessica: An Hour and A Half Later They Vanished ..." *The Sun* August 8 2002. And "Did Fiend Lure Them?" *The Sun* 6 August 2002 which describes the children's pastimes which the girls enjoyed. By contrast, the characterisation of T and V as, for example, "spawn of Satan" ("The Lost Children" *Sunday Times* 11 November 2001) detracts from their status as young children.

in which the media construction of age can give the appearance of increasing or decreasing it.[51]

It is the contention of this thesis that better mechanisms for dealing with the criminal capacity of children would go some way towards alleviating this tendency to condemn out of hand children who commit serious crimes in that it would provide a rational basis for explaining both their actions and the legal system's response to those actions. It could also allow the ascription of responsibility to children to become less absolute so that very young offenders are encouraged to take responsibility for their actions, but only to the extent that their actual understanding of their crimes allows.

Explaining the Notoriety

It is clear, then, that the Bulger case is treated, by the press, as seminal in the popular debate on children and crime. Yet, certainly by comparison with its actual legal importance, the case almost caricatures that debate, so overblown are most of the aspects which have assumed cultural significance. In legal terms, the case was noteworthy for the English courts'[52] clarification of the meaning and

[51] See Anne Solberg "Negotiating Childhood: Changing Constructions of Age for Norwegian Children" in Allison James and Alan Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (London: RoutledgeFalmer, 1997) [hereinafter *Constructing and* Reconstructing] 126 at pp 133 – 138 for a discussion of the construction of "social" age – how old the child *seems* by comparison with his/her chronological age.

[52] R v Secretary of State for the Home Department ex parte Venables; R v same ex parte Thompson [1997] 3 All ER 97

purpose of the sentence of detention at Her Majesty's pleasure[53] and for the European Court of Human Rights' judgment[54] on the trial and sentencing of children charged with such crimes generally. Both of these points emerged a number of years after the murder. Nonetheless, it is the crime itself, with all its macabre symbolism, which continues to be spotlighted. Clearly, this has had a stigmatising effect on Robert Thompson and Jon Venables, both of whom have had to be provided with new identities and also with the protection of a lifelong injunction banning the publication of any information which might serve to identify them.[55] This thesis advocates more effective mechanisms for dealing with the child's criminal capacity in an attempt to deflect some of this stigmatisation in future cases. It is, however, important, first of all, to attempt to understand the reasons for such notoriety attaching in the first place. Colin Hay, building on the work carried out by Stanley Cohen in the 1970s and 80s,[56] has attempted to explain the reaction provoked by the Bulger case in terms of a moral panic. In considering the role of the media, he notes that

> "[t]his event is phenomenally *newsworthy* due to its somewhat exceptional nature; the ease with which

[53] This is the mandatory sentence for anyone aged under 18 convicted of murder in England and Wales: Powers of Criminal Courts (Sentencing) Act 2000, s 90. See Claire McDiarmid "Children Who Murder: What is Her Majesty's Pleasure?" (2000) *Crim L R* 547 for a full discussion of the nature, effect and purpose of the sentence.

[54] T v UK; V v UK (2000) 30 EHRR 121

[55] Venables and Another v News Group Newspapers Ltd and Others [2001] 1 All ER 908

[56] Stanley Cohen *Folk Devils and Moral Panic: The Creation of the Mods and Rockers* (Oxford: Blackwell, 1980)

> conceptions of innocence and deviancy can be imputed; the resonance that such a 'story' is likely to find with the experiences of parents and guardians responsible for childcare (predominantly women); and above all the striking nature of the video footage (presented as 'evidence')."[57]

(a) Visibility

Perhaps the single most significant reason for the unparalleled level of media coverage which the case generated is the final one cited by Hay: the grainy video footage from the shopping centre security cameras depicting a small child hand-in-hand with a taller one, following another taller child. This image, played and printed repeatedly in 1993, has since become an icon for the case: three of the four books written about the murder use it as their cover photograph, for example.[58]

Commentators have suggested that its importance lies in the fact that it allows viewers to feel present at the commencement of the crime itself, where that is taken to be the abduction of James Bulger. According to Alison Young "[t]he replaying of the image promises the possibility of intervention; trauma is experienced due to the gap between the image's promise and the substance of its referent."[59] The same view is expressed more simply by Blake Morrison who states, in relation to the constant playing and replaying of the video:

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[57] Colin Hay "Mobilization Through Interpellation: James Bulger, Juvenile Crime and the Construction of a Moral Panic" (1995) 4 *Social and Legal Studies*197, at pp 205 – 206. Italics in original

[58] Mark Thomas', David Jackson's and David James Smith's (all three books cited *supra*, note 32)

[59] Young, *supra*, note 19, at p 132

"[f]orward and back, forward and back, as if we watched it often enough the picture might change and James be there again, safe by Denise's [his mother's] side."[60] While stopping short of imputing action in the Bulger case itself to viewers, Colin Hay still sees the shopping centre video as important in the mobilization of the moral panic generated by the case. In his view, newspaper readers and television viewers interpellate themselves into a similar situation and this causes them to act in particular ways in their own real lives – by, for example, exercising greater vigilance in relation to their own children in places such as shopping centres.[61]

The degree of impetus to action generated by the video, and the stills taken from it, is, of course, debatable. Also, it is important to bear in mind that the crime itself - the actual murder - was committed secretly during the hours of darkness.[62] To that extent then, the sensation generated by the video of being a witness to the crime is false. Indeed, given the indistinct nature of the images, even after enhancement by the RAF's Joint Air Reconnaissance and Intelligence Centre,[63] it is remarkable that they provided any assistance whatsoever in identifying T and V. It is undeniable, however, that the video's existence increased the news value of the story by making the crime more visible. Crime is often committed secretly and reported later, at a time when the only images available

[60] Morrison *supra*, note 20, at p 46
[61] Hay, *supra*, note 57, at pp 208 - 209
[62] See Young, *supra*, note 19, at p 137
[63] Thomas *supra*, note 32, at p 91

are, in themselves, if not mundane, then certainly unsuspicious. The flowers and teddy bears left outside Dunblane Primary School following the killing of sixteen children and their teacher in 1996 or Fred and Rosemary West's house in Cromwell Street, Gloucester in 1994 with the garden under excavation, after their involvement in at least ten murders of young women had been discovered, did not convey any sense of a crime in progress albeit that they were, at those times, instantly recognisable as symbols for those events. Equally, those images have not, arguably, attained the iconic status of the Bulger shopping centre video.[64]

The visibility attaching to the Bulger case was further enhanced after the trial when the judge took the decision to allow the identities of Robert Thompson and Jon Venables to be revealed. This led to the proliferation of two particular photographs, one of each boy dressed in school uniform. The photographs' sanctioned publication added, in itself, to the notoriety of the Bulger case given that the identity of most child offenders is protected, regardless of the crime committed.[65] In a sense these photographs served to complete the shopping centre footage by providing its indistinct figures with faces and names.

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[64] Other images do, of course attain iconic status, though, again, without the sense of participating in a crime in progress. The broken fuselage of the plane which crashed in Lockerbie is an example.

[65] Children and Young Persons Act 1933, s 49 for England and Wales; Criminal Procedure (Scotland) Act 1995, s 47 for Scotland

In themselves, the photographs were unremarkable yet they constituted a visual focus for the print and televisual media, allowing the adoption of variations on a "face of evil" theme,[66] particularly when juxtaposed with photographs of James Bulger. As Alison Young notes:

> "the media encouraged the spectator to project emotions, attitudes and thoughts into those eyes turned towards the lens. Certain emotions are 'preferred' to lie behind the child's eyes. Into the eyes of James Bulger is read innocence; into the eyes of Venables and Thompson is read 'a moral void', 'guileful naivety', 'streetwise defiance' (*Mail on Sunday*, 13 February 1994)".[67]

Overall, the media utilised the immediacy of the shopping centre images to project an initial sense of, if not participation, at least involvement. It then created a focus for the strong negative sentiment already generated, through the school photographs with the written "hints" to the readers as to the base nature of the emotion lying behind the *in fact* impassive face of Robert Thompson and the *in fact* smiling face of Jon Venables.[68] The visibility of the crime, through these iconic images, clearly contributed to its supreme, and supremely exploited, news value.

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[66] For example "Our Children's Minds Feast on Garbage" *The Herald* 30 November 1993 p 15

[67] Young, *supra*, note 19, at p 135

[68] See, for example, "James Bulger: The Death of Innocence" *Independent on Sunday* 28 November 1993, p 23 commenting on *France-Soir*'s headline, earlier that week "These Two Monsters Could Have Been Your Children", which, it is implied, appeared above the photos.

(b) innocence and evil

The other aspect of the crime which, arguably, greatly increased its newsworthiness has already been cited – the juxtaposition of innocence with evil and the opportunity which this presented for a collective focus on the nature of childhood itself and an outbreak of national hand-wringing on the state of a country which could produce two young children capable of such barbarity.[69] James Bulger's essential childishness and his portrayal as the smiling face of innocence provided a foil for such an analysis.[70]

The difficulty of reconciling these two images of childhood – the evil and the innocent - and the interest which, paradoxically, attaches to the attempt to do just that, is well expressed by an Australian journalist, Martyn Harris who wrote, in 1994, in an article sparked by the petition organised by James Bulger's parents:

> "[t]he paradox of the Bulger case and the reason why it was such a destabilising event are that both images of childhood are present, each conflicting with the other. For the parents to feel the rage they need to feel, Thompson and Venables, little boys of 10 who play with Boglins and watch *Thunderbirds*, must be monsters beyond redemption or pity. And yet, for the full force of our vengeful rage to be felt, it is also necessary for James, ..., to become another impossible abstraction: the avatar of innocence".[71]

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[69] For example, "Daring to Agree About Our Moral Sickness" *Independent* 19 February 1993, p 19; "The Nation Searches its Soul" *Independent* 20 February 1993, p 12; "An Indictment of Fractured Britain" *Independent* 27 November 1993

[70] "Liverpool Weeps as James Bulger is Buried" *Independent* 2 March 1993, p 1; "Murder Shook World" *The Sun* October 27 2000

[71] "Are Children Getting Worse?" *Sydney Morning Herald* 10 September 1994, p 8A. The style of this article suggests that the Australian press and public were as familiar with the facts and implications of the Bulger case as their British counterparts. This is a further indication of the unprecedented level of reporting which the case attracted.

The extremes of innocence and evil identified here constitute a focal point for the strong emotions which the case evokes, again affirming the story's unusually high newsworthiness. Nonetheless, Harris recognises the truism that, despite their acts, T and V are not wholly or only evil, in the same way that James Bulger did not live his life as a cipher for the concept of childhood innocence. The realities of all three lives were much more complex than that representation suggests. While innocence juxtaposed with evil clearly equates with newsworthiness then, it fails to present a rounded picture of the protagonists to whom it relates and adds nothing to the search for a measure of the child's understanding of his/her crime.

Nonetheless, murderers of children are, without exception, always categorised as especially worthy of condemnation even by comparison with those who kill adults. The mere mention of the Moors Murderers, Myra Hindley and Ian Brady, for example, still evokes a strong emotional response in many quarters despite Hindley's death and the fact that over thirty years have elapsed since their crimes. This is particularly true in cases where, initially, the child-victim is reported by the media only as "missing" thereby allowing the shared aspiration that s/he will be found alive.[72] This

[72] It is submitted that it is in these circumstances that Colin Hay's theory of the mobilization of a mass sentiment through individual readers and viewers of the event "interpellating" themselves into the situation is most perceptible. Hay, *supra*, note 57

phenomenon was apparent in the cases of both Sarah Payne,[73] abducted from a field adjoining her grandparents' home in Sussex in July 2000 and subsequently murdered, and of Holly Wells and Jessica Chapman.[74]

It is predictable and understandable that Myra Hindley, Ian Brady, Roy Whiting[75] and Ian Huntley[76] would be characterised as evil both by the media and in popular discourse. Because of the nature of their crime, Robert Thompson and Jon Venables fall into the same category. But it is their extreme youth at the time of the crime which gives the ascription of evil a particular interest. The issue which seems to have become buried in the plethora of reporting is that, while their age renders the crime more shocking, it should, in fact, render the perpetrators less, and not more blameworthy.

The notion that youth mitigates offending has been recognised, certainly by the English courts, in many cases. In R v Cosgrove,[77] for example, the offender, who was aged seventeen, was sentenced, at first instance, to ten years' detention under s 53(2) of the Children and Young Persons Act 1933 for causing grievous bodily harm with intent. He had collided with his victim in a shopping centre and, incensed, had then stolen a large knife from a store and attacked the victim with it causing serious damage to his arm. On appeal, the

[73] "Drivers Sought in Police Hunt for Girl" *Guardian*, 3 July 2000, p 4
[74] "Beckham to Help Search for Missing Girls" *The Times*, 6 August 2002, p 3
[75] Convicted of Sarah Payne's murder
[76] Convicted of the Soham murders
[77] (1995) 16 Cr App R (S) 76

sentence was reduced to seven years, primarily because of the appellant's youth. Again, in R v Kamali,[78] the sixteen-year old defendant was convicted of the same offence as Cosgrove, this time for entering a shop and stabbing two boys aged fourteen and fifteen respectively for no apparent reason. On appeal his sentence of five years' detention was reduced to four years, partly because of his youth.[79]

By contrast, in the popular discourse surrounding the Bulger case, the extreme youth of the offenders[80] seems to be used against them. The impression given is twofold – first that they were "old enough to know better" – a sentiment often voiced in disciplining children of all ages. To that is added the idea that Thompson and Venables' behaviour was so far removed from the traditionally "childish" that it, in fact, constituted an affront to adult understandings of the term. It was therefore perceived to merit the most severe censure.[81]

It is possible to draw a parallel here with one strand of feminist criminology usually known as double vilification.[82] This area of work embodies the view that women who commit serious crimes are

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[78] (1993) 14 Cr App R (S) 2

[79] See also Attorney-General's Reference (No 24 of 1991) (Mark Anthony Wollcocks) (1992) 13 Cr App R (S) 724, at p 728 and R v James Frazer (1992) 13 Cr App R (S) 705 at p 706

[80] Both boys were over the age of criminal responsibility by only a few months. Indeed, Michael King has commented on the fact that a mere quirk of the British political process made their prosecution possible at all. King, *supra*, note 3, at p 183

[81] See, for example, "Author Defends Book After Criticism by Bulger Family" *The Scotsman* 6 February 1997, p 3

[82] For a full discussion of the application of this theory to child offenders see Claire McDiarmid "A Feminist Perspective on Children Who Kill" 1996 *Res Publica* 2, 3

effectively judged and punished twice: once for the crime itself and then again for the extent to which they have failed to conform to the female gender role which requires women to be "docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic and domestic, made for child care, home care and husband care."[83] This can be seen in the nature of the criticism directed against women who commit heinous crimes, by comparison with their male counterparts.

An article in the *Daily Mail* following Rosemary West's conviction for murder illustrates this point. The writer asks:

> "[s]o how do we react to Rosemary West? With horror. Disbelief. A profound sense that the acts were against nature. More than merely against nature, that they were against the nature of women.
>
> Rosemary West is not only a woman, she is also a mother.
>
> ... So Rosemary West has shocked our deepest instincts, broken the most important taboos."[84]

It is the contention of a number of feminist criminologists that views such as these are carried into the criminal process so that women who offend violently and seriously are treated more harshly. As Susan Edwards explains:

> "... women, whether as suspects, defendants or offenders, are dealt with in accordance with the degree to which their behaviour deviates from what is expected

[83] Catherine A MacKinnon "Feminism, Marxism, Method and the State: An Agenda for Theory" 1982 *Signs* 7, 515 at p 530

[84] "A Woman, A Protector, A Mother ..... And A Monster" *Daily Mail* 23 November 1995 p 11

> of them in their appropriate gender role. Thus, the expression "women on trial" denotes a lived experience which is double-edged, encompassing not only a consideration of the female defendant's passage through the criminal justice system, but also the way in which *mens rea* and culpability, though issues based on fact – are nevertheless (like mitigation and sentencing process) influenced by the degree to which the female defendant in question is a good wife, mother and homemaker, honest, decent and moral, and above all, feminine."[85]

This theme has been explored, at some length, by a number of commentators in both the academic and the popular spheres.[86] It clearly has resonance in the Bulger case where the attribution of "evil" to Robert Thompson and Jon Venables placed them outside the realm of "normal" childhood and cleared the way for them to be treated particularly severely in the criminal process and in relation to the "tariff" or minimum period to be served in custody to satisfy the demands of retribution, set by the Home Secretary.[87]

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[85] Susan S M Edwards *Women on Trial: A Study of the Female Suspect, Defendant, and Offender in the Criminal Law and Criminal Justice System* (Manchester: Manchester University Press, 1984) at p 1

[86] See, for example, Helena Kennedy *Eve Was Framed: Women and British Justice* (London: Chatto & Windus, 1992); Ann Jones *Women Who Kill* (London: Victor Gollancz, 1991); Ann Lloyd *Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women* (Harmondsworth: Penguin Books, 1995); Ilene Nagel "Sex Differences in the Processing of Criminal Defendants" in Allison Morris (ed) *Women and Crime: Papers Presented to the Cropwood Round-Table Conference, December 1980* (Cambridge: Cropwood Conference Series No. 13, 1981) pp 104 - 124

[87] This was set at fifteen years by the then Home Secretary, Michael Howard. This period was one-and-a-half times the existing lifespan of T and V at the time of the crime and paid minimal heed to the principle of English sentencing law in relation to juveniles that "[I]t is important ...that the court should not impose a sentence which, the far end of it, would to young men [sic] like [the defendants] seem completely out of sight." R v Storey and Others (1984) 6 Cr App R (S) 104, at p 107.

(c) Childhood Itself in a State of Flux

As has been shown, the media coverage of the events surrounding the death of James Bulger was unprecedentedly wide-ranging, going beyond simple reporting of the facts to stir up a moral panic around youth crime generally.[88] The case occurred at a time when there was a growing perception that children were maturing (too) early[89] and the murder, regarded in some quarters as proof that young children were committing 'adult' acts, became a springboard from which to expound on the nature of modern childhood itself.[90] The case "initiated a reconsideration of the social construction of ten-year-olds as 'demons' rather than 'innocents'"[91] and, more generally, placed the whole concept of childhood under a spotlight. It is important to note, as will be discussed in more detail subsequently, that, in the early 1990s, childhood was beginning to be revealed, within sociological discourse, as an institution in a state of flux, which translated into an unease about children generally. For some then, two young children demonstrating an ability to kill served to concretise an inchoate feeling of alarm about the capabilities of the "modern" child. Robert Thompson and Jon Venables became the whipping boys for their generation.

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[88] See for example "Present Imperfect: Myths of National Decline Disguise the Real Political Agenda" *The Times* 24 February 1993 p 17
[89] Haydon and Scraton, *supra*, note27, at p 443
[90] See, for example, "Brainwashed by Hysteria" *The Times* 24 February 1993, p 16
[91] Haydon and Scraton, *supra*, note 27, at p 447

Overall, then, it is clear that, for a number of reasons including the immediacy of the images available to illustrate the coverage and the age and projected "evil" of the perpetrators especially in juxtaposition with the age and "innocence" of the victim, the Bulger case was newsworthy in the extreme. This was exploited by the media, propelling the case to the forefront of the news agenda in such a way that it has retained this position since, as a point of reference in relation to current issues relating to children and crime to an extent which is disproportionate to its actual legal importance. The legal coding of the event as "murder"[92] and of T and V as "responsible" (through the application of the *doli incapax* presumption) served only to fuel this condemnatory approach. It is submitted that better mechanisms for dealing with the child's criminal capacity might serve to defuse this highly charged response for the future so that, where the child's understanding of his/her act, its consequences and its social context is limited, this is reflected in the degree of responsibility which s/he is required to take for it. In this way, the scope for a child, whose youth mitigates the offence, to be perceived popularly as "getting away with it" may be diminished.

That, then, concludes this lengthy examination of the societal response to the murder of James Bulger, its length being justified by the extreme nature of the response itself. It is appropriate now to turn to the second of the three cases selected for discussion.

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[92] See King, *supra*, note 3, especially at pp 170, 174 and 175 – 6

Case (2): Stabbing of Morag Brown by Mary Cairns, 1973[93]

It is important to note at the outset that this case differs from the other three cases considered here in two key respects. First, Mary Cairns did not kill the victim and secondly, she pled guilty to the assault charges so that there was no trial. The facts were as follows: in September 1973, Mary Cairns, along with her sister Linda aged fourteen, pled guilty at Glasgow sheriff court to assaulting ten-year old Morag Brown, a neighbour who lived in the same tenement in Glasgow, by pulling her hair and kicking her. Mary, who was eight at the time of the offence on 1st June 1973, also pled guilty, on her own, to stabbing Morag on the body with a knife, severely injuring her. There was evidence that, prior to the assault, Mary and Morag had been friends but that an argument had ensued after Mary called Morag "the dunce of the class" and Morag responded by hitting her. Later, on the common stair where all three girls lived, Linda Cairns began to fight with Morag who was fighting back when Mary appeared with the knife and stabbed her. The wound partially punctured one of her lungs but, despite its potential seriousness, sealed itself, allowing Morag to make a full recovery.[94]

[93] Cairns v HMA, *supra*, note 7

[94] "18 Months for Girl of Nine who Stabbed Friend" *Glasgow Herald* 19 September 1973 p 3

This case took place not long after the children's hearings system,[95] set up by the Social Work (Scotland) Act 1968, had been brought into operation in Scotland in 1971. The commission of an offence by a child is a ground for referral to a children's hearing[96] but where the offence is particularly serious the reporter to the children's panel and the procurator fiscal have concurrent jurisdiction. In Mary Cairns' case, the decision was taken to refer the matter to the sheriff court and the sheriff sentenced Mary to eighteen months' detention under s 57(2) of the Children and Young Persons (Scotland) Act 1937. For present purposes the interesting aspect of the case is the nature of the public outcry which it generated.

On hearing the sentence, Mary Cairns was carried from the dock, by a policeman, screaming for her mother. Indeed, the *Glasgow Herald* reported that "[h]er screams and calls could be heard for minutes after she left the court".[97] This point was given prominence in the reporting of the case, even being picked up by the national press.[98] There was criticism of the sheriff for failing to impose a sentence which would have allowed Mary Cairns to stay at home subject to supervision by the social work department. The appeal was conducted on the basis that it would have been more appropriate for

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[95] The system is discussed in detail in chapter 4

[96] In 1973, this was in terms of s 32(2)(g) of the Social Work (Scotland) Act 1968, now s 52(2)(i) of the Children (Scotland) Act 1995

[97] "18 Months for Girl of Nine Who Stabbed Friend" *Glasgow Herald* 19 September 1973 p 3

[98] See "Girl Aged Nine Given 18 Months' Detention" *The Times* 19 September 1973 p 1

the sheriff either to have referred the case directly to a children's hearing, or to have taken its advice on the appropriate sentence.[99] In the post-Bulger world, it is difficult to conceive of a public backlash, led by the press, against the *severity* of a sentence for a serious crime committed by a child, yet this is the position which obtained in Glasgow in 1973. The victim's sister is quoted as having said "[m]y mother thought the sentence was a bit stiff",[100] and the Director of Social Work in Glasgow accepted that his department was at fault for failing to provide proper support to the convicted child and her family when the sentence was handed down.[101]

In giving its decision in the appeal against sentence, the High Court felt it necessary to emphasise those aspects of the case which demonstrated the seriousness of the crime over the accused's status as a young child, in order to justify the sheriff's decision. In fact, it strenuously defended the actions taken by the sheriff stating that it could not "be held that the sheriff erred in deciding that custodial treatment ... was ... appropriate"[102]. It also defended the decision to prosecute the child instead of referring her to a children's hearing, pointing out that it was recognised by Parliament ... that there might be cases where by reason inter alia of the nature of the alleged offence it was appropriate that the child should be brought before a

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[99] Cairns v HMA, *supra*, note 7, at p 46
[100] "Appeal for Girl (9) to be Released" *Glasgow Herald* 19 September 1973 p 1
[101] "Authorities Blamed in Case of Detained Girl" *Glasgow Herald* 20 September 1973 at p 1
[102] Cairns v HMA *supra*, note 7, at p 46

court of law."[103] Nonetheless, despite all but stating that the sentence imposed by the sheriff was fully justified in light of the "premeditated, deliberate and serious"[104] nature of the assault and observing that "among the wave of sympathy for the applicant which has been generated in some quarters some of that sympathy might have been reserved for the victim of the assault,"[105] it substituted a sentence of probation for the residential order which the sheriff had made, on the basis of the further information presented to the court at the time of the appeal.

Overall, its consideration of the case is predicated on a construction of Mary Cairns as a vulnerable child, whose own best interests were of importance to the interests of justice. Throughout the judgment she is referred to as "the girl" or "the young girl" or "the child" and a paragraph is devoted to "looking at the case simply on the basis of the child's own interests"[106] albeit that it is accepted that that could not be the sole consideration.

It would appear, therefore, that, in 1973, this welfare-driven mentality gripped the country such that even children who committed serious crimes were brought within its scope in the popular sphere to such an extent that the courts required to take it on board also. The image of the child-offender projected here – as a vulnerable child

[103] *Ibid* at pp 44 - 45
[104] *Ibid* at p 45
[105] *Ibid* at p 45
[106] *Ibid* at p 48

with unmet needs of her own – is the polar opposite of the demonisation of Robert Thompson and Jon Venables.

Case (3) Manslaughter of eighteen-month old baby by Nicola G, 1991[107]

The third case to be considered here occurred in roughly the same time frame as the murder of James Bulger and is included here because of its very different treatment. On 5th March 1992, Nicola G was convicted of the manslaughter of a boy aged eighteen months. The facts[108] were that on 8th January 1991, Nicola, then aged eleven was babysitting for two children, a girl aged four and the girl's younger brother, Sean, the victim. The children's mother was under the impression that Nicola was thirteen years old however it was accepted in court that, even had this been true, "she was plainly far too young ... to be left in charge of those children".[109] When Nicola arrived, the children were not in bed and Nicola agreed with their mother that she would put them to bed later. Nicola's cousin, aged thirteen, arrived shortly afterwards and was concerned because Nicola told him that she had "yanked" Sean. He came back later with other children and helped to clean what appeared to be dried blood from the corners of Sean's mouth, although Nicola said that it

[107] R v Nicola G, *supra*, note 9
[108] The facts are summarised closely from the report of her appeal against sentence, *ibid* at pp 350 - 351
[109] *Ibid*, at p 350

was chocolate. The cousin thought that Sean appeared frightened of Nicola.

The cousin and the other visiting children then left, leaving Sean and his sister in Nicola's care and, when their mother returned home at about 11.15 pm, Nicola told her they were fine. Later, the mother went into Sean's room and found him cold and motionless. He had, however, been tucked up bed in an apparently normal position for a child who was asleep presumably, although this is not stated expressly, by Nicola. He was pronounced dead on arrival at hospital. The post-mortem examination revealed that Sean had died of "cardio-respiratory failure caused by obstruction of the air passages". His nostrils had been pinched closed, his mouth obstructed and his throat gripped. He had abrasions and bruises to his face and scalp which were probably caused by his head being forcibly struck against the side of the cot as well as marks on his back consistent with it striking the end of the cot in a forcible manner.

It is interesting to note that these injuries, which at least indicate a fairly violent assault, are played down in the report of the appeal. Hutchison J, giving the court's judgment, notes: "[i]t has to be said ... that the other injuries [those to the face, scalp and back], though not insignificant, were not grave or indicative of a particularly serious assault. The evidence was that death could have resulted in a

very short period after the application of some restriction to the breathing passages."[110]

The other particularly interesting aspect of the case is the legal interpretation of the crime itself. It was proved that Nicola was responsible for Sean's death and, although she was originally charged with murder, the jury convicted her of manslaughter "on the basis, it is assumed, of absence of specific murderous intent".[111] In imposing the original sentence however, the trial judge had said:

> I ought to make one important finding before I proceed to sentence, and that is this: I am satisfied that what happened to Sean, finally, was not due to a simple, single and temporary loss of self-control, it was the culmination of an attitude which Nicola had formed towards Sean from a fairly early stage in that evening, and there is no evidence to suggest that Sean was particularly troublesome or fractious during the course of that evening when he was in Nicola's care.[112]

At the appeal against sentence, the defence sought to argue that these remarks were not warranted by the evidence but the Court of Appeal considered that the trial judge was in the best position to form this view of the evidence if he thought it justified. It is arguable therefore, that the trial judge came as close as he could, without denying the jury's findings outright, to suggesting that Nicola had, in fact, intended to kill Sean. Similarly to the treatment of the injuries inflicted on Sean then, it appears that an effort had been made to

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[110] *Ibid*, at p 351
[111] *Ibid*, at p 350
[112] Turner J, quoted *ibid*, at p 354

construct this crime in the least serious way possible. It is submitted that part of the reason for this may be the jury's - and indeed the appeal court's - disinclination to categorise an eleven-year old child as a murderer. Despite the trial judge's opinion, even the Crown had conducted this case on the basis "that it was to be assumed that what had led Nicola to kill the child was her inability to cope with his behaviour that evening."[113]

Finally, the way in which the court identified the child-criminal as Nicola G allowing her to be referred to at all points simply as "Nicola" is a mechanism by which her status as a child is emphasised. It is common practice for criminal defendants to be referred to by their surnames. The "official" reason for the use of surname and initial here is, presumably, to preserve her anonymity, as is the norm in cases involving children. Robert Thompson and Jon Venables were, however, identified as "T" and "V" throughout the proceedings in which their identities were protected. Since children are almost always called by adults by their Christian names only, "Nicola" is treated more like a child.

The paradox of the child who commits a serious crime has already been mentioned. In the Bulger case, the "crime" element is dominant in almost all discourses. In Nicola G's a better balance is struck between the fact that Nicola was a child and the fact that she had committed an offence, albeit that this was achieved by restricting the

[113] *Ibid*, at p 354

seriousness of the crime of which she was ultimately convicted. In fact, the criminal justice system strives to accommodate her *as* a child. The construction of the child-offender which can be read from this case accepts a degree of vulnerability and a consequent need for protection, albeit that this is tempered by an awareness of the nature of the criminal act and the need to respond to it.

The Court's of Appeal's judgment on the appeal against sentence demonstrates a particular awareness of welfare considerations[114] in relation to Nicola. It took into account, for example, a social background report which concluded that she "*need[ed]* an element of control and consistent boundaries which ha[d] not been demonstrated to date within her family."[115] An effort was made to ensure that the element of dangerousness which Nicola might continue to present was not overemphasised.[116] The undesirability of spending the period until her eighteenth birthday in an institution for disturbed children, when viewed from Nicola's point of view, was also discussed. Overall, the judgment, sites Nicola very firmly within a traditional conception of childhood and attempts to strike a balance between her interests, as those are, paternalistically, determined by others such as Northumberland social services, and the public interest.

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[114] The topic of welfare is considered in its own right in chapter 4
[115] Nicola G, *supra*, note 9, at p 351. Emphasis added.
[116] *Ibid*, at p 353

Additionally, it appears that this case received almost no coverage in the national media therefore there was no orchestrated public response. In a report on the incidence of children who kill in England and Wales, at the time of the Bulger case, *The Times* gave as an example "an 11-year old girl who battered and suffocated an 18-month old baby to death."[117] It is submitted that this is likely to be a reference to Nicola G's case yet, as such, it is isolated. The role of the media is a key factor in the construction of individual cases then simply because, if the public is not informed about a particular case, it is unable to have a collective interest in its outcome. The courts' eye to the public interest does not, therefore, have to be as focussed as in a high profile case.

Case (4) Manslaughter of George Burgess by Peter Henry Barratt and James Bradley, 1861

Robert Thompson and Jon Venables' and Nicola G's cases then illustrate almost simultaneous yet very different constructions of the child-criminal, occurring at the end of the twentieth century. It is interesting now to consider a much older case to examine what can be pieced together of the societal response at that time.

On 11th April 1861, in Stockport, Cheshire, Peter Henry Barratt and James Bradley, both then aged eight, killed two-year old George

[117] "Society Tempers Justice with Mercy in Dealing with Juvenile Killers" *The Times* 20 February 1993, p 6

Burgess,[118] a child who appears to have been a stranger to them. They met him, by their own confession, playing beside a pub, near where he was living at the time and they took him on a walk which finished near a brook at the bottom of a track known as Love Lane. The evidence indicated that the two boys had removed all of their victim's clothing and had then whipped him with a stick from a tree causing bloody weals across his back and buttocks and injuries to his head. The latter might have been serious enough to render him unconscious. Death resulted from the child's face being pressed against a stone in the water of the brook causing "suffocation from drowning".

Before George Burgess's death, the three children were seen by two witnesses. The first observed that the youngest child was crying and that one of the older boys appeared to be dragging him along. The second saw them after they had arrived at their destination and noticed that the youngest child was naked and that the two older children were pulling him towards the brook. Her thirteen-year old son, who was with her, saw one of the boys hit the toddler with a stick.

This case, then bears striking similarities to the Bulger case in terms of the ages of the three children involved, the abduction of an unknown child, the enforced walk and the witnesses who noticed

[118] All of the information on this case is found in Sereny, "B and B", *supra*, note 10 and in Wilson, *supra*, note 10, chapter 18

something unusual and, potentially, amiss yet did not intervene. The case also appears to have generated much public interest, despite the more limited communications available at that time. Gitta Sereny notes that over 1,000 people followed the victim's coffin to the cemetery and that, on the second day of the inquest into the death, the room where it was being held was "bursting with people".

When questioned by the police about the crime, B and B confessed quite readily, seeking only to ensure that each implicated the other equally with himself. In all these circumstances then, and given that the death penalty would have been the mandatory sentence for a conviction for murder at that time, it might have been expected that the boys would have been condemned out of hand both in the social context and, perhaps especially, by the legal system. It is therefore particularly interesting to compare the comments of the trial judge in Robert Thompson and Jon Venables' case with those of the presiding High Court judge at Chester Summer Assizes in 1861.

In 1993 Morland J said:

> "Robert Thompson and Jon Venables,
>
> The killing of James Bulger was an act of unparalleled evil and barbarity. This child of two was taken from his mother on a journey of over two miles and then, on the railway line, was battered to death without mercy. Then his body was placed across the railway line so it would be run over by a train in an attempt to conceal his murder. In my judgement your conduct was both cunning and very wicked.
>
> The sentence that I pass upon you both is that you should be detained during Her Majesty's pleasure ... .

> You will be securely detained for very, very many years until the Home Secretary is satisfied that you have matured and are fully rehabilitated and until you are no longer a danger.
>
> Let them be taken down."[119]

In 1861, Sir Charles Compton said

> "I am afraid you have been very wicked, naughty boys, and I have no doubt you have caused the death of this little boy by the brutal way in which you used him. I am going to send you to a place where you will have an opportunity of becoming good boys, for there you will have a chance of being brought up in a way you should be, and I doubt not but that in time, when you come to understand the nature of the crime you have committed, you will repent of what you have done. The sentence is that each of you be imprisoned and kept in gaol for one month, and at the expiration of that period you be sent to a Reformatory for five years."

The contrast is striking. In 1861, the judge clearly attempts to communicate in language which the boys could understand and he emphasises the rehabilitative element in the sentence. Sereny also indicates that he implicitly directed the jury towards applying the *doli incapax* presumption to bring in a verdict of guilty only of manslaughter and not murder. "He could not help expressing his opinion, he said, that it seemed straining the case to charge such young children with the crime of wilful murder." Here then is an example of the use of the concept of capacity to tie the child's actual understanding of his act to the responsibility for it imposed on him by law. The judge implies that there was not sufficient evidence to

[119] Quoted in Smith, *supra*, note 32, at pp 226 – 227

support the inference that the boys acted "wilfully" and, in his sentencing remarks, infers that they have yet to come to an understanding of the nature of their crime. This suggest that he did not regard them as having that understanding when they carried out the crime.

In 1993, the judge's words seem to have been directed as much to assuaging the public desire for vengeance as to the two boys themselves. Blake Morrison has questioned the strength of the phrase "unparalleled evil and barbarity" noting that the crime was "[h]orrendously cruel, certainly, but "unparalleled evil"?[120] Robert Thompson and Jon Venables *may* have understood them, but the words made no attempt to present the hopeful prospect for their future outlined by Sir Charles Compston 132 years earlier, nor did they show much recognition of the principle of English sentencing law that "the trial court should not impose a sentence so long that it would seem to the young men involved, particularly if they were not outstanding intellectually, that the far end of it was out of sight".[121]

In 1861 then, the judge's comment that the two boys would "in time" come to understand the nature of their crime, at least implies that their actual understanding of the crime had been considered by the court and found wanting. Given the eventual outcome, this provides

[120] Morrison *supra*, note20, at p 229

[121] R v Nethercote (1991) 12 Cr App R (S) 749 at p 752, referring to Conway (1985) 7 Cr App R (S) 303

some support for the view that asking such a question within the criminal trial may serve to diminish stigma.

These cases illustrate the difficulty for the legal system in responding appropriately to children who offend. The Bulger case responds to the crime. The trial judge calls it an "act of unparalleled evil and barbarity." Even the attempt made by the court to respond to T and V as children – raising their seating so that they could see better, for example – was struck at by the European Court of Human Rights as adding unnecessarily to their already heightened discomfort.[122] Mary Cairns, on the other hand, was treated as a young child with unmet needs of her own. The court's attempts to focus attention on the offence are largely lost in the press coverage. The media construction ultimately prevailed in that the custodial sentence imposed as first instance was quashed on appeal despite the High Court's stated opinion that the sheriff was not to be criticised for imposing it.

As cases, Nicola G, and B and B, both balance the dual status of the "child-criminal" better but, in Nicola G's case, this is accomplished by actively downplaying the seriousness of the crime. B and B are treated very compassionately, and expressly as children, although the crime is marked in the imposition of one month's imprisonment in addition to the rehabilitative element of detention in a reformatory.

[122] T v UK; V v UK, *supra*, note 42, at p 180 (para 88)

Overall, these cases indicate that the status of being a child presents a number of challenges to the legal system, even without engaging with the question of understanding of the crime and its consequences which this thesis regards as central. The complexities and the tension inherent in the status of "child" have also troubled sociology, leading to a conflict within the discipline itself, between the "traditional" and the "childhood studies" constructions. The way in which this conflict has manifested itself demonstrates that childhood is an institution currently in a state of flux, and begins to explain the difficulty which children present to the law. Also, this work adds detail to the picture of children drawn by the law, in which the definition relates purely to chronological age. It is important to see children in as rounded a fashion as possible in order to decide how best the law can respond to them. Finally, the sociology of childhood lays bare as assumptions not necessarily grounded in fact, certain widely held expectations of children, which tend to obscure the reality of their lives and to determine the way in which adults, and institutions like the criminal justice system, interact with them. It is helpful to question these.

For all of these reasons, then, the sociological approach to childhood is important in the context of this thesis and will now be examined.

The Sociology of Childhood

The perspectives which sociology, - the study of society - has taken on childhood, are important in the context of the social response to

children who commit serious crimes in that they both influence and reflect the societal reaction to such children. As Arlene Skolnick indicates "[p]olicies and decisions concerning children ultimately derive from conceptions of childhood."[123]

Although it has been noted that "in 1990 the sociology of childhood was only just beginning to emerge as a distinct sub-discipline,"[124] it is not strictly fair to imply that, prior to then, the matter had been ignored by sociologists. The position was rather that certain assumptions were (and, indeed, continue to be) made about children and childhood which became so embedded as to be considered "natural" to all children.[125] This "traditional approach" to childhood has been criticised by sociologists working on "the emergent paradigm"[126] who argue that it fails to give children a voice. Here, then is the first indication of a tension at the heart of the study of childhood. As Alan Prout and Allison James note "[t]he history of the study of childhood in the social sciences has been marked not by an absence of interest in children – … this has been far from the case … but by their silence."[127]

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[123] Arlene Skolnick "The Limits of Childhood: Conceptions of Child Development and Social Context" 1975 *Law and Contemporary Problems* 38, at p 38

[124] Preface to Second Edition of *Constructing and Reconstructing, supra*, note 51, at p *ix*

[125] Jens Qvortrup "A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to Be Heard" in *Constructing and Reconstructing, supra*, note 51, 85 [hereinafter "Voice"] at p 85

[126] Allison James and Alan Prout "Introduction" to *Constructing and Reconstructing, supra*, note 51, 1 at pp 2 – 6

[127] Allison James and Alan Prout "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems" in *Constructing and Reconstructing, supra*, note 51, 7 [hereinafter "New Paradigm"] at p 7

Thus, particularly in the 1980s and early 1990s, a body of work was being built up, under the loose heading of "childhood studies",[128] seeking to challenge certain elements of the traditional approach. For a number of reasons, some of which will be examined here, the traditional approach has, over a prolonged period, gained such wide acceptance in both popular and academic discourses that it was and, in many respects still is, regarded as a description of children's true and natural state. One of the aims of childhood studies was to expose this as, at best, a partial truth, and to reveal the assumptions on which it was based as socially constructed rather than scientifically verifiable "facts".[129]

Interestingly, however, an area which has never endorsed wholesale acceptance of the traditional approach to children is the criminal law.[130] Particular caution is therefore required in challenging the traditional approach because it is arguable that the criminal law, unlike sociology, is not yet ready to move beyond it, never having fully endorsed it in the first place. As will be discussed more fully in

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[128] Leena Alanen *Modern Childhood? Exploring the 'Child Question' in Sociology* (Jyväskylä: Institute for Educational Research, 1992) at p 20

[129] For example, Jens Qvortrup "Childhood Matters: An Introduction" in Jens Qvortrup, Marjatta Bardy, Giovannie Sgritta and Helmut Wintersberger (eds) *Childhood Matters: Social Theory, Practice and Politics* (Aldershot: Avebury, 1994) [hereinafter *Childhood* Matters] where he challenges, *inter alia* the "omnipotence of the family" in children's lives (at p 13) and the ways in which dependence and paternalism characterise children's lives, at pp 20 - 21. See also Martin Hoyles *The Politics of Childhood* (London: Journeyman, 1989) ch one, particularly at p 10

[130] For a discussion of ways in which English criminal law has tended to ignore children's status as children and treat them very much as adults see Haydon and Scraton, *supra*, note 27, at pp 419 – 423.

chapter 3, Scots criminal law has a tendency simply to ignore the child's status as a child.

The Traditional Approach

It is important, first of all, to isolate the key elements constituting the traditional approach. Perhaps the primary component of the traditional approach is that children are perceived as undergoing two distinct but not unrelated processes: (1) socialization and (2) psychological development.[131] Both of these processes emphasise the role traditionally assigned to childhood as a period of preparation for adulthood. In addition, developmental psychology employs research methods drawn from the natural sciences to reach and support its conclusions[132] and this, in itself, appears to have reinforced its claim to scientific "truth" concerning children.

Socialization[133] is the process through which children acquire the trappings of the culture into which they are born and become members of adult society. It may be characterised as a training in the ways of the world or viewed, more normatively, as the modification of the individual's behaviour to conform with the demands of social life. The process begins in infancy and is deemed complete once the child has attained adulthood, albeit that s/he will continue to

[131] See Chris Jenks *Childhood* (London: Routledge, 1996) especially at pp 13 - 30
[132] See Skolnick, *supra*, note 123, *passim*
[133] For a critique of socialization discourses, from the childhood studies perspective, see Alanen, *supra*, note 128, at pp 80 – 90

assimilate aspects of social functioning in much the same way throughout his/her lifespan.

Developmental psychology,[134] on the other hand, builds on the newborn child's incompetence and dependency in order to construct a theory of childhood as a series of phases in each of which children acquire additional skills and abilities, whilst cementing the set acquired in the previous phases, such that, at the end of the development process, children are turned from individuals lacking ability in all spheres, into competent, rational and fully autonomous adults.

The predominance of these two processes in traditional accounts of childhood has created an overarching presumption, hegemonic in many discourses, that the overriding practice in which children are engaged is that of "becoming" adult, such that all of the individual's experiences as a child are valued in terms of the qualities which they are perceived as generating in the adult whom the child becomes.[135] In other words, "the concept of socialization acts as a kind of suppressor of childhood's present tense, orientating analysis either towards the past (what went wrong with socialization) or the future (what the goals of socialization should be)."[136] This has meant that childhood is perceived as "the period of growth, the period in which

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[134] This thesis considers the theories of Jean Piaget and Erik Erikson in chapter 2.

[135] See, for example, Anne Murcott "The Social Construction of Teenage Pregnancy: A Problem in the Ideologies of Childhood and Reproduction" 1980 *Sociology of Health and Illness* 2, 1 at pp 3 – 4

[136] Prout and James "New Paradigm", *supra*, note 127, at p 28

the individual in both the physical and moral sense does not yet exist, the period in which he [sic] is made, develops and is formed."[137] Such definitions of the child as a non-person contribute to children's marginalization within mainstream society on the, somewhat spurious, basis that there is no need to pay very much attention to individuals who do not yet exist.[138]

This perception that children are, in some way, incomplete until they attain the goal of adulthood has also meant that traditional sociology tends to consider children primarily in relation to adults. "[S]ociological knowledge is based on data that concerns the actions and experiences of adults but not of children ... and social theory continues to be written in which everyone is presumed to be an adult."[139] As Jens Qvortrup notes "[w]hen we find children described it is practically always done with reference to their parents' situation. ... The socio-occupational background of children ... is in fact a description of their *parents'* status.[140] In the context of the criminal law, this assimilation of children with their parents has led to criticism of the parents of those who offend which has the effect of focussing attention away from the child's own responsibility for his/her actions.[141]

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[137] Émile Durkheim "Childhood" in Chris Jenks (ed) *The Sociology of Childhood: Essential Readings* (Aldershot: Gregg Revivals, 1982 (1992 reprint)) 146 at p 147

[138] Solberg, *supra*, note 51, at p 142

[139] Alanen, *supra*, note 128, at p 1

[140] Qvortrup "Voice", *supra*, note 125, at p 90. Emphasis in original.

[141] For example, s 8 of the Crime and Disorder Act 1998 introduced "parenting orders" which could be imposed on parents of children who had been convicted of

A further assumption going hand-in-hand with the child solely as the object of socialization and psychological development, rather than the agent of his/her own destiny, is that s/he will occupy certain spaces, with both a physical and a metaphorical dimension, in which these twin processes can take place. Traditional sociology considered the family (or the home) and the school, almost exclusively, as the key sites, with little consideration of the actual importance of such institutions in the experience and lives of individual children themselves.[142] Children required to *be* socialized primarily by their nuclear family and to *be* educated by school. In this way, their participation in these processes is constructed as more passive than active.

The central role accorded to the family and the school can be illustrated by a cursory examination of early sociological texts in this area. Part II of Ritchie and Koller's *Sociology of Childhood*,[143] for example, which was first published in 1964, is entitled "Social Settings for Childhood" and contains chapters entitled "The Primacy of the Family as Culture Carrier"[144]; "Adult Non-Family Participants"[145] and "The Child and the Classroom."[146] In a similar

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offences. The Scottish Executive plans to extend this measure to Scotland: Anti-Social Behaviour etc (Scotland) Bill, Part 9

[142] See James and Prout "New Paradigm", *supra*, note 127, at p 22

[143] Oscar W Ritchie and Marvin R Koller *Sociology of Childhood* (New York: Appleton-Century-Crofts, 1964)

[144] *Ibid*, at p 76

[145] *Ibid*, at p 94. While this title may suggest an outward-looking approach, the family is still treated as the primary element with other participants examined by reference to it.

[146] *Ibid*, at p 112

vein, Bossard's *Sociology of Child Development*[147] devotes over 200 pages to the family together with a chapter on "School Situations and Child Development".[148] Some more contemporary commentators continue to emphasise the importance of the family[149] or to consider the child as, solely, a family member.[150]

With regard to schooling, in Skolnick's words "[f]or us, school is the "natural habitat" of childhood, the school child is the child".[151] The difficulty in terms of societal perceptions of the child, with investing the school with such centrality is that those children for whom it is not fundamental, for whatever reason, and who consequently truant are identified as having committed a "status offence", an action which is deemed wrong by virtue solely of the status of the actor.[152] Truancy is a status offence because adults cannot "commit" it. Only children are required to attend school. The failure to conform to mainstream "childishness" which truancy represents may, however be sufficient to begin the process of labelling as "deviant".[153]

The point which childhood studies seeks to make is that, while it is indeed the case that many, probably most, children spend a

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[147] James HS Bossard *The Sociology of Child Development* (London: Harpers, 1948). (Two subsequent editions were published in 1960 and 1966)
[148] *Ibid*,, Chapter XXII
[149] See, for example Dame Elizabeth Butler-Sloss "Children in Society" 1989 *Current Legal Problems* 71, especially at p 83
[150] See, for example Susan Moller Okin "Women and the Making of the Sentimental Family" 1982 *Philosophy and Public Affairs* 11(1), 65
[151] Skolnick, *supra*, note 123, at p 69
[152] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) (the "Beijing Rules") make specific reference to the provisions for status offences in signatory states. See Article 3.
[153] See Prout and James "New Paradigm" *supra*, note 127, at p 14

proportion of their time within the family and the school, these are not necessarily the defining aspects of modern childhood and, more importantly, that it is necessary actually to gather data from children themselves to ascertain the appropriate level of significance to attach to these, and all other institutions in a child's own life.[154]

The physical dimension of children's allocation to school and the family points up a further element of the traditional approach: that children inhabit a world separate from adults. This is illustrated in a metaphor employed by John Holt, who describes childhood as "a kind of walled garden in which children, being small and weak, are protected from the harshness of the world outside until they become strong and clever enough to cope with it."[155] Other commentators have espoused this view including Iona and Peter Opie whose 1959 account of *The Lore and Language of Schoolchildren*[156] proceeds from the assumption that childhood is "a thriving, unselfconscious culture ... which is ... unnoticed by the sophisticated world and ... little affected by it."[157] This separation, coupled with the construction of children as human "becomings" rather than human

[154] See, for example Jiří Kovařík "The Space and Time of Children at the Interface of Psychology and Sociology" in *Childhood Matters*, *supra*, note 129, 101
[155] John Holt *Escape from Childhood* (Boston: Holt Associates, 1974) at p 9
[156] (Oxford: OUP, 1959)
[157] *Ibid*, at pp 1 - 2

beings has meant that "children have been attributed with certain special qualities and disabilities".[158]

Childhood is often idealised as a golden period of the lifespan in which, separated from adults, children are left to indulge in childish activities in a carefree and spontaneous manner. They are perceived as liberated from responsibility for "adult" concerns such as employment and finance. The concept of vulnerability permeates this perspective, fuelled by children's dependency in infancy, and translates into welfare-based juvenile justice policy and the conferring of special human rights on children which, unlike other such rights, allow for an overarching paternalism towards them.[159] In these conditions, the concept of childhood innocence has free rein partly because, if vulnerable children are separate from the adult world, they cannot be contaminated by it.

These, then, are the basic components and assumptions comprising the traditional account of childhood. It is arguable that its level of acceptance is so high that it is often constructed as "normal" in such a way that divergence may be perceived as deviant. It is necessary now to consider the childhood studies (contrasting) approach to the concept.

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[158] Jo Boyden "Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood" in *Constructing and Reconstructing*, *supra*, note 51, 190, at p 191]

[159] The point about differing constructions of rights and the image which each projects of the child who holds them is taken up in chapter 4.

The Childhood Studies Approach

Childhood studies seeks to challenge not necessarily each of these individual assumptions, but rather the way in which they are accorded the status of "truth" such that it becomes difficult to conceive of all children and any individual child as doing anything other than pursuing a course to adulthood, guided solely by family and educators and attended along the way by vulnerability and a need for protection which renders paternalism the only appropriate response by the adult community. There is a parallel with earlier work on gender[160] which successfully questioned the naturalness of many perceptions of women, such as the view that it was appropriate to confine them to the domestic sphere.

While childhood studies specifically characterises contemporary understandings of childhood as a social construction then, it would be wrong to regard it as the first body of work to contest these understandings. That honour is usually conferred on Philippe Ariès and his book, *Centuries of Childhood*, first published in 1962.[161] Ariès' radical premise was that, until around the twelfth century, very little distinction was made between children and adults at all. His argument is based largely on the representation of children in early European art where they are drawn simply as small adults wearing identical clothes and indulging in the same activities as their older

[160] See particularly Alanen, *supra*, note 128, especially at p 24

[161] Philipp Ariès *Centuries of Childhood* (translated by Robert Baldick) (London: Jonathan Cape, 1962, 1973)

counterparts. Adults, for example, played games and children hunted. Ariès states: "[i]n the world of Romanesque formulas, right up until the end of the thirteenth century, there are no children characterized by a special expression but only men [sic] on a reduced scale. ... [T]he men [sic] of the tenth and eleventh centuries did not dwell on the image of childhood, and that image had neither interest nor even reality for them."[162] Using the developing iconography as a basis, Ariès goes on to trace what he terms "the discovery of childhood".[163]

It is from these beginnings, then, that research into the changing construction of childhood has taken place. Overall, it seeks to examine children as a functioning minority group within society with attributes, aims and practices unique to it as such, but also with characteristics which are shared with the adult world. In other words, "[c]ontrary to custom, childhood is not perceived as "the next generation", rather, it is seen as a part of today's society. Even if it is true that children grow up and become adults, it is equally true that they live and lead a life as children. It is astonishing how widely this trivial fact has been ignored by the social sciences."[164]

Sociological enquiry into children's real lives then, yields data which can be used to challenge the traditional perspective. For example, in an empirical study of the work carried out in the home by a sample of

[162] *Ibid*, at p 32
[163] *Ibid*, chapter 2
[164] *Childhood Matters*, *supra*, note 129, at p 394

school-age children in Norway, it was noted that "placing children in the division of labour at home shows that children's capacity to work is large. ... [The ability to withdraw that labour] indicates a certain negotiating power among children."[165] This is interesting for a number of reasons. The study itself draws the conclusion that by giving children actual and complete responsibility for "large" issues such as the family's main meal, and seeing them carry out such tasks satisfactorily, the parents' perception of the child's age is increased. It can also be inferred that children are, in fact, in closer proximity to "work", albeit domestic work which tends to be devalued, than the traditional conception of childhood permits. Again, such tasks can only be performed by an individual who is autonomous. Finally, the idea that children might negotiate with their parents, whatever the inequalities in bargaining strength, belies the traditional view of children's subordination.

The unquestioning acceptance that, in their own interests, children should occupy separate play- or education-spaces from adults has also been contested, particularly in work on street children in South America. As a group such children are an empirical demonstration that all children are not in fact contained in the spaces (home and school) traditionally set aside for them. One commentator has suggested that, by their use of the street for survival, such children "confront and touch society's dominant sector's views and lives and

[165] Solberg, *supra*, note 51, at pp 133 - 4

interfere or threaten to interfere with its major interests. It is ... the concern not for children's but for society's needs which has given importance to the concept and the category of "street children".[166] This also serves to demonstrate how children's vulnerability, a key component of the traditional approach, can be extracted from its context and used to further adult agendas, under guise of meeting children's needs, a theme which has been pursued by several commentators.[167]

It is interesting that, in 1990, childhood studies was described, by two of its main exponents, as an "emergent paradigm" yet by 1997, in the second edition of the same text, it had become sufficiently mainstream to claim for itself the title of "the sociology of childhood".[168] There has, then, been a major shift in the methodology and the approach taken by sociology to children in the recent past.

Taken together, then, these conflicting sociological discourses – the traditional and the childhood studies – point to the tension at the heart of childhood between the child as vulnerable and the child as

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[166] Benno Glauser "Street Children: Deconstructing A Construct" in *Constructing and Reconstructing, supra*, note 51, 145, at p 153

[167] See, for example Penelope Leach *Children First: What Our Society Must Do – and is Not Doing – For Our Children* Today (London: Michael Joseph, 1994) chapter 4, in which she argues that the clamour for provision of additional nursery places to meet children's needs masks the true agenda of allowing their parents to work. See also Deborah Gorham "'Maiden Tribute of Modern Babylon' Re-Examined: Child Prostitution and the Idea of Childhood in Late Victorian England" 1978 *Victorian Studies* 353 who suggests that the would-be reformers of Victorian child prostitution sought primarily to instil upper class values in working class girls.

[168] Allison Prout and Alan James "Preface" to the second edition of *Constructing and Reconstructing, supra*, note 51, at p 1

independent agent leading his/her own life. This is an issue which will be picked up again in chapter 4. A similar disjunction has also been apparent over a much longer period in the philosophical-religious discourse relating to children which is also worthy of note.

Original Sin and Original Innocence

Throughout history, the concepts of original sin and original innocence have been applied to childhood and, although contemporary secular society has largely moved away from the unreflective application of either doctrine, shades of each are often apparent where children commit serious crimes. This was particularly apparent in the Bulger case where the juxtaposition of innocence and evil was such a major theme in its own right.[169]

In brief compass, original sin posits that children are born evil and must be educated and disciplined out of that state, generally through the indiscriminate use of corporal punishment,[170] in the religious cause of "a rapid saving of a potentially damaged soul before the child die[s]".[171] Original innocence, on the other hand, takes the opposite standpoint, apparently being widely promulgated, in the first instance, as a result of "the cult of the infant Jesus which symbolises

[169] See, for example, "The Horror of Dead Children" *Financial Times* 27 March 1993, p XXIV; "Save Us from the Cruel Truth" *Daily Mail* 5 November 1993, p 4

[170] For a summary of the historical and philosophical development of this view see David Archard *Children: Rights and Childhood* (London: Routledge, 1993)

[171] Christine Hardyment *Dream Babies: Child Care from Locke to Spock* (London: Jonathan Cape, 1983) at p 8

childish innocence ... dat[ing] from the seventeenth century."[172] It was expounded in *Émile*,[173] an early philosophical account of the nature of childhood and education, by Jean-Jacques Rousseau who described his book as "a treatise on the original goodness of man [sic], intended to show how vice and error, alien to his constitution, are introduced into it from outside and imperceptibly distort it."[174] The basic premise of original innocence is that children are born good and that corruption and depravity only arise as a result of their life experiences. In Rousseau's words, "God makes all things good; man [sic] meddles with them and they become evil."[175]

These bodies of work then – the sociological and the philosophical – demonstrate that it is not only the criminal law which finds difficulty in the concept of childhood and in accommodating individual children. The sociological literature indicates the danger of making assumptions about children; the concepts of original sin and original innocence reveal that children are often viewed at extremes (here, of good and of evil) in a way which is not the case for adults. The pull between the child as competent and autonomous and the child as dependent and incapable which is implicit in the work on the sociology of childhood, and the extreme moral positions in which children are sometimes cast, arising from the philosophical literature

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[172] Hoyles, *supra*, note 129, at p. 12

[173] Jean-Jacques Rousseau *Émile* (translated by Barbara Foxley) (London: Everyman, 1993 (1762)) [hereinafter *Émile*]

[174] Jean-Jacques Rousseau *Dialogues* [1776] quoted in P.D. Jimack "Introduction" to *Émile*, *ibid*, xvi at p xxi

[175] *Ibid*, at p 5

will be reconsidered generally in chapter 4, which seeks to reconcile the concepts of "welfare" and "justice" in relation to children who offend.

Conclusion

Overall, the cases and the other commentary presented in this chapter point to the problems which arise from making presumptions about children and from seeking to categorise them rigidly by reference to characteristics which are perceived as essential and "natural" to childhood, but which may not be applicable at all – either generally or to the individual child. The characterisation of T and V in Bulger case, particularly in the social context, adheres quite closely, albeit not expressly to the doctrine of original sin. Mary Cairns is categorised as "small and weak" in terms of John Holt's metaphor of childhood as a walled garden. Efforts are made to describe Nicola G's behaviour as if it were contained within the boundaries of the "childish"[176] despite the strain which this places on the facts. Finally, B and B are portrayed as naughty but uncomprehending – children who did not understand the nature of their act. It is interesting that, of the four, it is this case in which the sentence imposed arguably strikes the best balance between punishment for the crime[177] and

[176] The impression given is that Nicola G lost control of herself because of the strain of being required to look after another small child, a responsibility which should not be imposed on a child in the first place because, it is implied, only adults have the maturity to accomplish this without losing their self-control.
[177] One month in prison

rehabilitation[178] in recognition of the accused being children. In this thesis, understanding of the crime is regarded as key to fair outcomes and B and B supports this view.

All four of these cases then, point to the need for a better mechanism to deal with children who offend within the criminal justice system, which will allow those aspects of their status as children which are important to a determination of guilt of a criminal offence to be canvassed fully by the court but which, at the same time, will ensure that the crime itself is not entirely overlooked. It is the contention of this thesis that paying more attention to the child's criminal capacity can meet this need. The next chapter explains how this is to be achieved.

[178] Five years in a reformatory

Chapter 2

Children and the Mental Element in Criminal Law

Introduction

The maxim *actus non facit reum nisi mens sit rea* – "no act is punishable unless it is performed with a criminal mind, *i.e.* by a person whose state of mind is such that it makes his [sic] actings criminal"[1] – is the fundamental principle by which the criminal law attributes fault. Its justification is usually in terms of the unfairness of holding an individual responsible for an act of which either s/he had no knowledge[2] or which s/he was powerless to prevent.[3] In relation to sane adults, such difficulties as it presents are largely related to determining its scope – should intention include forcseeable consequences, for example – and to proving, effectively, what was in another person's mind. With regard to children and the insane however, it acknowledges the unfairness in imputing responsibility for the commission of a criminal act where the accused did not, through no fault of his/her own, have the ability – or capacity – to understand or rationalise his/her actions. This chapter investigates the attribution of criminal responsibility to children by means of the mental element.

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[1] Michael G A Christie (ed) Gerald H Gordon *The Criminal Law of Scotland* (Edinburgh: W Green, 2000) Vol. 1at p 245, para 7.01
[2] Sweet v Parsley [1970] AC 132
[3] Hogg v MacPherson 1928 JC 15

Two reasons are here put forward to justify the differential treatment of children and adults in this respect. First, on both the traditional and the childhood studies views of childhood presented in the previous chapter, children and childhood are perceived to display different qualities from adults and adulthood. In order to retain its moral legitimacy, the criminal law must reflect that difference. As Neil MacCormick has said "[w]e do not treat [children] differently [from adults] because we respect them less. Rather our respect for them as moral beings is differentiated in a way that makes proper allowance for the differences between mature and immature agents."[4] Second, the notion that children are as responsible for their actions as adults is questioned on the basis of their deficit, in terms of understanding and competences, by comparison with their adult counterparts.[5] Proper consideration of this second issue, which goes to the heart of the question of criminal responsibility, presupposes some body of knowledge by reference to which those understandings, competences and capabilities can be assessed. The position adopted here is that the best discipline to which to look in this respect is

[4] Neil MacCormick "A Special Conception of Juvenile Justice: Kilbrandon's Legacy" The Fifth Kilbrandon Child Care Lecture, 1 November 2001, part 9. See http://www.scotland.gov.uk/library5/education/ch30-00.asp

[5] Some adults may, of course, lack understanding. For present purposes however, it is assumed that the criminal law would be inoperable if it could not presume mental competence and, hence, capacity over a certain age. The plea in bar of trial on the ground of insanity currently takes account of the inability to understand the trial process and/or to instruct a solicitor. Criminal Procedure (Scotland) Act 1995 ss 54 – 57; and see HMA v Wilson 1942 SLT 194

developmental psychology. This is, however, a position which requires some justification.

There is no doubt that, in certain quarters, developmental psychology is deeply unfashionable. The material presented in chapter 1, on the social construction of childhood, indicates that contemporary sociology is sceptical of psychology's hegemonic grip on the popular understanding of childhood. This is partly because of its tendency to fragment childhood into sets of abilities, and to treat the child as a variable in experimentation, which is not conducive to the view of each child as a whole and individual human being, with agency, rather than a "becoming" whose position in society is only recognised once s/he has attained adulthood.

There is, however, a distinction between developmental psychology's presence as a monolith dictating the developmental path followed by all children, at which much of the criticism is directed, and its *application* in drawing conclusions concerning the abilities and understandings of an individual child. The monolithic structure is a prerequisite of the availability of the data for application in individual cases but it is not, as is sometimes assumed, the whole story. Indeed, within the discipline itself, there is evidence of sideways movement from the notion of an age-dominated and universal developmental

progression, propounded initially by Sigmund Freud,[6] towards a more sensitive and nuanced appreciation of the child as an active participant in relationships with parents and others from birth.[7]

For example, following work published by P B Balthes *et al* in 1980[8] there has been a growing recognition that other variables may be as influential as chronological age. Balthes' study identified events such as world wars, which affect a whole generation's development and significant events in the individual child's own life such as his/her parents' divorce as exercising a similarly prominent role.[9] This work also served to emphasise that development continues throughout the lifespan shifting the focus away from the child alone as in the process of "becoming" adult towards a recognition that adults, too, continue to develop.[10]

Again, in broadening the focus of the discipline, this time away from the child as the object of laboratory experiments, Uric Bronfenbrenner's work has advocated and applied an "ecological"

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[6] See, eg, Sigmund Freud *On Metapsychology; The Theory of Psychoanalysis; Beyond the Pleasure Principle; The Ego and the Id; and Other Works* (Harmondsworth: Penguin, 1984)

[7] Eg Campos *et al* demonstrated that a mother who appears to be giving "poorer" care to her child may, in fact, simply be responding to the baby's own innate characteristics which cause him/her to be particularly unresponsive. It would not, therefore, be correct to state simply that "quality of care" creates strong attachment to the mother in the child. It is a two-way process between mother and child. See J J Campos, K C Barrett, M E Lambe, H H Goldsmith and C Sternberg "Socioemotional Development" in M M Haith, and J J Campos (eds) *Handbook of Child Psychology, Vol 2: Infancy and Developmental Psychobiology* (New York: Wiley, 1983)

[8] P B Balthes, H W Reece and L P Lipsitt "Life-Span Developmental Psychology" 1980 *Annual Review of Psychology* 31, 65

[9] The work of Campos and Balthes is discussed in Ann Birch *Developmental Psychology from Infancy to Adulthood* (Basingstoke: Palgrave, 1997) from which this information was obtained.

[10] This is also a facet of Erik Erikson's theory, to be discussed subsequently

approach. This involves devising tests which operate in the environment familiar to the child and which take account of more actors than simply the experimenter and a single experimentee at any one time.[11] Thus, the child is more likely to behave "naturally" and the data yielded to be correspondingly more accurate.

These examples indicate that developmental psychology does, itself, develop. They may also suggest that criticisms of the discipline for representing development and, by implication, childhood itself, as fixed and prescriptive of the experience of all children, are misconceived.

This chapter will draw on developmental psychology to substantiate some of its claims concerning the abilities and understandings of children accused of crime. This is on the argument that such data has its place within the criminal process because it is specifically directed towards establishing how and, indeed, despite its overtones of "good" and "bad", "normal" and "abnormal", how *well* the child functions and understands in various areas. There are precedents for the use of such information in this way.[12] Indeed, it has been suggested, specifically in relation to adolescents, that "understanding the nature

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[11] Urie Bronfenbrenner "Developmental Research, Public Policy and the Ecology of Childhood" 1974 *Child Development* 45, 1

[12] In HMA v S, (unreported) (9 July 1999) (High Court) (plea in bar) http://www.scotcourts.gov.uk/opinions/845_99.html at p 8 (of internet copy), evidence given by a psychologist was "helpful" in linking the child-accused's impairment to his ability to function in the court environment. See the fuller discussion of this case in chapter 3

of psychological development ... will help improve policy-making, *judicial decision making and legal practice.*"[13]

The work of two theorists in particular - Erik Erikson and Jean Piaget - will be considered because their work examines development over an extended period – in Piaget's case from birth to the end of adolescence and in Erikson's over the whole of the lifespan. This is helpful because it gives a flavour of the continuing nature of development, and developmental acquisitions over a prolonged period, but within two self-contained bodies of work. Because of their claim to comprehensiveness then, these theories provide a model for the applicability of developmental psychology in general, within the criminal process.

Of Piaget, it has been noted that "the vast majority of critical studies [of his work] contain a tribute to the man whose great intellectual scope provided such a monumental contribution to our understanding of child development."[14] His theories and experiments are basic to much subsequent work, even if that work does not necessarily endorse his findings in their entirety.[15]

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[13] Thomas Grisso and Robert G Schwartz (eds) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (Chicago and London: University of Chicago Press, 2000) at p 7. Emphasis added. This book arises from the work of the MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice which exists primarily to conduct research into "adolescents' capacities as trial defendants and the culpability of adolescent offenders" through the application of developmental psychology (at p 4). The Network is comprised of experts in psychology, sociology, public policy and law.

[14] Birch *supra*, note 9, at p 78

[15] Eg Margaret Donaldson undertook work to challenge Piaget's claim that a child aged between two and seven was "egocentric" or unable to see any other point of

Erikson, on the other hand, has been selected for inclusion because his work is in the psychoanalytic tradition of Freud[16] who is widely regarded as the "father" of modern psychology. Erikson's theory is, however, premised on studies of children themselves, whereas Freud's was developed from case studies of his adult patients. Erikson's work is also directed more towards the social forces which drive development, in contradistinction to Freud's which, as is well known, defined development in psychosexual terms.

It may be useful, at this stage, to provide an overview of the salient aspects of their respective theories. The theory of the mental element in crime in relation to children which is put forward in this chapter could apply to a child of any age.[17] Piaget and Erikson's theories are both predicated on the assumption that children move through a series of phases in each of which they acquire new skills and build upon those from the previous phase. The phases follow consecutively one from another. The view taken in this chapter is that the child-accused requires certain understandings to be able to participate in the trial process at all and that, beyond that, fairness to him/her dictates that the court should assess certain specific issues

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view than his/her own. Margaret Donaldson *Children's Minds* (London: Fontana Press, 1978).

[16] Henry W. Maier *Three Theories of Child Development: The Contributions of Erik H. Erikson, Jean Piaget and Robert R. Sears and Their Applications* (New York, Evanston and London: Harper and Row; Tokyo: John Weatherhill Inc., 1969) at p 17

[17] The thesis as a whole nonetheless supports the retention of an age of criminal responsibility, on political grounds, to prevent any possibility of a very young child being prosecuted solely to assuage public opinion. This is discussed more fully in chapters 3 and 5.

related to his/her understanding of the crime in context in order to determine his/her criminal responsibility. It is therefore necessary to summarise the whole of Piaget's and Erikson's theories so that it is clear where the developmental acquisitions which are key to these understandings fit into their overall schemes. This information can then be applied when the relevant issues arise later in the chapter.

Jean Piaget's Theory of Intellectual Development

Piaget viewed childhood as a linear progression through four phases, characterised by the child's refinement of old skills and his/her problem-solving approach to new challenges. The child's attempt to deal with a new situation or concept is termed "accommodation"; his/her attempt to build this novelty into his/her existing intellectual framework, "assimilation". As indicated, on Piaget's model, the child has to pass through four developmental phases in a set order which does not change from child to child. In the "average" case, children do so within a range of clearly defined chronological ages. The four stages are as follows:

(1) Sensorimotor Phase (birth to two years):

During this phase, the child learns mainly by using his/her senses. It is wrong, however, to suggest that the child does not demonstrate "intelligent" behaviour because Piaget's observations indicate that very young children *do* assimilate discoveries. He gives the example

of a child who learns that a distant object can be brought close by pulling the rug on which it is situated and who then repeats this operation the next time a similar situation arises. Overall, however, the child lives, almost entirely, in the present. This stage comes to an end as the child acquires speech and language and, accordingly, the beginning of the ability to understand that a word may represent an object.

(2) Pre-Operational Phase (two to seven years)

This phase is characterised by imaginative play as the child's intellectual ability to see things symbolically, in the mind alone, when they are not physically present, develops. The child's reasoning ability is, however, still limited. For example, Piaget conducted many experiments to establish that children at this stage cannot understand that a quantity of a commodity (water or clay for example) stays the same even if it is reshaped or placed in a differently shaped container. To a considerable extent then, seeing is still believing.

(3) Concrete Operations (seven to 11 years)

During this phase the child acquires the ability to classify objects and to understand that there are broad categories with more specific sub-categories subsumed within them (e.g. "daisies" within "flowers"). Although the child begins to recognise logical relationships between objects, s/he still largely requires to have the objects physically before him/her in order to do this. For example, it would not be

sufficient to make a series of statements to a child of this age, as is sometimes done in logic problems, from which an adult would be able to deduce that a named individual was taller than others. The child would require actually to see the people concerned concretely in front of him/her to make this assessment. The ability to understand at an abstract level, by making mental representations of statements made to him/her, is not yet present.

(4) Formal Operations (11 onwards)

It is during this phase that "the child becomes capable of reasoning not only on the basis of objects, but also on the basis of hypotheses, or of propositions."[18] In other words, the child develops the ability to deal with intellectual and logical problems by thought alone. The main developmental acquisition of this stage is "reversibility" or the ability to dissect a series of actions carried out as a sequence and to start with any one of them, working through from end to beginning as easily as vice versa.[19] The child could previously perform this function if s/he had the objects to be manipulated present, physically, in front of him/her. During this fourth stage, s/he develops intellectually sufficiently to do it by thought alone.

Piaget's theory, then, relates specifically to intellectual development. Psychoanalytic theory, Erik Erikson's area, is more concerned with

[18] Jean Piaget "The Stages of the Intellectual Development of the Child" in Alan Slater and Darwin Muir (eds) *The Blackwell Reader in Developmental Psychology* (Oxford: Blackwell, 1999) 35 [hereinafter "Stages"] at p 41

[19] Maier, *supra*, note 16, at pp. 135-36 and 139. Reversibility will be discussed more fully in relation to capacity later in this chapter.

emotional development. The child will obviously be developing on both these levels simultaneously. Erikson's theory is useful, therefore both in its own right and because, taken alongside Piaget's, it broadens the enquiry into the child's developmental acquisitions and treats him/her more holistically.

Erik Erikson's "Eight Stages of Man"[20] [sic]

In common with all psychoanalysts in the Freudian tradition, Erikson regards the developmental process as being driven by the interactions between three forces: the id, the superego and the ego. The id is the individual's baser instincts and consists of everything "which would make us mere creatures".[21] It is countered by the superego, which corresponds, very broadly, to the individual's conscience.[22] The superego is comprised of values and rules for living which the child absorbs, largely unconsciously, from his/her parents' (or, presumably, main carers') attitudes and ways of being. It also contains cultural deposits and signs of the child's grandparents' creed, to the extent that his/her parents have incorporated this into their own superegos. The child may also assimilate material gleaned from other adults who are significant in his/her life.

[20] Erik H Erikson *Childhood and Society* (New York: WW Norton, 1963) chapter 7
[21] *Ibid*, at p 192.
[22] *Ibid*, at p 193

By contrast with the id and the superego, which are part of the unconscious, the ego is the "central principle of organisation in man's [sic] experience and action."[23] It is the conscious organising force which mediates, balances and organises the id's tendency towards selfish and depraved behaviour and the superego's opposing pull towards excessive moralism. One of the ego functions is to draw together all the knowledge and skills which the child acquires as s/he develops and to organise them for future application.[24] Thus, the ego exercises *control* over id and superego impulses.

Erikson divides the lifespan into eight phases and regards each of them as sites of conflict between two opposing ends, one of which will contribute to the growing personality's stability, the other which will cause lasting problems if it is allowed to predominate. The recognition that development continues into adulthood is a striking feature of Erikson's theory which he himself describes as a "unique contemporary discovery."[25]

The eight phases are:

(1) Basic Trust Versus Basic Mistrust (up to age 1)

If the child receives a high standard of basic care in the first year of his/her life so that his/her needs are met appropriately and promptly

[23] *Ibid*, at p 415
[24] *Ibid*, at pp 193 - 194
[25] *Ibid*, at p 261

s/he will develop a feeling of trust both in the primary caregiver[26] and in the wider social context in which s/he lives and a sense of hope for the future. In order to inculcate this, parents need to convey a strong sense that there is a meaning to what they are doing. If mistrust is allowed to predominate in this phase, because of inconsistent care, the child will ultimately become insecure and suspicious.

(2) Autonomy Versus Shame and Doubt (roughly ages 1 to 3)

This outcome of this phase is dependent on the external restraint exercised over the child as s/he gains some autonomy and power over his/her own life through the ability to walk and the ability to exercise conscious control over the expulsion of bodily waste. The child has, however, previously enjoyed his/her dependency and experiences shame at rebelling against it. "From a sense of self-control, without loss of self-esteem comes a lasting sense of goodwill and pride; from a sense of loss of self-control and of foreign over-control comes a lasting propensity for doubt and shame."[27]

(3) Initiative Versus Guilt (roughly ages 4 to 5)

Initiative is an enhancement of autonomy in that the child now begins to plan activities through choice for the pleasure of being "active and on the move."[28] In the previous phase, s/he often acted out of wilfulness or defiance. The child needs to be eased into an

[26] Erikson assumes that this will be the mother.
[27] Erikson, *supra*, note 20, at p 254
[28] *Ibid*, at p 255

understanding of roles and institutions in the culture within which s/he lives, otherwise the superego will become overly restrictive of his/her action and s/he will experience excessive guilt. S/he may also hate his/her parents where they fail to live up to his/her own exacting standards.

(4) Industry Versus Inferiority (roughly ages 6 -- 11)

During this period of early schooling, the child is impelled to learn and to produce all the time. The role of peers is particularly important and the child gains confidence from the positive responses of those around him/her. S/he aims for superlatives – being, for example, the best, strongest, or funniest in as many spheres as possible. Throughout this phase, the child is actively working to improve his/her ego processes. While striving to succeed, the child fears failure. Any area of functioning where s/he feels mediocre may result in the predominance of the feeling of inferiority which impedes confident development.

(5) Identity Versus Role Confusion (Adolescence) (roughly ages 12 – 18)

In adolescence, the young person is seeking to find his/her place in the world and to integrate, through frenetic activity on the part of the ego, all that s/he has previously identified with during his/her childhood. Where the negative force towards role confusion predominates, s/he suffers uncertainty, creating an insecure base from

which to take decisions on important matters such as career or life partner.

(6) Intimacy Versus Isolation (Young Adulthood) (20s and 30s)

Erikson's concentration in this phase is on finding an appropriate marital partner[29] – or more broadly on the positive pull to experience love and commitment. Henry Maier, commenting on Erikson's sixth phase notes that "[g]raduation from adolescence requires a sense of identity; graduation from the first phase of adulthood requires finding a *sense of shared identity*."[30] The sense of isolation develops where the individual remains single, or without a significant relationship, and is thus, in Erikson's analysis, placed at a distance from his/her peers.

(7) Generativity Versus Stagnation (Middle Adulthood) (40 – 64)

Generativity consists primarily in "establishing and guiding the next generation."[31] Where the individual is childless or, for other reasons, not concerned in directing the lives of his/her own children, despite Erikson's apparent view that this is a less usual course, s/he will instead be directing natural gifts towards creativity and productivity in other areas. The negative outcome, where the pull to generativity

[29] His work is, however, perhaps of its time (1963) in its failure to entertain the possibility of a fulfilling same-sex relationship.
[30] Maier, *supra*, note16, at p 70. Emphasis in original.
[31] Erikson, *supra*, note 20, at p 287

is not realised often involves a "pervading sense of stagnation and personal impoverishment."[32]

(8) Ego Integrity Versus Despair (Late Adulthood) 65+

It is only in old age that the ego is finally developed and, assuming a transition through, particularly, middle adulthood with the positive pull predominating, the individual attains what Erikson calls ego integrity. The individual is satisfied with the achievements of his/her life. On the other hand, where despair is the dominant pull, the individual realises that an insufficient period of the lifespan remains to find a route to ego integrity by starting again and living life in a different way.

These, then, are the developmental theories which will be applied in this chapter. Clearly they do not constitute a comprehensive summary of the whole of developmental psychology – this would be an impossible task. Their purpose is rather to provide a flavour of the information which the discipline can make available to the criminal process in order that this can be built upon in relation to the specific questions of understanding to which the chapter now turns its attention.

[32] *Ibid*, at p 287

Overview of the Mental Element for Child-Accused

It is the overall contention of this thesis that the child's criminal capacity is key to his/her rational, de-stigmatising treatment as the accused in criminal proceedings. This chapter engages with the mental element of criminal offences in Scots criminal law where the accused is a child, seeking to conceptualise it in such a way that the need to establish that the child-accused understands his/her criminal act in context is given a central position and properly assessed in each individual case. This point is often obscured where "straightforward" *mens rea* is the only aspect considered. The chapter therefore seeks to unpack the mental element, dividing it into three separate elements:

(1) a threshold of understanding and development which must be passed before the child can proceed to trial. This is conceived as three preconditions. In function, the preconditions resemble the plea of insanity in bar of trial which operates to determine whether an accused is able to be tried. That plea is only used where the defence deems it appropriate. The preconditions, on the other hand, must be applied, without exception, in every case of a child-accused;

(2) the child's criminal capacity. In order to be criminally responsible, the child must have criminal capacity or, in other words, must have understood his/her action to be wrongful, and carrying consequences both physically, in terms of causation and criminally,

in terms of sanctions. The child's criminal capacity is examined as a set of capacity points, predicated on these broad issues, in relation to each of which the child may have a greater or lesser degree of understanding and ability. Criminal capacity then, and criminal responsibility which is contingent on it, are both relative concepts; and

(3) *mens rea*. This is conceived as a purely factual matter which the prosecution must establish beyond reasonable doubt in the same way as it is required to prove that the accused actually carried out the criminal act. So far as possible, all aspects of understanding, which are sometimes subsumed under the heading of *mens rea*, are considered instead as elements of the child's criminal capacity.

Preconditions

Introduction

The purpose of preconditions is to create a threshold which, if it is not met, debars children from proceeding to trial, no matter the charge, on the grounds that their lack of understanding of the trial process, its purposes and its legitimacy, and of their own actions in their social context, is such that any trial would be, in Antony Duff's phraseology, a "travesty".[33] The concept of preconditions is derived

[33] R.A. Duff "Law, Language and Community: Some Preconditions of Criminal Liability" 1998 *OJLS* 18, 189 [hereinafter "Preconditions"] at p 194

from Duff's 1998 article on the topic but, as applied in this chapter, it also bears a resemblance (and no more than that), in terms of the function which it might serve in the criminal process, to the plea of insanity in bar of trial.

For Duff, preconditions are "the conditions which must be met if the trial is to be possible, or legitimate, at all."[34] If they are not satisfied then any ensuing trial would be similarly futile to the attempt to play football with no ball or to lecture, in English, on philosophy, to visiting Poles who speak no English.[35]

In simplified form, Duff's theory of preconditions is two-pronged, requiring (1) understanding of legal language and concepts; and (2) inclusion in the community promulgating the law. The first precondition derives from his conviction that "[a] criminal trial purports to be, and ought to be, a rational process of communication in which the defendant is actively involved".[36] If, for any reason, it is impossible to achieve this quality of communication, then the trial will lack moral legitimacy. Convicting a French-speaking accused after a trial conducted in English with no access to an interpreter would be an example of this. In that event, there would, in effect, be no communication with the defendant whatsoever – and certainly not a rational, active dialogue.

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[34] *Ibid*, at p 193
[35] *Ibid*, at p 193
[36] *Ibid*, at p 194

In order to facilitate this level of communication then, it is necessary that the accused should understand the language and the concepts of the law, at a sufficiently deep level to permit full participation in the adversarial process and its legal arguments. Duff accepts that there is, inevitably, a difference in the *level* of understanding, which it is appropriate to expect from lawyers and from lay-persons.[37] The process of understanding for the latter group is assisted by the use of "thick" concepts such as "murder" and "theft" which have a technical legal meaning but which are also commonly used with a meaning approximating to the legal one. The deployment of such concepts allows the participation of the accused in the process by providing a common point of departure with the legal language.[38] Thus, an accused person is likely to understand at the outset of his/her trial that "murder" consists in killing another, even if his/her awareness of the need for, and legal definition of, intention and/or recklessness is lacking. The accused could discuss "murder" using such a restricted definition and this is enough to satisfy Duff's precondition of understanding.

In Duff's view, the necessary understanding is only *demonstrated* however, where the accused is sufficiently comfortable with the legal language and concepts, to adopt these into his/her normal, first-personal speech in such a way as to show, not only his/her

[37] *Ibid*, at p 200
[38] *Ibid*, at pp 200 - 201

comprehension, but also his/her acceptance of their normativity for him/her personally.[39] This fits with Duff's conviction that the law, in a sense, *belongs* to those whom it constrains and that their obligation to obey it stems from this sense of ownership.[40]

The leads into the second precondition – of community inclusion – which rests on Duff's theory of communitarianism[41] – that law is a product of the community which it binds and that, accordingly, community endorsement is what imbues it with both moral legitimacy and normativity for individuals.[42] As he says,

> "one account of the moral conditions of the obligation to obey the law, and of being answerable through the courts, is expressed in terms of community. The defendant is obligated to obey the law in virtue of his membership of a community whose law it is; and he [sic] is answerable through the courts to his fellow members of the community for his alleged breaches of that law."[43]

The precondition is applicable where the strength of the criminal law's moral entitlement to hold the accused to account is in doubt by virtue of his/her alienation from the community to which the law automatically applies, because s/he belongs to "unjustly

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[39] *Ibid*, at p 199
[40] *Ibid*, at p 199
[41] See R A Duff *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001), [hereinafter *Community*] particularly chapter 2
[42] Duff "Preconditions," *supra*, note 33, at p 197
[43] *Ibid*," at p 197

disadvantaged, impoverished and alienated groups"[44] within that community.

Duff's concern here is, therefore, with social exclusion, and with the unfairness of subjecting those who are, effectively not part of the political community to the authority and sanction of its law.[45] In order to identify such groups, he questions the voice in which the law is expressed. In other words, *who* is perceived as speaking and in what accent? If the answer to that question is "oppressive institutional powers in which [severely impoverished and disadvantaged groups] have no share"[46] then, while such groups will still have the necessary *understanding* of the law - this is unaffected by social exclusion - it may not be reasonable to suggest that they could really *speak* it, in the first-personal fashion required. Such groups are too marginalised to share the core values of the community.

This is an interesting idea and, superficially at least, one which appears to relate directly to children who, as a group, are not even notionally included in the community speaking the law. Participation in the democratic process as an elector is denied until the age of 18[47] and, while it is true that children are ever-present within society, they

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[44] *Ibid*, at p 204

[45] For Duff, a political community is one which is bound together *inter alia* by consciously shared values and aspirations. See *Community*, *supra*, note 41, at pp 47 - 48

[46] Duff "Preconditions," *supra*, note 33, at p 204

[47] Representation of the People Act 1983 s 1. The writer is grateful to Jean McFadden for providing this reference.

are not usually accorded "full" membership.[48] Power is largely directed away from them. The approach taken to them is often paternalistic. This can be seen in the difficulty for lawyers acting for children as to whether they are simply acting for them – representing to the court the child's own wishes and interests – or whether they should in fact be advocating for their own perception of the child's *best* interests.[49] The latter is paternalistic; the former respects the child's agency.

By the same token, the voice of the law - the interests perceived as "speaking" it -- will not belong to a child.[50] On this view, then, it is unlikely that children could ever satisfy the precondition of community inclusion as conceived by Duff. Should this weaken the criminal law's moral hold over them? In other words, is it morally acceptable to make them subject to that community's criminal law, and the state-sponsored imposition of sanctions which it entails?

Whilst not seeking to diminish the potential unfairness in the lack of status accorded to children, it is submitted that, as a precondition for the criminal trial, exclusion from the political community is not fatal

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[48] In Scotland, for example, they do not have legal capacity until the age of sixteen. The Age of Legal Capacity (Scotland) Act 1991, s 1(1), states that "a person under the age of 16 years shall … have no legal capacity to enter into any transaction."

[49] Anne Griffiths and Randy Kandell "Reconceiving Justice? Children and Empowerment in the Legal Process" in Simon Halliday and Peter Schmidt (eds) *Human Rights Brought Home: Some Socio-Legal Studies of Human Rights in the National Context* (Hart) (forthcoming)

[50] This point may be similar to the argument presented by some commentators at the time of the Bulger case to the effect that a jury of Robert Thompson and Jon Venables' *true* peers could only consist of 10-year old children. See "James Bulger's Murderers Must Get Justice From an Adult World" *Independent* 29 May 1994, p 18

morally. Much of the world which children inhabit is created and expressed in adult terms, yet this does not prevent their participation in social life, at their own level. Children are used to listening to, and interpreting the adult voice, language and concepts and should be given credit for this ability.

To an extent, this objection to Duff's exclusion of the disempowered from the communitarian reach of the law, draws on the, rather problematic, feminist theory of standpoint epistemology, which asserts that individuals placed low down in a hierarchy develop a particular knowledge and understanding of their situation because that is necessary to their survival within the relevant structure. In other words, standpoint epistemology "privileges [the lowly] status by claiming that it gives access to understanding about oppression that other cannot have. ... The experience of [having this status] ... reveals truths about reality that [the more privileged] do not see."[51]

This theory has been criticised, *inter alia*, for its tendency to prioritise the experience of women over that of men and to construct the former group only as victims.[52] Despite this, it does provide a basis from which to argue that children's knowledge and experience of membership of society is equally rich to, if different from, that of adults. Accordingly, it is submitted that it would actually be detrimental to children's interests as rational agents to remove them

[51] Kathleen Bartlett "Feminist Legal Method" 1990 *Harvard Law Review* 103, 829 at p 872
[52] *Ibid*, at pp 873 - 877

from the criminal process on the grounds of exclusion from the powerful élite. Such a step would deny the reality of children's lives as young members of the society in which they live, albeit that their (political) participation in that society is often restricted by adults. This does not mean that the issue of membership of the community is not relevant to the morality of subjecting a child to the criminal trial – rather that, as will be outlined subsequently, it is necessary that the precondition should be conceived in different terms.

Overall, for Duff, the moral rationale for preconditions is that the accused must be tried as a "responsible citizen"[53] and failure to satisfy the preconditions disqualifies him/her from this status. His theory however specifically applies to "sane *adults*".[54] It is therefore necessary to consider how best to conceptualise a similar threshold for child-accused.

Pre-Conditions for Child-Accused

Clearly, there are many aspects of the trial and the criminal process, not to mention the criminal act itself and the state of mind which accompanies it, with which children may have conceptual and comprehension difficulties. The majority of these are considered in this chapter as part of the child's criminal capacity. The distinction in purpose between "capacity points" and the issues which are here

[53] Duff "Preconditions," *supra*, note 33, at p 195
[54] *Ibid*, at p 203. Emphasis added.

theorised as preconditions is that the latter are regarded as so fundamental to the moral underpinning of the trial that, if they are not satisfied, it cannot proceed.[55] The difference in content will be considered subsequently in this chapter.

(1) Pre-Condition of Understanding

The first precondition which is applicable to children is that they should understand the legal language and concepts deployed in their trial and, by extension, the trial process itself in such a way and to such an extent that their active participation is facilitated. As applied in this chapter, this precondition is, in certain respects, similar to the test for the plea of insanity in bar of trial which asks "whether [the accused] is fit to instruct a defence and fit to follow the proceedings in ... court."[56]

Following the case of T v UK; V v UK,[57] it is an accepted legal principle that children *must* have sufficient understanding to enable them to participate actively in their criminal trial. The particular importance of the achievement of a certain level of development in language in satisfying this test was highlighted in the Scottish case of HMA v S,[58] where the accused, S, aged 13 years at the time of the

[55] This does not mean that in all such cases, the child's actions will have no consequences whatsoever within the criminal justice system – merely that the trial cannot proceed. Chapter 5 argues that, in certain circumstances, it would be appropriate to refer child-accused who do not satisfy the preconditions to a children's hearing.
[56] HMA v Wilson, *supra*, note5, at p 195
[57] (2000) 30 EHRR 121
[58] *Supra*, note 12 This case will be discussed in more detail in the next chapter.

trial[59] was charged with murder but found to be insane in bar of trial. S suffered from a developmental delay causing him, *inter alia* "particular problems with language development". He also had "impaired verbal memory function".[60] As a result, "[h]e [would] not follow dialogue during court proceedings if [it was] not adjusted to levels normally understood by a nine year old child."[61]

The judge in the plea in bar of trial made two comments which highlight the legal and moral fundamentality of such abilities. First, he stated that: "[t]he question [was] not whether it would be possible to have the accused understand the case being made against him in ideal circumstances, but whether he could participate to the necessary degree in a trial which was conducted in accordance with the necessary forms and procedural rules."[62] It is clear from this that, in Lord Caplan's opinion, both the child-accused's abilities and the trial process itself are to be considered as they actually are – not as they could be in an ideal situation. Whilst certain concessions could be made by modifying aspects of the trial to accommodate the child's developmental deficits,[63] a fit between the two cannot be forced. Where the mismatch is too great, the trial cannot proceed.

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[59] S was 12 at the time of the offence

[60] IIMA v S, *supra*, note 12, at p 5 (of internet copy). This information is taken from the expert testimony of a chartered clinical psychologist, Ms Jenny Munro, who had examined S on behalf of the Crown.

[61] *Ibid*, at p 5 (of internet copy)

[62] *Ibid*, at p 9 (of internet copy)

[63] The judge could, for example, ask counsel to formulate their remarks in language tailored to the understanding of the child-accused.

Lord Caplan's second important dictum in HMA v S, was: "[i]n particular [an accused child] should not be expected to sit passively, like an object, while adults take exclusive control of his defence."[64] This serves to demonstrate that the existence and quality of the child's legal representation is insufficient to remedy his/her own difficulties with language and comprehension. A child who understands little or nothing of the language used, or who is so uncomfortable and afraid that s/he is disabled from following and contributing to the trial,[65] is unable to participate actively.

Language skills are not, however, the whole story in relation to this precondition. Because legal debate is conducted at an abstract level, a child's ability to understand it, in all its complexity, is also in doubt because the acquisition of abstract reasoning skills – i.e. the ability to perceive by thought alone without any concrete referent - occurs relatively late in childhood. This is an issue which Piaget specifically examined. He found that it is only during the fourth phase[66] that the child begins to develop the ability to understand and reason by thought alone, a skill which, it is submitted, is vital to the ability to follow a trial, where almost the whole argument will be made using concepts rather than concrete objects. Even if the *actus reus* of the offence could be represented concretely – perhaps because it had

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[64] HMA v S, *supra*, note 12, at p 7 (of internet copy)

[65] As was the European Court of Human Rights' finding in relation to Jon Venables. See T v UK; V v UK, *supra*, note 57, para 95 (re Jon Venables) (para 87 in judgment in respect of Robert Thompson)

[66] In effect, during adolescence which, for Piaget, begins around the age of 11.

been recorded by CCTV – grave difficulties would remain with the representation of both the *mens rea* and the explanation of the act's relationship to the definition of the relevant criminal offence, to take two obvious examples, in anything other than abstract terms. Even Duff's thick concepts may not provide much assistance for children because, as George Fletcher notes: "[a] child could easily draw you a picture of stabbing, poisoning, or stealing, but it would be hard pressed to explain to you in words the boundaries of the crimes of homicide or theft."[67]

The child's abilities in both language and abstract reasoning then are crucial to his/her ability to understand the trial process sufficiently to participate actively in it. If either of these abilities is lacking, or there is some other issue hindering the child's active participation, the language precondition will not be satisfied.

(2) The "Community Membership" Preconditions

Two further preconditions are applicable to children: (a) empathy and (b) knowledge of criminality. Both are underlain by the communitarian perspective attributable to Duff and require the child to have evolved into an appreciation of his/her membership of the society in which s/he lives and of the fact that such membership places certain obligations on him/her.

(a) Empathy

[67] *Basic Concepts of Criminal Law* (Oxford: OUP, 1998) at p 78

The empathy precondition requires that the child has a reasonably developed understanding, or at the very least, an awareness, of the way in which his/her actions can impact adversely on others and an appreciation of how it would feel to be in the position of the victim suffering those harmful effects.[68] S/he must also be able to apply that appreciation to restrain or arrest harmful acts which s/he is considering, or in the process of, committing. As discussed above, children are not accorded full membership of adult society. The development of empathy, however, signifies their own acknowledgment of their membership of an interconnected community.

This conception of empathy is close to Adam Smith's theory of moral sentiments[69] which has itself been associated with a theory of development – "the development of conscience through the internalisation of social norms, as well as a theory of how the morally developed individual is able to ascend from moral conformity to moral autonomy."[70] The theory of moral sentiments requires moral judgments about the propriety or impropriety of action, or feelings, to be made by the individual, as an "impartial spectator,"[71] projecting

[68] Psychopathic personality types may also cause an inability to empathise. This is, however, a different issue from the case of a child who has not yet developed an understanding of his/her place in his/her community.
[69] Adam Smith *Theory of Moral Sentiments* (edited by Knud Haakonssen) (Cambridge: Cambridge University Press, 2002)
[70] Jerry Z. Muller *Adam Smith In His Time and Ours: Designing the Decent Society* (Princeton: Princeton University Press, 1993) at p 100
[71] In Smith's theory, this is an "ordinary person when he [sic] is in the position of observing the behaviour of any person with whom he has no special connection and

him/herself into the position of the agent or the "patient" (the person experiencing the feelings), this being the only way of judging whether an action or a feeling is just or unjust. On Stephen Darwall's analysis of Smith's theory, "[w]hat is distinctive about injustice is that it is properly resented and resisted, and this is something we can assess only from the perspective of individual patients."[72]

Because, in Smith's view, human beings wish to put themselves in a position of "shared sympathy" with others, they learn, by honing the skill of projection, to modify their own emotions to bring them into line with those of their colleagues. Another person's extreme grief on the death of a loved one, for example, is experienced by the impartial spectator also as grief, but not on the same scale. Similarly, because the bereaved person realises, by projection, that his/her own emotion, in this situation, is much stronger than that of other people, s/he tries to modify it.[73] As individuals become more skilled in the art of projection, they attain the status of the impartial spectator and develop the ability actually to restrain themselves from acting in certain ways by reference to their appreciation of other people's feelings. The impartial "spectator is biased neither towards [him/herself] nor towards those affected by [his/her] actions. ...

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whose behaviour does not affect him any more or less than it affects anyone else." T D Campbell "Scientific Explanation and Ethical Justification in the *Moral Sentiments*" in Andrew S Skinner and Thomas Wilson (eds) *Essays on Adam Smith* (Oxford: Clarendon Press, 1975) 68 at p 71

[72] Stephen Darwall "Sympathetic Liberalism: Recent Work on Adam Smith" 1999 *Philosophy and Public Affairs* 28(2), 139 at p 143

[73] See Muller, *supra*, note 70, at p 102

[His/her] imaginative identification with ""the sentiments of the impartial spectator"" provides the motivation which leads [him/her] to temper "his/her mutinous and turbulent passions.""[74]

Clearly, then, Adam Smith saw the ability to project imaginatively and then, on the basis of the information so acquired, to temper action, as one which individuals had to develop. Children require to acquire it in the first place, a point which is acknowledged in Piaget's theory of intellectual development. In Piaget's second (pre-operational) stage, one of the characteristics which he notes is "egocentrism"[75] where all of the child's activities are centred on his/her own body and s/he cannot understand that there are other perspectives than his/her own.[76] Initially, then, the child lacks the ability to empathise. Until s/he develops it, the precondition remains unsatisfied.

(b) Knowledge of Criminality

The other precondition stemming from the principle of communitarianism is the need for the child to have some awareness of the meaning, and consequences, of criminality. The child may be able to understand, at a basic level, that a particular action is wrong

[74] *Ibid*, at p 103

[75] Although he later recast it more as "lack of reversibility of action". Piaget "Stages," *supra*, note 18, at p 39

[76] It has subsequently been suggested that Piaget may have underestimated the ability of children in this respect. See Martin Hughes and Margaret Donaldson "The Use of Hiding Games for Studying the Coordination of Viewpoints" 1979 *Educational Review* 31, 133 in David Messer and Julie Dockrell (eds) *Developmental Psychology: A Reader* (London: Arnold, 1998) at p 279

but if s/he has no understanding that his/her actions operate within a broader societal framework which, in itself imposes certain obligations on him/her, then subjecting him/her to a trial, one purpose of which is to uphold those broader obligations, would clearly lack moral legitimacy.

Both Piaget[77] and Erikson accept that, for the younger child, adult commands will constitute the primary source of normativity.[78] It is implied in psychoanalysis and explicit in Piaget's work that, initially, all such rules are regarded by the child as something external to him.[79]

Piaget specifically studied children's perception of, and respect for, rules, in particular those applying in their own games[80] as one of his main areas of research into moral development.[81] He found that very young children have a deep, almost sacred respect for rules and instructions given by adults and older children.[82] They regard these as unalterable and expect that punishment will be visited on them for any breach.[83] The content of the rules means little to them, and rules

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[77] It should be noted that Piaget conducted his research into moral development almost exclusively on children aged between six and twelve. This was because of the difficulty of constructing a set of moral dilemmas which younger children could understand. Jean Piaget, *The Moral Judgment of the Child* (translated by Marjorie Gabain) (London: Routledge and Kegan Paul, 1932 (1975)) [hereinafter *Moral Judgment*] at p. 120. It seems to be implied, therefore, that he assumed moral maturity at or around the age of twelve.

[78] See, *ibid*, for example at p 47

[79] *Ibid*, *passim*, particularly at pp 18 and 188

[80] *Ibid*, Chapter I, pp 1 - 103

[81] The other two areas were lying and the child's relationship with others. *Ibid*, at pp 135 - 171 and Chapter III, pp 195 - 325

[82] For example, *ibid*, at p 114

[83] Eg, *ibid*, at pp 51 – 53 and 104

which relate to concepts such as the instruction to "be good" are a source of anxiety to them because their intellectual development is not sufficiently advanced to provide them with a referent.[84] Commands related to objects, such as "don't touch the fire" are regarded as a property of the object itself, which again emphasises their external nature.[85]

On a similar theme, with reference to his second phase,[86] Erikson notes the need for very clear boundaries to be set by parents,[87] thus implying that the child, although seeking to behave autonomously, is as yet unable to establish such moral guidelines for him/herself.[88] It is in his third phase,[89] that the superego undergoes a rapid period of development[90] so that, instead of the child acting in accordance with the requirements of his/her parents and/or culture as a purely external source of constraint, their commands and values begin to be internalised. Here, then, is the psychoanalytic origin of the child's conscience.

Thus, the primary moral code for younger children is unquestioning obedience to their elders. This almost total reliance on others for

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[84] Maier, *supra*, note 16, at p 125

[85] See also Piaget, *Moral Judgment*, *supra*, note 77, at pp 250 - 261, where he discusses "immanent justice" - "automatic punishments which emanate from things themselves" (at p 250)

[86] The phase is characterised by a conflict between autonomy on the one hand and shame and doubt on the other. It usually occurs between the ages of 1 and 3.

[87] Erikson, *supra*, note 20, at p 251

[88] Erikson also states that, if there is excessive parental control, the child will feel powerless and unable to exercise any autonomy at all which will have adverse repercussions for his/her self-esteem.

[89] Characterised by the opposing pulls of initiative and guilt and usually occurring around ages 4 and 5

[90] Maier, *supra*,note 16, at pp 46 - 47

definition of "good" and "bad" tends to suggest that they are not in a position to be held responsible for the actions resulting from the external commands. Piaget draws a distinction between constitutive and constituted rules.[91] Constitutive rules require an understanding of the "spirit of the game" - of an overarching ethos in accordance with which constituted rules – effectively "the letter of the law" - are made. Until the child begins to appreciate the existence and content of the constitutive rules, s/he cannot fairly be held responsible for breach of constituted rules. In other words, the child requires some idea of his/her own as to why an action is wrong.

This will occur once the child begins to internalise values and rules and to evaluate them for him/herself. Piaget considers that this will happen as past of the gradual shift from "unilateral respect" for adults to "mutual respect" between equals. For him, the whole of *moral* development echoes the transition in *intellectual* development from egocentrism - utilising the self as the primary referent in everything - to membership of society.[92] Instead of simply accepting the word of others as to how to behave, the child begins to take an active part in *making* the rules, in association with others.

This process of development is important with regard to the child's understanding that certain actions are criminal because it demonstrates that, initially, the child has a very narrow understanding

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[91] Piaget, *Moral Judgment*, *supra*, note 77, at pp 92 - 93
[92] *Ibid*, at p 53

of wrongfulness, seeing it as directly linked to the objects to which it relates or as emanating from older individuals. S/he lacks the understanding that such instructions have a context in two senses. First, s/he lacks the narrow understanding that there is a reason for an instruction, for example, not to touch the fire, other than the absolute authority of an adult. Secondly, and *a fortiori*, s/he lacks a broad understanding of the need for certain instructions to be obeyed by all members of a society, if that society is to continue to function in a peaceable fashion.

In practical terms, this means that the child may understand that s/he is prohibited from doing certain things – for example, attacking other children – but have no understanding of why this is a rule. Specifically s/he will not link the prohibited act (which is wrong to him/her because a particular adult said it was) with the involvement of the police (who are, to him/her, adult strangers unconnected to the original prohibition) in enforcing the boundaries which the community has set. Since the criminal process and sentencing are even more remote from the act, these are even further outside his/her comprehension.

Taken together, then, these three preconditions - understanding of language, empathy and knowledge of criminality - constitute the threshold for the subjection of a child to a criminal trial. All three must be satisfied – it is not sufficient, for example, to establish that

the child can empathise if s/he lacks the language and abstract reasoning skills necessary to follow a criminal trial.

Distinguishing Preconditions for Criminal Capacity and Criminal Capacity from *Mens Rea*

Assuming however, that these preconditions can be met and that the trial proceeds, the court must still approach the mental element as a matter which is in issue. Two further aspects must be determined: (1) the child must have criminal capacity; *and* (2) s/he must have the *mens rea* for the specific offence with which s/he is charged.

Before going any further, it is important to draw out the distinction between the three aspects of the mental element. Criminal capacity has an overlap with, at one end, the preconditions and, at the other, *mens rea*. In relation to the preconditions, the overlap is specifically between the two community membership requirements and the investigation into the capacity points (which will be outlined subsequently) of distinction between right and wrong and understanding of criminality and criminal consequences. The evidence led on the preconditions will also be of relevance to the two capacity points with which they overlap. Chapter 5 will consider how best to approach this difficulty procedurally however, provided the evidence led on the preconditions is available to the court investigating capacity, no insurmountable problem arises. Apart

from this, the preconditions are self-contained and must be determined prior to all other aspects of the trial process.

Preconditions are a novelty in the criminal process. Capacity and *mens rea* both already exist yet the distinction between them is rarely drawn. Indeed, if capacity is considered at all, it is often regarded as subsumed within *mens rea*. For example, Merrin v S[93] where the High Court was required to determine whether a child aged under the age of criminal responsibility could commit an "offence" in any circumstances, decided that s/he could not do so, on the basis of his/her inability to formulate *mens rea* or *dole*,[94] with little or no reference to her criminal capacity *per se*, as a different, or separate concept. In the same vein, a leading (English) textbook discusses the "character conception" of responsibility in contrast to the "capacity conception" but both under the broad heading of "*mens rea*".[95] The distinction between *mens rea* and capacity may well not be significant in relation to a sane adult, in respect of whom no question of lack of understanding or rationality arises. It is, however of considerable importance in ensuring that children are only held responsible for criminal activity where they have sufficient understanding of what they are doing.

[93] Merrin v S 1987 SLT 193
[94] *Ibid*, at p 196
[95] C M V Clarkson and HM Keating *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 2003) at pp 117 - 119

Capacity is directly related to understanding; *mens rea* is, at base, simply a component element of the crime, which must be proved, as a fact, by the Crown beyond reasonable doubt, in the same way as the *actus reus*. Victor Tadros' analysis of the distinction between two different aspects of responsibility - "attribution-responsibility" and "capacity-responsibility" - under the criminal law is helpful in drawing out this distinction.[96]

Attribution-responsibility "concerns the way in which [a particular consequence, state of affairs or action] came about: say whether it was done intentionally, recklessly or, alternatively was a mere accident, or whether it was justified or excused." Capacity-responsibility, on the other hand, "concerns the kind of agent who performed the action" and whether s/he is "the sort of individual who is regarded as responsible in criminal law."[97] It is submitted that attribution-responsibility is concerned with the "attribution" of *mens rea*. Capacity-responsibility, on the other hand, recognises that there is a notion of responsibility, relevant in criminal law which is *not* specifically tied up with the accused's ability to formulate *mens rea*. If the act is not "brought about in an appropriate way" the agent lacks attribution-responsibility. If the agent is "not an appropriate subject of criminal responsibility", s/he lacks capacity-responsibility. Using these concepts, Tadros demonstrates that the doctrine of insanity

[96] Victor Tadros "Insanity and the Capacity for Criminal Responsibility" 2001 *Edinburgh Law Review* 5, 325
[97] *Ibid*, at pp 326 - 327

need not to be contingent on whether the accused has sufficient rationality to formulate *mens rea*, as is sometimes taken to be the case, but rather on whether s/he is a responsible agent.

The position in relation to children is that capacity and *mens rea* play two different roles, each of which is necessary to the establishment, or otherwise of a child-accused's responsibility for a criminal offence. Capacity relates to his/her understanding; *mens rea*, effectively, to the completeness of the Crown's case. In this thesis, *mens rea* is defined very narrowly so that, as far as possible, any aspect of understanding which would normally be subsumed under that heading is considered instead as an aspect of capacity.

It is logical to consider capacity first because, if it is deemed to be *completely* absent, there is no need to consider *mens rea* (or, indeed *actus reus*) at all because the child is simply incapable of committing crime. As Peter Cane explains,

> "The law absolves certain categories of persons from responsibility for failure to meet its standards because they lack minimum general capacity; but it sets the level of minimum capacity needed for legal responsibility very low. People whose capacity exceeds that minimum level are held responsible regardless of the extent to which their general capacities exceed the minimum. This is not to say that differences in abilities and resources are irrelevant; but they are relevant to deciding how to treat responsible persons, not to attributing responsibility. In legal terms, differences in capacity are relevant to sanctions, not liability."[98]

[98] Peter Cane *Responsibility in Law and Morality* (Oxford: Hart, 2002) at p 76

In fact, however, this chapter argues for the relative conception of capacity, in relation to responsibility itself, which is implicit in Cane's view, in terms of which the child-accused could have *some* capacity without being as responsible for his/her actions as an adult. A child-accused with less capacity is less responsible and *therefore* subject to lesser sanctions. The consequences of this conceptualisation of the issue for decision-making within the criminal process will be discussed in chapter 5.

Currently, the criminal law's primary engagement with the child's capacity is in relation to the age of criminal responsibility, which will be discussed in more detail in the next chapter. It is not, however correct to say that "law" in general can deal with issues of age, maturity and development *only* in a blanket and broad-brush fashion, such as that represented by the age of criminal responsibility or the age at which marriage is permitted.[99] In many areas, the civil law has taken a much more nuanced approach, requiring, for example, an individualised assessment of the competence of a child to give informed instruction to a solicitor[100] and conferring an obligation on courts and children's hearings to take account of the views of the child by reference to his/her maturity.[101] The paradox of imposing criminal responsibility in a blanket fashion, at eight, whilst

[99] Currently 16: Marriage (Scotland) Act 1977, s 1
[100] Age of Legal Capacity (Scotland) Act 1991 s 2(4A) (inserted by Children (Scotland) Act 1995, [hereinafter "C(S)A 1995"] sch 4 para 53(3)
[101] C(S)A 1995 s 16(2)

recognising, in other areas of law, the individualised way in which children acquire abilities, knowledge and competencies is apparent. While this thesis supports, on political grounds, the need for an age of criminal responsibility, linked to capacity, this chapter examines one possible alternative way for the law to conceptualise capacity, unconstrained by the bright line which the age of criminal responsibility represents.

Defining the Child's Criminal Capacity

It is fundamental tenet of the criminal justice system that only those who are "responsible" should be subjected to sanctions. Responsibility is tested by the trial process generally on two grounds: (1) did the accused, in fact, behave in a particular fashion accompanied by a specified mental attitude? and (2) did that behaviour and attitude together constitute a breach of the criminal law? The additional issue which capacity builds into the equation is whether, regardless of the answers to question (1) and (2), there are any grounds for holding that the accused person is *unable* to take responsibility for his/her "crimes" because of characteristics specific to him/her as an individual which prevent him/her from fully understanding, or rationalising[102] his/her behaviour. This part of this

[102] The current law on insanity, for example, makes a direct link between rationality and responsibility. See Hume i, 37; HMA v Kidd 1960 SLT 82; Brennan v HMA 1977 SLT 151

chapter examines what it is that requires to be established in order to answer this third question where the accused is a child.

Before proceeding to do this, it is important to note that capacity *per se* is not the only possible device for dealing with this third issue, which effectively amounts to a question of the *fairness* of attributing responsibility to an individual who, on the available evidence, has *in fact* committed an act which constitutes a criminal offence. One other possible mechanism would be an examination of the accused's character.

Instead of looking at the criminal act in isolation, character responsibility considers it as an expression of the accused's underlying character.[103] As Jeremy Horder has clarified however, this does not mean that evidence of a previously unimpeachable character will serve to exonerate completely an accused who, in the manner of Dr Crippen,[104] has committed a heinous crime. Rather the character conception "limits the inquiry into culpability to aspects of character manifested *by actions themselves*; nothing more or less."[105] This view is appealing in certain respects because, despite its concentration on the act, it still entails a more all-embracing examination of the accused as a person than other approaches to the

[103] For an exposition of the principles of character responsibility see Michael D Bayles "Character, Purpose, and Criminal Responsibility" 1982 *Law and Philosophy* 1, 5

[104] Dr Crippen murdered and decapitated his wife but previously had apparently led a quiet and law-abiding life. See http://www.met.police.uk/history/crippen.htm

[105] Jeremy Horder *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at p 133. Emphasis added

mental element. It also allows for disposals to be tailored to the accused as an individual, taking into account the offence, rather than making the offence the primary referent. In the search for a theory which links punishment, directly and proportionately, to responsibility, its advantage is that it does not tag issues of character onto the end, as part of a plea in mitigation, after the determination that the accused is criminally responsible has been made through his/her conviction.[106] Rather such issues are of the essence of the conviction itself.

With regard to child-accused, however, the overriding disadvantage of the character conception of responsibility, which gives an edge to the capacity approach, with its investigation of *current* abilities and understandings, is the fact that the child's character is unlikely, as yet, to be "settled", therefore sanctioning by reference to it may produce fundamentally uneven results. Of course, this makes the assumption that, in adulthood, individuals all arrive at some settled state, something which is, in itself, open to question. Nonetheless, this point about malleability was recognised, in relation to children, by Hume,[107] whose own conception of the mental element – dole – which will be discussed more fully in the next chapter, has some resonance with character responsibility. The character of a child who

[106] For a full discussion of the benefits of a character approach see Nicola Lacey *State Punishment: Political Principles and Community Values* (London: Routledge, 1988) especially chapter 3

[107] Hume describes "persons under age" as being "naturally deficient in intelligence, and *in firmness or maturity of will.* Hume i, 30. Emphasis added.

commits a heinous crime is, potentially, still redeemable because his/her ways of being are less fixed than those of his/her adult counterpart. It is therefore not as useful to make decisions on responsibility based on that character. For this reason, the character approach is not here examined any further.

Defining Capacity

What is meant by the term "criminal capacity" generally? H L A Hart's well-known exposition of capacity, or the conditions in which a person can be required to take moral responsibility for his/her actions,[108] is a useful starting point from which to examine the child's capacity.

Hart's concept has been explained in these terms:

> "[t]his conception of responsibility consists in both a cognitive and a volitional element: a person must both understand the nature of her actions, knowing the relevant circumstances and being aware of possible consequences, and have a genuine opportunity to do otherwise than she does – to exercise control over her actions, by means of choice.[109]

It is clear then, that understanding of the act in context and its consequences, together with the ability to control one's actions are the key elements. A similar position obtains in relation to children

[108] HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), especially ch 1
[109] Lacey, *supra*, note 106, at p 63

although, because their understanding in general is more questionable than that of adults in the first place, it is necessary to spell out in detail exactly what it is that they are required to understand, and which abilities they need to have, to be held criminally responsible. This goes well beyond the enquiry into the presence or absence of *mens rea* and allows lack of appreciation of, for example, the secondary consequences of a serious assault (ie death) -- a lack of appreciation which may be entirely appropriate to the child's age and developmental status - to be examined, in the *standard* case, as part of the criminal proceedings against the child.

How, then, are the relevant understandings and abilities to be fleshed out to provide an explanation of the concept of capacity? To have criminal capacity at all, the child must have at least a smattering of ability in, and/or understanding of, each of the "capacity points" which will now be examined. This list is indicative of the areas which the court requires to investigate and is not intended to be exhaustive. If the child-accused is *completely* lacking in all of the abilities or understandings then s/he does not have criminal capacity and must be acquitted. In practice, it is unlikely, in this event, that s/he would satisfy the preconditions for criminal liability

The Capacity Points

(a) The Volitional Element

The volitional element in capacity requires that the accused genuinely had a choice as to whether to act illegally or not or, in other words, that s/he had the ability to control his/her actions. It may seem strange to use it as the *starting*-point for a catalogue of capacity points because, in relation to the concept of insanity, there has been much debate as to whether any impulse to action is *genuinely* irresistible as opposed to simply not resisted due to weakness on the part of the accused. Indeed, the Scottish Law Commission has recently argued, in its *Discussion Paper on Insanity and Diminished Responsibility*, that there should be no volitional element in a revised version of the defence.[110] Even commentators who are strongly in favour of a robust set of insanity principles are not supportive of the volitional prong to the defence,[111] primarily because of the difficulty of measuring the irresistibility of an impulse.

What is under discussion here, however, is not so much the issue of irresistible impulse conceived as a, literally, overwhelming urge with which the individual is simply unable to avoid compliance. Instead, the concern in this section is the inability of the child to conform his/her actions to the societal norms represented by the criminal law *because of* his/her lack of development of the appropriate, internal,

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[110] Scottish Law Commission *Discussion Paper on Insanity and Diminished Responsibility* (Discussion Paper No 122) (Edinburgh: The Stationery Office, 2003) at paras 2.47 – 2.51

[111] See Richard J Bonnie "The Moral Basis of the Insanity Defence" 1983 *American Bar Association Journal* 69, 194 at p 196

restraining and controlling mechanisms. It is appropriate to consider the approach taken by developmental psychology to this matter.

In psychoanalytic theory, the ego is central to the child's ability to control his/her impulses and, until it is sufficiently developed to allow him/her to exercise *conscious* control over the id and the superego, s/he cannot be held responsible for actions stemming from an *un*controlled id or superego impulse. In Erikson's second phase[112] (which runs from the end of babyhood until the nursery and pre-school years and is characterised by conflict between a (positive) sense of autonomy and a (negative) sense of doubt and shame) the negative pull towards doubt and shame might suggest that the child is beginning to be aware of "doing something wrong", in a loosely moral sense. In fact, however, both the positive and the negative pulls are id impulses and therefore essentially instinctive. The ego is only beginning to develop to take conscious control over them. The process of ego development is ongoing into adolescence (Erikson's fifth phase),[113] and his fourth phase (commencing in the early primary school years and continuing until puberty) is a period of particularly rapid ego development. The ego becomes dominant as the child aims is to consolidate and refine all existing developmental acquisitions and to be the best in as many spheres as possible.[114]

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[112] Erikson, *supra*, note 20, at pp 251 - 254
[113] See *ibid*, at pp 261 – 263
[114] See *ibid*, at pp 258 – 261

In psychoanalytic theory, then, the ego synthesises the child's understandings and abilities, allowing him/her to organise all developmental acquisitions and to deploy these in achieving new skills. The ego also plays a central role in allowing the child to *control* action and to make moral choices. Accordingly, it is important that the child's level of development in this respect should be assessed as an integral part of his/her criminal capacity. The more developed this central, organising concept, the greater the degree of criminal responsibility which can be imputed.

The ego's counterpart, in Piaget's theory of intellectual development is cognition, which is treated as a purely mental process. (Ego development is influenced by emotional processes as well.) Cognition is the conscious mind's attempt to organise all that the child perceives, thinks or does, throughout childhood and later life, into a cohesive system, so that earlier developmental acquisitions can be applied to solving novel problems. Piaget sites the earliest indications of cognition towards the end of his second (pre-operational) stage[115] yet regards it as still developing very actively in adolescence. Full maturity of cognitive thought occurs, for him, only around the age of 14 or 15.[116]

Any approach to capacity, then, needs to take account of the existence of such an organising concept, be it ego or cognition, and to

[115] Between the ages of, approximately, four and seven. See Maier, *supra*, note 16, at p 125
[116] *Ibid*, at p 150

consider how well this is developed in the particular child-accused before the court. Without it, the child's understandings will be partial and possibly insufficiently connected to support the imputation of capacity to any meaningful degree.

The ego and/or cognition, then, represent an overarching concept governing all of the child's understandings and the ways in which s/he deploys these in rationalising action. There are also a number of more specific matters which a child-accused requires to understand before it is appropriate to hold him/her criminally responsible. These will now be considered.

(b) Distinction Between Right and Wrong

It is fundamental that a child-accused should understand that his/her action is wrong. This corresponds to Hart's requirement of understanding of the nature of the act. The difficulty for the criminal law is in establishing in what sense and to what degree. Where this question has been asked at all traditionally, it has tended to be considered one-dimensionally because of the criminal law's preference for black and white tests to which a straightforward "yes" or "no" answer can be given.

In Scotland, after Hume and Alison, it appears that there has never been any systematically applied test – nor indeed any particular

concern about this deficiency.[117] In England, until its abolition in 1998,[118] the *doli incapax* doctrine made the legal presumption which, as an intrinsic element of its case, the prosecution had to lead evidence to rebut, that children aged between 10 and 13 (inclusive) were *in*capable of *dolus* or evil. The presumption, which will be discussed in more detail in the next chapter, therefore covered some of the appropriate ground but also constituted a good example of the difficulties and inconsistencies arising where the issue was reduced to a single question. In the standard case, this question would be whether the child understood his/her action to be seriously wrong, as opposed to merely naughty.[119] A number of other, often contradictory, formulations were also used, however.[120]

What is, in fact, required in relation to this capacity point is a broad investigation into a number of related matters, none of which is exhaustive of the issue. In order to satisfy the precondition of empathy, the child-accused will have a basic, possibly inchoate, understanding of the fact that his/her actions can impact adversely on another. In order to have (some) criminal capacity on this point, s/he should understand that his/her action is wrong morally and legally because it causes harm and it is contrary to his/her society's accepted norms. S/he should also have some understanding of degrees of

[117] This is discussed in more detail in the next chapter.
[118] Crime and Disorder Act 1998, s 34
[119] See C (a minor) v DPP [1995] 2 Cr App R 166
[120] Eg morally wrong: JBH and JH (minors) v O'Connell [1981] Crim LR 632; knowing the difference between good and evil: B v R 1960 44 Cr App R 1

wrongfulness – that it is more reprehensible to kill a baby than a cat for example, although each of these may appear to a small child to be an animate object taking up the attention of adults which is, in itself, unable to communicate effectively, by the use of language.

These issues are bound up with the child's moral development and the way in which s/he develops an understanding of rules and begins to internalise concepts of self-discipline[121] and reasons for conforming behaviour to acceptable standards. Until such time as the child begins to build on the rules which s/he has been taught to create his/her own value system, s/he will have very little understanding of the reasons for the proscription of some actions and the sanctioning of others.[122]

(c) Causation

The next capacity point is causation. For the imputation of criminal capacity, the child must have some understanding of his/her behaviour as the trigger to a chain of causation. For example, a child who throws a bottle out of a fifteenth floor window[123] must understand that this action may have knock-on effects, such as serious injury to a passer-by or damage to property, which are directly attributable to the act and for which, therefore, s/he is

[121] Modern child-rearing manuals point out that very young children cannot be expected to have any self-discipline and that it only becomes firmly established in later adolescence. See Christopher Green *Toddler Taming: A Parents' Guide to the First Four Years* (London: Vermilion, 1990) at p 42

[122] See Piaget, *Moral Judgment*, *supra*, note 77, at p 53

[123] As happened in W v HMA 1982 SLT 420

responsible. The point made by the defence in a 1749 case where the twelve-year old accused was convicted of murder remains valid: "[c]hildren are more ignorant of natural operations ... [which] are only picked up by experience. ... [They] are not supposed to know, because, in fact, they seldom know the natural effect of any of their actions."[124]

An assessment must be made of the extent to which the child understands the physical rules of causation and, particularly of his/her understanding of his/her agency in bringing about remoter consequences. For example, in an assault, the child-accused is likely to have understood that striking a victim with a baseball bat would cause injury. It may be less clear, however, whether s/he understood that the same act might cause internal injuries which in turn might cause death. Again, s/he may have no understanding of the finality of death as an absolute state, from which the victim cannot be resuscitated. S/he may not have any understanding of the extent to which committing a crime such as theft can cause emotional distress to the victim. Factual issues of this nature require to be investigated in all crimes.

Developmentally, the argument being advanced here is that the child-accused must be able intellectually to link up the action with the result flowing from it. This process requires the child to have

[124] HMA v Alexander Livingston 1749 Maclaurin No 55, at p 116

mastered Piaget's concept of "reversibility", an ability which s/he begins to develop in Piaget's fourth phase[125] but which is only perfected during adolescence.

As was noted previously, this ability allows the child to separate out a series of actions carried out as a sequence and to start with any one of them, working through the process in any order. The child is always able to come back to his/her starting point and this discovery helps him/her in his/her understanding of the whole of an event as a series of connected parts. The developmental advance in the fourth phase is that the child acquires the ability to conceptualise the process which s/he is dissecting so that s/he can see how the operation works by thought alone. Previously, this was only possible where the relevant objects were physically present. Because the ability to return to the beginning is never lost, the child can experiment with different means of accomplishing a task. In this way, s/he discovers the existence of more than one perspective and his/her interest in which means can bring about which ends is stirred.[126] Reversibility, then, enhances the child's ability to understand the relationship between two events, such as an act and its consequences.

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[125] of formal operations (commencing at approximately age 11)

[126] Piaget sites the development of reversibility in his third phase of "concrete operations" which, on average, covers the period from seven to 11 years. It is not, however until the fourth phase – the final one identified by Piaget – that the child can perform reversibility exclusively by thought. Until then, s/he needs actually to see and to manipulate objects in order to understand how they work and their relationship to each other. In the fourth phase, an explanation may be enough.

(d) Understanding of Criminality and Criminal Consequences

Satisfaction of the precondition of knowledge of criminality implies that the child-accused understands that his/her membership of a society allows intervention, on behalf of that society, by the police where s/he has committed a wrongful act. To have some criminal capacity on this point, s/he must also understand that police involvement begins the criminal process, which may ultimately lead to the imposition of a sanction for breach of the criminal law – society's agreed behavioural boundary. The child may not, of course, understand in quite these terms! S/he should, however, know that seriously wrongful acts engender the involvement of the police as a first step towards the imposition of punishments such as loss of liberty. For a very small child, this is arguably so remote from the physical consequences of the act as to be justifiably beyond his/her consciousness.

In assessing the child's ability and understanding in respect of this capacity point, then, the psychological issues covered for the knowledge of criminality precondition will be revisited, particularly the issue of the child's understanding of rules and the extent to which s/he has made the transition from merely following adult commands and sticking rigidly to the "constituted" rules to an understanding of the spirit underlying the rules.

A child who is completely without an understanding of the interface between doing wrong as a matter purely for those concerned, and doing wrong as a societal issue, lacks criminal capacity on this point.

(e) Rationality

A number of commentators regard rationality as the key to capacity, at least as far as adult-accused are concerned. Tadros, for example, uses it coupled with self-control, to ground his concept of capacity-responsibility[127] and Richard Bonnie, in his examination of the moral basis of the insanity defence notes that "it is fundamentally wrong to condemn and punish a person whose *rational control*[128] over his or behaviour [is] impaired."[129] For John Gardner, rationality is not only central to criminal capacity but also, at a much more basic level, to the status of being a human being because human beings require it of themselves to give reasons for their actions.[130] Rationality goes beyond the understandings already discussed in that it facilitates the ordering of thought and allows the actor to *explain* his or her actions.

Gardner's concept of "basic responsibility" requires that an actor has the ability to have, and to deploy, reasons for acting whilst s/he is actually doing so and then to use those same reasons in explaining, or giving a good account of, those actions at a later date. Gardner's view is that while it is reassuringly human to wish to avoid the

[127] Tadros, *supra*, note 96, at p 346
[128] Emphasis added
[129] Bonnie, *supra*, note 111, at p 195
[130] John Gardner "The Mark of Responsibility" 2003 *OJLS* 23, 157, at p 158

unpleasant consequences of one's actions, actors seek to do this by the use of rational explanation. "As rational beings we cannot but aim at excellence in rationality."[131] Human actors therefore, do not simply wish to avoid punishment but rather to demonstrate that their reasons for acting were so good, so justified, so reasonable that punishment is not deserved. At his/her trial then, the accused must be able to explain to the court the reasons for his/her actions at the time of the offence. In this way, basic responsibility applies at both points in time: during the commission of the crime and during its explanation to the court.

There are difficulties with the application of rationality to children. Gardner himself identifies infancy as a factor which may effectively eliminate basic responsibility.[132] Jean-Jacques Rousseau, in *Émile*, his outspoken treatise on children and child-rearing, states that childhood is "the sleep of reason",[133] which might suggest that it is inappropriate even to attempt to impute rationality to the very young. If, however, rationality in some way equates with humanity, then although it is clear that children's reasoning ability is not as developed as that of an adult, it is necessary to credit them with some rationality. Its extent in the individual case is, again, a matter for investigation. Developmentally, Piaget's concept of reversibility which has already been discussed, and which is not perfected until

[131] *Ibid*, at p 158
[132] *Ibid*, at p 162
[133] Jean-Jacques Rousseau *Émile* (London: Everyman, 1993) (1762) at p 84

late adolescence, demonstrates the considerable period which the refinement of reasoning ability occupies in the lifespan. Children, then, are rational but in different degrees depending, *inter alia*, on age.

Finally, it is worth noting that if the court carries out an inquiry into the child's reasoning abilities – the extent of his/her rationality – then the likelihood is that this will lead it into some exploration of *why* the child committed the crime. In general, motive is not relevant to the criminal law. The Scottish courts have not been impressed by submissions that setting a dog on young boys was done as a joke[134] nor that vandalism of nuclear installations is justified by the belief that nuclear weapons are contrary to international law.[135] As is clear from the previous chapter, however, some serious violent crimes committed by children provoke even greater outrage than those of their adult counterparts and, alongside that, because of the position in which children are often placed in society, as primarily vulnerable and in need of protection themselves, there is a greater demand to understand "why" they acted in such an apparently uncharacteristic fashion. Examining how such a child reasoned to the conclusion which led him/her to act, may provide some answers.

(f) *Mens Rea*-Related Capacity Points

[134] Quinn v Lees 1994 SCCR 159
[135] John v Donnelly 1999 SCCR 802

The issue of *mens rea* in this threefold formulation of the mental element (preconditions, capacity, *mens rea*) will be discussed in the next section. As far as possible however, all issues of understanding are to be stripped from *mens rea* and considered as part of the child's criminal capacity. This means that certain issues, which are closely related to *mens rea* and, therefore, usually subsumed within it, may have to be considered instead, or as well, as part of the child's capacity.

Perhaps the most likely one is the child's developmental ability to intend. In fact, the child's basic ability to intend, in terms of desiring an outcome and taking steps to attain this, is one of the earliest capabilities developed. Piaget identifies the very first stirrings of the notion of intention during the second stage of his first "sensorimotor" phase[136] i.e., on average, during the second month of the child's life. Previously the child has taken in food, expelled waste products, cried and slept purely as reflex actions necessary to his/her survival. As a result of the repetition of these reflex actions, sometimes, by accident, in a slightly different way from previously, the baby learns to carry them out voluntarily. S/he has the first glimmering of an understanding that a certain action may lead to a certain result. Piaget terms this a "primary circular reaction".[137]

[136] Roughly from birth until the age of two.
[137] Maier, *supra*, note 16, at p 105

At a more sophisticated level, intention depends on the development of the ego and the child's cognitive abilities, as discussed in relation to the volitional element of capacity, because intention requires that the child should bring together his/her desire for a particular outcome with his/her ability to think through the means of bringing it about. To be turned into an intention, these elements require some organisation - the role played by the ego and cognition.

This indicates that the basic question of intention can be allocated to *mens rea* and dealt with very narrowly, because even the youngest children have an awareness of the principle of seeking to effect a desired end. Other issues, such as the child's understanding of bringing about direct, but undesired consequences through an intended act, will require further investigation. These may be covered under other capacity points such as causation and knowledge of criminality and consequences but, to the extent that they are not, should be investigated in their own right.

Similarly, with regard to recklessness, it will be necessary to investigate the child's understanding of risk, a point which is closely related to his/her understanding of causation.

Mens Rea

In the model of the mental element adopted by this thesis, all that is left for *mens rea* to do, after the preconditions and capacity points

have been dealt with, is to provide a justification for the imputation of fault to the child on the basis that a harm proscribed by the criminal law occurred as a result of behaviour which s/he had intended or known about or as a result of a risk which s/he had recklessly taken. This is because the same moral difficulties arise as with adult-accused if the child is completely unaware of his/her role in the commission of a criminal offence, a matter which has been described as "the public scandal of convicting on a serious charge persons who are in no way blameworthy."[138]

As far as possible, *mens rea* is seen as a purely factual matter, without which there is no case to answer. As Lord McCluskey stated, in a case where a plea of automatism had been led: "I know of no exceptions, other than statutory ones, to the rule that the Crown must prove *mens rea* beyond reasonable doubt. ... If there were to be no such evidence at all the proper verdict ... would be a simple verdict of "not guilty.""[139]

In theory, in this chapter, *mens rea* is conceptualised as divested of all questions of understanding, which are, instead, considered as part of the child's criminal capacity. *Mens rea* therefore becomes the narrowest possible concept. Thus, if the child "meant" to hit his/her sibling with a wooden brick, for example, this would, *prima facie*, constitute the *mens rea* of assault - issues of his/her understanding of

[138] Sweet v Parsley, *supra*, note 2, at p 149
[139] HMA v Ross 1991 SLT 564 at p 575

the causation of injury or the distinction between right and wrong having already been dealt with as part of the investigation of capacity.

In certain respects, this view of *mens rea* corresponds to the principle of "ideal subjectivism which was originally conceived by JWC Turner in the 1940s and taken on board by Glanville Williams in his systematic exposition of English criminal law,[140] becoming, for a period over the middle years of the twentieth century, the main academic perspective on *mens rea*.[141] Jeremy Horder has explained the concept as follows:

> "... [u]nder "ideal subjectivism, a defendant will not be found guilty of a crime to which moral stigma attaches, unless he or she intended his or her conduct to bring about (or was aware that his or her conduct might bring about) the forbidden consequence in question. The subjective *mens rea* must "correspond" with the exact nature of the *actus reus*."[142]

Thus, the accused is made responsible, both morally and legally, for only those consequences of an action which were exactly and directly in his/her contemplation when s/he carried it out. For example, during police interrogation Jon Venables indicated that he and Robert Thompson had continued to hit James Bulger with bricks because "James just kept on getting back up again. He wouldn't stay

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[140] Glanville Williams *Criminal Law: The General Part* (London: Stevens & Sons Ltd, 1961) (First edition published in 1953)
[141] Jeremy Horder "Two Histories and Four Hidden Principles of Mens Rea" 1997 *MLR* 113, 95 at p 95
[142] *Ibid*, at p 97

down".[143] Ideal subjectivism could take on board the intention to make him stay down without necessarily adding into the equation the virtual certainty of death which such an attack would engender.

In fact, the ideal would be for the court to be required to ask only "Did this child intend / know / behave recklessly?" receiving the "yes or no" answer which was regarded as so deficient in relation to capacity. In practice, however, it is impossible to narrow the matter down to this extent. Ideal subjectivism ultimately foundered because of the sheer difficulty of achieving its aims. The existence of *mens rea* is usually determined objectively, by an examination of the surrounding circumstances, because of the impossibility of knowing what was actually in the mind of another. This is, however, what would be required for ideal subjectivism to operate effectively. By the same token, even the thinnest possible concept of *mens rea* cannot avoid taking on board some extrinsic issues since this is dictated by the definition of *mens rea* in individual crimes.

Antony Duff has drawn a distinction between "intended" consequences, which correspond to the narrowly drawn concept of intention described here, and "intentional" consequences which include foreseeable outcomes. As he has shown, it is all but

[143] David James Smith *The Sleep of Reason: The James Bulger Case* (London: Arrow, 1994) at p 125

impossible for the criminal law to utilise one of these concepts exclusively, without touching on the terrain occupied by the other.[144]

In Scotland, following the case of Drury v HMA,[145] murder exemplifies this difficulty. The issue which the court was required to decide in that case related to provocation where the loss of self-control was induced by infidelity. The High Court re-examined the *mens rea* for murder and decided that, in order properly to differentiate it from culpable homicide, it was necessary not only that the accused should have *intended* to kill but that that intention should have been wicked. Cases of provocation were therefore not, strictly speaking, murder *reduced* to culpable homicide but never, in fact, murder in the first place because the intention accompanying them was not wicked.

In a case of murder involving a child-accused then, asking the "yes/no" question as to whether s/he intended to kill would not be sufficient to satisfy the *mens rea* element. The court would still have to hear evidence from the prosecution to substantiate its factual claim that that intention was wicked, even if the issue of the child's understanding of wickedness had already been canvassed during the investigation of his/her capacity. Issues as to the scope of intention, while strictly matters of law, might create a similar overlap with

[144] R A Duff "Intention, Mens Rea and the Law Commission Report" 1980 *Crim LR* 147
[145] 2001 SLT 1013

capacity which can only be resolved fairly to the child-accused through examination under both headings.

For example, the English law on murder, which requires intention (or "malice aforethought") has generated a considerable literature, both judicial and academic,[146] as to what should be included within the scope of intention. The current received view is set down in the case of R v Woollin[147] which held that only outcomes which are a virtual certainty of the intended act may be regarded as subsumed within the defendant's intention. In order to treat a child-accused fairly then, the court would require to hear factual evidence as to whether the death of the victim was a "virtual certainty" following from the accused's act in order to make out the *mens rea*. But, in relation to capacity, it would also require to hear testimony as to whether the child was able intellectually to understand this.[148]

The position in relation to recklessness is even more complicated because, to a greater extent than intention, recklessness rests on key understandings of risk and of the likelihood that an action will create a risk. It may be that children regularly act recklessly because their experience is more limited than that of adults and they therefore require to test boundaries and to establish for themselves, by experimentation what behaviour constitutes a risk. The case of HMA

[146]Eg Antje Pedain "Intention and the Terrorist Example" 2003 *Crim LR* 579; RA Duff *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990)
[147] [1999] 1 AC 82
[148] This would be covered by the causation capacity point

v S, has, in fact, endorsed the suggestion that a different standard for recklessness might be applied to children in appropriate cases.[149]

Scots law currently adopts an objective perspective on recklessness so that behaviour is reckless, if other (reasonable) people would regard it as being so.[150] This suggests that it is possible to identify a quality of recklessness - i.e. what it is that reasonable people regard as reckless - which is sufficient to satisfy the *mens rea*, but which is divorced from issues of understanding.[151] The difficulty is that children's lack of understanding and experience may cause them to act even more recklessly than their adult counterparts. This creates a situation which is dangerous to the preservation of the peaceful society but where their lack of understanding renders it particularly difficult to criminalise their behaviour. As Stewart Field and Mervyn Lynch have suggested "the young, the inexperienced and the mentally disordered may all in different ways lack the capacity to foresee at least some of the risks that the prudent person might perceive as 'obvious' or indeed 'obvious and serious'."[152] The consignment of issues of understanding to the arena of capacity however allows both issues to be dealt with more easily. The

[149] This is discussed in the next chapter.
[150] See Robson v Spiers 1999 SLT 1141
[151] That is to say, it is reckless to drop a bottle from a fifteenth floor window, or to chase bullocks along a road and reasonable people would recognise it to be so simply by judging the behaviour. The issues of the accused's understanding of risk is separate from this and could not be part of the judgment made by the reasonable person because the accused is unknown to him/her.
[152] Stewart Field and Mervyn Lynch "The Capacity for Recklessness" 1992 *Legal Studies* 12(1), 74 at p 76

dangerous behaviour is curbed because the child's participation in a risky activity without due regard to the dangers, judged objectively, is enough to satisfy the *mens rea* and therefore to criminalise the behaviour but the response of the criminal justice system is tempered by its investigation into his/her actual understanding of his/her actions. Where the child genuinely has little or no understanding of the risks, it is unlikely that s/he would satisfy the preconditions, particularly of empathy, for subjection to the criminal trial in the first place.

The approach to the *mens rea* of knowledge depends, even more for children than for adults, on what it is that the specific crime requires the accused to know. In reset, for example, the requirement that the accused knew that the goods were stolen may be satisfied without too much difficulty, as a bare statement of fact, provided it is read in the child's terms, stripped of any imputed understanding of the technical legal aspects of the crime of theft.[153] It is particularly important that the precondition of understanding sufficient to facilitate participation is met in such cases, especially if the knowledge called for is complex or specialised because, if the child cannot understand the crime, s/he will be unable to answer it. Beyond this, issues of understanding belong to capacity.

Conclusion

[153] Or, *a fortiori*, embezzlement or fraud

This chapter has argued that the child's understanding of the crime in context is key to the imputation to him/her of any degree of criminal responsibility. It has therefore sought to reconceptualise the mental element in crime, where the accused is a child, to clarify the specific understandings which the child requires in order to be held criminally accountable. It has drawn extensively on the theories of Jean Piaget and Erik Erikson to demonstrate that children acquire and refine understandings and abilities throughout childhood, that these are acquired on an individualised basis and that, accordingly, it is not appropriate to make assumptions about what any individual child-accused might or might not understand without specifically investigating this. The two theories taken together also demonstrate that the child is developing in several areas simultaneously. Piaget is concerned with intellectual and moral development - Erikson with the emotional dimension.

Understanding is important in two particular respects. First, the court must establish whether the child can be tried at all. This requires that s/he should understand enough of the legal language and the concepts used in the trial, to be able to participate actively. Equally, however, for the trial to be meaningful and fair, the child must have begun to acknowledge his/her position as a member of a community which both generates and then enforces its boundaries using the criminal law. Without this understanding, the child-accused will not understand the justification for being tried – that is for scrutinising

his/her action, against one other person, which s/he may regard as private, in a formal, often public forum, with the power to impose sanctions including the deprivation of liberty. The chapter argues that this requires that the child-accused should be able to empathise with others to the extent of understanding the need to exercise control over his/her own behaviour to avoid causing harm to those others. The child must also have some understanding of the purpose, effect and trappings of criminality including the role of the police. These three understandings are grouped together as preconditions which constitute a threshold for proceeding to the trial itself.

If the child-accused meets the preconditions, it is appropriate to try him/her. Within the trial process, the chapter specifically separates out criminal capacity from *mens rea*, requiring that the court actively investigates the former. This investigation is predicated on the attempt to ascertain the child's understanding of the act in context and is achieved by the investigation of the six capacity points listed and explained in the chapter *viz*: the volitional element, the distinction between right and wrong; causation; understanding of criminality and criminal consequences, rationality and the *mens rea*-related capacity point. The chapter seeks to indicate the role which developmental psychology might play in establishing these points.[154]

[154] The nature of the evidence required to establish the points is discussed in more detail in chapter 5.

Finally, the Crown must prove, as a factual issue, beyond reasonable doubt, in the normal way, that the child-accused carried out the *actus reus* of the crime with the necessary *mens rea*. *Mens rea* which, as the chapter argues, is sometimes regarded as subsuming all and any relevant issues of understanding, is here conceived in the most pared down formulation possible. As far as possible, all issues of understanding are stripped from it and considered as aspects of capacity.

The child is criminally responsible if s/he committed the *actus reus* with the relevant *mens rea* **and** s/he has some understanding of the capacity points. Responsibility is, however, a relative concept which varies by reference to the level of capacity imputed in each individual case. Chapter 5 considers the implications of this.

This chapter, then, has presented a model for investigating the child's understanding in order to establish his/her criminal capacity and, on the basis of this, the degree of criminal responsibility which s/he can take for his/her actions.

The threefold characterisation of the mental element put forward here allows the criminal process to respond to the child as an individual with certain developmental deficits whilst, at the same time, responding appropriately to his/her criminal act(s). This tension between the child as vulnerable and in need of protection on the one hand, and as the perpetrator of serious wrongful acts on the other, is

present in all aspects of the criminal process's engagement with children. The next chapter examines the way in which Scots criminal law has dealt with this difficulty.

Chapter 3

The Treatment of Children in Scots Criminal Law

Introduction

Thus far, this thesis has been concerned with two main themes. The first is the tension inherent in the status of "child-criminal" arising from being, simultaneously, vulnerable and in need of protection and capable of seriously anti-social, sometimes violent, behaviour. The second is the search for a mechanism within criminal law to take account of the child's actual understanding of his/her criminal act in context so that an appropriate level of criminal responsibility can be imputed to him/her. This chapter examines the approach taken by Scots criminal law to children who commit serious crimes both historically and in contemporary times. In particular, it will consider the place of the child's criminal capacity but it will also touch upon the importance or, conversely, in some cases, the apparent irrelevance, of the accused's status as a child. The chapter is organised chronologically commencing with the institutional writer, Mackenzie and ending with cases decided in Scotland under the Human Rights Act 1998. It also draws on comparative material to elucidate certain of the points discussed including, specifically, a discussion of the *doli incapax* presumption as it was applied in English law until 1998, since this is a good example of the difficulties arising from addressing capacity only in a very narrow

sense. Overall, the chapter seeks to demonstrate the need, and the scope, in the modern law, for a broader and more detailed investigation of the child-accused's understanding of his/her alleged criminal acts.

Before proceeding to examine the capacity issue *per se* however, it is useful to provide a brief overview of some of the other historical currents in relation to children who offend, both in Scotland and comparatively. In particular, it is helpful to identify the nature of the punishments historically imposed on children.

Historical Overview

The rules of the criminal law have always been of general application to both adults and children. It is as much murder, for example, if a child kills with wicked intention as if an adult does so. Differentiation between the two groups therefore arises, if at all, in relation to the *application* of the law. For example, it is known that the Anglo-Saxon king, Athelstan, passed a law specifying that no child under fifteen could be executed unless he had resisted or fled.[1] Similar leniency is discernible in the Netherlands in the sixteenth century where there is some evidence that children aged under twelve

[1] J.W. Cecil Turner (ed) *Kenny's Outlines of Criminal Law* (Cambridge: Cambridge University Press, 1966) (nineteenth ed) [hereinafter *Kenny*] at p 78, n 7. Athelstan lived from 895 - 940 AD and became king of the whole of England in 925. Blackstone also credits Athelstan with setting the age of legal responsibility at twelve, in all cases of theft, for a greater sum than twelve-pence. Sir William Blackstone *Commentaries on the Law of England* (London: Thomas Tegg, Cheapside, 1830) Vol. IV, (17th edition) [hereinafter IV Blackstone] at p 23

"either did not appear in court or received such light punishment that it was not worth registering" and "[c]hildren between age twelve and fifteen received milder punishments than adults"[2]

The general rule in Scotland which was, in principle, applicable to adults and children, was that capital punishment was mandatory for offences such as murder, theft and fire-raising. One consequence of this was that it applied to crimes which seem minor by modern standards. For example, because theft was a capital crime, hanging could be imposed for pocket-picking.[3] In the sixteenth and seventeenth centuries, in England, there is evidence of this, the ultimate penalty, actually being carried out against very young children. Kenny reports that "a boy of eight was hanged in 1629 for burning two barns and it appears that a brother and sister aged seven and eleven respectively were hanged for felony at King's Lynn in 1708".[4]

In Scotland, lesser punishments were known as "arbitrary pains" and the courts had discretion in deciding what to impose once it was clear that the death penalty was not to apply. The punishments to which children were subjected, having been 'saved' from the gallows however, seem barbaric when judged by modern standards. For

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[2] Josine Junger-Tas "The Juvenile Justice System: Past and Present Trends in Western Society" in Ido Weijers and Antony Duff (eds) *Punishing Juveniles: Principle and Critique* (Oxford: Hart, 2002) 23 at p 25

[3] In his discussion of the legal treatment of minors, Hume mentions the case of "a lad of about eighteen", Walter Ross, who had the death sentence passed for such an offence in 1786. Hume, i, 30

[4] *Kenny*, *supra*, note 1, at p 80. Blackstone makes reference to the same case: IV Blackstone at pp 23 - 24

example, in 1493, Thomas Gothraston, aged eight, was sentenced to be scourged to the effusion of blood for the murder of John Smith – because the law could not justify imposing the death sentence on someone of his age.[5] Again, in March 1701, two boys, Duff, aged fourteen and Millar, aged about twelve were convicted, along with two "grown men" of breaking into the Earl of Home's house and stealing a quantity of plate. The libel against the two boys was only found relevant to infer an arbitrary pain.[6] In other words, there was not enough evidence to convict them of the capital crime of theft by housebreaking. One of the men was, however, "condemned to die". Duff and Millar were sentenced to be "scourged at the gibbet, at the time of his execution and Duff [was to] stand for an hour with an ear nailed to the gibbet in the presence of Millar."[7] It also seems to have been common practice to impose a "transportation pardon" on children convicted of capital crimes.[8] They were transported to penal colonies abroad, sometimes for life,[9] this being considered humane by comparison with hanging.

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[5] Maclaurin *Arguments and Decisions in Remarkable Cases Before the High Court of Justiciary, and Other Supreme Courts, in Scotland* (Edinburgh: J Bell, 1774) at p 747

[6] Criminal procedure at this time required a debate on the relevancy of all libels. Having heard argument, the judge then pronounced an interlocutor, on the basis of which the matter was remitted to an assize to determine guilt or innocence. John W Cairns "Hamesucken and the Major Premiss in the Libel, 1672-1770: Criminal Law in the Age of Enlightenment" in Robert F Hunter (ed) *Justice and Crime: Essays in Honour of the The Right Honourable The Lord Emslie* (Edinburgh: T&T Clark, 1993) 138 at pp 143 – 144

[7] Hume i, 33

[8] See examples given by Hume i, 31 – 34; Alison i, 664 - 5

[9] Alexander Livingston 1749 Maclaurin no 55

This, then, provides a flavour of the historical approach to children who offend and of the context within which the institutional writers were operating. It is appropriate, therefore, now to examine their work.

Institutional Writers

The institutional writers have been key to the development of Scots law. Between the seventeenth and the nineteenth centuries, three attempts to set down the principles specifically of criminal law in a comprehensive and accessible fashion are notable, each of which has acquired the status of an institutional writing - a primary source of law. The first edition of *The Law and Customs of Scotland in Matters Criminal* by Sir George Mackenzie is dated 1678, Baron David Hume published the first edition of his *Commentaries on the Law of Scotland, Respecting Crimes* in 1797 and Archibald Alison's *Principles of the Criminal Law of Scotland* appeared in 1832. Of these, Hume is pre-eminent, perhaps because Alison's account is notably derivative of his.

All three writers paid close attention to the question of crimes committed by children. It is, therefore, interesting that there has been very little contemporary commentary on this aspect of their work. The Scottish Law Commission did ground its discussion of the age of criminal responsibility in Hume and Alison, but it was at pains to argue that they were concerned solely with the imposition of

punishment and not at all with capacity or *mens rea*.[10] This chapter contends that this is too limited a reading of Hume and Alison. It is true that they were primarily concerned with the issue of punishment but the argument here put forward is that they justified its imposition at various ages by reference to the child's understanding of issues which would come under certain of the capacity points identified in the previous chapter. It is, therefore, arguable that capacity was seen as an integral part of the process of determining and applying punishment.

The Law Commission's Report makes no reference to Mackenzie. This is a surprising omission because it leaves the Commission's analysis of the historical foundations of Scots law in this area incomplete. Also, and more importantly, Mackenzie's view on children who offend is noticeably different to Hume and Alison's but strikingly similar to the recommendation ultimately made by the Commission – that children should be *immune* from prosecution up to the age of twelve.[11] It is appropriate, therefore now to examine the content of these three institutional writings with regard to child-offenders.

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[10] Scottish Law Commission *Discussion Paper on Age of Criminal Responsibility* (Discussion Paper No. 115) (Edinburgh: TSO, 2001) paras 2.8 – 2.10; Scottish Law Commission *Report on Age of Criminal Responsibility* (Scot Law Com No 185) (Edinburgh: TSO, 2002) paras 2.2 – 2.3

[11] The relevant age will be discussed in more detail in chapter 5.

Dole

In order to understand the position of Hume and Mackenzie in relation to the *child's* criminal responsibility and liability it is necessary firstly to have an understanding of the way in which the mental element, which consisted in "dole," was conceived generally in their time.[12] By the time of Alison, the beginning of the shift towards the modern concept of *mens rea* is discernible, at least in relation to certain crimes.[13]

Hume's whole analysis of the criminal law of Scotland commences with a discussion of "the nature of crimes",[14] central to which is this concept of "dole" which he defines as "that corrupt and evil intention, which is essential (so the light of nature teaches, and so all authorities have said) to the guilt of any crime."[15] Although he uses the word "intention", thus suggesting a concept similar to the modern *mens rea* requirement,[16] he goes on to qualify his explanation in this way:

> "Now, in delivering this precept, those authorities are not to be understood in this sense, as if it were always necessary for the prosecutor to bring evidence of an intention to do the very thing that has been done, and to do it out of enmity to the individual who has been injured. In this more

[12] See Lindsay Farmer *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge: Cambridge University Press, 1997) [hereinafter *Genius*] at pp 132 - 133

[13] See *ibid*, at p 160 with regard to homicide

[14] Hume i, 21.

[15] Hume i, 21.

[16] J Irvine Smith and Ian MacDonald have suggested that "[t]he doctrine of *mens rea* ... existed in Scotland from medieval times": "Criminal Law" in The Stair Society *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958), Volume 20, chapter XXI, at p. 280. This does, however, seem to be slightly mis-stating the case.

> favourable sense to the prisoner, the maxim cannot be received into law; for it would screen many great offenders from the due punishment of their transgressions. And I think it is only true in this looser and more general, but a practical and reasonable sense, ... that the act must be attended with such circumstances, as indicate a corrupt and malignant disposition, a heart contemptuous of order, and regardless of social duty."[17]

Hume's understanding of the mental element of crime, in the form of dole, then, is of a pervasive wickedness of character[18] which, he appears to be implying, would be necessary before an individual would be motivated to commit a crime – any crime – in the first place. It fits most closely with the character conception of responsibilty discussed in the previous chapter, in its pervasiveness in an individual, although it picks up only negative aspects of character. It is also a more objective concept than modern formulations of *mens rea*. If the accused has committed a wicked act, then, the argument goes, his generally "corrupt and malignant disposition" can be implied from this.[19] There is little place for subjective concepts, such as "intention" which, in contemporary criminal proceedings, require the Crown to prove, at least notionally, what was actually in the accused's mind at the time of the criminal act.[20]

Hume says

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[17] Hume i, 21 – 22

[18] See Michael G A Christie (ed) Gerald H Gordon *The Criminal Law of Scotland* (Edinburgh: W Green, 2001) at para 7.02

[19] Farmer *Genius*, *supra*, note 12, at p 133

[20] See also, in relation to dole, Lindsay Farmer "The Criminous and the Incriminating: Narratives of Guilt and Innocence in Scottish Criminal Trials" 2000 *Juridical Review* 285, [hereinafter "Criminous"] at pp 294 - 5

> "[i]f indeed the thing happen accidentally, and in the prosecution also of some lawful act, from which the panel cannot reasonably have any apprehension of the harm that ensues, this is exclusive of the notion of guilt: There is no *malus animus,* no vice or corruption of purpose, to fix an evil character on his deed. But if the circumstances indicate a wicked and malignant spirit, a resolution to do some violent and atrocious mischief; here, though the event prove more disastrous than the paunel was absolutely bent upon, or though it take a course somewhat different from what he intended, it is clear, that in many cases it will be quite the same, in the estimation of law, as if he had foreseen and intended all that happens."[21]

In Hume's view, the fact of embarking on such obviously unacceptable courses of conduct in the first place makes the accused a worthy object of punishment, and the criminal law would be failing in its purpose if it did not exact this. The accused's specific state of mind in relation to the act actually committed, the point with which modern *mens rea* is concerned, is not relevant.

This, then, explains the principles of the mental element for Hume. Although it is his analysis which is examined here, the concept is applicable to Mackenzie's work, which will now be considered.

Mackenzie

Mackenzie deals only with the category of "minors", though he does not specifically identify the ages included in this group.[22] At the outset, he notes that the issue of whether minors may be punished for their crimes is "contraverted amongst the Doctors"[23] and, perhaps as

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[21] Hume, i, 22 - 24
[22] For Hume and Alison, minority commenced at fourteen.
[23] Mackenzie, I, I, 7

a consequence, his own account expresses a number of differing views on the issue. The received view, in Mackenzie's time, appears to have been that punishment is only appropriate at all where there has been "contrivance," (by which he apparently means conscious deviousness or scheming) and, even then, only if dole can be proved.[24] More importantly from the point of view of the issues explored in this thesis, there is also a clear indication that the child's ability to generate dole – in a sense, his/her "capacity" for wickedness - must be investigated by the courts. It will not be assumed or inferred from the offence.

Mackenzie draws a distinction between what would today be known as *mala in se* - "Crymes [sic] against the Law of Nature, such as Murder" and *mala prohibita* - "meerly [sic] Statutory Crymes, such as usury, forestalling of mercats &c."[25]. For the former category, a minor is liable but not to the standard punishment; for the latter no punishment is appropriate unless "malice supplements age,"[26] a point which can only be proved by very strong evidence. It is unclear why the child's punishment is to be limited for crimes contrary to natural law. The inference it that it is simply obvious that it should be. The Calvinist view was that "although the natural law was inscribed on the conscience of man [sic], human understanding could be deficient

[24] Mackenzie I, I, 7. This requirement for proof of dole has overtones of the *doli incapax* presumption which will be discussed in more detail later in this chapter.
[25] Mackenzie I, I, 7
[26] "*ubi malitia supplet aetatem*" Mackenzie I, I, 7

as a result of original sin".[27] Perhaps the child's understanding was perceived as deficient anyway.

Mackenzie specifies that children should not be punished for art and part involvement in a crime because this requires "judgement and contrivance" on their part and ultimately "depends upon Acts of the judgement, wherein minors may be mistaken, because of their fragility and less age."[28] Mackenzie therefore recognises the power exercised by adults over children and assumes, it appears, that responsibility for crimes committed by adults and children together rests primarily with the adult.

Mackenzie's own views on the criminal capacity of minors are trenchant and interesting, and, apparently, different from those of the "Doctors" in certain key respects. He is particularly concerned with the child's ability to participate in the trial, and his discussion foreshadows the debate arising from the right to a fair trial contained in Article 6 of the European Convention on Human Rights over 300 years later. Mackenzie cites authority for the view that it is the law that a minor cannot be obliged to answer, during minority, for any crime by which s/he might "loss" life or limb. This is because s/he might omit some defence competent to him/her.[29] For his own part, he takes this issue further by arguing that minors should not be obliged to answer for *any* crime committed during their minority,

[27] Farmer "Criminous," *supra*, note 20, at pp 294 - 5
[28] Mackenzie I, I, 7
[29] Mackenzie I, I, 8

until they attain majority[30] - a view which is criticised by Hume for its dangerous overindulgence of adolescents.[31] Mackenzie's position is reached on the basis that, since a minor cannot be obliged to debate his/her inheritance through his father (*de haereditate paterna)* during his/her minority, much less should s/he be "oblieged [sic] to defend in a criminal pursuit where, in the heat of youth s/he might say, or not say, something which would then do him/her harm (*ubi calore juvenili potest dicere vel tacere quod ei nocere potest*)."[32] Effectively, then, Mackenzie argues for immunity from prosecution for minors on the basis that they lack the skills necessary to render the trial process fair. It is particularly interesting that Mackenzie adopted this position in 1678 yet virtually the same conclusion was reached by the Scottish Law Commission in 2002, at least for children aged eleven and under, without any overt reference to his work.[33]

Because it is minors' ability to participate in the trial which is in doubt, however, it appears that Mackenzie has no qualms about calling them to account for crimes committed in minority once they attain majority. Perhaps this makes sense in the context in which Mackenzie is writing in that, by the time the accused becomes an adult, it will be clearer whether or not, in terms of dole, his/her character has "settled" to be wicked and depraved.

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[30] Mackenzie, I, I, 8
[31] Hume, i, 31
[32] Mackenzie I, I, 8
[33] Scot Law Com No 185, *supra*, note 10, at paras 3.2 to 3.5

Mackenzie, then, has been widely disregarded by modern commentators, certainly in relation to children, but his views are no less interesting for that. It is appropriate, now, however, to turn to Hume, whose work remains key to Scottish criminal law.

Hume

In his own time, Hume's *Commentaries* were an "outstanding success" because "for the first time lawyers had access to a comprehensive and fully argued account of crimes, defining them, explaining their nature, and discussing them on the basis of the records of the Justiciary Court."[34] Even in modern times, the leading work on substantive Scottish criminal law, Gerald Gordon's *The Criminal Law of Scotland*[35] takes Hume's position as the starting point for its discussion of most common law offences[36] and defences[37] whilst the High Court has applied Hume as a decisive authority. In McKinnon v HMA,[38] for example, a five-judge court was convened specifically to consider the law on art and part liability in murder cases. In delivering the judgment of the court, Lord Justice General Cullen stated, "[i]n considering the law ... it is appropriate for us to begin by considering what was stated in Hume on crimes concerning art and part of murder."[39] Again, in Brennan v HMA,[40]

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[34] Cairns, *supra*, note 6, at p 174
[35] Gordon, *supra*, note 18
[36] Eg, theft, para 14.01; embezzlement, para 17.02
[37] Eg, self-defence in murder cases paras 24.03 – 24.07
[38] 2003 SLT 281
[39] *Ibid*, at p 284.
[40] 1977 JC 38, at p 43

one of the leading cases on the Scots law of insanity, Lord Justice-General Emslie, giving the opinion of the court, stated "[i]n discovering what is insanity within the meaning of our criminal law we cannot do better than begin by noticing that Hume treated the nature of the plea, ..., thus".

Lindsay Farmer[41] has noted that the resort to Hume by the courts has tended to be pragmatic or instrumental. Thus, where Hume represents the position which the court wishes to reach, he can be cited as the 'true position' regardless of a conflicting line of authority. Where this is not the case, he can be disregarded 'as a representative of an earlier age'.[42] It is clear, therefore, that Hume's views cannot be disregarded as irrelevant in the modern context.

Alison's views follow Hume's very closely in many respects and this may be one reason for the primacy of Hume's account. Nonetheless, it is appropriate now to examine the views of both writers on children who offend.

Hume and Alison

Hume's analysis of dole has already been considered. It is implicit in that analysis that part of the purpose of dole generally is to establish

[41] Farmer, *Genius*, *supra*, note 12, at pp 39 – 40

[42] For example, in Stallard v HMA 1989 SCCR 248, the court took the view that the marital rape exemption, which provided that a husband could not be guilty of the rape of his wife, and which was based on a passage in Hume (i, 306) was no longer good law.

which persons ought to be punished, a point which assumes greater importance in relation to his treatment of children.

Hume deals with children under the more general heading of "Who may commit crimes?"[43] an issue which he raises immediately after his treatment of dole because, in his view, the only reason for exempting any individual or group from criminal responsibility is the absence of dole. As he says, it is "the defect ... of that dole, that vicious will or depraved disposition"[44] which alone protects against the imposition of legal punishment.

Applying Dole to Children

On the face of it, then, this concept of the mental element might seem to facilitate the conviction of children for criminal offences, because even very young children do commit such acts,[45] and the act itself is the primary referent from which dole is to be inferred. In fact, however, Hume seems to turn this assumption on its head. Because children's characters are not yet set in stone, due to their lack of development, it is not safe to infer dole simply from their actions. Indeed, Hume adopts an overtly developmental perspective in

[43] Hume, i, 30.
[44] Hume i, 30.
[45] For example, "[a] boy aged three threw a tantrum in a New Zealand chemist's shop and attacked two women shoppers. He kicked and punched them and hit them so hard with his toy truck that both needed hospital treatment, one for a fractured skull. His mother said "Yeah, he does that sometimes.""
The Week 9 March 2002, p 12

relation to juvenile offenders in his analysis,[46] the main objective of which is to determine which children might be eligible for the death penalty, which for an arbitrary pain and which are exempted from punishment altogether by reason of age. Hume states that "minors, or persons under age, ... are naturally deficient in intelligence, and in firmness or maturity of the will."[47] He also recognises the individualised nature of these developmental deficits, noting that the above principle "is not, however, equally true of all minors; but is various according to the several degrees of nonage, and is even very different in persons of the same years."[48] Since this is his starting-point, it is perhaps surprising that, in common with Alison, he adopts rigidly age-bound categories - minor (aged fourteen years and over), pupil (aged seven to thirteen), and infant (aged six and under) – as a mechanism for differentiating between broad groups of children.[49] This must, however, have brought its own difficulties. There was no centralised system of registration of births at this time[50] therefore, in some cases, evaluation of claims of nonage must have been problematic, as must attribution of children to one of the three sub-

[46] As does Blackstone in his exposition of English criminal law. IV Blackstone, *supra*, note 1, at p 23

[47] Hume i, 30

[48] Hume i, 30

[49] Mackenzie, on the other hand, discusses only "minors" and it is unclear from his account whether he includes all children in this category or, as is perhaps more likely, whether he is only considering those aged fourteen and over. Mackenzie I, I, 7

[50] It appears that civil registration of births in Scotland commenced on 1 January 1855: http://www.genresearch.com/sco-crib.htm

categories identified.[51] Generally, on this point, Hume notes that "[i]n some of [the cases he cites as examples], the pannel, in his declaration, may have pretended to be younger than he was, in order to recommend himself to mercy. Ordinarily, the age seems to have been judged of from the pannel's declaration, or his personal aspect."[52] In one case, Hume mentions the need to obtain a testimonial from the parish of the accused's birth regarding his age.[53] Nonetheless, given that Hume seeks to justify the imposition of the different punishments available by reference primarily to the *understanding* which could be expected of child-accused at particular ages, it is possible to discern here, a historical basis for the provision of an age of criminal responsibility linked to capacity. This flies in the face of the Scottish Law Commission's rather more prosaic interpretation of the institutional writers,[54] which was discussed earlier in this chapter.

In general, Hume is equivocal in his account of children, first of all narrating the, apparently settled, position in English law and then prefacing his account of Scots law by stating, "[a]s for our own municipal practice, - I know not whether it can be affirmed, that it has yet, in all these articles, attained to the same degree of maturity

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[51] In England, judges required to examine every accused child individually to assess his/her age. A W G Kean "The History of the Criminal Liability of Children" 1937 *LQR* 53, 364 at p 367

[52] Hume i, 33, footnote

[53] William Jameson, indicted for murder in 1632 and "past saxtene years of age". Hume i, 31

[54] Scot Law Com No. 185, *supra*, note 10, at paras 2.2 and 2.3

and precision as that of England."[55] By the time of Alison, the rules seem to have been more firmly set, or certainly Alison's account records them in unequivocal terms. It is interesting, particularly for those who regard young offenders as a peculiarly modern problem, that Alison commences his treatment by lamenting "[t]he vast increase in juvenile delinquency".[56] How, then, did Hume and Alison approach this issue of children who offend?

Minors (aged fourteen and over)

Hume and Alison

A W G Kean has suggested, in relation to English law, that "[i]n the seventeenth century, the age of discretion became fixed at 14 ... [because] Coke dogmatised the results of the Middle Ages and subsequent lawyers took his word."[57] Kean credits Hale with making the position absolute. Given that both Hume[58] and Alison[59] provide a statement of the English law on children's criminal responsibility, it is quite possible that they too were influenced in this way. Certainly, in the 1845 English case of R v Sydney Smith,[60] the judge was able to state, "[w]here a child is under the age of seven years, the law presumes him to be incapable of committing a crime; after the age of

[55] Hume i, 31
[56] Alison, i, 663
[57] Kean, *supra*, note 51, at p 369
[58] Hume, i, 30
[59] Alison, i, 666 - 667
[60] (1845) 1 Cox 260

fourteen, he is presumed to be responsible for his actions, as certainly as if he were forty."[61]

It is clear that minority *commenced* at fourteen. Its endpoint in Hume's time is, however, more uncertain. He discusses a number of cases of accused aged eighteen[62] and also one where one of the accused was aged nineteen or twenty.[63] Majority may therefore have commenced at age 21. According to Blackstone, in English law, those under 25 were regarded as minors.[64] In terms of its characteristics, Hume, paralleling some modern perspectives on adolescence,[65] identifies minority as "that season of life when men [sic] are most adventurous, and more peculiarly liable to the seduction of evil example"[66] suggesting, because of this, that exempting minors from trial during their minority[67] "not only would not be salutary, but would in the end prove the reverse of merciful or humane."[68] It is not, however, entirely clear what Hume sees as "merciful and humane" in the imposition of the death penalty.

Both Hume and Alison commence their detailed accounts of the law on the punishment of minors with a strong statement that those who

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[61] *Ibid*, per Erle J, at p 260

[62] Eg John Johnson convicted of pocket-picking on 20 June 1786 and Archibald Stewart convicted of two acts of house-breaking on 23 June 1791. Hume i, 32

[63] Black (aged eighteen) and Macdonald convicted of robbery and murder on 17 June 1813

[64] IV Blackstone, *supra*, note 1, at p 22. He subsequently refers to the age of 21 as "full age" (at p 22)

[65] Ann Birch *Developmental Psychology From Infancy to Adulthood* (Basingstoke: Palgrave, 1997) at p 203

[66] Hume i, 31

[67] As proposed by Mackenzie and discussed earlier in this chapter

[68] Hume i, 31

have reached fourteen are liable to any punishment, including death, although this is only automatic for certain, particularly serious, crimes identified by Hume as "murder, fire-raising, theft and the like"[69] and by Alison as "murder, robbery, housebreaking, fire-raising, or the like".[70] With regard to capacity, Hume considers that these are offences "whereof minors may know the wickedness even at those early years"[71] – Alison, that they are offences "which are forbidden, under the highest penalties, by God himself, and contrary to the conscience even of inveterate offenders."[72]

For Hume, then, knowledge of wickedness seems to be a prerequisite of criminal responsibility. Alison, echoing Hume, is equally moralistic, justifying the criminalisation of these offences on a religious basis and invoking assumptions drawn from natural law that the wrongness of the act will simply be apparent to an offender of this age.[73] Both writers demonstrate an implicit awareness of a process of moral development which brings a child to an awareness of the wrongfulness of certain acts. Younger children are not expected to have attained maturity of judgment in these matters, albeit that the actual awareness itself appears to be innate (though requiring to mature).

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[69] Hume i, 31
[70] Alison i, 663
[71] Hume i, 31
[72] Alison, i, 663
[73] Hume's reference to murder as a crime "against the law of nature" also suggests this natural law perspective. Hume i, 31

In terms of the analysis of capacity in the previous chapter, then, both Hume and Alison require an understanding of the distinction between right and wrong, an issue which clearly belongs to criminal capacity as the term is used in this thesis. Both writers are prepared to impute this, in the general run of cases, to offenders aged fourteen and over. It is interesting however, that neither writer is able to provide many examples of cases where minors actually proceeded to execution. Indeed, Alison comments approvingly on the apparently generalised practice of allowing the law to take its course in the imposition of capital punishment and then commuting the sentence to transportation.[74] Hume identifies four cases[75] where the accused, aged eighteen, sixteen, eighteen and nineteen or twenty respectively *were* executed, explaining that these accused "were examples of early and irreclaimable depravity."[76] The implication is that, in other cases, the likelihood was that the depravity would be reclaimable[77] – that the minor's apparently evil disposition as evidenced by his/her criminal acts could be changed. Here, then, is another hint that Hume regarded young people, in the usual case, as particularly

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[74] Alison, i, 664. Despite expressing the opinion that "in extreme cases, such as murder or fire-raising, or atrocious rape" (Alison i, 664) transportation was possibly not appropriate, Alison cites no cases where the death penalty was actually carried out.

[75] Macdonald, Macintosh, Black and Macdonald. Hume i, 32, note 3.

[76] It appears that the execution of the first two young people in this list of four was in respect of their role as ringleaders in the Tron Riot of 1812. This is discussed in more detail later in this chapter as the spur to the introduction of industrial and reformatory schools in Scotland. See Andrew G Ralston "The Tron Riot of 1812" 1980 *History Today* 30 [hereinafter "Tron Riot"]

[77] This view is shared by Alison who considers that transportation gives "youthful depradators ... that chance of amendment in another country which they have lost in their own." Alison i, 664.

malleable and capable of change in character, if handled appropriately.

Hume expands on his views on the development of criminal capacity in young people in his discussion of statutory offences. He states

> "In the case of crimes which have been made capital by statute, such as hearing mass, or striking in presence of the Court of Session, it seems to be more doubtful, whether there may not be room for a distinction in favour of those minors, who are nearer the years of pupillarity than majority. And here we are furnished with an argument by the statute 1661, c. 20, concerning the cursing and beating of parents, both in favour of such an indulgence, as in itself a reasonable thing, and for fixing on the age of sixteen, as that at which the minor shall be punishable with death, for offences of this description. For so it is appointed by that ordinance, with respect to the transgressions there vindicated; which, though known to every child as great immoralities, and deserving the most severe domestic correction, yet as objects of public trial, and sentence of death, are rather the creatures of the law, and not fit to be visited with such severity, on any but those who have attained to maturity of judgment and discretion.[78]

Here, then, Hume appears to recognise the need for the child to develop an understanding of the criminality of certain actions, before sentence of death is appropriate. His view seems to be that some crimes, such as murder, are so absolutely wrong that no child aged fourteen or over could fail to appreciate their seriousness, therefore hanging is appropriate. For lesser offences, such as the ones outlined in this passage, while minors will be aware that such acts are wrong, this is not enough for the imposition of the ultimate sanction. Only by the age of sixteen can they be expected to understand their

[78] Hume i, 33

seriousness in a societal context – and this understanding is necessary for hanging to be imposed.

Each of the institutional writers, then, is equivocal about holding children in the oldest age category (over fourteen) criminally responsible, to the extent of being punished capitally, for their actions. Hume and Alison are concerned with the child's understanding of the wrongness of his/her acts, Mackenzie with the fair opportunity to argue his/her defence. It is certainly arguable, therefore, that each regarded some aspect of what would today be recognised as criminal capacity as key to the justification for diversion from the gallows. The concern with understanding is not necessarily individualised for each child-accused (Mackenzie argues for a blanket ban on the prosecution of all minors during their minority; Alison approves the *generalised* practice of commuting the death sentence to transportation) however there is still a case to be made for the basis of a link between criminal capacity and the appropriate degree of punishment from the work of each writer.

Pupils (aged seven to thirteen)

Despite being honoured more in the breach than the observance, both Hume and Alison are prepared to commit themselves to the existence of a rule that minors *may* be subjected to capital punishment. With regard to pupils, Alison is equally definite that they can*not* be

punished "to the pain of death".[79] He justifies this on the basis of their essential redeemability noting that "whatever the depravity of the acts committed, complete corruption of the heart can hardly have taken place."[80] Interestingly, for the modern-day "blame-it-on-the-parents" lobby, he locates the impetus to criminality in "the influence of guilty parents, or elder associates."[81]

Hume, on the other hand, will not even "venture to affirm on the credit of such scanty and imperfect material as the record supplies" "[w]hether [pupils] are in any case liable to be capitally punished."[82] His position is that pupils who are *infantiae proximus*[83] (aged between 7 and 10½) are probably exempt from capital punishment.[84] Although he does not cite a single case where a pupil was executed, for older pupils he is not willing to rule out completely the possibility of the death penalty "how deliberate soever the wickedness, or how incorrigible the obstinacy, or how cunning the malice of the offender as it appears in evidence at his trial."[85] In an adult-accused, these qualities, which link in with the concept of dole in that they all point to defects of character, might be inferred from the crime itself. Hume seems here to be implying that something far beyond ordinary wickedness, obstinacy or malice would be required to justify hanging

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[79] Alison i, 665
[80] Alison, i, 666
[81] Alison, i, 666
[82] Hume i, 33
[83] literally, close to infanthood
[84] Hume i, 35. This view is shared by Blackstone, with reference to English law. IV Blackstone, *supra*, note 1, at 22
[85] Hume i, 34

a pupil. These qualities do not particularly address issues of understanding but they do require a certain degree of intellectual development. They suggest, in effect, a thoroughly rotten character, tying in with the general approach, at this time, to the mental element identified and analysed by Nicola Lacey in English law,[86] as defined in terms of character responsibility.

As examples of acts which might not allow the law "to extend its mercy" because they represent "situations of such extreme and hopeless depravity." Hume cites "repeated acts of fire-raising, or ... the murder of a parent, or ... murder by poison, committed by a boy of twelve or thirteen years of age."[87] Here, then, is a further hint of Hume's underlying philosophy of the essentially redeemable quality of children who offend. Only those who commit such heinous crimes are placed beyond its remit.

With regard to the infliction of arbitrary pains on pupils, both Hume and Alison feel themselves to be on solid ground in that no writer seems ever to have suggested that this is, in any way, inappropriate. Both nonetheless require the practice to be justified by reference to the child's understanding. Alison states that "[p]upils, ..., though only nine, ten, or eleven years of age, may be subjected to an arbitrary punishment, *if they appear qualified to distinguish right*

[86] Nicola Lacey, "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory" [2001] *MLR* 350 [hereinafter "Responsible Subject"]; Nicola Lacey, "Responsibility and Modernity in Criminal Law" 2001 *Journal of Political Philosophy* 9(3), 249 [hereinafter "Responsibility and Modernity"]

[87] Hume i, 34

from wrong."[88] Again, this is a narrow concept – only one small area of understanding is targeted – but it does clearly relate to the child's criminal capacity. If a pupil is unable to draw this distinction, s/he cannot be punished. Hume, similarly to his treatment of minors, allows punishment only for "crimes whereof [pupils] may know the wickedness".[89]

Alison also records the type of tariffing which occurred in an effort to ensure that more "hardened" young criminals were more severely punished, noting that "[i]t has not been unusual to transport children of eleven and twelve years, where their character seemed hardened, and to imprison them where they did not appear so completely depraved."[90] The direct link between responsibility, in the character terms which dole highlights, and punishment is apparent here.

It is also clear from Hume's account that he envisages the *doli incapax* presumption operating in relation to pupils. He exempts those who are *infantiae proximus* from the ambit of the death penalty because they "can hardly be supposed capable of the full and capital degree of dole."[91] By the same token, he notes that children aged over 10½, who satisfy the "knowledge of wickedness" test and who are "proved to be capable of dole" are liable to any arbitrary pain which "shall be adequate ... to the ends of correction and example."[92]

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[88] Alison, i, 665. Emphasis added.
[89] Hume i, 35
[90] Alison, i, 665
[91] Hume i, 35
[92] Hume i, 35

In this regard, both Hume and Alison make reference to the 1749 case of Alexander Livingston[93] who was convicted, at the age of twelve, of the murder of twelve-year old Alexander Henderson having been specifically found, by the jury, to be *doli capax*. The case was one of those reported by Maclaurin in his *Arguments and Decisions in Remarkable Cases Before the High Court of Justiciary, and Other Supreme Courts, in Scotland*.[94] Given that, in the mid-eighteenth century, cases were not reported in any systematic fashion,[95] the fact that Maclaurin chose to include this one indicates its interest at the time.

In common with the style of the official record of the time,[96] Maclaurin's report sets out in full the arguments of the Crown and of the defence and then gives the judgment of the court in its briefest possible form *viz*, "January 8 1750. The court banished him to the plantations for life."[97] It is therefore necessary to read between the lines of the, obviously slanted, submissions made on behalf of the prosecution and the defence in order to discern matters of general relevance to the law in this area.[98]

There are two interesting aspects of the case from the perspective of general criminal law. First, there is no finding in fact that Alexander Livingston actually inflicted the fatal stab wound on Alexander

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[93] *supra*, note 9
[94] *supra*, note 5
[95] Cairns, *supra*, note 6, at p 148
[96] *Ibid*, at p 149
[97] HMA v Alexander Livingston, *supra*, note 9, at p 120
[98] Cairns, *supra*, note 6, at p 149

Henderson. In fact, the jury finding was "not proven that the panel was the person who stabbed or wounded him".[99] The conviction for murder appears instead to have been obtained on the basis that he was, at least, art and part liable. No other person is, however, implicated at all, as having been the principal actor. Second, it seems to have been proved that Alexander Henderson provoked Alexander Livingston by punching him on the face.[100] The level of development of the doctrine of provocation in Scots law at this time is not entirely clear – Lindsay Farmer notes that it was recognised in the late eighteenth century[101] - but, at least on the face of it, it would appear that this might, in itself, have provided a reason to rule out the death penalty in this case.[102] Instead, however, argument was directed to the ambiguity of the jury finding on Livingston's actual involvement in the stabbing and, importantly, on his youth. The memorial for the defence specifically appeals first to the need for the child to *develop* morally so that, even in relation to crimes against nature, s/he cannot be held as accountable as his/her adult counterparts and, second, to the child's more limited understanding of the consequences of his/her actions because of his/her more limited experience of "natural operations".[103]

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[99] HMA v Alexander Livingston, *supra*, note 9, at p 101
[100] *Ibid*, at p 113
[101] Farmer, *Genius*, *supra*, note 12, at p 153
[102] On the position in English law see Jeremy Horder *Provocation and Responsibility* (Oxford: Clarendon Press, 1992)
[103] HMA v Alexander Livingston, *supra*, note 9, at pp 115 - 116

This is the only case cited by either Hume or Alison in which a finding of *doli capax* is mentioned. It is therefore disappointing that there is virtually no discussion of its import. The Crown simply relies on the fact that "the jury have explicitly given their judgement that he is *doli capax*" in conjunction with their submission that he "was the author of the defunct's death"[104] to support their conclusion that he was guilty of the murder. The defence, having gone to some lengths to characterise the killing as a childish event, and the accused as a child lacking understanding of his actions[105] seek to argue that the *doli capax* finding means only that "the pannel being proved to be a sagacious and smart boy, must be capable of evil as well as of good." They add that "[t]he jury, from this verdict, could never possibly imagine, that the infant[106] had any intention to commit murder."[107]

The actual finding of capacity of dole then, does not seem to settle the matter of guilt. Even though the jury has effectively overridden the presumption that the character of a child of twelve could not be sufficiently hardened and evil to support a verdict of guilty of murder, he is not automatically condemned. Instead, even the prosecution present arguments from "the doctors" indicating that

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[104] *Ibid*, at p 105
[105] *Ibid*, at pp 118 - 119
[106] This incorrect technical term for a twelve-year old must be a further attempt to present the accused in as childish a light as possible.
[107] HMA v Alexander Livingston, *supra*, note 9, at p 120

capital punishment is not to be automatic for children.[108] The direct link between responsibility and punishment, which the conception of character responsibility, demonstrated in dole, facilitates, still operates to tailor the punishment primarily to the offender as a young person.

Infants (aged six and under)

This category presents the least difficulty. Very young children are not subject to punishment in any circumstances, a position which has, apparently, never been challenged.[109] Hume simply states this, whereas Alison justifies it on the basis that such children "are held to be incapable of crime."[110] The Scottish Law Commission warns against interpreting these words through a modern filter, stating that "it is anachronistic to read Alison's reference to children being incapable of crime in terms of the later idea of capacity to form mens rea."[111] Nonetheless, Alison proceeds to explain his rule by stating that "whatever vice exists must be ascribed to improper tuition, or bad example, *and the child cannot be considered as answerable for a violation of what he* [sic] *could not understand.*"[112] Whilst heeding the warning against anachronistic interpretation then, this explanation strongly sets up the link between understanding and responsibility

[108] *Ibid*, at pp 106 - 109
[109] Hume i, 35; Alison, i, 666
[110] Alison, i, 666
[111] Scot Law Com No. 185, *supra*, note 10, at para 2.3
[112] Alison, i, 666. Emphasis added

posited in chapter 2 as key to the establishment of the child's criminal capacity.

It is interesting to take note of the English case of Marsh v Loader[113] in 1863. Loader was a builder by trade as was Henry Marsh, father of six-year old William, whose actions sparked the proceedings. Loader caught William in the act of stealing wood from his premises and "gave him into custody". It appears that Loader must have detained William himself in order to take him to the official authorities. A magistrate discharged William, presumably because of his nonage. The Marshs then sued Loader for false imprisonment and were awarded £20 damages. On appeal, it was conclusively determined that not only does nonage operate to prevent the infliction of punishment, it also precludes prosecution.

This indicates that, by 1845, seven operated much as the current age of criminal responsibility does to preclude criminal proceedings altogether.[114] It is also interesting that the arguments presented in the case draw such a clear distinction between conviction and sentence. The direct role which responsibility played in the infliction of punishment for Mackenzie, Hume and Alison is not so clearly discernible.[115]

In general, then, the work of the Scottish institutional writers implies the existence of a criminal justice system which was sensitive to the

[113] (1863) 14 CBNS 535
[114] Merrin v S 1987 SLT 193
[115] Obviously, there are certain dangers in drawing conclusions from an English civil case.

interests and comprehension of children as different in key respects from their adult counterparts and which sought to accommodate this difference by at least adverting to the child-accused's understanding of his/her actions. Because the mental element consisted in dole, some of the judgment which the law was required to make in relation to an individual child-accused related to his/her tractability– whether or not his/her character had hardened into criminality and depravity. Despite this, there is still evidence of an overtly developmental approach to the child's criminal responsibility and that issues of understanding - primarily of the distinction between right and wrong - formed an important plank of the decision as to the appropriate punishment – the main purpose of a criminal justice system which tended to assume the guilt of the accused and to use the trial to see if any exculpatory evidence existed.[116]

Unfortunately, this is one area in which Hume has not been regarded as the authoritative basis for modern Scots criminal law and practice. Reasons for the failure to translate these relatively clear principles of children's criminal responsibility into the emerging doctrine of *mens rea* in cases concerning children will be discussed subsequently. Before that, however, it may be instructive to consider the historical approach to the child's criminal capacity in English law as represented by the *doli incapax* presumption.

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[116] See Lacey "Responsibility and Modernity," *supra*, note 86; Lacey "Responsible Subject," *supra*, note 86

The *Doli Incapax* Presumption

The literal translation of *doli incapax* is "incapable of dole". English law does not, however, appear to have defined the mental element specifically as "dole" in the exact sense in which it is explained by Hume in Scots law. Nonetheless, it is clear that, certainly in the mid-eighteenth century, criminal responsibility was defined in character rather than capacity terms, similarly to the then Scottish position.[117] In any event, the presumption survived well into the period when, in both jurisdictions, every offence carried its own specific mental attitude or *mens rea*. It was finally abolished by section 34 of the Crime and Disorder Act 1998. The effect of this piece of legislation, by a new Labour government anxious to follow through on its commitment to be "tough on crime, tough on the causes of crime"[118] was the loss of a benefit to accused children which had, by 1998, existed in English law for around a thousand years.[119] Traces of the modern doctrine were evident in the law, already mentioned, which

[117] See Lacey "Responsibility and Modernity", *supra*, note 86, particularly at pp 256 – 261; Lacey "Responsible Subject," supra, note 86, particularly at pp 361 - 362

[118] Labour party election manifesto, 1997 general election. (http://www.psr.keele.ac.uk/area/uk/man/lab97.htm)

[119] In this instance, the legislature was only following the path taken by the judiciary in 1993 in the case of C (a minor v DPP) [1994] 3 All ER 190 where Laws J, in the Queen's Bench Division, sought single-handedly to abolish the presumption. This was thwarted by the House of Lords when the case was appealed ([1995] 2 WLR 383), largely on the basis that the Divisional Court's actions came too close to judicial legislation.

was promulgated by Athelstan in the tenth century saving, from the death penalty, children who had not resisted or fled.[120]

The presumption is of importance because it indicates that there is no very obvious reason why a legal system cannot impose a capacity requirement, in cases involving children, to ensure that some attention is focussed on their understanding of their criminal acts. Indeed, the case, discussed earlier in this chapter, of HMA v Alexander Livingston,[121] the twelve-year old who, in 1749, was transported for life for having stabbed to death a young acquaintance, infers that Scots law itself made some use of this concept. Certain other legal systems still employ it.[122]

In this thesis, the particular interest of the seam of English case law on the presumption is that it demonstrates the difficulties which arise from seeking to target the investigation of capacity in too narrow an area. The criminal law prefers questions to which a "yes or no" answer can be given. Examination of the operation of the *doli incapax* doctrine suggests, however, that criminal capacity is too complex a concept to lend itself to this type of analysis. How, then, did the presumption operate?

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[120] See *Kenny*, *supra*, note 1, at p 78, n 7. Also, Thomas Crofts *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (Aldershot: Ashgate, 2002) at pp 5 - 8

[121] *supra*, note 9

[122] Eg Hong Kong. See The Law Reform Commission of Hong Kong *Report on the Age of Criminal Responsibility in Hong Kong* (May 2000) (http://www.info.gov.hk/hkreform) particularly at pp 5 – 11

The explanation of the concept which was received into modern English law stemmed from Sir Matthew Hale's *Pleas of the Crown: A Methodical Summary*, published in 1678.[123] He stated that the prosecution had to prove that the child-accused had a "mischievous discretion",[124] a phrase which, without judicial interpretation, would convey very little to the modern reader. In 1845, the presumption was explained in these terms: "between the ages of seven and fourteen, no presumption of law arises at all [as to the child's ability to commit crime], and that which is termed a malicious intent - a guilty knowledge that he was doing wrong - must be proved by the evidence and cannot be presumed from the mere commission of the act."[125]

In the development of the law on the meaning of "mischievous discretion", or "malicious intent", which terms tend to be used interchangeably, the only point which is beyond doubt is that no child could be convicted unless there was clear evidence that s/he understood that his/her action was wrong. The decided cases strove to clarify the quality of the wrongness which had to be established yet, paradoxically, in so doing, they tended to confuse the issue.

Cases from the mid-nineteenth century made reference to guilt in a manner which is circuitous, given that, ultimately, guilt depended on the existence of the mischievous discretion. In R v Elizabeth Owen,

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[123] (Abingdon: Professional Books Ltd, 1982 (reprint))
[124] *Ibid*, at p 630
[125] R v Sydney Smith, *supra*, note 60, at p 260

where a ten year-old child was charged with stealing coal, the judge stated that a child under fourteen "ought not be convicted, unless ... [s/he] had a guilty knowledge that [s/he] was doing wrong."[126] Again in R v Manley, a case where the accused had induced a child of nine to steal money from the child's father's till and give it to him, counsel for the prosecution advised the jury that, in relation to the child, they would have to determine "whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt."[127] Even if the term "guilt" is stripped of its connotations in a criminal trial, this basically indicates only that the child must know that s/he was doing wrong.

This rather unsophisticated approach is discernible even in more modern cases. In B v R,[128] the accused was aged eight and was charged with housebreaking and larceny. The test for satisfaction of the presumption was stated to be that the child should "know in the ordinary sense the difference between good and evil;"[129] in R v B; R v A[130] that s/he should, quite simply "know the difference between right and wrong".[131] Clearly, this understanding is an important plank of the child's criminal capacity – perhaps even the basic element – but it is also, in isolation, relatively easily satisfied. Even

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[126] (1830) 4 C & P 236, at p 237
[127] (1844) 1 Cox 104
[128] (1960) 44 Crim App R 1
[129] *Ibid*, at p 4
[130] [1979] 1 WLR 1185
[131] *Ibid*, at p 1186. In this case the two accused were aged thirteen and charged with blackmail.

very young children know that they should not do certain acts because adults have so instructed them. Knowledge of the difference between right and wrong, then, is not sufficient, in itself, to establish that the child's understanding of his/her act in its context grounds the imputation of full criminal responsibility, which is the effect of rebuttal of the presumption.

In fact, however, the majority of cases did not apply this bald and simple test but a slightly more searching one derived from R v Gorrie[132] in 1919. This was a case arising from the, possibly preventable, death of an eleven-year old boy named James Lane. Gorrie, the accused, who was then aged thirteen, stabbed Lane in the buttock with a penknife in the course of some horseplay. Lane did not mention the wound to anyone and it eventually became septic. He died from blood-poisoning and Gorrie was charged with, though eventually acquitted of, his manslaughter.

The test which came out of the case was that the prosecution must satisfy the jury that "when the boy did this he knew that he was doing what was wrong - not merely what was wrong, but what was gravely wrong, seriously wrong."[133] This was applied as the relevant test for rebuttal of the presumption in subsequent cases[134] and, in 1995, the

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[132] (1919) 83 JP 136

[133] *Ibid*, at 136.

[134] Eg JM (a minor) v Runeckles (1984) 79 Cr App R 255 at p 259; I.P.H. v Chief Constable of South Wales [1987] Crim. L.R. 42, at p 42; R v Coulburn (1988) 87 Cr. App. R. 309, at p 314 (in defence submissions on appeal); and A v D.P.P. [1992] Crim LR 34 at p 35

House of Lords held that its meaning was reasonably clear when used in direct contrast with "merely naughty or mischievous".[135]

As a test it was not, however, without its detractors. In his attempt, in 1994, to abolish the presumption by judicial fiat, Laws J attacked as "conceptually obscure" the phrase "seriously wrong" which, in his opinion, meant neither "legally wrong" nor "morally wrong"[136] so that it was impossible to know what it was that the law required the prosecution to prove.

In fact, however, both of these, allegedly plainer, alternatives - "legally wrong" and "morally wrong" - had been canvassed over the course of the *doli incapax* presumption's long history without bringing conspicuous clarity. Sydney Smith's case, where a child of ten was charged with maliciously setting fire to a hayrick, added a nuance to the general nineteenth century requirement of knowledge of wrongness in the suggestion that the child must have a "guilty knowledge *that he was committing a crime*".[137] This was, however, directly contradicted by the 1992 case of A v D.P.P.,[138] an appeal against the conviction of an eleven-year old for a public order offence arising out of throwing bricks at a police car, where it was stated that "the test was not knowledge of unlawfulness."[139] It might be argued that the 147-year gap between these two cases explains this

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[135] C (a minor) v DPP [1995] 2 WLR 383 at p 397
[136] C (a minor) v DPP,*supra*, note 119, at p 197
[137] *Supra*, note 60. Emphasis added.
[138] *Supra*, note 134
[139] *Ibid*, at p 35

inconsistency but it seems more likely, given the general lack of clarity surrounding the test to be applied, that this is simply an example of two judges expressing diametrically opposed views which cannot be reconciled with each other. The search for a narrow test, which could be easily applied, then, served to generate confusion.

With regard to knowledge of wrong in the moral sense – Laws J's alternative to legal wrongness as the basis of a clear test - similar uncertainty and contradiction existed. The case of J.B.H. and J.H. (minors) v O'Connell[140] held, unequivocally, that it had to be proved that the accused knew that they were doing wrong morally. Three years later, and apparently without reference to that case, Robert Goff, L.J. stated: "I do not feel able to accept that the criterion in cases of this kind is one of morality".[141] His position was confirmed by his fellow judge, Mann J., who thought it "unnecessary to show that the child appreciated that [his/her] action was morally wrong ... [but rather] sufficient that [s/he] appreciated that it was seriously wrong."[142]

Again, the test was confused both in terms of this direct contradiction concerning its content and consequently as to what it was that the prosecution required to prove. For example, can something be "wrong" at all *without* being morally wrong in the sense that it is

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[140] [1981] Crim L.R. 632 at p 633
[141] JM (a minor) v Runeckles, *supra*, note 134, at p 260
[142] *Ibid*, at p 259

something which should not be done? Or, if it can – parking in a controlled area, for example, may not, *prima facie*, carry moral connotations – is this something the wrongness of which a child could be expected to appreciate? It is even questionable whether appreciating that an action was "seriously wrong" conveyed, by itself, the quality of understanding necessary to constitute criminal capacity. It might be seriously wrong for a group of children to ostracise one of their peers to the extent that s/he commits suicide but it is unlikely to constitute a criminal offence. Conversely, it would, technically, constitute the crime of theft to take a pencil from another child intending to keep it, but it is hardly "seriously wrong". Instead, it is submitted that the test should have been directed towards establishing whether the child-accused had some understanding of the nature, purpose and effects of *criminalisation* such that it was just to hold him/her to account for breaking this code.

The attempt to set down a test for the rebuttal of the *doli incapax* presumption, then, reveals the difficulty of encapsulating into a narrow test, to which a "yes / no" answer can be provided, an issue as complex as the child's criminal capacity. It demonstrates the benefits of a much broader approach as advocated in the previous chapter.

However narrow or imperfect its approach though, English law did at least pay lip service, through the *doli incapax* presumption, to the issue of the child's understanding of his/her criminal acts, for this lengthy period, the value of which was, as ever, particularly

recognised and lamented only on abolition.[143] Scots law, on the other hand, does not seem to have developed any similar principle, or similar mechanism for assessing the child's criminal capacity, even to date, with the result that its response to this issue is, at best, patchy. It is necessary now to return to the Scottish position in the nineteenth century and beyond.

Scotland: The Shift from Dole to *Mens Rea*

It is the contention of this chapter that the work of Hume and Alison indicates that, in their times, Scots criminal law did accord some importance, in the general case, to the child's understanding of his/her criminal acts, in terms of determining the appropriate level of punishment. Thereafter, this principle of inquiry into understanding, as a general precept of the treatment of juvenile offenders, seems to have been lost. It is important to consider how this might be explained.

First, the mental element itself changed from dole - the pervasive wickedness of character of Mackenzie and Hume - to *mens rea*, a specific mental attitude accompanying a specific criminal act. This shift was, in fact, already well under way by 1832 when Alison's first edition was published. His work contains no discussion of dole as a free-standing concept and his definitions of individual offences deal

[143] See, for example, Nigel Walker "The End of an Old Song?" 1999 *NLJ* 149(6871), 64; Sue Bandalli "Abolition of the Presumption of *Doli Incapax* and the Criminalisation of Children" 1998 *Howard Journal of Criminal Justice* 37(2), 114

in phraseology which is easily accessible to a modern Scots criminal lawyer. For example, "[m]urder ... consists in the act which produces death, in consequence either of a *deliberate intention* to kill, or to inflict a minor injury of such kind as indicates an *utter recklessness as to the life of the sufferer, whether he live or die.*"[144] Or, again, "Reset of Theft is the receiving and keeping of stolen goods, *knowing them to be stolen, with the design of feloniously retaining them from the real owner.*"[145] There is no difficulty in separating out the *actus reus* from the *mens rea* in these examples, nor would it be historically incorrect to attempt to do so.

The fact that Alison's section "of minority and pupillage"[146] bears such a strong resemblance to Hume's, both in content and in underlying philosophy, indicates primarily its, widely recognised, derivative quality.[147] But it perhaps also reveals the beginnings of the failure of the post-Hume law to engage with the issues presented by children who offend, outwith the conceptual box within which Hume had placed them. Such an engagement was, and would continue to be, required, given the shift in the focus of the criminal law away from its preoccupation with the punishment of children towards the question of their criminal responsibility as the key to the earlier question of conviction.

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[144] Alison, i, 1. Emphasis added
[145] Alison, i, 328. Emphasis added
[146] Alison i, 663
[147] See Farmer, *Genius*, *supra*, note 12, at p 41

This shift is inferred by John Macdonald's 1867 *Practical Treatise on the Criminal Law of Scotland* in which he covers, in the briefest possible compass, what is by then referred to as the defence of nonage. The principles set down are, again, derived, almost verbatim, from Hume and Alison, who are cited as his main sources. He states that "[a] child under seven years of age is held in law not to be liable to any punishment as a criminal. But children above that age may be *prosecuted* and punished."[148] Neither Hume nor Alison had demonstrated any interest in the process of prosecution of children as in any way distinct from the process of inflicting the appropriate punishment – the primary concern of each of them.

Nonage then, together with insanity, had the distinction of spanning the gap between dole, which could allow an exception for a lack of understanding demonstrating a character which had not yet hardened into depravity, and *mens rea* which could be cancelled by the absence of that understanding, or rationality, which was required to formulate it in the first place. Indeed, it has been suggested in relation to the broadly comparable English position, that "eighteenth-century ideas about age and sanity represent a thin doctrine of capacity as a condition for criminal responsibility."[149]

The status of being a child and, almost by definition, lacking in the mental, moral and emotional development necessary to permit the

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[148] John HA Macdonald *Practical Treatise on the Criminal Law of Scotland* (Edinburgh: William Paterson, 1867) at p 14

[149] N Lacey "Responsibility and Modernity," *supra*, note 86, at p 261

formulation of criminal capacity, is comprehensive, like dole, even though it can be used to establish the absence of a specific *mens rea* for a particular offence. This apparent fit with both the old dole regime and the new *mens rea* situation may, therefore, partially explain the lack of urgency in refining Hume's principles of children's responsibility during the generalised period of transition to the *mens rea*-based system. It does not, however, explain why ever less attention was paid to this issue by the major treatise writers, who may be regarded as a barometer of criminal legal thinking for their times. The third edition of Gordon, published in 2000, states only that "[a] person under the age of criminal responsibility cannot commit any offence, including an offence of strict responsibility."[150] In order to find an explanation for the lack of developed principles, it is necessary to look elsewhere.

The Child-Saving Philosophy of the Nineteenth Century

For children and, most notably, poor, destitute and delinquent children, the nineteenth century – and particularly the latter half, especially in England and the United States, was dominated by the child-savers[151] whose efforts, insofar as they concerned the criminal law, were directed towards the protection of child-offenders from the rigours of the adult criminal justice system. These reformers had

[150] Gordon, *supra*, note 18, para 8.28

[151] For a full and critical discussion of their role and achievements see Anthony M Platt *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1977) [hereinafter *Child-Savers*]

little interest in the child's criminal capacity except insofar as lack of understanding might serve as a generalised justification for progress towards this overarching aim. Instead they viewed children who offended more as victims of their unfortunate social circumstances[152] and consequently sought to play down issues of responsibility which would engender harsh punishment. Their interest was in diversion out of the adult system or, if this was not instantly achievable, in the provision of disposals which were specifically designed to rehabilitate young people, often grouping together the deprived (who had not offended) and the depraved (who had).

These, in any event, were the outwardly expressed aims of the child-savers but the received view among modern historians is that they were, in fact, seeking to exercise ever-greater control over the children concerned. Anthony Platt's "seminal and highly influential"[153] work in this area centres on the rise of the juvenile court in America in the late nineteenth century. He has noted that "[w]hat seemingly began as a movement to humanise the lives of adolescents soon developed into a programme of moral absolutism".[154] In his opinion, "[t]he main aim of the child-savers

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[152] Martin J Wiener *Reconstructing the Criminal: Culture, Law and Policy in England 1830 – 1914* (Cambridge: Cambridge University Press, 1990) at 286

[153] M D A Freeman "The Rights of Children When They Do Wrong" 1981 *Brit J of Crimin* 21(3), 210, at p 214. Freeman is, however, critical of the way in which Platt's work has been perceived as foreclosing the debate on the child-saving movement and takes the view that there is simply insufficient evidence to conclude that there was "some kind of ruling class conspiracy".

[154] Anthony Platt "The Rise of the Child-Saving Movement" in Chris Jenks *The Sociology of Childhood: Essential Readings* (Aldershot: Gregg Revivals. 1982) (1992) reprint) 151 at p 157

was to impose sanctions on conduct unbecoming youth and to disqualify youth from enjoying adult privileges".[155] Platt suggests that, in fact, the underlying purpose of the child-savers, albeit tacit and perhaps not even fully recognised by the reformers themselves, was the imposition of a middle-class value system on, predominantly, working-class youth, which accorded with the reformers' own.[156] In addition, young peoples' subordination to adults was reinforced through programmes which treated adolescents "as though they were naturally dependent, requiring constant and pervasive supervision."[157]

Deborah Gorham[158] has echoed these themes in her examination of Victorian England's response to child prostitution. Her conclusion is that the motivation of many of those advocating reform was the desire to ensure that the poorest working-class girls (and those most likely to become child prostitutes) had middle- and upper-class values instilled in them. Reformers were unable to separate "child abuse" from the need to earn a living, and tended to ignore both the fact that many young women had exercised a choice to become prostitutes and that the, extremely marked, inequalities between the classes meant that the poorest, even if they were "saved" from

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[155] *Ibid*, at p 157

[156] This principle of "fostering middle class character in the general population as an important purpose of the law" has been identified as a more general Victorian phenomenon, at least in England, by Wiener, *supra*, note 152, at p 51

[157] Platt *Child-Savers*, *supra*, note 151, at p 4

[158] Deborah Gorham "The 'Maiden Tribute of Modern Babylon' Re-Examined": Child Prostitution and the Idea of Childhood in Late-Victorian England" 1978 *Victorian Studies* 21, 353

prostitution, had such a limited range of economic options open to them that they could never aspire to middle-class girlhoods anyway. Thus, philanthropy and control became confused.

The particular concern of this chapter is the impact of the child-saving philosophy in Scotland, and its effect on the criminal justice system. The philosophy is apparent in the development of industrial and reformatory schools from 1832 onwards.[159] Andrew Ralston has noted that, despite the fact that there was a consolidating Act of 1866[160] standardising the law on reformatory schools in Scotland and England, the impetus to reform, and its early implementation, were different in each jurisdiction.[161] It is therefore important to concentrate on the Scottish situation.

According to Ralston, the initial trigger to the reform movement was the Tron Riot of 1812[162] an organised robbing spree which took place during the New Year celebrations that year at the Tron Church in Edinburgh. Over 65 boys took part[163] and their preparation consisted in forcing the city watchmen from their posts, one of whom was murdered. In the interests of future deterrence, the immediate response of the authorities was about as far from the child-savers' philosophy and practice as it was possible to be. Four ringleaders

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[159] Most of the information included here, on these institutions is taken from two articles by Andrew G Ralston: (1) "The Development of Reformatory and Industrial Schools in Scotland, 1832 – 1872" 1988 *Scottish Economic and Social History* 8, 40 [hereinafter "Development"] and (2)"Tron Riot," *supra*, note 76

[160] The Reformatory Schools Act 1866 (29 & 30 Vict. c 117)

[161] Ralston "Development" at p 40

[162] Ralston "Tron Riot" at p 41

[163] Or, at least, 68 arrests were made. *Ibid*, at p 43

were identified, the involvement of one of whom, John Skelton, was established only on highly questionable evidence. His sentence of death was commuted to transportation for life. The other three, Hugh Macdonald and Neil Sutherland both aged eighteen and Hugh MacIntosh aged sixteen were all hanged on a gibbet erected specially for the purpose opposite the spot where the murder had been carried out.[164]

Following the riot and the public executions, a period of soul-searching ensued as the underlying causes of the increase in juvenile delinquency evidenced so forcefully by the Tron Riot were considered. The view taken was that the church had not taken a sufficiently active role in moral education but, in the course of its attempts to remedy this situation, it was discovered that literacy amongst the children attending its new Sunday Schools was extremely low. Accordingly, in April 1813, the Edinburgh Sessional (day) School was opened to which each Kirk Session – the governing body of each individual Church of Scotland – in the city was entitled to send up to fifteen of its children.[165] This institution, part of the stated purpose of which was to reduce juvenile delinquency, was the forerunner of the industrial schools which were developed in eleven Scottish towns and cities[166] between 1841 and 1851.

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[164] *Ibid*, at p 44. Hume cites the case of Macdonald and Macintosh as an example of "early and irreclaimable depravity". Hume i, 32, n 3

[165] *Ibid*, at p 45

[166] Aberdeen, Ayr, Dumfries, Dundee, Edinburgh, Glasgow, Greenock, Paisley, Perth, Stirling and Stranraer. Ralston "Development" at p 41

The early Scottish industrial school philosophy, first espoused by Sheriff William Watson in Aberdeenshire, is fascinating for its similarity to that underlying the modern children's hearings system. Watson set up the first industrial school, in Aberdeen, in 1851 and the other ten followed in relatively quick succession. All were local initiatives and held as a primary aim the *prevention* of delinquency.[167] To this end, they targeted children who were already involved in vagrancy. Nonetheless, in contrast to their English counterparts they did, at least prior to 1854, also take children who had already been convicted of offences because, in Watson's view, "they belonged to the same class."[168] Children attended twelve hours a day and were provided with three meals and with training in industrial skills as well as basic literacy. The school in Aberdeen taught net-making for the fishing industry, for example. Watson insisted that the early industrial schools should be day schools because he wished to promote the continued involvement of parents in their children's lives and development. These principles of meeting the child's needs (in the nineteenth century, for something as basic as food), of mixing children who had offended with those who were only at risk of doing so, because their situations were similar, and of involving parents as much as possible in taking responsibility for their children are all still overtly adhered to by the children's

[167] Ralston "Development," *supra*, note 159, at pp 41 and 42
[168] *Ibid*, at p 43

hearings system, which will be considered in more detail in the next chapter.

Scotland also had reformatory schools, which were specifically for children with a criminal conviction, as early as 1832 in Edinburgh and 1838 in Glasgow.[169] These establishments provided an alternative to a sentence of imprisonment in an adult gaol, something which was commonplace to Hume[170] and Alison.[171] Nonetheless, children were still sometimes subjected to a short prison sentence first,[172] although the local legislation applying to Glasgow sought to avoid this.[173]

With the movement to standardise the provision of industrial and reformatory schools in England and Scotland certain key features of the Scottish system were diluted. Under Dunlop's Act in 1854, magistrates were given the power to *commit* vagrant children to industrial schools, thus weakening the previously accepted principle of voluntary attendance. This also changed the way in which such institutions were funded. A vagrant child who had been committed brought funding with him/her thus discouraging those charities and churches which had previously provided financial assistance from

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[169] *Ibid*, at p 42
[170] Hume i, 35 - 36
[171] Alison i, 665
[172] The Hansard debate on the 1866 Act to consolidate English and Scots law in this area contains quite an extensive discussion of what would be the most appropriate minimum or maximum period of imprisonment prior to attending the reformatory. Hansard *Parliamentary Debates* 3S, 184, col 1608
[173] Act for Repressing Juvenile Delinquency in the City of Glasgow 1841 (4&5 Vict. Cap xxxvi). See Ralston "Development," *supra*, note 159, at pp 43 and 45

doing so in the future. In addition, the principle that such schools should be day schools was eroded, in that, in many cases, it was cheaper to provide residential accommodation. Finally, in 1856 an Act was passed to amend Dunlop's Act so that, for the future, no school could be certified as both an industrial and a reformatory institution. This was to satisfy the general feeling south of the border that children who offended should not be mixed with those who merely found themselves in difficult circumstances.[174]

It is clear, then, that the child-saving philosophy reached Scotland, albeit that it was mediated in a practical and almost piecemeal fashion, with the momentum towards the establishment of industrial and reformatory schools being generated on a very localised basis. Within this philosophy, and the practice which it spawned then, lies another possible reason for the relative failure of Scots law, after Alison, to engage with the issue of the child's criminal capacity. The emphasis on prevention of delinquency appears to have been relatively successful[175] so that there were, perhaps, simply less juvenile offenders generally for the law to deal with overall. There was, therefore, no particular spur to the courts to provide a coherent set of principles for an ever-decreasing body of clients.

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[174] The position in relation to mixing convicted and vagrant children reverted following the consolidating Reformatory Schools Act 1866 (29 & 30 Vict c 117) and Industrial Schools Act 1866 (29 & 30 Vict c 118)

[175] Certainly in the eyes of its protagonists. See Ralston "Development," *supra*, note 159, at p 50 for the views of the Rev Thomas Guthrie who was instrumental in the opening of the Edinburgh Original Ragged School in 1847, and was a central figure in the development of the industrial schools programme more generally.

At a more abstract level, child-saving, as an ideology, was very pervasive in the nineteenth century and particularly strong in England, with activists there making their presence felt in Scotland too, especially in the latter half of the century when the relevant legislation was consolidated for the two jurisdictions. It is likely, therefore, that there was a general feeling that the adult courts were an inappropriate forum for child-accused altogether so that there would have been a disinclination to expend time and energy developing legal doctrines for a group of offenders who were no longer regarded as overtly criminal but, in many spheres, more as victims of circumstances.[176] As will be argued more fully subsequently, this does not excuse the courts for their failure to engage with child-accused, but it may partially explain it.

This principle of diversion had, in fact, been given some legislative effect as early as 1828 with the passing of an Act[177] to allow child-accused to be dealt with by magistrates under summary jurisdiction, to obviate the need for them to be subjected to lengthy trials or to spend prolonged periods in adult prisons on remand. It was not, however, until 1932, that courts specifically for children – juvenile courts - were set up, in terms of the Children and Young Persons

[176] The Scottish Law Commission sought to justify its recommendation that "there [was, in 2002] no need for a rule on the criminal capacity of children" partly on the basis of the existence of the children's hearings system as the primary forum for dealing with children who offend. Scot Law Com No. 185, *supra*, note 10, paras 3.2 to 3.5

[177] 9 Geo IV c 29

(Scotland) Act of that year. The children's hearings system,[178] set up in 1971, under the Social Work (Scotland) Act 1968[179] continues this strong tradition of diversion.

However well the diversionary tactic worked, however, a small number of children continue to be prosecuted in Scotland every year. It is therefore necessary to conclude this chapter with an examination of the modern law, as set down in the reported cases of children who offend.

The Modern Law

Introduction

One of the main arguments put forward in this chapter is that Scots criminal law does not engage sufficiently with the issue of the child's criminal capacity. To substantiate this claim, this part of the chapter will examine the reported cases, in modern times, where the accused is a child in order to highlight the invisibility of this issue in many instances. It is necessary, however, first of all, to consider the one area where capacity *is*, at least for the present,[180] regarded as relevant.

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[178] This will be discussed in detail in chapter 4

[179] Now generally governed by Part II of the Children (Scotland) Act 1995

[180] The Scottish Law Commission's proposals, which are discussed in this section, seek to sever this link with criminal capacity.

Age of Criminal Responsibility

The only statutory provision which is generally recognised as relating directly to the child's criminal capacity is section 41 of the Criminal Procedure (Scotland) Act 1995 which sets the age of criminal responsibility at eight and expresses this as a conclusive presumption that no child under that age can be guilty of any offence.[181] In Merrin v S[182] the High Court had to determine whether a child aged under eight could be referred to a children's hearings on the ground that "he [sic] ha[d] committed an offence."[183] In its interpretation of section 41, the High Court was clear that the issue was whether, given the irrebuttable nature of the presumption, a child under eight was capable of formulating *mens rea* or dole. Lord Justice Clerk Ross stated that the presumption constituted a substantive rule, rather than merely a procedural one, and that it had its origins in the law as set down by Hume and Alison.[184] The view of the majority[185] was that such a young child would not be able to formulate *mens rea* therefore s/he could not be referred to a children's hearing on the offence ground. This examination of the nature and meaning of section 41 is particularly interesting given the Scottish Law

[181] Criminal Procedure (Scotland) Act 1995, [hereinafter "CP(S)A 1995"] s 41
[182] *Supra*, note 114
[183] Social Work (Scotland) Act 1968 s 32(2)(g) (now Children (Scotland) Act 1995, s 52(2)(i))
[184] *Supra*, note 114, at p 197
[185] Lord Dunpark dissented though on the basis that the word "offence" could be construed differently where the purpose of the proceedings was to ensure the welfare of child in trouble, not that the age of criminal responsibility had no connection with criminal capacity. *Ibid*, at p 197

Commission's recent recommendation that the age of criminal responsibility should be restated simply as an age denoting immunity from prosecution and, hence, disconnected from capacity altogether. It has been suggested that this proposal would effectively reverse the decision in Merrin v S.[186]

The Law Commission proposes that, in a system where the majority of juvenile offenders are processed through the, welfare-based, children's hearings system, the age which is of particular significance is that at which most children become liable to prosecution in the adult courts. Under the Commission's scheme, that would remain, as at present, sixteen.[187] In line with the views of the Kilbrandon Commission[188] however, it considers that there is still a need to retain the power to prosecute children aged under 16, in exceptional circumstances.[189] It proposes twelve as the age below which this would be impossible[190] but it specifically recommends that this line-drawing exercise at the age of twelve should be completely severed from the issue of the child's capacity. Children aged eleven and under would simply be immune from prosecution.[191]

Although this thesis argues for a detailed and individualised examination of a child-accused's criminal capacity, it is still regarded

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[186] Elaine Sutherland "The Age of Reason or the Reasons for an Age: The Age of Criminal Responsibility" 2001 SLT 1,at p 2
[187] CP(S)A 1995, s 42(1)
[188] Report on Children and Young Persons (Scotland) (1964) Cmnd 2306, paras 124 and 125
[189] Scot Law Com No. 185, *supra*, note 10, paras 2.10 – 2.13
[190] *Ibid*, paras 3.15, 3.16, 3.19 and 3.20
[191] *Ibid*, para 3.6

as important that there should be an age of criminal responsibility and, in contrast to the Law Commission's stance, that that age should, at least notionally, be seen as expressing a general view about children's capacity.[192] The justification for having an age of criminal responsibility is political to ensure that very young children are never prosecuted, no matter the circumstances of the offence or the prevailing political climate in which it is committed. This is broadly in line with the Law Commission's proposal to debar children aged under twelve from prosecution, which accords with the view of a number of the Commission's consultees that having no minimum age might expose the very young to the adult courts.[193] For example, the wave of opprobrium generated by the murder of James Bulger suggests that there would have been a political will to prosecute Robert Thompson and Jon Venables no matter what their age at the time of the crime.[194] It is submitted that very young children should be protected from political points-scoring exercises of this nature.

There are, however, two reasons for departing from the Law Commission's recommendation that the age below which prosecution is impossible should be divorced from capacity.[195] The first of these

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[192] *Ibid*, paras 3.4 and 3.5

[193] *Ibid*, para 3.4

[194] This is demonstrated by the press reports cited in chapter 1 concerned with attempts to raise the age of criminal responsibility in Scotland and Eire which expressed outrage that the proposed increases would have exempted "the Bulger killers" from prosecution.

[195] The *Draft Criminal Code for Scotland* also takes the view that "children under 12 years of age are too young to be held guilty of a criminal offence": Commentary to section 15 (Children) at p 41

is stigma. Immunity from prosecution, by definition, prevents children from appearing in court but it does not provide any justification for so doing. Accordingly, it merely serves to heighten the perception of children "getting away with murder". If the age of criminal responsibility is notionally linked to capacity, this identifies children as a group whose development is, in certain respects key to the criminal process, lacking, and who are, therefore, entitled to some protection from prosecution which is not appropriate for their adult counterparts.

Secondly, immunity from prosecution expires once the relevant age is attained. This raises the spectre of a child who committed a crime as a toddler becoming liable to prosecution years later. The need for this safeguard is demonstrated by the case of a child who was charged, by the district attorney in Cincinatti, Ohio, with a murder allegedly committed when she was aged three. At the age of twelve, the child, who was in foster care, started to display disturbed behaviour and to suffer from nightmares. She eventually told her foster parent that she had killed her baby cousin, when she was aged three herself, by drowning him in a bucket of water.[196] It appears that the DA eventually dropped the charge but the case illustrates the possibility that prosecution, even of those who were very young at the time of the offence, might take place later, if the age of criminal

[196] "Can 3-Year-Old Child Commit Murder?" *Montreal Gazette* 9 March 1994 pp A1 and A12

responsibility did not operate to prevent this. This is undesirable most notably because of the difficulty of assessing his/her understandings of the crime and of criminality generally, at the time when the offence was committed given that it is likely that, by the time of the trial, s/he will have a more mature understanding of such matters simply by virtue of having aged.[197] As the Law Commission has noted,[198] Article 6 of the European Convention on Human Rights which requires prosecution "within a reasonable time" would, almost certainly, ensure that this did not happen, but the possibility, undesirable in itself, remains.[199]

Support for the view that the age of criminal responsibility should be linked to capacity is to be found in international law. Both the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) ("Beijing Rules) and the United Nations Convention on the Rights of the Child (1989) ("CRC") include provisions which indicate that this is required. The CRC is a multi-lateral treaty[200] which has been signed and ratified by the UK and is

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[197] It is, of course, arguable that this is an acceptable way to proceed if the view is taken that the primary justification for protecting children from prosecution is their inability properly to defend themselves. The position adopted here is however, that the child's understanding of his/her actions, in a number of respects, *whilst s/he is committing them* is an element integral to the establishment of his/her criminal responsibility. Without this the maxim *actus non facit reum nisi mens sit rea*, which requires the *actus reus* and the *mens rea* to occur simultaneously, and which is fundamental in Scots criminal law, is not satisfied.

[198] Scot Law Com No 185, *supra*, note 10, para 3.18

[199] These issues are discussed more fully subsequently in relation to the case of HMA v P 2001 SLT 924

[200] Currently the USA and Somalia are the only countries which are not signatories. John P Grant and Elaine E Sutherland "Scots Law and International Conventions"

therefore binding in international law, although it does not have direct effect in British law. The Beijing Rules, which predate the Convention, have been described as "soft law".[201] Although not binding in international law, the British government is a signatory to them and they therefore constitute one of its international obligations,[202] of importance in issues connected with the administration of juvenile justice. The UN invites, but does not require, states to adopt the Rules.[203]

Rule 4(1) of the Beijing Rules states:

"In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity"

The official commentary on the provision expands on this by explaining that

> "The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless."

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in Alison Cleland and Elaine E Sutherland (eds) *Children's Rights in Scotland* (Edinburgh: W Green, 2001) 29, at para 3.28

[201] Penal Reform International website: http://www.penalreform.org/english/vuln_intinsjuve.htm

[202] Sutherland, *supra*, note 186, at p 3

[203] Scot Law Com No. 185, *supra*, note 10, para 2.21

The Law Commission's opinion on this provision is that " [a]t first sight the concept of age of criminal capacity used in Article 4(1) is that of criminal capacity but it is clear from the commentary that the provision is concerned rather with an appropriate age for being prosecuted in the criminal justice system."[204] It is not, however, altogether clear how this conclusion is reached. The purpose of the age of criminal responsibility is, of course, to determine, in the broadest possible terms "an appropriate age for being prosecuted in the criminal justice system" but it is submitted that this Rule seems clearly to indicate that that determination should be predicated on principles of criminal capacity, defined loosely as the child's understanding of his/her criminal actions which allows him/her to take responsibility for them.

The CRC provides that "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular ... [t]he establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law."[205]

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[204] *Ibid*, para 2.22
[205] Art 40(3)(a)

The Law Commission makes two main points concerning this provision.[206] The first is that its requirement that states "seek to promote" these matters is weak. Signatory states will satisfy its terms merely by moving towards the establishment of such laws. Secondly, the Commission considers that, if Article 40(3) is read in the context of the rest of the provisions in the CRC on children who offend, which are seeking to ensure diversion out of the adult courts wherever possible, then that Article's formulation of the age of criminal responsibility should be read simply as the age at which children become liable to prosecution in the adult courts. It is submitted that this is a very strained reading of an Article which expressly and in as many words links up the minimum age for prosecution with the concept of capacity. Elaine Sutherland argues that the Commission's reading of Article 40(3)(a) would mean that it was effectively treated as if it were *pro non scripto*.[207]

These provisions, in both the Beijing Rules and the CRC then, on a straightforward reading lend support to the view that the age of criminal responsibility should be linked to the child's criminal capacity. The question of the appropriate age itself is discussed in chapter 5

[206] Scot Law Com No. 185, *supra*, note 10, paras 2.27 to 2.30
[207] Sutherland, *supra*, note186, at p 3

Scottish Domestic Case Law

(a) Age of Little Consequence

The age of criminal responsibility deals with capacity very broadly, as applicable to all children in the same way. This thesis is, however, primarily concerned with capacity on an individualised basis. It is therefore necessary to examine how the issue has been characterised in individual cases of children who commit serious crimes in modern times. It should be noted at the outset that very few children are prosecuted, the vast majority of juvenile offenders being referred to the children's hearings system.[208] Accordingly, there is a paucity of reported cases in this area generally, however some analysis of those which are reported is both possible and useful. Even prior to the question of capacity, it is noteworthy that the accused's age, and his/her corresponding status as a child, are often, in themselves, disregarded or downplayed to the extent that case reports accord them only a passing reference.

For example, in McDermott v HMA[209] the accused was convicted of murder at the age of fifteen. Despite the seriousness of the crime, his youth is mentioned only twice: once to explain why his conviction

[208] The Scottish Law Commission interpreted the statistics on children who offend for 1997, 1998 and 1999 to mean that 99% were referred to the children's hearings system and only 0.5% to the courts: Scot Law Com No. 185, *supra*, note 10, at para 3.10. The figures for referrals to the hearings system and prosecution do not exactly match, causing the 0.5% discrepancy.

[209] 2000 SLT 366

was for "detention for life"[210] in terms of s 206(2) of the Criminal Procedure (Scotland) Act 1995)[211] (only adults are imprisoned) and the second time as part of a reminder to the jury that he had allegedly confessed to the crime in the absence of his solicitor.[212] Similarly, in W v HMA,[213] where the accused had been convicted of rape and appealed, the fact that he was aged fifteen at the time is left out of the headnote completely and only covered in the indictment itself, and, in passing, in Lord Ross's opinion.[214] The case turned on whether the trial judge's charge to the jury was sufficiently clear concerning what constituted rape where the complainer (who, in this case, was also aged fifteen) was intoxicated.[215] From a methodological point of view, this failure to attach importance to age has the consequence that indexing or digesting of cases on an annual basis often fails to identify the accused as a child, making finding such cases difficult in itself.

Capacity in Cases Dealing Specifically with *Mens Rea*

Even where *mens rea* itself is the key issue in a case, and where it might, therefore, be considered particularly important that the child's

[210] In fact convicted murderers aged under eighteen are sentenced to "detention without limit of time".
[211] McDermott v HMA, *supra*, note 209, at p 368
[212] *Ibid*, at p 370
[213] 1995 SLT 685
[214] *Ibid*, at p 685 and p 686
[215] See also Mathieson v HMA 1981 SCCR 196 where it is noted, in passing that "Mathieson ... is now sixteen". It is unclear what age he was when he committed the offence, nor does this appear to have been of any further relevance in the case.

capacity be taken into account, this tendency to gloss over the accused's status as a child is still discernible. This is clear from the cases of W v HMA[216] and C v HMA[217] in each of which the accused was a fourteen-year old boy. In W, the accused was convicted of culpable and reckless injury for throwing a bottle out of a fifteenth floor window and seriously injuring a passer-by. In C, the conviction was for two counts of indecent assault committed against an eleven-year old girl, the second count having been reduced from a charge of rape.

In W, the court discussed, to the extent that the case has become part of the accepted Scottish canon of recklessness,[218] the (high) degree of culpability and recklessness required to constitute this crime. There is no hint that the requisite degree might vary to accommodate the accused's status as a child or that, even if he had, objectively, acted recklessly, he might not have understood his actions and their consequences in the same way, or to the same extent as an adult. For example, his conduct had "near fatal consequences to a member of the public,"[219] yet there is no discussion of the nature of his understanding of the likelihood that his action might kill someone. That such issues might at least be considered is not as idealistic as it at first appears. Seventeen years after W, in HMA v S, Lord Caplan stated his view that "[c]ertainly children can act recklessly (and it

[216] 1982 SLT 420
[217] 1987 SCCR 104
[218] See Gordon, *supra*, note 18, at paras 7-58, n 4 and 7-61 n 44 and 49
[219] W v HMA, *supra*, note 213, at p 420

may be that they are even more prone to do so than adults) but their capacity to appreciate the dangers they are creating may not always be sufficient to attach criminality to their conduct."[220]

In C, the accused claimed that he had believed that the complainer had consented to the indecency and, therefore, that he lacked the *mens rea* of evil intent for a conviction of assault. It was conceded on his behalf, however, that a girl aged eleven or under was incapable in law of consenting to acts of indecency. Because his error was as to a matter which, if proved, could not have afforded him a defence anyway, it was irrelevant. Again, the case is sufficiently important legally to be cited by Gordon in his discussion both of error[221] and of consent in assault.[222] The complainer's age is accorded importance because of its significance in the general law. By contrast, the accused's age is treated as largely irrelevant, only discernible at all in the trial judge's rather patronising comments about "[s]upposed heroes of the playground."[223] The assessment of capacity is particularly important in a case of this nature where, in law, there is, effectively no defence.

In both of these cases, then, C and W, in determining responsibility in terms of whether or not to convict, the criminal law simply treats the child-accused as if he were an adult. Capacity is, presumably, if

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[220] HMA v S (unreported) (5 October 1999) (High Court) (examination of the facts) See http://www.scotcourts.gov.uk/opinions/845A_99.html) at p 7 of 10 (on internet copy)
[221] Gordon, *supra*, note 18, at para 9.08
[222] *Ibid*, at para 29.39
[223] C v HMA, *supra*, note 217, at p 106

it is considered at all, regarded as an implicit element of *mens rea*.[224] Here, then, the "contra-factualism", - treating young accused as if they were mature - identified, in the *juvenile justice* system by Ido Weijers[225] and commented upon by Antony Duff[226] is writ large. The law treats these accused "'as if' [they were] fully responsible",[227] when, in fact, their inherent immaturity may well mean that they are not. Examining capacity specifically would allow a more accurate assessment of their individual responsibility and obviate the need for reliance on the fiction of maturity.

A note of caution may be necessary here. There may be number of reasons for the absence of any discussion of capacity in cases concerning children as offenders. First, case reports are selective in the points which they consider, sometimes illuminating only one legal issue out of a number discussed. Equally, the majority are appeals, with the consequence that information presented to the trial court as evidence is unlikely to be discussed again. Capacity may slip through the reporters' net on either or both of these bases.

Secondly, reference can be made to the Scottish Law Commission's view that the fact that the vast majority of juvenile offenders are

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[224] In sentencing C, youth was taken into account in mitigation. Sentence was deferred for a year with the promise that, if the judge received a "satisfactory report" and the accused behave[d] [him]self", that would "be an end of the matter." *Ibid*, at p 106. The sentence in W is not recorded in the case report.

[225] Ido Weijers "The Moral Perspective: A Pedagogical Perspective on Juvenile Justice" in Weijers & Duff (eds), *supra*, note 2, 135 at p 141

[226] Antony Duff "Punishing the Young" in Weijers & Duff (eds), *ibid*, 115 at pp 116 - 7

[227] *Ibid*, at p 116

referred to the welfare-based children's hearings system obviates the need for a sophisticated approach to capacity for those who are prosecuted. In fact, however, it is contended that because so few children are dealt with in this way, the importance of securing their fair treatment, in a system which does not set out to be child-centred, is heightened. Additionally, the small number of child-accused means that the employment of mechanisms for the thorough testing of their capacity should not overstretch the criminal justice system.

Unpreparedness for Children

Certain cases illustrate the unpreparedness of the Scottish criminal courts for dealing with children. In F v HMA,[228] the accused, aged fourteen and described as a "one-boy crime wave"[229] pled guilty on indictment to nine charges of theft by housebreaking all committed in Shetland. There is no doubt, from his note to the appeal court, that the sheriff gave the case anxious consideration. He paid lip service to capacity, though without investigating it. His note states that "[t]he appellant ... was for all his extreme youth the leader and planner of the pair. He is not mentally immature. He knew or ought to have known that what he was doing was wrong." The sheriff sought a disposal which took into account "[a]dolescent nature" whilst weighing up both the accused's development and the public

[228] 1994 SCCR 711
[229] *Ibid*, at p 712

interest.[230] In order to achieve this, however, he detained the accused "without limit of time", the equivalent of a sentence of life imprisonment for an adult and carrying the same connotations of seriousness (of offence) and dangerousness (of offender).

Ironically, the sheriff's primary aim – to ensure the greatest flexibility so that the accused could be released as soon as he had been appropriately rehabilitated – would have been realised by the imposition of a determinate sentence of detention, the law allowing the release of a juvenile offender *at any time* during the sentence, on the recommendation of the Parole Board.[231] It appears then, that neither the sheriff, his colleagues whom he consulted, nor either the crown or the defence had to hand the information required to make an informed decision on sentencing a child, nor did they apprise themselves of it. The consequences for this accused, given that the sentence of detention without limit of time requires release on life licence, could have been severe. Of course, as in many cases, the errors here were corrected on appeal and it is arguable that it was unreasonable to expect the sheriff in Lerwick to be fully cognisant of the law in every case over which he might preside. Nonetheless, he had specifically sought to deal with the child-accused in an age-appropriate fashion and his failure to access the relevant information

[230] *Ibid*, at p 711
[231] *Ibid*, at p 715

suggests that the system as a whole is not particularly well prepared for the prosecution and sentencing of the young.

In HMA v S,[232] the accused aged twelve at the time of the offence and thirteen at the time of the court proceedings was originally charged with murder. He had set fire to a pool of petrol situated a short distance from his friend, the deceased, who was lying on a path and who, to the accused's knowledge had petrol on his clothes. Petrol vapour ignited and the deceased suffered severe burns from which he later died. In order that the court could hear evidence on the child-accused's (delayed) development, a plea in bar of trial on the ground of insanity was entered on his behalf. Although, ultimately, this mechanism served the child-accused well, because it allowed information on his capacity to be fed into the process,[233] the fact that the only means by which this could be achieved engendered a finding of "insanity"[234] is indicative of a system which can cope only clumsily with the young. It was necessary for expert witnesses to present evidence that the accused suffered from a mental

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[232] (plea in bar of trial on ground of insanity) (unreported) (9 July 1999) (High Court) see http://www.scotcourts.gov.uk/opinions/845_99.html ; (examination of the facts – *supra*, note 220)

[233] Cf B v HMA 2003 SLT 662 where the accused aged fourteen at the time of the offence (rape) had an IQ of 74 (S's IQ was 76). No plea in bar was led and, therefore, the only aspect of the accused's understanding which was discussed was his ability to understand the caution administered by the police.

[234] It should be noted however, that, in recognition of the, often inappropriate, stigma attaching to the term insanity, the Scottish Law Commission has proposed that the plea should be renamed "disability in bar of trial." Scottish Law Commission *Discussion Paper on Insanity and Diminished Responsibility* (Scot Law Com No 122) (Edinburgh: TSO, 2003) paras 4.8 – 4.12

impairment[235] which would be recognised by the Mental Health Acts.[236]

The procedure in a plea of insanity in bar of trial is contained in sections 54 to 57 of the Criminal Procedure (Scotland) Act 1995 which are primarily designed to deal with offenders suffering from mental illness or disorder. If it had been determined, at the examination of the facts, that S had committed the offence then, because he was originally charged with murder, the mandatory disposal at that time would have been incarceration in the state mental hospital with the imposition of the equivalent of a restriction order on release.[237] This would clearly have been inappropriate given that S's mental impairment, which justified the plea in law, was a developmental delay. In other words, S had, in certain important areas - primarily verbal and abstract-reasoning abilities - failed to develop as fast as his peers and the deficit was, in his case, significant. All children, however, are, to some extent lacking in development – that being an integral part of the status of being a child. The legal system is failing children if it can only engage at all with the question of their development – or lack of it - in circumstances where this is "abnormally" slow. As discussed in the previous chapter, development and capacity are intrinsically bound up with each other.

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[235] HMA v S (plea in bar) *supra*, note 232, at p 7 of 9 (on internet copy)
[236] *Ibid*, at p 3 of 9 (on internet copy)
[237] CP(S)A 1995, s 57(3). This subsection has now been amended to remove the mandatory disposal for murder: Criminal Justice (Scotland) Act 2003, s 2

The Effect of the Human Rights Act 1998

HMA v S[238] is one of the first cases involving a child to be decided after section 57(2) of the Scotland Act 1998 came into force on 20th May 1999. This section prevents members of the Scottish Executive from acting in a way which is incompatible with any Convention right or with European Community law. Accordingly, it specifically requires the Lord Advocate (as a member of the Scottish Executive) to adhere to the European Convention on Human Rights, even prior to the coming into force of the Human Rights Act 1998 on 2nd October 2000. It is submitted that these two legislative provisions - or, in other words, the incorporation of the European Convention into domestic Scots law – have gone some way to improving the situation of children accused of serious crimes in Scotland. The interpretation of the Convention in such cases, all of which have so far been concerned, directly or indirectly, with Article 6, is informed by the European Court's decision in the Bulger case.

Article 6 is concerned with the right to a fair trial. In T v UK; V v UK,[239] the European Court, following an earlier case,[240] took the view that, read as a whole, this Article required an accused person's effective and active participation in his own trial. Where the accused

[238] *Supra*, notes 220 (examination of the facts) and 232 (plea in bar)
[239] (2000) 30 EHRR 121
[240] Stanford v UK *The Times* 8 March 1994. Here the applicant's argument was that he was unable to hear some of the evidence and it was held that this did not preclude his participation given the role played by his legal representatives.

is a child, "it is essential that [s/he] is dealt with in a manner which takes full account of his [sic] age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his [sic] ability to understand and participate in the proceedings."[241]

This points to the need to *assess* a child's functioning under the heads identified here of maturity and intellectual and emotional capacities in order that s/he can be dealt with in the appropriate manner. The court specifically held that the child's active participation in the trial will not be achieved merely by his/her presence and legal representation throughout. It is this finding which was applied by the High Court in HMA v S in determining whether S could have a fair trial, given his intellectual impairment. It is interesting to examine the construction of capacity in S's case.

HMA v S was determined by a single judge in the High Court (because the charge was murder), sitting without a jury to deal with, what is, essentially, a procedural matter. Its relative insignificance within the doctrine of precedent is, however, displaced in this thesis by its subject matter – the level of understanding, in particular areas, of a child accused of a serious crime. The court was called upon to decide whether S was insane in bar of trial in terms of the test set down in HMA v Wilson[242] - ie "whether he [was] fit to instruct a

[241] T v UK; V v UK, *supra*, note 239, at para 86
[242] 1942 SLT 194

defence and fit to follow the proceedings."[243] The evidence led was, accordingly, geared towards answering these questions – and Lord Caplan specifically took into account in making his ruling the need for S's *active* participation in his trial.[244] The evidence required to answer these questions also however covers a number of the pre-conditions to a legitimate trial and the capacity points identified in the previous chapter.

The ability to follow the proceedings and the requirement of effective participation are both intrinsically bound up with the question of understanding of legal language and concepts theorised previously as a precondition. Accordingly, S's verbal and abstract reasoning skills were subjected to close scrutiny both because these were the areas in which his deficit was the greatest[245] and because they were the most crucial to understanding and participating in a criminal trial. A clear picture emerged of his (dis)ability in these respects,[246] the difficulties which this presented for the conduct of the trial and the steps which might be taken to ameliorate, if not to resolve the problems. For example, his difficulties with language were such that he would understand the trial better if it could be translated from verbal into

[243] *Ibid*, at p 195 (per Lord Wark)
[244] HMA v S, *supra*, note 232, at p 7 of 9 (on internet copy)
[245] In general, in these areas, he functioned at the level of a child aged just over eight years, despite his chronological age of twelve at the time of the offence and thirteen at the time of trial. See *ibid*, at pp 2, 3, 5 and 7 of 9 (on internet copy)
[246] Despite its technical nature, Lord Caplan was able to present a clear summary of this evidence, expressed in terms which were helpful from the legal perspective. See *ibid*, at p 7 of 9 (on internet copy)

visual images.[247] He could not follow sentences of more than ten words in length[248] therefore participants in the trial should limit themselves to such short sentences containing no more than two concepts.[249] His understanding, certainly of key points, possibly of all points, would require to be checked, on a sentence by sentence basis, by a trained interpreter because it would be insufficient simply to ask him if he had understood.[250] It was likely that this checking would require to take place outwith the presence of the jury and it was unclear whether the evidence would require to be reheard if it was determined that S had not, in fact understood it.[251] As in T v UK; V v UK,[252] S was beginning to suffer from post-traumatic stress disorder[253] and the court proceedings would significantly increase his anxiety, making it even more difficult for him to follow.[254] It was therefore recommended that the trial be conducted in a small room with not more than four people present at any one time,[255] that low vocal tones should be used at all times and that wigs and gowns should be removed.[256]

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[247] *Ibid*, at pp 4 and 5 of 9 (on internet copy). No opinion was expressed as to how this might be accomplished.
[248] *Ibid*, at pp 3 and 5 (on internet copy)
[249] *Ibid*, at p 5 (on internet copy)
[250] *Ibid*, at pp 4 and 5 (on internet copy)
[251] *Ibid*,at p 8 (on internet copy)
[252] *Supra*, note 239 at pp 180 – 181 paras 89 and 90
[253] HMA v S (plea in bar) *supra*, note 232, at p 4 (on internet copy)
[254] *Ibid*, at p 2 (on internet copy)
[255] The judge's calculation was that the absolute minimum number of personnel who could be present at a Scottish jury trial was, in fact, 25.
[256] HMA v S (plea in bar) *supra*, note 232, at p 5 (on internet copy)

Given this evidence, it is unsurprising that Lord Caplan sustained the plea in bar of trial on the basis of "unequivocal and satisfactory expert evidence from defence witnesses that the accused would not be able to follow the proceedings were he to go to trial."[257] The evidence is also interesting in its own right because Lord Caplan reached his conclusion on the basis of an inference that S had "an effective age of a child of little more than eight years, if not younger."[258] This inference was drawn because several of the expert witnesses placed S's skills in specific respects at about the level of a child of eight. Given the difficulties with a criminal trial to which these findings indicated that S would be subject, the setting of the age of criminal responsibility in Scotland at eight must be seriously questioned. This is point which will be considered in chapter 5.

The case also demonstrates that there is no difficulty about obtaining and leading evidence which would enable a court to reach conclusions about a child-accused's understandings both in terms of preconditions to a legitimate trial and capacity points. Expert witnesses in the case also opined, for example, that S was capable, with appropriate explanation, of understanding that a charge of murder involves an attribution of blame, that he could understand the difference between guilty and not guilty and that his lack of understanding was of a different order from that of an adult of low

[257] *Ibid*, at p 8 (on internet copy)
[258] *Ibid*, at p 7 (on internet copy)

intellect.[259] There was also a close examination of his understanding of causation in the specific circumstances of this case, in terms of the flammable properties of petrol and petrol vapour and how this related to his state of mind with regard to the harm caused to his friend, the deceased.[260]

While the case demonstrates the Scottish courts' *ability* to deal with issues of capacity, as a precedent, it still only stands for the fact that such issues are relevant where an accused who is a child brings a plea in bar of trial on the ground of insanity. Capacity, then, has not, by virtue of this case, become a major concern of the Scottish criminal justice system. More encouragingly, however, recent cases on the question of unreasonable delay in terms of Article 6(1) of the European Convention have demonstrated a generally child-centred approach which touches on the need to determine capacity, albeit only obliquely.

Article 6(1) requires "a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law." It is accepted generally by the Crown Office that cases involving children, whether as witnesses, complainer or accused should be expedited.[261] In HMA v P,[262] Lord Reed set down a rationale for this rule where the child is the accused. In so doing, he attached

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[259] *Ibid*, at p 2 (on internet copy)
[260] *Ibid*, at p 8 (on internet copy); (examination of the facts) supra, note 220, at pp 3, 5, 7 and 8 (on internet copy)
[261] HMA v P, *supra*, note 199, at p 927, para 9
[262] *Ibid*

significance to the status of child *per se*, in a way which has resonance for all cases involving child-accused. He also drew on the CRC and the Beijing Rules, according to them an importance in their own right in Scots law[263] which had previously been absent.[264] The High Court's implicit acceptance of the framework which these treaties create for cases involving children is particularly welcome given their lack of binding status in Scots law which was discussed above. In fact, the requirement to have regard to the CRC and the Beijing Rules, in cases involving child-accused, was subsequently endorsed by the Privy Council in a Scottish appeal on a devolution issue.[265] Overall then, Lord Reed's judgment re-focussed attention on the child as a child and as the bearer of rights in international law, additional to those accorded to everyone, child or adult, by the European Convention on Human Rights.

HMA v P involved two child-accused charged with rape, allegedly committed when they were aged thirteen. They were charged in March 1999 but, for various reasons, their trial was not due to start until February 2001. Lord Reed examined the reasonableness of this delay in a child-centred fashion.[266] He noted that a child of thirteen might be very different from a child of fifteen "both in terms of

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[263] *Ibid*, p 927, paras 7 and 11

[264] In Cook v HMA 2001 SLT (Sh Ct) 53 for example, which also concerned delay under Article 6, where the accused was aged fifteen at the time of the offence, the sheriff was dismissive of the CRC and stated that the Children (Scotland) Act, which is, in part, based on the CRC, was "of no relevance to a criminal prosecution." (at p 55)

[265] Dyer v Watson; K v HMA 2002 SLT 229 at p 243

[266] HMA v P, *supra*, note 199, at p 928

physical development and in terms of maturity and understanding," thereby giving a very different impression to a jury than if the trial had taken place expeditiously. He indicated, encouragingly in capacity terms, that it might be much more difficult to assess the child's understanding, in this case of sexual matters and relationships, at the time of the offence, if the trial was delayed for two years.[267] He also recognised that the experience of the passage of time is relative to age and that a two-year period during childhood may have a very different significance than the comparable period for an adult.[268]

HMA v P is not concerned with capacity in its own right, but it does demonstrate an awareness that understanding is linked to development and that it is the child's understanding of the crime *at the time of its commission* which is and ought to be the concern of the criminal law. Its weighting towards the child of the balance between the accused's status as a child on the one hand, and his/her status as the alleged perpetrator of a serious offence on the other[269] may help to redress the previous situation in cases such as W v HMA[270] and C

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[267] A similar point is recognised in the official commentary to Rule 20 of the Beijing Rules. (Avoidance of Unnecessary Delay). It states: "[a]s time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically."

[268] In a subsequent appeal, the whole of Lord Reed's statement on these points was quoted and adopted by the High Court. Kane v HMA 2001 SCCR 621

[269] See Claire McDiarmid "Children Who Murder: What is Her Majesty's Pleasure?" 2000 Crim L R 547 for a discussion of this tension. See also Rule 17 of the Beijing Rules and the official commentary thereon.

[270] *Supra*, note 216

v HMA[271] where youth was ignored. At the very least, there is now no doubt that, because of the characteristics of youth including developmental progression, children's cases must be expedited if they are not to fall foul of Article 6(1).[272]

Capacity Under the Convention and in International Law

These cases also give new authority, within the Scottish criminal law framework, to the Beijing Rules and the CRC. This is a step forward even from the treatment of the Bulger case in the European Court where the use made of the CRC has been described as "an aid to construction"[273] of the European Convention. The main provisions of the relevant international instruments on the child's criminal capacity have already been examined – Article 6 of the European Convention requires that the child-accused understands the proceedings sufficiently to participate in them actively and effectively; Article 40(3)(a) of the CRC and Rule 4(1) of the Beijing Rules require that the age of criminal responsibility be linked to capacity. Both the Scottish courts' recent treatment of delay under Article 6 and the decision in T v UK; V v UK[274] indicate that the

[271] *Supra*, note 217
[272] Haston and Ors v HMA (unreported)
(see http://www.scotcourts.gov.uk/opinions/xc898_03.html) held that "[t]he approach in the case of a child of eight or nine years old would not be the same as in the case of child who was nearly sixteen. There had to be a sliding scale." At para 11
[273] See Grant and Sutherland, *supra*, note 200, at p 48
[274] *Supra*, note 239

European Convention, which does not, in general,[275] engage with the rights of children as distinct from those of adults[276] can be interpreted and applied to take account of the special characteristics of children. Both the CRC and the Beijing Rules include provisions which, while not relevant to an assessment of the child's capacity as such, do indicate the need actively to promote children's understanding of the criminal proceedings. Article 40 of the CRC is reminiscent of Article 6 of the European Convention suggesting that it could be construed similarly so as to require active participation.

In a similar vein, Rule 14(2) of the Beijing Rules states: "[t]he proceedings[277] shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely." This provision is particularly clear as to the need to promote the child's understanding within the proceedings.

Conclusion

This chapter has examined the treatment of the child's criminal capacity in Scots criminal law from the seventeenth century to date,

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[275] Though certain Articles do make specific reference to children. Article 6(1), for example, modifies the obligation on states to dispense justice publicly so that the press and public can be excluded "where the interests of juveniles so require." For a complete list see Grant and Sutherland, *supra*, note 200, at p 38

[276] Article 1 secures rights and freedoms to "everyone" (ie including children) within the jurisdiction of a High Contracting Party

[277] The Beijing Rules are expressed very broadly so that they can be applied in all countries which adhere to them, whatever their specific system. "Proceedings" therefore refers to any proceedings which deal with a criminal offence committed by a child. In Scotland this includes both the children's hearings system and the adult courts.

drawing on comparative material where appropriate. A picture emerges of a law which, because of the prevalence of capital punishment in an earlier period, at that time engaged quite extensively with the justification for saving children and young people from the gallows. This is grounded in issues of understanding which, although relating only to the narrow areas of the distinction between right and wrong and the ability to participate actively in the trial, nonetheless resemble certain aspects of criminal capacity as the term would be understood today.

From the beginning of the nineteenth century however, the law begins to take less and less interest in child-accused as such partly, perhaps, because of the success of programmes to divert those at risk of offending into industrial schools, which may have resulted in fewer children being prosecuted, in the first place. The child-saving philosophy, part of which was that the court was not the most appropriate forum for dealing with children may also have been significant here.

This lack of engagement with child-accused as children, particularly in relation to capacity, has continued into the modern law, although there are more promising indicators in relation to cases decided under the Human Rights Act 1998. The tension between the child as dependent and in need of protection and the child as perpetrator of crime underlies much of this analysis. It will be examined specifically in the next chapter.

Chapter 4

Reconciling Welfare and Justice

Introduction

This chapter discusses specifically one of the major underlying themes of the whole thesis: the tension between the child as vulnerable and in need of protection and the child as independent actor[1] and the even greater paradox presented by a child who commits a serious crime. This returns the debate specifically to some of the issues raised in chapter 1 arising from the distinctions drawn between the "traditional" and the "childhood studies" constructions of childhood and between original sin and original innocence. The traditional construction of childhood is criticised for representing children primarily as "becomings" on the road to adulthood rather than (young) persons in their own right. The childhood studies construction concentrates on the child's own, individual reality and eschews the attempt to theorise childhood as a universalisable experience. This thesis seeks to treat children holistically, realistically and individually and, in so doing, to recognise both their interactivity, as young members of society, with adults and other children and their need to be protected, to the extent which each of

[1] Erik Erikson's theory of child development, discussed in chapter 2, suggests that even very young children (those in his second phase of development, aged between 1 and 3 on average) experience conflict caused by a developing sense of autonomy drawing them out from the state of dependence which they have previously enjoyed and which still pertains in their lives in many respects.

them, as an individual, requires, in their participation in the criminal justice system.[2]

Children are neither wholly vulnerable nor fully independent and responsible yet the discussion of the modern law in chapter 3 suggests that it is sometimes easier for the criminal law to approach them as if they were as responsible as adults.[3] In order to treat children fairly however, the law, both civil and criminal, *ought* to be able to accommodate the child's vulnerability and his/her agency simultaneously. This chapter is particularly concerned with this challenge and with the way in which the law responds to it.

It is impossible to discuss these issues properly, especially in the Scottish legal context, without bringing in a philosophical approach to the legal treatment of children which has been touched upon on several occasions in the earlier chapters but not, until now laid bare, explained and analysed. That is the concept of welfare. Welfare is fundamental to Scots law's engagement with children in general, including those who commit crime. It is often regarded as paternalism in practice and, for this reason, perceived as an appropriate response to the "vulnerable" child in need of care and protection, but not so obviously to the serious child-offender.

The argument to be presented here is that this perspective is too narrow in that welfare, certainly as practised by the Scottish

[2] As will be discussed later in this chapter, in Scotland this encompasses both the courts and the children's hearings system.

[3] See, particularly, the discussion on "Capacity in Cases Dealing Specifically with *Mens Rea*" in chapter 3

children's hearings system, is not opposed to criminal justice. Rather, it encompasses certain of its key components – specifically capacity and responsibility - albeit that its approach and methodology may not conform to those commonly accepted in the criminal legal sphere.

Overall, then, the chapter seeks to effect a reconciliation of "welfare" with "justice"[4] examining, along the way, the need for, and the advantages of such a reconciliation and looking at models taken from other areas of law and legal practice where similar reconciliations have been successful.

In order to make this argument, it is necessary, first of all, to provide an overview of the role of welfare and the way in which it is practised in the Scottish legal system together with an exposition of the concept of "justice" in this context.

The Role of the Children's Hearing

A thesis concerned primarily with children who offend in Scotland would be seriously lacking if it failed to give welfare its place. Indeed, Scotland, as a jurisdiction, has been described as "one of the few bastions of a welfare-based youth justice system throughout the

[4] Justice will be explained more fully subsequently but, for present purposes, can be taken to represent the approach of the (adult) criminal courts to issues such as "due process" rights and "just deserts" but translated into the juvenile justice context.

world."[5] This statement, of course, relates primarily to the children's hearings system, yet this thesis has, hitherto, been almost entirely concerned with the prosecution of children in the (adult) courts. It is important, therefore, to clarify the role of the hearings system in relation to children who offend.[6] A child may be referred to a children's hearing on the ground that s/he "has committed an offence".[7] This ground for referral is not qualified in any way so that all crimes, even the most serious can, in theory, be dealt with through the hearings system, including crimes within the privative jurisdiction of the High Court.[8] Accordingly, the hearings system is an integral part of the Scottish criminal justice system, making it all the more important that its response to juvenile offending should be effective and defensible.

The Statutory Foundations of Welfare

It is widely recognised that welfare underlies the system's ethos philosophically but it is necessary also to be clear concerning the

[5] John Muncie and Gordon Hughes "Modes of Youth Governance: Political Rationalities, Criminalization and Resistance" in John Muncie, Gordon Hughes and Eugene McLaughlin (eds) *Youth Justice: Critical Readings* (London: Sage, 2002) 1 at p 8

[6] The writer has been a member of the children's panel for the city of Glasgow since 1996, a position which informs some of the analysis of the hearings system in this chapter.

[7] Children (Scotland) Act 1995, [hereinafter "C(S)A 1995] s 52(2)(i)

[8] See, for example Walker v C 2003 SLT 293 concerning rape. In practice, the reporter to the children's panel and the procurator fiscal have a concurrent jurisdiction over crimes committed by children. The presumption is that most crimes will be dealt with through the hearings system however, for more serious offences, the reporter and the fiscal will discuss the position to decide which is the more appropriate forum.

firm statutory foundations on which this ethos rests. It is an overarching principle of the system that "the welfare of [the] child throughout his [sic] childhood shall be [the] *paramount* consideration"[9] in decisions taken by children's hearings.[10] This is qualified only "for the purpose of protecting members of the public from serious harm (whether or not physical harm.)"[11] Despite the strength of the statutory wording, it might still be possible to be dismissive of the hearings system as 'just a welfare institution.'[12] Welfare is, however, so entrenched in the Scottish legal approach to children that "[e]very *court* in dealing with a child who is brought before it as an offender [is required to] have regard to the welfare of the child and ... in a proper case [to] take steps for removing him [sic] from undesirable surroundings."[13]

The provisions on welfare relating both to the courts and to the hearings system are bolstered by the UN Convention on the Rights of the Child ("CRC") which provides, in Article 3(1) that "in all actions concerning children, whether undertaken by public or private social

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[9] C(S)A 1995, s 16(1)

[10] Emphasis added. This requirement applies only to decisions made by children's hearings or courts under Part II of the Act. Welfare is therefore the key element in decisions taken by children's hearings on children who are referred to them for offending behaviour – as, indeed, on any other ground. There is also a crossover between the criminal courts and the children's hearings through the power conferred on the courts to remit cases of children who offend to a children's hearing for disposal. Alternatively the court can apply to the children's hearing for advice as to sentence. (Criminal Procedure (Scotland) Act, [hereinafter "CP(S)A 1995] s 49)

[11] C(S)A 1995 s 16(5).

[12] As a concept, welfare has been much criticised, particularly outwith Scotland, as will be discussed subsequently.

[13] CP(S)A 1995 s 50(6). Emphasis added. The modern reported cases canvassed in chapter 3 make little or no reference to this provision and it is, therefore, very difficult to assess its impact, or even the interpretation placed on it.

welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[14] This Article makes no distinction between civil and criminal proceedings therefore both sets of courts are placed under the same obligation to respect the child's best interests. As noted in chapter 3, the cases of HMA v P[15] and K v HMA[16] accept that the CRC is applicable to Scottish children charged with offences and therefore has to be considered by courts dealing with them.

Legally, all of these statutory requirements create a duty on decision-making bodies breach of which would, at the very least, ground an appeal. They assume even greater importance philosophically and practically however, in that they serve to prioritise "welfare" or "best interests" but to leave the content of those terms relatively uncircumscribed. The meaning ascribed to welfare, and the way in which it is practised therefore become key to the decision-making process. These issues will now be considered, as the foundation for an examination of the appropriate legal response to child-offenders as both children and criminals.

The Theory and Practice of Welfare in the Children's Hearings System

[14] Emphasis added
[15] 2001 SLT 924 at pp 927 - 928
[16] (otherwise known as Dyer v Watson) 2002 SLT 229 at p 243

In short compass, the welfare concept holds that offending by juveniles is a product of unmet needs in their lives. If these needs can be isolated and satisfied then the offending is likely to cease or, at least, to be diminished. Children whose unmet needs are signalled by the commission of an offence are placed in exactly the same category as those who are in need of care and protection from the state. Accordingly, welfare-based systems are often characterised as "mixing the deprived and the depraved"[17] or as dominated by "needs not deeds".[18] Because welfare theory treats every child as an individual, with, consequently, an individualised set of needs, it confers a high level of discretion on decision-makers in determining how best to meet those needs. Punishment, as such, plays no overt part whatsoever in welfare decision-making. For those who regard punishment as an essential element of the state's response to crime,[19] this is a deficiency. This may be one reason for the development of a further theoretical approach to juvenile justice alongside welfare which is often juxtaposed with it, both in theory and in practice. It is known, not very helpfully as will be seen, as "justice".

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[17] See, eg Kathleen Murray "Residential Provision" in FM Martin and Kathleen Murray (eds) *Children's Hearings* (Edinburgh: Scottish Academic Press, 1976) at p 140

[18] See, for example Janice McGhee, Lorraine Waterhouse and Bill Whyte "Children's Hearings and Children in Trouble" in Muncie, Hughes and McLaughlin (eds) *supra*, note 5, 228 at pp 228 and 234 -5

[19] See, for example, Antony Duff "Punishing the Young" in Ido Weijers and Antony Duff (eds) *Punishing Juveniles: Principle and Critique* (Oxford: Hart, 2002) 115

One of the main contentions of this chapter is that the distance between welfare and justice, as philosophical approaches to juvenile justice, is not as great as is sometimes suggested. In order to be clear about the generally accepted content of each approach, however, it is necessary to examine justice, first of all, separately from welfare, before proceeding to make the argument in favour of their actual proximity.

The "justice" approach concentrates almost exclusively on the criminal act itself and bases the action which it takes in respect of the child-offender on the severity of the crime. Other factors which might be taken into consideration in determining the appropriate disposal include any previous offences which the child has committed and the penalty imposed for these. The "due process" rights of the individual child are respected. The purpose of juvenile justice programmes predicated on this theory is threefold: to protect society from the offender; to indicate its intolerance of behaviour of that kind; and to deter the perpetrator from committing further criminal acts. It is likely that there will also be a rehabilitative element but, by contrast with welfare, it does not play the most prominent role. In terms of underlying philosophy, then, systems predicated on the justice model[20] are markedly similar to adult courts,

[20] For a full explanation of the system and procedure in English youth courts, for example, see Richard Ward *Young Offenders: Law, Practice and Procedure* (Bristol: Jordans, 2001), particularly ch 1

although it is still likely that both the procedure[21] and the disposals available will be tailored for children.[22]

This is a fair summary of the justice concept as it is often used in child law to signify all matters which cannot be brought under the umbrella of welfare. From the criminal law perspective, however, this broad exposition runs together and blurs the boundaries of two issues which are usually treated as distinct and belonging to two different areas of the criminal legal sphere. First, the right to a fair trial,[23] or the accused's "due process" rights, form part of the law of evidence and ought to apply to the child-accused in the same way, for the same purpose and to the same extent as to adult accused. This belongs to justice rather than welfare because, as will be discussed subsequently, informal procedures are usually regarded as one of the hallmarks of welfare.

Second, the concentration on the offence as the main referent determining the system's response to the offender – the "just deserts" element – is part of criminal justice as opposed to substantive criminal law. It is "not-welfare" because punishment has no place in welfare systems. Because issues like criminal capacity and criminal

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[21] For example the Magistrates Courts (Children and Young Persons) Rules 1992 (SI 1992/2071) (L. 17), which governs the procedure in youth courts, includes a number of provisions for explaining various aspects of the proceedings to the child-accused and his/her parents.

[22] Under the Crime and Disorder Act 1998, s 69 for example, a court may impose an action plan on a young offender which requires him/her to undertake, under supervision, certain acts, and to account, where necessary for his/her whereabouts over a three-month period,.

[23] Enshrined in Article 6 of the European Convention on Human Rights

responsibility are usually regarded as intrinsic to the criminal trial, and necessary for the imposition of a sentence, they would also normally be treated as part of justice.

One outcome of the tendency in law, which will be discussed in more detail later in this chapter, to treat children as *either* vulnerable *or* autonomous, is that welfare and justice are often viewed as in opposition to each other. Indeed, as Bill Whyte has noted, with reference to the ever-changing face of government policy on juvenile justice, "[t]he debate tends to be classified, rather simplistically and unhelpfully, as justice *versus* welfare."[24] In fact, most juvenile justice systems[25] draw on aspects of both theories and, certainly, it would be impossible properly to understand the way in which the children's hearings system practises welfare without an appreciation of the role and purpose of justice as well.

What, then, can be said of the practice of welfare within the children's hearings system?[26] The trigger to a children's hearing is the establishment of grounds for referral and, in the context of this thesis, this will mean that the child "has committed an offence."[27]

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[24] Bill Whyte "Rediscovering Juvenile Delinquency" in Andrew Lockyer and Frederick H Stone *Juvenile Justice in Scotland: Twenty-Five Years of the Welfare Approach* (Edinburgh: T&T Clark, 1998) 199 at p 199. Emphasis added

[25] Where that term is used to delineate systems (such as the children's hearings system) set up specifically to deal with children, usually outwith the (adult) court structure

[26] This summary concentrates exclusively on the offence ground for referral (C(S)A 1995, s 52(2)(i)). S 52 lists a further eleven grounds for referral, some of which constitute "status offences" (eg truancy under s 52(2)(h)) but which are generally grouped together as "care and protection" grounds in contradistinction to the offence ground.

[27] C(S)A 1995, s 52(2)(i)

Where the factual basis for this is in dispute – i.e., where the child or a parent denies the offence,[28] or where the child's understanding is in issue,[29] the matter is referred to the sheriff court for proof.[30] Thus, it is a fundamental principle from the outset, that fact-finding forms no part of a children's hearing.[31] By relieving the hearing of responsibility for such an adversarial element of the proceedings, this cleavage between establishing the facts and deciding their consequences arguably accentuates, from the beginning, the hearings' orientation towards welfare. The hearing is concerned only with the child's needs and how best to meet these through the disposals available to it, in order to move the child on from the offence.

Once the grounds have been established so that the hearing can proceed, the form of process which the hearing employs assumes importance. The decision which the children's panel members take is a product of the discussion at the hearing informed by the written information passed to them in advance.[32] Welfare-based systems lend themselves to informal discussion. Rules of evidence, such as hearing witnesses on oath and cross-examination would militate

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[28] C(S)A 1995, s 65(7)

[29] C(S)A 1995, s 65(9)

[30] This also protects the "due process" rights of a child accused of a criminal offence. The offence ground uniquely requires to be proved to the criminal standard (beyond reasonable doubt) (C(S)A 1995, s 68(3)(b).

[31] McGhee, Waterhouse and Whyte, *supra*, note 18, at p 230

[32] Since the case of McMichael v UK (1995) 20 EHRR 205, parents have been furnished with the same papers as panel members in advance of the hearing, to facilitate equality of arms. This is now being extended to older children, unless a report-writer indicates that his/her report contains information which it would be detrimental for the child to read.

against the free exchange of information. Decision-making is a response to the information presented and children's hearings are both obliged and empowered to look to the broadest range of material available. A hearing *must* consider a social background report, prepared by the social work department expressing its estimation of the child's needs, the report from any residential establishment in which the child is living, "any other relevant document" and, most broadly, "any other relevant information available."[33] The case of O v Rae[34] endorsed the hearings' use of the widest variety of information available to it.

The discursive (or dialogical)[35] nature of the process is also emphasised legislatively in the obligation on panel members to discuss the case with, not only, the child, but also the parents, the safeguarder[36] and any representatives[37] who are present at the hearing.[38] In the midst of all these participants however, the discussion which the hearing will seek to hold involving each of

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[33] Children's Hearings (Scotland) Rules 1996 (SI 1996/3261) [hereinafter "CH(S)R 1996"] rule 20(3). These requirements are reiterated more briefly in C(S)A 1995 s 69(1).

[34] 1993 SLT 570

[35] This is the term used by Neil MacCormick, in his Kilbrandon lecture, to describe the process at a children's hearing. See Neil MacCormick "A Special Conception of Juvenile Justice: Kilbrandon's Legacy" Fifth Kilbrandon Child Care Lecture, 1st November 2001.
See http://www.scotland.gov.uk/library5/education/ch30-00.asp

[36] The safeguarder's role is explained subsequently.

[37] The CH(S)R 1996 (SI 1996/3261) r 11(1) provides that "[a]ny child whose case comes before a children's hearing and any relevant person who attends that children's hearing may each be accompanied by one person for the purpose of assisting the child, or as the case may be, the relevant person at the hearing."

[38] CH(S)R 1996 (SI 1996/3261) r 20(3)(c)

[39] See Claire McDiarmid "Perspectives on the Children's Hearings System" in Jane Scoular (ed) *Family Dynamics: Contemporary Issues in Family Law* (Edinburgh: Butterworths, 2001) 29 at p 30

them, and the, potentially extensive, mass of written information which the hearing considers, the child remains the pre-eminent player[39] and the process is above all, child-centred.[40]

Panel members seek to ensure the child's understanding of all stages of a hearing and also to elicit and weigh his/her views. To a greater or lesser extent, these aspects of the procedure are legislative requirements[41] yet it is the way in which they are implemented, and the degree of importance which panel members accord to them, which give the hearing its welfare focus. A recent research project carried out on behalf of the Scottish Office by Christine Hallett noted, against its own empirical finding that children said little in hearings,[42] that "the fact that panel members made considerable efforts to engage families, that parents and children and young people were able to contribute significantly to some hearings and that the contributions of families, even when they were small, could be crucial suggests that for some families participation was a reality."[43] Even beyond the point being made here concerning participation, this

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[40] See Scottish Child Law Centre *Children and Young People's Voices: The Law, Legal Services, Systems and Processes in Scotland* (Edinburgh: HMSO, 1999) at p 50

[41] The chairman [sic] is required to explain the grounds for referral to the child and any relevant person (C(S)A 1995, s 65(4)); s/he must also inform them of the substance of any reports (except where this would be detrimental to the child) (CH(S)R 1996 rule 20(4)); finally, s/he must inform them of the decision made, the reasons for that decision, their right of appeal and their right to call for a review of any supervision requirement (CH(S)R 1996 rule 20(5)). The duty to give the child an opportunity to express his/her views and to have regard to these is found in the C(S)A 1995, s 16(2) and the CH(S)R 1996 rr 15 and 20(3)(d).

[42] Christine Hallett and Cathy Murray with Janet Jamieson and Billy Veitch *The Evaluation of Children's Hearings in Scotland, Volume 1, Deciding in Children's Interests* (Edinburgh: The Scottish Office Central Research Unit, 1998) at pp 47 - 48

[43] *Ibid*, at pp 120 - 21

indicates the importance attached by panel members to this facilitative aspect of their role.

Equally, all discussion should, at some level, be oriented towards establishing and then meeting the child's needs. Hallett *et al* specifically commented on the extent to which welfare "talk" characterised the hearings which their study observed.[44]

Welfare is a broad and flexible concept which relies in large measure on the wide discretion accorded to decision-makers. Within the children's hearings system that discretion is, on the face of it, delimited by the very few decisions actually available to a hearing – it can either discharge the grounds for referral[45] or impose a supervision requirement.[46] Such a requirement may, however "require the child ... to comply with any condition contained in the requirement".[47] This short phrase confers extremely wide-ranging powers on children's panel members. They can impose any obligation whatsoever on the child, assuming that it is broadly in compliance with the overarching principle of the paramountcy of his/her welfare throughout his/her childhood.[48]

As will be discussed subsequently, certain checks are imposed on the hearings' use of its broad discretion. Nonetheless, traditionally, the view has been accepted that welfare attaches little importance to the

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[44] *Ibid*, at pp 52 – 54. The study found that welfare talk characterised some hearings more than others but that it featured in all hearings to some extent.
[45] C(S)A 1995, s 69(1)(b) and (12)
[46] *Ibid*, s 70(1)
[47] *Ibid*, 1995, s 70(3)(b)
[48] *Ibid*, 1995, s 16(1).

child's "due process" rights, because these are regarded as unnecessary where the whole purpose is to achieve a beneficial outcome for him/her.[49] Because of the high level of discretion accorded to the decision-maker in a welfare process, however, there is always a risk that the outcome for the child is not, in fact, as benevolent as the theory demands. At the extreme, it might herald "[b]eatings becom[ing] justified as a means of promoting a therapeutic attitude change".[50] Even where the disposal selected is, "objectively",[51] in the child's best interests, it is certainly not clear that the child him/herself and his/her family will recognise it in this way.[52] Any decision to commit a child who has offended to residential accommodation when s/he would prefer to remain at home, for example, is likely to be experienced as punitive.[53]

The opportunity conferred by welfare to act in this way then, as the iron hand in the velvet glove is, rightly, one of the most critiqued aspects of the philosophy. It lay behind the decision in the famous American case of In Re Gault,[54] where Gerald Gault, aged fifteen,

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[49] See Jean Trépanier "Juvenile Courts After 100 Years: Past and Present Orientations" 1999 *European Journal on Criminal Policy and Research* 7, 303 at p 313

[50] Sanford J. Fox "The Scottish Panels: An American Viewpoint on Children's Right to Punishment" 1975 *Journal of the Law Society of Scotland* 20, 78 at p 79

[51] All that this can mean in the context of welfare is that there are clear justifications for the course of action taken which are likely to impact positively on the child's life *and* that implementing this course is more likely to have a positive impact than maintaining the *status quo*.

[52] See, Peter D. Scott, "Juvenile Courts: The Juvenile's Point of View" 1959 *British Journal of Delinquency* 9(3), 200; and Allison Morris and Henri Giller, "The Juvenile Court - The Client's Perspective" 1977 *Crim L R* 198

[53] See Martin and Murray, *supra*, note 17, at p 131

[54] 387 U.S. 1 (1967)

was committed to the Arizona State Industrial School "for the period of his minority (that is, until 21) unless sooner discharged by due process of law"[55] on the basis of having made one obscene telephone call to a neighbour. It was, in fact, never formally established that Gerald had uttered any of the obscene statements alleged to have been made during the call, and the maximum penalty for an adult convicted of the same offence would have been a fine of $5 to $50 or up to two months' imprisonment.[56]

In giving the judgement of the American Supreme Court, Mr Justice Fortas remarked that "the condition of being a boy does not justify a kangaroo court."[57] The case lists in detail the many procedural requirements and constitutional guarantees which had been disapplied to Gerald by virtue of his status both as a child and as a "juvenile delinquent".[58] The Supreme Court asserted that children had an entitlement to the protection of the Constitution. The case itself is often regarded as the catalyst by which the American system distanced itself from welfare and moved back towards a justice-based model.[59]

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[55] *Ibid*, at pp 7 - 8
[56] *Ibid*, at p 9
[57] *Ibid*, at p 28
[58] He had one previous conviction for having been in the company of a boy who stole a purse from a woman's handbag. See *ibid*, at p 4
[59] See Allison Morris "Legal Representation and Justice" in Allison Morris and Henri Giller (eds) *Providing Criminal Justice for Children* (London: Edward Arnold, 1983) 125 at pp 132 – 134. It has been suggested that this overstates the position and that the "movement away [from welfare] ... was prompted, at least in part, by a desire for more punitive responses to juvenile offending." Elaine E Sutherland "The Child in Conflict with the Law" in Alison Cleland and Elaine E

The children's panel undoubtedly has the *power*, which is latent in all welfare systems, to abuse its discretion by acting punitively, provided this is cloaked in best interests terminology. This tendency, if it exists at all, may be more apparent in the process at a children's hearing than in actual imposed disposals. For example, it is not unusual for panel members to "threaten" children referred for truancy[60] that they will have to go and live in a residential school if they fail to improve their attendance in mainstream education.[61] In relation to the offence ground, Hallett *et al* commented specifically on the way in which the discussion at children's hearings moved backwards and forwards between overtly welfarist considerations and issues such as the seriousness of the offence, protection of the public and tariffs.[62] This may suggest, then, that, whilst it is clear that children's hearings operate within a strongly welfarist framework, the role which they actually play is broader than this and captures certain aspects of the "just deserts" model of justice, although only, apparently, in the process at the hearing itself and not in the disposal imposed.

It is important to take issue, at this point, with a further criticism sometimes levelled against welfare systems generally and the children's hearings in particular. The critique of "net-widening"

Sutherland (eds) *Children's Rights in Scotland* (Edinburgh: W Green, 2001) at p 287

[60] C(S)A, s 52(2)(h)

[61] See Hallett *et al*, *supra*, note 42, at pp 53 and 56

[62] *Ibid*, at pp 52 - 54

arises from the principle that, in a welfare system, those who have offended should be treated identically to those who are in need of care and protection. It has been suggested that one of the main results of this is simply to bring a greater number of children into contact with the "criminal" process than is desirable. The "net" of potential juvenile justice clients is thus "widened". This in turn is said to mean that children who go on to commit offences subsequently, having first entered the system as, for example, truants or neglect cases may receive more serious or punitive disposals from the system because they already have a "record" with it. They receive a disposal from further "up" the "tariff" than would be the case if the "crime" constituted their first contact with the system.

In fact, welfare systems are seeking to respond to the child's best interests at the moment of intervention. Whilst previous work undertaken with the child may be an important element of the disposal imposed, it is not determinative of the matter. Equally, as already indicated, "punishment" *per se* has no place whatsoever in the system. Disposals, then, are never imposed with the aim of "more punishment than the time before" and there is the same possibility of a child being authorised for admission to secure accommodation[63] on his/her first attendance at a children's hearing as after years of involvement with the system. Welfare systems seek to

[63] C(S)A 1995, s 70(9) and (10). This is the most restrictive disposal available to a children's hearing.

respond anew to the child's unique set of needs with every appearance.

Net-widening and up-tariffing may be by-products of a welfare system then, but only where the outcomes are viewed in isolation from the process. Citing these as criticisms, fails to take account of the justification which a welfare system offers for its decisions.

Despite its clear welfare orientation, justice principles, on the "due process" model play a role in the children's hearings system.[64] It is important to accord to these the significance which they deserve because they may promote the child's best interests, as mentioned above, by limiting the scope for abuse of discretion. The statutory obligations alluded to above - to explain to, and inform the child and the relevant persons of, certain aspects of the proceedings - give shape to the hearing. For example, the discussion in a hearing commences with the chairperson's explanation of the purpose of the hearing;[65] the end is marked by a statement of each panel member's decision and the reasons for it.[66] In addition, the family has the right to appeal the decision to the sheriff court[67] and/or to call for a review of any supervision requirement imposed, any time after three months

[64] See, eg Joan Rose "Procedure in Children's Hearings" 1994 SLT (News) 137 where she discusses the distinction between "the relative informality of the setting of hearings and the procedures which must be followed." (at p 137)
[65] Required by the CH(S)R 1996 (SI 1996/3261) r 20(2)
[66] CH(S)R 1996 (SI 1996/3261) r 20(5) imposes an obligation on the chairman to communicate this information to the child and any relevant persons, as well as informing them of their rights of appeal.
[67] C(S)A s 51(1)

from the date of the hearing which put it in place.[68] If not reviewed sooner, a supervision requirement can continue in force for no longer than one year.[69] These provisions act as checks on the hearings' discretion and may promote confidence in the system as well as serving their more obvious purpose of protecting children against arbitrary and unfair decision-making. It remains true that "[t]he challenge of the children's hearings system is to demonstrate how far an honest and uninhibited discussion of intensely personal issues can be carried on without disregard for the essential principles of the administration of justice."[70]

There is little doubt, then, that the children's hearing is an explicitly welfarist institution, albeit that its practice is tempered by certain aspects of justice theory. While it lays stress on the child's views – indeed the Children's Hearings Rules make several suggestions as to mechanisms by which these might be obtained[71] – its decision-making is still driven by the assessment made by adults of the child's best interests. The most compelling criticism of welfare, which the foregoing discussion does little to dispel, is its tendency to detract from the child's agency in this way. It is submitted, however, that the discursive nature of the process and the importance which ought

[68] C(S)A s 73(6)
[69] C(S)A s 73(2)
[70] Martin and Murray (eds), *supra*, note 17, at p 78
[71] The child may present his/her views in writing or on audio or video tape or through an interpreter. (CH(S)R 1996 (SI 1996/3261) r 15(4)(b)

to be attributed to the child's contribution, even if it is very minor, may alleviate it, at least to some extent.

The most damaging criticism of welfare arises from the public perception of crimes such as the Bulger case, canvassed fully in Chapter 1. Because such crimes are regarded as heinous, a system which responds to them by assessing and meeting the child-perpetrator's needs, rather than by, metaphorically, locking him/her up and throwing away the key, is marked out as "soft" on crime. This, in turn, generates a groundswell of, often wholly uninformed, opinion that welfare simply does not work. It is in circumstances like this that justice, on the "just deserts" model, sometimes ceases to be solely a philosophical approach and is mobilised instead to further the political end of securing punitive outcomes for child-offenders. In jurisdictions where welfare's place, as the primary approach to juvenile offending, has been eroded justice, has stepped into its place. As a basis for policy decision-making, knee-jerk reactions, both to individual crimes and to the welfare philosophy, are clearly not very satisfactory. They may, however, begin to provide an explanation for the extremes of favour and disfavour to which welfare has been subject since the mid-twentieth century.[72]

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[72] See Trépanier, *supra*, note 49 *passim*, particularly at pp 305, 309, 311, 317, 319 and 321

The Changing Fortunes of Welfare

It is clear from chapter 3 that welfare principles have been of significance in relation to the law's interaction with children, certainly since the nineteenth century yet, politically, welfare's popularity has ebbed and flowed. In the 1960s, welfare theory seemed to be particularly buoyant. Two examples serve to illustrate this. In his seminal discussion of *Punishment and Responsibility*, HLA Hart devotes a chapter to the "elimination of responsibility" laying stress on Barbara Wootton's view[73] that the offender's act should be looked upon "merely as a symptom of the need for either punishment or treatment."[74] Although the work is directed primarily towards England and Wales, this suggests, more generally, that welfare theory had such an embedded place in criminological discourse at that time that it was viewed as generalisable to adults as well.

In Scotland, with specific reference to children, the report of the Kilbrandon Committee[75] in 1964 led to the enactment of the legislative framework for the children's hearings system in 1968 and its implementation in 1971. Kilbrandon noted that "the object must

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[73] Set down in Barbara Wootton *Social Science and Social Pathology* (London: Allen and Unwin, 1963)

[74] HLA Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968) at p 178. Alan Brudner, in fact, classifies Hart as a welfarist by contrast with those who regard the criminal law as ordered by the principle of "desert". See Alan Brudner "Agency and Welfare in the Penal Law" in Stephen Shute, John Gardner and Jeremy Horder (eds) *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993) 21 at p 26

[75] *Report on Children and Young Person SCOTLAND* Cmnd 2306, 1964

be to effect, so far as this can be achieved by public action, the reduction, and ideally the elimination, of delinquency. ... [T]he appropriate treatment measures in any individual case can be decided only on an informed assessment of the individual child's actual needs."[76] It would be difficult to find a clearer statement of faith in the efficacy of "pure" welfare.[77]

In recent years, certainly in jurisdictions other than Scotland, the space occupied by welfare as the primary mechanism for tackling offending by children has, however, been greatly diminished.[78] In England, the youth court, a more justice-based institution than the children's hearing, deals with children who offend.[79] In America, waiver procedure is often invoked, based on the seriousness of the offence rather than the offender him/herself, so that an older child can be tried as an adult.[80]

These developments suggest that there is a discernible trend in youth justice away from welfare towards establishing criminal liability and responding to it in increasingly punitive ways. Even in Scotland where, despite some tinkering at the margins,[81] the welfare

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[76] *Ibid*, at para 12

[77] It is an indication of the importance attached to this report generally that it was republished in 1995 (Edinburgh: HMSO, 1995) (to coincide with the passing of the C(S)A 1995)

[78] See Josine Junger-Tas "The Juvenile Justice System: Past and Present Trends in Western Society" in Weijers and Duff (eds) *supra*, note 19, 23

[79] See Ward, *supra*, note 20

[80] Philip H Witt "Transfer of Juveniles to Adult Court: The Case of HH" 2003 *Psychology, Public Policy and Law* 9, 361

[81] For example, the Scottish Executive has proposed that children's hearings be empowered to order electronic monitoring, or "tagging" of child offenders in certain circumstances. Anti-Social Behaviour (Scotland) Bill, clause 103

foundations of the system remain solid, the political climate suggests some antagonism towards it, certainly if press coverage is any indicator. For example, the Scottish Executive was recently reported to be anxious about appearing "soft" on youth crime.[82] On a similar theme, a *Daily Record* readers' forum on "neds" advocated *inter alia*, birching, boot camps and scrapping children's panels.[83]

This trend espouses an overtly punitive and just deserts-based approach to children who offend including a concentration on ensuring that they take responsibility for their criminal acts. This is derived, at least to an extent, from "justice" – the philosophical approach to child-offenders which requires that children be found criminally responsible for their acts, in proceedings which are fair because they accord to them their "due process" rights, as a prelude to the imposition of a "just" punishment. Criminal responsibility, in a traditional sense, then, is of relevance to the justice model. Equally, this chapter will argue that children's hearings have an interest in the child's responsibility for his/her criminal act, which does not necessarily equate to the traditional conception. Both of these approaches can be contrasted with "responsibilization" to which the chapter will now turn its attention.

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[82] "Jim's Guilty Youth Crime Secret" *Daily Record* 3 October 2002 at pp 1 – 2. The article is critical of a campaign of spin launched by the Scottish Executive in the face of expected criticism from Audit Scotland about its handling of youth crime. The briefing note for ministers warned, *inter alia*, that the Matrix (diversion) Project might be seen as soft on crime.

[83] "Sling 'Em in Boot Camp" *Daily Record* 6 September 2003, pp 26, 27, 32 and 33

Responsibilization

The "justice" approach, and children's hearings, are both concerned with the child taking responsibility for his/her criminal acts, in the individual case. Responsibilization, on the other hand, is a term describing a particular trend within criminal justice. The move towards increasing children's liability for their criminal acts, documented above, often through the use of punitive measures, is almost certainly underlain by this trend which was first identified by David Garland.[84] It arises from the recognition by the state that it is no longer able, by itself, to control crime, using only the traditional methods of policing, the courts and prison. Instead, it is necessary to involve a number of other organisations, down to the level of the individual, and to impose, or simply impress, upon them, their "responsibility" for crime prevention. Neighbourhood Watch schemes, for example, play a role in the responsibilization strategy as an example of groups of private individuals coming together to take particular responsibility for crime prevention, and the reporting of suspicious activity, within a given area or community. Garland describes responsibilization as "a new form of 'governing-at-a-distance'."[85]

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[84] See David Garland *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: Oxford University Press, 2001) at pp 124 - 127

[85] *Ibid*, at p 127

With regard to children who offend more generally, there is no doubt that the response of the criminal justice system is driven by the political ideology of the government of the time. Indeed, it has been suggested that "young people" are so central to the embodiment of that ideology in practice that "[t]hey remain the touchstone through which crime and punishment can be imagined and re-imagined."[86] This may explain why government policies in relation to them change so frequently. On this basis, it is, therefore, unsurprising that the responsibilization strategy should have been extended to them.

At the general level envisaged by Garland, the government effected responsibilization through the enactment, for England and Wales, in 1998, of a very broad provision stating that, "in addition to any other duty to which they are subject, it shall be the duty of all persons and bodies carrying out functions in relation to the youth justice system to have regard to [the principal] aim [of the youth justice system which is] to prevent offending by children and young persons."[87] This was tied down in a number of more specific provisions such as the need for the establishment of youth offending teams.[88] At a stroke then, everyone involved in the field was "responsibilized" such that no scope remained for the argument that an individual agency "carrying out [presumably *any*] function in relation to youth justice" was not also responsible for crime prevention.

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[86] Muncie and Hughes, *supra*, note 5, at p 13
[87] Crime and Disorder Act 1998, s 37 (1) and (2)
[88] Crime and Disorder Act 1998, s 39

From this, it appears that Garland's account of responsibilization simply documents an extant phenomenon – that of the government divesting itself, or at least sharing, as far as possible, its duty to maintain order in society. It is, however, the way in which responsibilization directly affects children who offend as individuals which is of particular interest in the context of this chapter. John Muncie and Gordon Hughes note that the second plank on which the responsibilization strategy is built, in addition to the generalised sharing of the role of crime prevention and detection, is that "individuals should be held responsible for their actions."[89]

In relation to the young, they argue that New Labour have attempted to link this to the more aspirational elements of the restorative justice movement[90] such as "reconciling conflicting interests and … healing rifts."[91] The claim has been made for "Victim-Offender Mediation", for example, that it "serves an educative, rehabilitative, and ultimately preventive function for the juvenile offender while giving victims a much needed voice in the criminal process."[92] Effectively then responsibilization is presented, positively, by government as providing children who offend with choices – for example, to behave

[89] Muncie and Hughes, *supra*, note 5, at p 3

[90] The Scottish Executive has specifically addressed the issue of the use of restorative justice in children's hearings but only in relation to the breach of an anti-social behaviour order. See its consultation document *Putting Our Communities First: A Strategy for Tackling Anti-Social Behaviour*, section 2 (http://www.scotland.gov.uk/consultations/social/pocf-00.asp)

[91] Muncie and Hughes, *supra*, note 5, at p 4

[92] Nancy Lucas "Restitution, Rehabilitation, Prevention and Transformation: Victim-Offender Mediation for First-Time Non-Violent Youthful Offenders" 2001 *Hofstra Law Review* 29, 1365, at p 1370

in a non-criminal fashion in the future or to make reparation to the victim in some way. To this extent, then, it is in keeping with the aim espoused by this thesis as a whole of seeking to ensure that children take such responsibility for their criminal acts as they can. Barry Vaughan has argued that this ought, in fact, to be the overall effect of the "responsibilizing" provisions of the Crime and Disorder Act 1998.[93]

Muncie and Hughes, however, express concern about the *punitive* ends which it will, in fact, achieve, and may be covertly pursuing, particularly where a child-criminal re-offends.[94] In their view it "appears most interested in ensuring that offenders face up to the consequences of their actions"[95] and they note specifically that these strategies for bringing (full) responsibility for criminal activity home to the perpetrator "also extend[...] to ten-year-olds."[96] At this level, then, there may be a fit between responsibilization and the "just deserts" model of justice simply because both arrive at a similar outcome. Justice as a philosophical approach is not, however, a specific tenet of responsibilization.

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[93] Barry Vaughan "The Government of Youth: Disorder *and* Dependence" 2000 *Social and Legal Studies* 9(3), 347

[94] This sentiment is echoed by Loraine Gelsthorpe and Allison Morris who are similarly pessimistic about the prospects for restorative justice within an overall youth justice agenda which is largely coercive and which includes noticeably punitive elements such as detention and training orders. See Loraine Gelsthorpe and Allison Morris "Restorative Youth Justice: The Last Vestiges of Welfare?" in Muncie, Hughes and McLaughlin (eds), *supra*, note 5, 238 at pp 246 - 250

[95] Muncie and Hughes, *supra*, note 5, at p 4

[96] *Ibid*, at p 4. The age of criminal responsibility in England and Wales is 10 by virtue of the Children and Young Persons Act 1933, s 50, as amended by the Children and Young Persons Act 1963, s 16(1)

Effectively, responsibilization ultimately makes it possible to impose liability on children for their criminal acts in an unquestioning and absolute fashion particularly in the situation where, having been presented with the options which restorative justice makes possible, the alternatives which they select lead them into criminal behaviour. "[I]f their choices lead to offending they must take the full consequences."[97] In other words, if it is established in fact that the child carried out the criminal behaviour, with the appropriate mental attitude, s/he must take the full responsibility. This thesis as a whole challenges such an absolute ascription of responsibility, absent any investigation into the child-offender's actual understandings of the complexities of his/her apparent criminality and its consequences. The concern of this chapter is however, specifically with the way in which welfare, as a philosophy might be able to move beyond this all-or-nothing approach and to accommodate the child offender's actual level of responsibility.

The Tension Inherent in the Child

To this point, then, in its examination of welfare theory and responsibilization theory, this chapter has presented, albeit implicitly, two different, and largely opposed, images of the child. The child in welfare theory is primarily vulnerable and in need of protection; the "responsibilized" child is fully accountable for his/her actions

[97] Muncie and Hughes, *supra*, note 5, at p 11

because s/he was the agent who occasioned them and their consequences. As noted in the introduction to this chapter and in chapter 1, a corresponding tension between defencelessness and independence is inherent in the status of being a child. If the law, in general, is to treat children justly, it must accommodate them as they are, taking account of this paradox. The areas of children's rights and legal representation of children place this issue in particularly sharp focus and serve to demonstrate the difficulty which arises where the law seeks to respond to one of these characteristics exclusively. This chapter will therefore consider these issues next. This discussion will show that a reconciliation of the child's need for protection with his/her impetus to independent action is possible in the legal sphere which reconciliation will, in turn, serve as a model in the attempt to draw together welfare and justice.

Children's Rights

Turning first then, in this context, to children's rights, the tension between vulnerability and agency is apparent from the two distinct meanings of the term "right", when the rights in question are ascribed to children.[98] On the one hand, the construction of the child as powerless has given rise to a category of rights which might be

[98] For a full discussion of the various meanings attributable to the term "right" with particular reference to children see C A Wringe *Children's Rights: A Philosophical Study* (London: Routledge and Kegan Paul, 1981)

described as protective or paternalistic.[99] The history of children's rights in international law, certainly until the promulgation of the CRC in 1989, has been very much orientated towards protection in this sense – indeed this was the philosophy underlying the three Declarations on the Rights of the Child passed, in 1924 by the League of Nations and in 1948 and 1959 by the UN.[100] Rights conferred expressly on children are more likely than those conferred on everyone, or on adults only, to fall into this category.

Without endorsing the perspective, Sheila McLean has conceptualised such rights as arising expressly from the construction of the child, which was critiqued in chapter 1, as a "becoming" rather than a "being". She states, "because children are not fully rational or autonomous human beings, what they need is not a description or history of rights but rather only one right and that is the right to be adequately cared for and to receive adequate guidance and advice."[101] In essence, this one, primary right is not clearly a right for children at all but more a recognition of obligations placed on others – for example parents and the state – to ensure the child's well-being and healthy growth and development.

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[99] See Ruth Adler "Taking Children's Rights Seriously: Some Reflections on the Juvenile Justice System" in Kathleen Murray and J Eric Wilkinson (eds) *Children's Rights in a Scottish Context* (London: National Children's Bureau, 1987) 19. At pp 20 – 23 Adler provides a typology of rights which includes "parentalist" and "protectionist" children's rights.

[100] See Kathleen Marshall "The History and Philosophy of Children's Rights in Scotland" in Cleland and Sutherland (eds), *supra*, note 59, 11 at pp 24 - 25

[101] Sheila A M McLean "Children's Rights in Health Care" in Murray and Wilkinson, supra, note 99, 40 at p 43

This protective meaning and purpose for a right can be juxtaposed with the other type of right sometimes conferred on children. In this context, such a right is taken to delineate an area of personal freedom within which the right-holder can operate without interference either from other individuals or from the state.[102] In this sense, then, a right is essentially permissive. Freedom of expression,[103] freedom of religion[104] and, indeed, rights in property are all examples of rights of this nature. This better describes a right as the term is generally understood, without specific reference to children. The idea that children as human beings should have "human" rights[105] is relatively new and has been described as "little short of revolutionary."[106] Nonetheless, the conferment of such a right on a child emphasises his/her autonomy and makes the assumption that s/he will be able to exercise it, whether alone or with assistance, thus assuming a level of competence and capability.[107]

The CRC itself still accords protection to the child. Article 32, for example, "recognise[s] the right of the child to be protected from

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[102] See Wringe, *supra*, note 98, at pp 46 - 56

[103] Enshrined for children in Article 13 of the CRC

[104] CRC, Article 14

[105] See J Eric Wilkinson and Kathleen Murray "Rights in Relation to Children" in Murray and Wilkinson (eds) *supra*, note 99, 40, at p 43

[106] MDA Freeman "The Rights of Children When They Do Wrong" 1981 *Brit J of Crimin* 21(3), 210 at p 212

[107] These ideas were taken to the extreme in the 1970s by adherents of the child liberation movement. They argued that children were seriously disadvantaged in society and, in order to redress their power deficit, they needed not only the same rights as adults but also some additional ones. See Richard Farson *Birthrights* (Harmondsworth: Penguin, 1978); and John Holt *Escape from Childhood* (Boston: Holt Associates, 1974). Holt, for example, proposed that children should have the right to control their own learning, by which he meant that they should choose whether or not to attend school.

economic exploitation and from performing any work that is likely to be hazardous." Article 33 protects children from the illicit use of drugs. In addition however, the CRC "assures to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."[108] Kathleen Marshall has noted the way in which this right to participation draws together the two rather more polarised types of children's rights identified above.[109] By allowing the child "the opportunity to be heard in any judicial and administrative proceedings affecting [him/her], either directly, or through a representative or an appropriate body"[110] it expressly acknowledges his/her agency. Simultaneously, it retains a focus on protecting him/her by tempering the right with consideration of his/her age and maturity. Thus, "it ... retains the character of a welfare provision, and leaves room for the exercise of individual discretion ..."[111]

The CRC then deals with the tension between the child as agent and the child as vulnerable by providing rights appropriate to both perspectives. Article 12, however, demonstrates that the gap between the two perspectives can be spanned, in the legal arena. The child is

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[108] CRC, Article 12(1)

[109] Indeed, the Travaux Préparatoires expressly recognise that "the child should be considered from a dual perspective: as an object of protection and as a possessor of rights." See Sharon Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Dordrecht: Martinus Nijhoff Publishers, 1992) at p 625

[110] CRC, Article 12(2)

[111] Marshall, *supra*, note 100, at p 25

given the opportunity to participate but in a protected environment where his/her lack of development and the difficulties to which this may give rise for him/her are recognised and accommodated. The Convention also gives specific recognition to his/her evolving capacities in Article 5.[112]

Representation of Children

Another area where the tension between the child's vulnerability and his/her agency is problematic is the representation of children, primarily by lawyers but also by others who advocate for them. The difficulty arises in clarifying the actual purpose which the representative is being asked to pursue within the relevant legal process. On the one hand, it may seem straightforward that a solicitor, acting for a child, is that child's "agent", as the term is understood in the law of agency. Accordingly, the child-client gives instructions as to his/her wishes and the solicitor either puts these into practice or else formulates an argument that they should prevail over the other interests represented in the proceedings. This is the role performed, unreflectively, by legal representatives for their adult clients and, as such, it clearly recognises the autonomy of a child-client.

[112] The Article is concerned with the role played by parents or guardians in assisting the child to exercise his/her rights under the CRC and requires them to provide "appropriate direction and guidance" in a manner consistent with the child's evolving capacities.

On the other hand, the representative may, on the basis solely of the client's status as a child, instead perceive his/her role as presenting to the court or tribunal a summary of his/her own evaluation of the child-client's *best* interests. This is largely the way in which safeguarders in the children's hearings system interpret their role. Safeguarders may, but do not require to, be legally qualified and are appointed "to safeguard the interests of the child in the proceedings."[113] This statutory statement of their role tends towards the paternalistic and recent research suggests that safeguarders themselves take the view that their role is to advise the hearing as to what is in the child's best interests.[114] The child's views clearly have some significance in determining the content of these interests but it is the child's needs, as assessed, paternalistically, by the safeguarder, which drive the recommendations ultimately made.

There is not yet any research of a similar nature into the role played by solicitors who are appointed to represent children at hearings under the Children's Hearings (Legal Representation) (Scotland) Rules 2001.[115] In S v Miller,[116] it was decided that a children's hearing determines the child's rights in civil proceedings in term of Article 6 of the European Convention on Human Rights. This

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[113] C(S)A 1995, s 41(1)(a)

[114] Anne Griffiths and Randy Kandell "Reconceiving Justice? Children and Empowerment in the Legal Process" in Simon Halliday and Peter Schmidt (eds) *Human Rights Brought Home: Socio-Legal Studies of Human Rights in the National Context* (Hart) (forthcoming),

[115] SSI 2001/478

[116] 2001 SLT 531

necessitated the provision of legal representation for the child in certain limited circumstances.[117] The role of the legal representative is defined, more ambiguously than the safeguarder's as being to "allow the child to effectively participate at the hearing."[118] While this suggests facilitation of an active role for the child and therefore tends towards allowing children their autonomy, it is not encouraging that the decision as to whether a child should have a lawyer under the new scheme is entirely in the hands of the children's panel itself.[119] There is no statutory mechanism by which a child can compel, or even request,[120] the appointment of a solicitor, nor can s/he refuse the services of a solicitor appointed by the children's panel for him/her.[121]

Generally on this point, Griffiths and Kandell have noted that "[a] growing number of studies are pointing to the fact that where children are involved lawyers who represent them have difficulty in acting purely as their advocate and that they operate instead on the basis of a mixed welfare and rights perspective."[122] This does not

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[117] Broadly, where the issues involved are so complex that the child requires some assistance in understanding them, where the child's interests are in conflict with his/her parents' or in any case where secure accommodation is proposed since this would deprive the child of his/her liberty. See Joe Thomson *Family Law in Scotland* (Edinburgh: Butterworths, 2002) at p 321 for a more detailed discussion.

[118] Children's Hearings (Legal Representation) Scotland Rules 2001 (SSI 2001/478), r 3(1)(a)

[119] *Ibid*, r 3

[120] It is submitted that, if a child made such a request to children's hearing, they would have to take it seriously in terms of their general obligation to have regard to the child's views (C(S)A 1995, s 16(2)) but this is very far from a right in this respect.

[121] Griffiths and Kandell, *supra*, note 114

[122] *Ibid*

change the fact, however, that "there is a tension in representing both views and interests, which has been observed and criticised by several commentators, who conclude in favour of a clearer delineation of representation/advocacy."[123] The advantage of this would be that the decision as to whether to advocate for the child's views or his/her best interests would be less arbitrary. The individual representative would, presumably, no longer be able to make this call independently of the court or tribunal, the child-client and the other interests represented in the case.

Sharper delineation of these roles would, however, still support a dichotomous construction of the child-client. The agent whose remit was to represent his/her views would, necessarily perceive the client as an autonomous agent; the representative charged with presenting the child's best interests might touch upon the same child's views but would regard him/her primarily as in need of protection. This renders more difficult the attempt to view the child-client holistically and realistically.

As with children's rights, however, efforts have been made to bring together these divergent conceptions of the purpose of legal representation of children. Alison Cleland has sought to reconcile them in such a way that the child him/herself can benefit from both. She has developed the concept of "protected empowerment" in terms

[123] Kathleen Marshall, L Kay M Tisdall and Alison Cleland *'Voice of the Child' Under the Children (Scotland) Act 1995: Having Due Regard to Children's Views In All Matters That Affect Them* (Edinburgh: Scottish Executive Central Research Unit, 2002) Vol 1, p 54, para 7.7.1

of which the overarching requirement that all decision-makers should hold the child's best interests as the paramount consideration in their deliberations is tempered by the need for the child's views to be heard and given due weight.[124] In other words "[c]hildren are given their place in the decision-making forum, but adjustments are made to promote their welfare."[125] In this way, paternalism is not renounced entirely, where it is acknowledged that the child still requires protection and guidance but his/her agency is simultaneously and expressly recognised especially in circumstances where s/he is seeking to present him/herself as an actor – for example where s/he has requested the right to participate in proceedings such as his/her parents' divorce action.

The Paradox of the Child-Criminal

In relation both to children's rights and to legal representation then, it is clearly possible to make provisions which reconcile the child's independence with his/her vulnerability – even if this is a rather artificial, bipartite division of attributes.[126] Indeed, since children naturally display characteristics of need for care alongside autonomy, the law fails them if it cannot deal with both simultaneously. This, then, provides some hope that it should be possible to find a

[124] Alison Cleland "Children's Voices" in Scoular (ed), *supra*, note 39, 7 particularly at pp 11 - 15
[125] *Ibid*, at p 27
[126] Children will, of course, display innumerable other characteristics alongside these two, which are primary in the legal context.

mechanism for drawing together welfare and justice so that a similar reconciliation can be effected. Before examining the mechanism by which this might be achieved however, it is necessary to consider two objections to the whole enterprise.

First, proponents of restorative justice would argue that, ultimately, the aims pursued by welfare and justice are so divergent that there can be no crossover between them. Lode Walgrave, for example, has stated that, "it is in fact a mission impossible, to try to combine the humane goal of responding to the needs of juveniles and their families with the societal need for just and fair trials. The constraints of formal procedural rules hinder the possibilities for flexibility and rich human dialogue which the therapeutic ambitions require."[127] This is because restorative justice seeks to create a new space for itself, freed from the constraints of either welfare or justice "to provide the conditions for reasonable reparation or compensation for the harm caused by the offence."[128] Since this is not an aim which either welfare or justice has pursued overtly in the past, there is little benefit to the restorative justice movement in expending time on the attempt to reconcile the two philosophies. On the other hand, it has already been noted that the Scottish legal system mixes elements of welfare and justice (certainly on the "due process" model) therefore

[127] Lode Walgrave "Not Punishing Children But Committing Them to Restore" in Weijers and Duff (eds) *supra*, note 19, at pp 99 - 100
[128] *Ibid*, at p 102

the characterisation of the attempt at reconciliation as a "mission impossible" is too pessimistic.

The second potential objection is that a further element is present here, which is not necessarily present in relation to children's rights and legal representation: the "welfare versus justice" debate applies only to juveniles who have offended. It might, therefore, be argued that, because the child-offender exercised a choice to carry out the criminal act, it is not incumbent on the law to find a means of incorporating his/her need for protection alongside its response to the harm which s/he has caused. In other words, where the child has committed an offence, the inherent wrongfulness, where the behaviour is an exercise of freewill, might be regarded as absolving the law of any duty to respond to the tension inherent in the child as a child and as an offender. Again, this appears to be an attempt to ignore the "child" in the child-offender.

This is not an unusual response. Children who commit serious crimes often engender such an extreme and adverse public response that they lose their status as children in the public perception. There is a parallel here with the similar paradox presented by the "teenage pregnancy" as this has been constructed by Anne Murcott. She states "teenage pregnancy ... is a contradiction in terms. ... Child and adult are mutually exclusively conceptualised. It is impossible simultaneously to be child and adult. ... Teenage pregnancy offends a morality which can identify children only by separating them from

adults. ... A girl's pregnancy ... raises doubts about her status as a child."[129]

There is a direct comparison here with the concept of the "adult crime" which was touched upon in chapter 1. The notion underlying this, and Murcott's conception of "teenage pregnancy," is that certain acts, or areas of life, are reserved for adults. Where an individual, who is otherwise categorised as a child, strays into these, s/he thereby places him/herself outwith the protection generally afforded by childhood and must accept the (adult) consequences of this act. Violent crime and teenage pregnancy both, in some sense, transgress the restrictive morality circumscribing the behaviour of children and part of the "punishment" is the forfeiture of the status of "child".

The political and societal response to the Bulger case, for example, suggests that there is a difficulty in perceiving a child who has committed such an act as vulnerable in any degree. Instead s/he is characterised not only as autonomous in an extreme sense which would require him/her to be held *fully* accountable for his/her actions but also, beyond that, as a latter-day monster whose actions deserve a strongly and overtly punitive approach, incorporating incapacitation (through detention) in order to protect the public.

The view adopted in this chapter is that, if the law can find a means by which to reconcile welfare with justice, this enables it to present a

[129] Anne Murcott "The Social Construction of Teenage Pregnancy: A Problem in the Ideologies of Childhood and Reproduction" 1980 *Sociology of Health and Illness* 2, 1 at p 7

more holistic and true image of the serious child-offender as both a criminal *and* a child so that a way of responding simultaneously to these characteristics emerges. Overall, there is a need for welfare and justice to be in harmony with each other, since each provides an element which is necessary for the fair and humane treatment of the child-accused. There is evidence from a recent empirical study that it is only possible to separate the child who offends from the child in need of care and protection by arbitrary line-drawing. The "most significant finding" of a study of youth offending in Glasgow, based on referrals to the reporter, was "the extent to which persistent offenders had already been formally identified as children in need of care and protection."[130]

Reconciling Welfare and Justice

One of the consequences of the general tendency to characterise the debate as welfare set against justice, rather than as two complementary philosophies is that welfare and justice are conceived as mutually exclusive, or as completely dichotomised from each other. In fact, however, as was discussed earlier in this chapter, this rigid bifurcation serves to obscure the way in which the two philosophies complement each other, certainly within the Scottish legal system. It is clear from the earlier discussion that, in both the

[130] Iain Gault *Study on Youth Offending in Glasgow* (Stirling: Scottish Children's Reporter Administration, 2003) at p 16

courts and the hearings, the Scottish system mixes aspects of welfare and justice. The hearings are not "pure" welfare institutions[131] any more than the courts can deal with children regardless of their welfare.[132]

The notion of welfare as in opposition to justice, then, does not accurately represent the factual situation. A further difficulty which this dichotomous terminology creates is the idea that, if welfare and justice are mutually exclusive, then welfare cannot occupy the same territory as justice. But, because justice is so called -- and welfare is, by definition "not justice" – the impression is generated that welfare is not just. Thus, setting up welfare and justice as polar opposites leads to a perception that the outcomes delivered by welfare-orientated institutions lack the quality of justice – understood as fairness. Neil MacCormick has termed this "[t]he 'Welfare versus Justice' Fallacy."[133] In fact, there is no reason to think that welfare decisions are not "just" in this sense. MacCormick states:

> "I want to offer a frontal assault on an implicit 'persuasive definition'. This persuasive definition is accomplished precisely in the juxtaposition of the two rival models or ideal types under the terminology of welfare for the one and justice for the other. It is important to note carefully what a sleight of hand there is involved. It is achieved by arrogating the term 'justice' to one of the two models for treatment of children in trouble. In saying that the justice model

[131] Because of the elements of justice, on the "due process" model, which are inbuilt.
[132] Under the CP(S)A 1995, s 50(6)
[133] MacCormick, supra, note 35,at p 11

> dispenses justice and the welfare model dispenses welfare we sell the pass at once."[134]

In this passage, he lays bare one of the ways in which the concept of welfare is subtly downgraded by its implicit labelling as "not justice". Later in his lecture, he challenges the exclusivity of the space occupied by "justice". He argues that it is, in fact, more just for children, who, in general terms, lack certain of the advantages of adulthood such as power, status, wealth and maturity of judgment, that decisions made in relation to them should take into account their needs. He states:

> "Our system is not a welfare system that works better than a justice system. It is a better system because it matches a better conception of justice than in this context the so-called 'justice model' would do. We do better justice to children than we used to do and than we would do if we were to go down the road of further assimilating the children's system to the criminal law and the criminal process as this ... applies to adults. ... [N]ever accept that our system ... diverges from what could properly be called a justice model. ... Say, rather, that we have here a model of justice that tells us why to treat children differently from adults."[135]

MacCormick, then, argues that the children's hearings system – an overtly welfarist forum - is infused by justice, as that term is commonly used, to mean fairness, or as he himself would have it, as "the first virtue of political institutions."[136] Although he does not specifically address the tenets of justice theory as outlined above, he

[134] *Ibid*, at p 7
[135] *Ibid*, at p 11
[136] *Ibid*, at p 7

suggests that there is no necessary opposition between the two concepts. In the same way that, as discussed above, procedures usually ascribed to justice, (on the "due process" model) such as rights of appeal and review, actually complement the provision of welfare then, it may be that the practice of welfare actually incorporates, without necessarily acknowledging this, other "justice" elements. In this way, considerations which have always been placed on the 'justice' side of the welfare/justice divide – in particular, capacity and responsibility – may actually already have a role in welfare decision-making. Thus, it is not so much a reconciliation of welfare with justice which will be discussed here, but rather the drawing out of a position which has always existed, albeit implicitly.

The Concept of Responsibility in a Children's Hearing

Criminal responsibility in the court system is a still snapshot set against the moving picture which constitutes the offender's life.[137] It arises where it is proved that the accused committed the *actus reus* of the criminal offence with the necessary *mens rea* and is, therefore, specifically linked to the moment in time when the offence took place. Only if reason to question the extent of the accused's capacity exists, as in the case of a child or a mentally disordered person, would any wider issues be canvassed and even these are specifically

[137] This metaphor was used by Margaret Ross in relation to the law on adoption. See "Adoption in the 21st Century: Still Image Against a Moving Picture?" in Scoular (ed) *supra*, note 39, 105

related to understanding of, and the ability to rationalise, the criminal act itself. Criminal responsibility also constitutes the link between the crime itself and the sanction. Once it has been established, the state is authorised to impose punishment. The existence of this serious consequence, which may consist in deprivation of liberty, arguably justifies the narrowness of the concept and the need to ensure that it is established only where a rigorous procedure which protects the rights of the accused has been followed.

Nonetheless, it is worth noting that there have been calls, particularly from feminists, for more contextualised decision-making in the criminal law albeit that these have been made primarily in relation to provocation[138] rather than criminal responsibility.[139] It is not obvious, however, that the argument in favour of examining the criminal act in the context of the offender's life as a whole is only of relevance to cases where the accused has suffered an excusable loss of self-control. If contextualised decision-making is fairer, because it allows other issues than simply the offence itself to be taken into account, why should it not be fairer in relation to other aspects of the criminal law and process as well?

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[138] The law on provocation, which, if successful as a defence, reduces a charge of murder to culpable homicide requires a sudden loss of self-control following immediately upon either an act of violence against the accused or his/her discovery of sexual infidelity by a partner. Feminists argue that women who have been subjected to sustained domestic abuse over a long period are more likely to suffer a "slow burn" effect so that the repeated acts of violence against them have a cumulative effect and their own use of deadly force does not arise out of a specific incident.

[139] See Donald Nicolson and Rohit Sanghvi "Battered Women and Provocation: The Implications of *R v Ahluwalia*" [1993] *Crim LR* 728

It is clear from the discussion earlier in this chapter that the children's hearings system has no concern whatsoever with the issue of punishment and that its style of decision-making is almost completely contextualised. Its criteria for relevancy,[140] in relation to the material presented to it, both written and oral, are drawn very widely and, in reaching its conclusion as to disposal of the case, it is as likely to accord importance, for example, to the fact that the child enjoys football as to his/her acceptance of the offence ground for referral.[141] The criminal courts' narrow construction of criminal responsibility then, would, on the face of it, appear to have no role in a children's hearing. Constructing criminal responsibility exclusively on that model consigns it very clearly to the justice side of the welfare / justice divide.

This chapter, however, seeks to argue that welfare and justice are not, in fact, as dichotomised as the traditional debate suggests. In particular, it is misleading to accept that justice is concerned exclusively with the offence, whereas welfare pays no heed to it once it has served its purpose of triggering the process. It is, however, important to note that welfare is not *necessarily* concerned with the offence even if the child has been referred under s 52(2)(i) of the Children (Scotland) Act. Kenneth Norrie has stated that "[i]t is the

[140] Kenneth Norrie defines this as "whether the matter is relevant to the question of what course should be taken in the child's best interests". Kenneth McK Norrie *Children (Scotland) Act 1995* (Edinburgh: W Green / Sweet & Maxwell, 1998) at p 140

[141] See McDiarmid, *supra*, note 39, at pp 34 - 36

strength of the [children's hearings] system that the existence of a ground of referral merely raises the question of whether compulsory measures are necessary ... but does not determine their nature; it is both questions which must be considered by the children's hearing."[142]

Nonetheless, in summarising those aspects of the discussion which were most commonly present in the sixty children's hearings which they observed, Hallett *et al* noted that "[o]ne main topic of the children's and young person's contribution [at the hearing] was the explanation of the offence, the circumstances surrounding it and the young person's ... part in this."[143] This was against an overall finding that children tended not to say very much in hearings[144] and suggests first, that the offence was of greater relevance to the hearings' deliberations and decision than simply as a justification for bringing the case in the first place and, second that children themselves regarded utilising the opportunity presented to explain their criminal activity as important. On this basis, the offence itself *is* of significance in welfare decision-making, at least as practised by the children's hearings. This in turn supports the view that welfare and justice are not as polarised as is sometimes thought.

What, then, of the concepts of criminal capacity and criminal responsibility as specific aspects of the offence which are also

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[142] Norrie, *supra*, at p 140
[143] Hallett *et al*, *supra*, note 42, at p 50
[144] *Ibid*, at pp 46 - 48

usually branded as "justice" considerations along with the offence itself? It should be clear from the detailed discussion of the theory and practice of welfare in the hearings system earlier in this chapter that the process itself – the discussion within the hearing mediated by panel members but involving all participants – is as key, in many respects, as the disposal itself. It is therefore necessary to look at these concepts in both contexts: the discussion and the decision.

Capacity and Responsibility in a Children's Hearing

The discussion surrounding the offence which Hallett *et al* identify as a common feature of hearings brought under section 52(2)(i) clearly occupies territory which is covered by the rationality capacity point identified in chapter 2. It indicates that the child is seeking to provide a rational explanation of the crime, and his/her involvement in it and it will demonstrate practically the child's ability to do this. The nature of the discussion is also likely to touch upon some of the other capacity points. In the court setting, the evidence presented on the points is purely descriptive. It gives an indication of the child's existing understanding of the issues covered such as the wrongfulness of the act, its criminality and its consequences. The panel members may attempt to apply the points, or some of them, in a rather more normative sense – that the child *should* understand that the act was wrongful, or criminal, or carried wider consequences.

This can be viewed as an attempt to assist the child to *build* his/her capacity.

It might be argued that all that is suggested here is that the child should take a more mature attitude to his/her wrongdoings and panel members indulge in moralising or preaching which merely emphasises the child's lack of status. It is submitted, however, that there is a concept of criminal responsibility (in a broad sense of taking responsibility for a criminal act) at play here. While it eschews the crude link with punishment generally made in the criminal courts, it is still concerned with the child's criminal capacity as that has been theorised in chapter 2. It is, however, as, if not more, concerned with facilitating the taking of responsibility in the future, to avoid criminal behaviour, as with the completed criminal act which cannot be undone. Responsibility in this sense is also important to the actual outcome of the hearing – the disposal decided upon by panel members.

The hearing's decision cannot seek to punish the child for the crime. It is likely that the hearing will regard it as in the child's best interests, both objectively and subjectively, that s/he should stop offending. It will therefore seek to impose a condition which facilitates this, for example requiring the child to attend an Intermediate Treatment programme[145] specifically designed to

[145] Such programmes are intended to be "intermediate between supervision in the home and committal to care". Geoff Aplin "Intermediate Treatment" in Martin and

address offending behaviour in both a backward-looking (towards the offence itself) and a forward-looking fashion. Issues like the wrongfulness of criminal action, the harm which it causes and the need to control impulses towards it, all of which may be covered in such a programme, are certainly aspects of criminal capacity and may serve to move the child towards the assumption of criminal responsibility in the narrow, traditional sense. The hearings' concept of responsibility may be broader than "criminal responsibility" but it is no less valid. The purpose which it serves, of bringing the child to an awareness of his/her criminality, with all of its connotations, fills in some of the gaps, in relation to understanding and prevention of criminal behaviour in the future, which are left by the courts' practice of equating the commission of the crime with criminal responsibility and imposing punishment on that basis

Conclusions

Overall, this chapter has sought to argue for a holistic and realistic view of the child-offender which accommodates his/her status as both a child and a criminal simultaneously. It has considered, in detail, the theory and practice of welfare, both because of its centrality to the Scottish legal system's interaction with child-

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Murray (eds) *supra*, note 17, 177 at p 178. See also Anthony Bottoms, Phillip Brown, Brenda McWilliams, William McWilliams, and Michael Nellis, in collaboration with John Pratt *Intermediate Treatment and Juvenile Justice: Key Findings and Implications from a National Survey of Intermediate Treatment Policy and Practice* (London: HMSO, 1990)

criminals and because of the image which it is often seen as presenting, of the child as primarily, or indeed only, in need of protection. This was contrasted with the view of the child implicit in the government's perspective on responsibilization, as an independent agent who can and should take (often full) responsibility for the criminal act and its consequences. Having noted the reconciliation between the construction of the child as vulnerable and the construction of the child as independent agent achieved in children's rights and in legal representation, the chapter concludes that a similar reconciliation is possible between welfare and justice in relation to children who offend. In fact, it would appear that, as practised by the children's hearings system, welfare has, all along, taken on board sufficient elements of the justice approach to provide an effective response to the child as offender as well as the child as child. In the current, punitive, political climate, this is encouraging for the continued durability of the children's hearings system.

Chapter 5

Procedural Framework and Conclusions

Introduction

The central theme around which this thesis has been built is the response of the Scottish legal system to children who commit serious crimes, both as it is currently in the courts and the children's hearings system and as it could be, specifically where children are prosecuted. The aim of the innovations which have been suggested, particularly to the establishment of the mental element where the accused is a child, is to ensure the fairest treatment possible of the child-accused. The issue of fair treatment has been theorised to encompass two key elements, around which the main discussion in the thesis has centred. These are: first, the need to engage thoroughly with the child's criminal capacity, conceived as his/her understanding of the criminal act in context, and its consequences; and second, the tension inherent in the status of child between autonomy and dependence which becomes even more pronounced and less tractable when the child commits a criminal offence. In the latter case, the status of "child-criminal" is almost a contradiction in terms, so difficult is it for the legal system to accommodate an individual who is, simultaneously, a child and an offender. This point was examined in detail in chapter 4.

In the popular consciousness, in Scotland as much as in England, the murder of James Bulger is still regarded as the main example of a

serious crime committed by children. The trial judge's description of the event as an "act of unparalleled evil and barbarity" stigmatised Robert Thompson and Jon Venables legally in the same way as the media coverage had done socially. Other than the rebuttal of the *doli incapax* presumption, however, which, as was discussed in chapter 3, only considers the understanding of the distinction between right and wrong in a very narrow sense, there was no engagement with T and V's actual understandings of their act and its consequences. The importance of a close examination of the mental element where the accused is a child, which this thesis has set out in chapter 2, and advocated throughout, is that it provides a mechanism for informing the court of the child's true level of comprehension, in relation to his/her criminal act, and of other aspects of his/her functioning, such as the general ability to control and determine conduct. From this, the court can build a picture of the child's actual level of criminal responsibility and make more rational decisions on "guilt" and "sentence".

Developmental psychology may be censured by sociological work on the childhood studies model for its monolithic structure, which overlooks the individualism and the lived reality of children's lives but, as exemplified in chapter 2, it holds data which is necessary to making such determinations in individual cases. The law may sometimes have difficulty with the discourses utilised in other

disciplines[1] but developmental psychology can still provide information on which to base a legal decision.

There is a need to routinise the procedure for dealing with children who offend in the courts to move away from the presentation of such cases as aberrant and, again, to ensure fairer treatment by levelling the playing field so that all children who offend are processed in the same way – a way which focuses attention on their understandings. In so doing, it may also be possible to improve upon certain of the existing elements of the system.

These points are specifically addressed in this chapter, together with a number of others which have been raised, expressly or implicitly, in the discussion in chapters 1 to 4 but which have not, so far, received due consideration. In form, the chapter is, therefore, procedural. In effect, however, it is an appeal for fairness towards, parity between and a compassionate approach to, children who commit serious crimes.

The Age of Criminal Responsibility

The provision of an age of criminal responsibility is a demonstration of Scots law's acceptance of the difference between the commission of criminal acts by young children and by their adult counterparts. It is, in fact, the only formal provision currently made by the Scottish

[1] For example, there are difficulties in translating psychiatric evidence into information which the courts can understand and apply in insanity cases. See Derek Chiswick "Medicine and the Law – Use and Abuse of Psychiatric Testimony" 1985 *BMJ* 290(6473), 975

legal system in relation to the capacity of children. Chapter 3 explained its operation, arguing that its retention is necessary to avoid the spectre of very young children being prosecuted to serve political ends and that the age ought to be linked the capacity. This chapter will look at the age which should be set, bearing in mind, given the individualism of child-offenders, that this can only ever be decided arbitrarily.

The basic premise of the Scottish Law Commission's *Report on Age of Criminal Responsibility* is that, in a system where the vast majority of child-offenders are referred to the children's hearings system, the age which is of importance is the age at which the child is *automatically* subject to the adult system. In the Commission's view, that is, and should remain, sixteen. Currently, the relevant statute does not formally state the position in these words but it is clear that prosecution of an individual aged under sixteen is to be viewed as an unusual course.[2] Equally, only a "child" can be referred to a children's hearing and the Children (Scotland) Act 1995 states that "child means ... a child who has not attained the age of 16 years."[3] In its Discussion Paper which preceded the Report, the Commission tentatively suggested that it might not be appropriate to have any

[2] Criminal Procedure (Scotland) Act 1995 [hereinafter "CP(S)A 1995"], s 42(1) which only allows prosecution of a child aged under 16 on the instructions of the Lord Advocate and then only in the sheriff court or the High Court.

[3] Children Scotland Act 1995 [hereinafter "C(S)A 1995"] s 93(2)(b)(i). Sixteen- and seventeen-year olds come within the definition of "child" if they are already on a supervision requirement as do individuals already on a similar requirement made in England and Wales or Northern Ireland: C(S)A 1995 s 93(2)(b)(ii) and (iii)

other relevant age apart from sixteen, and sought views on this.[4] In effect, therefore, it was canvassing opinion on the proposition that the age of criminal responsibility, as such, should either be regarded as having been abolished or else as having been recast as sixteen for the reason given above.

In the end, the Commission was persuaded "by the views of the majority of its consultees ... that there should be a rule that a child below a certain age cannot be prosecuted" ... on the basis that "a rule of this nature expresses important values about the ways in which society should deal with young children who offend [and] that the criminal process is not a suitable mechanism for dealing with such children."[5] It refused, however, to call any such lower age for prosecution an age of criminal responsibility.

In the end, the Commission proposed that the relevant lower age should be twelve, a view which is endorsed by this thesis and, indeed, in the *Draft Criminal Code for Scotland*.[6]

Why 12?

Twelve can only be an arbitrary choice but, nonetheless, the Law Commission's arguments in its favour are impeccable. The three

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[4] Scottish Law Commission *Discussion Paper on Age of Criminal Responsibility* (Discussion Paper No 115) (Edinburgh: TSO, 2001) at paras 3.13 to 3.16

[5] Scottish Law Commission *Report on Age of Criminal Responsibility* (Scot Law Com No 185) (Edinburgh: TSO, 2002) at para 3.15

[6] s 15

reasons which the Commission gives for selecting 12[7] are: (1) that this is the age proposed by the majority of its consultees; (2) that it meets the requirements of the European Convention on Human Rights as interpreted particularly by T v UK; V v UK;[8] and (3) that it accords well with similar assumptions made by the civil law concerning children's capacity. A brief expansion on points (2) and (3) is necessary to explain in more detail why the view is also taken here that 12 would be an acceptable age.

Human Rights Angle

It is clear from the discussion of the precondition of understanding in chapter 2 that the child-accused must have sufficient command of the trial process, including its nature and purpose and the language used, *actively* to participate in the trial. It is worth reiterating that the age of criminal responsibility in Scotland is eight. The evidence led in the case of HMA v S[9] however, implicitly attacks eight as being too young. According to the expert testimony, despite his chronological age of thirteen, S functioned, in certain key respects, more as a child of just over eight[10] or a child of nine or ten.[11] The view was expressed that, in order to be able to follow discussion, he would require dialogue to be "adjusted to levels normally understood by a

[7] These are listed in Scottish Law Commission Report No 185, *supra*, note 5, at para 3.16
[8] (2000) 30 EHRR 121
[9] (plea in bar of trial) (unreported) (High Court) (9 July 1999)
See http://www.scotcourts.gov.uk/opinions/845_99.htm
[10] See *ibid* the evidence of Dr Isobel Campbell and Dr Norman Clark
[11] *Ibid*, evidence of Dr Dorothy Taylor (at p 3 of internet copy)

nine year old child."[12] On the basis, partly, of this evidence, which supported the view that S would have considerable difficulty in following the trial process, the decision was taken that S was insane in bar of trial.[13] At the very least then, this suggests that the likelihood of a child of eight being able to follow trial proceedings is minimal. This, in turn, implies that there is a need to raise the age of criminal responsibility, probably to at least eleven, if a child of nine or ten is also likely to struggle with the language and concepts involved

In T v UK; V v UK[14], the European Court of Human Rights refused to hold "that the trial on criminal charges of a child, even one as young as eleven, *as such* violates the fair trial guarantee under Article 6(1)."[15] It did however, take the view that the actual treatment accorded to Robert Thompson and Jon Venables, taking account of their age (11) and immaturity, the public scrutiny to which the case was subject, and their disturbed emotional states, *had* prevented them from participating actively in the trial and was therefore a breach of Article 6(1).[16] Because the age of eleven was a relevant consideration in this decision, even if it was not decisive, it would be

[12] Ibid, evidence of Miss Jenny Munro (chartered clinical psychologist)
[13] This infers that S was unable to instruct counsel or to follow the proceedings at the trial since these elements are necessary to satisfy the test for the plea in bar set down HMA v Wilson 1942 SLT 194 at p 195
[14] *supra*, note 8
[15] *Ibid*, at p 179 para 86. Emphasis added.
[16] *Ibid*, at p 181 paras 90 and 91

unwise, in changing the age of criminal responsibility, to set it any lower than twelve.

In terms of the views expressed in both HMA v S and T v UK; V v UK then, twelve seems to be an acceptable age legally, albeit that it is also the youngest age which would satisfy the concerns relative to understanding raised in these cases.

Comparison with the Civil Law Position

There are a number of statutory provisions in the civil law which recognise the age of twelve as a pivotal point in a child's life in terms of capacity where this is, broadly, conceived as having sufficient maturity to take key decisions. The Law Commission lists several of these[17] including the need, in the standard case, for a child of twelve or over to consent to his/her own freeing for adoption[18] and the presumption that a child of that age is sufficiently mature to instruct a solicitor on his/her own behalf in civil proceedings.[19] In addition, section 6 of the Children (Scotland) Act 1995 requires that parents seek the views of their children in making any major decision relating to their parental responsibilities and rights[20] with a presumption that a child aged twelve or over "is of sufficient age and

[17] Law Commission Report No 185, *supra*, note 5, para 3.16(3)
[18] Adoption (Scotland) Act 1978 ss 12(8) and 18(8) as substituted by Age of Legal Capacity (Scotland) Act 1991, s 2(3)
[19] Age of Legal Capacity (Scotland) Act 1991, ss 2(4A) and (4B) as inserted by C(S)A 1995 sch 4, para 53
[20] Listed in C(S)A 1995, ss 1 and 2

maturity to form a view."[21] Children of that age are also specifically imbued with the capacity to make a will.[22]

The disparity between the age of twelve, as the first age at which it is to be presumed that the child has the maturity to take decisions of this nature, and the age of eight as the first age at which the child is to be regarded as capable of taking (full) criminal responsibility is very stark. This is particularly the case when the various elements of criminal capacity teased out in chapter 2 as capacity points are taken into account. Whilst consenting to adoption, for example, may be one of the most important decisions a child ever takes, the assumption of criminal responsibility allows the state to impose sanctions including detention. Both are highly significant events; both require a mature understanding.

By comparison with the civil law then, the current criminal law on the age of criminal responsibility appears actively unfair to very young children, in making an assumption about their maturity and understandings which is not tested in the individual case but which may have seriously detrimental consequences. This is particularly so given that provisions such as that relating to adoption also allow for the situation "where the court is satisfied that the child is incapable of

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[21] Some commentators take the view that this provision is unenforceable given that it provides no sanction for a failure on the part of the parent to consult with the child. See Kenneth Norrie *Children (Scotland) Act 1995* (Edinburgh: W Green / Sweet & Maxwell, 1998) at pp 19 – 20. Others are more favourably impressed regarding it as "do[ing] an admirable job" of "m]arrying together the various strands in the [CRC]". Elaine E Sutherland *Child and Family Law* (Edinburgh: T & T Clark, 1999) at p 89

[22] Age of Legal Capacity (Scotland) Act 1991, s 2(2)

giving his [sic] consent".[23] In that circumstance, the consent may be dispensed with. Even where the age is set at twelve in the civil law, then, there is a recognition that not all twelve-year olds will have the necessary maturity. It is submitted that these are good arguments for levelling the playing field in the treatment of the child's capacity between the civil and the criminal law. Given the volume of civil statutory provisions recognising twelve as the appropriate age at which to presume maturity for decision-making purposes, it seems acceptable that the age of criminal responsibility should also be twelve.

Criminal Procedure

This thesis has argued, by reference to developmental psychology, that it is necessary, in the interests of fairness and rational decision-making, to place the child-accused's understandings of his/her criminal act, and related matters, in issue in a criminal trial and, indeed, prior to that. Such a proposal is, however, of no value unless it is supported by the appropriate procedural framework. Currently, Scottish criminal procedure is seriously lacking in this respect. In the discussion, in chapter 3, of the general unpreparedness of the Scottish courts for cases involving child-accused, it was noted that the only mechanism by which the child-accused in HMA v S could bring his

[23] Adoption (Scotland) Act 1978, s 12(8) as substituted by the Age of Legal Capacity (Scotland) Act 1991, s 2(3)

developmental delay to the court's attention was by a plea of insanity in bar of trial. This demonstrates the absence of dedicated procedures for children.

One justification for the failure to make specific provision for child-accused is that there are very few of them. The vast majority of children are referred to the children's hearings system.[24] This is, however, a weak argument. By comparison, insanity is also rarely pled. As Derek Chiswick has noted "[m]entally disordered offenders in Scotland form a tiny proportion of the populations passing through the criminal justice and mental health systems."[25] Despite this, recognised procedures exist to deal with insanity both as a special defence,[26] (indicating that the accused lacked capacity at the time of the crime), and as a plea in bar of trial.[27] Insanity is the most comparable situation to that of child-accused in that both involve a lack of rationality in relation to, and/or understanding of, the nature of the criminal offence. The plea in bar of trial bears at least a passing resemblance to the preconditions for children. The special defence of insanity serves a similar function to the capacity points,

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[24] The Scottish Law Commission reports that "the number of children under sixteen prosecuted in the criminal courts was 189 in 1997, 179 in 1998 and 105 in 1999." Scottish Law Commission Report No 185, *supra*, note 5, para 3.10. The number of children aged under thirteen, which is included in these overall figures, was particularly low (fourteen in 1997, nine in 1998 and five in 1999: note 60 in para 3.10)

[25] Derek Chiswick "Mental Disorder and Criminal Justice" in Peter Duff and Neil Hutton (eds), *Criminal Justice in Scotland*, (Aldershot: Ashgate, 1999) 262 at p 262

[26] In which case, the accused's decision to plead insanity must be notified to the Crown in advance: CP(S)A 1995, s 78

[27] CP(S)A 1995, ss 54 – 57.

albeit that insanity is determined on an all-or-nothing basis whereas the capacity points admit of degrees of understanding.

The fact that there are recognised rules and procedures to deal with insanity, despite its rarity, indicates that the paucity of prosecutions of children is not a good enough reason to fail also to have dedicated processes for them in place. It is therefore necessary to identify the changes to criminal procedure which are necessary.

Accommodating the Mental Element

The main issue is the need to accommodate the mental element as conceived in relation to child-accused in chapter 2. A three-fold classification was proposed. First, the three preconditions identified[28] form a threshold for subjection to the trial process. Assuming that they are satisfied, the court then proceeds to examine the child's criminal capacity, by investigating the appropriate capacity points[29] and, finally, *mens rea* has to be proved, as an essential, very narrow and primarily factual element of the Crown case. There is an overlap between the community membership preconditions, of empathy and knowledge of criminality, and the capacity points of distinction between right and wrong and

[28] These are preconditions (1) of understanding; (2) of empathy and (3) of knowledge of criminality. The last two are grouped together under the heading of "community membership".

[29] Six of these were identified but this was not intended to be exhaustive. They were: (1) the volitional element; (2) distinction between right and wrong; (3) causation; (4) understanding of criminality and criminal consequences; (5) rationality; and (6) *mens rea*-related capacity points.

understanding of criminality and criminal consequences. There is also an overlap between the *mens rea*-related capacity point and *mens rea* itself. Also, there would be little point in proving the *mens rea* separately from the *actus reus* therefore these must also be considered together. How is all of this to be achieved procedurally? First, and most simply, proof of the *mens rea* and the *actus reus* are currently, and would remain, the main points at issue in the trial diet since its primary objective is to ascertain whether it is proved beyond reasonable doubt that the accused committed the offence. The preconditions and the capacity points are the real innovations and require further thought.

The purpose of a preliminary diet[30] is to settle any matter which would be better resolved before the actual trial takes place.[31] The preconditions determine whether there can be a trial at all, a point which, by definition, must be settled in advance. It therefore appears uncontroversial that a preliminary diet is required in this respect.[32]

The capacity points are more problematic. On the one hand, there is an argument in favour of carrying out the investigation into the

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[30] In proceedings on indictment in the sheriff court, a "first diet" is held. (CP(S)A 1995 s 71(9)). This serves the same function as a preliminary diet (CP(S)A 1995 s 71(2)). This chapter will, however, make reference only to "preliminary diets" which take place where the proceedings are in the High Court (CP(S)A 1995, s 72(1). See *Renton & Brown* at para 17-01

[31] Implied in CP(S)A 1995, s 72(1)(d)

[32] S 72 of the CP(S)A 1995 sets down the circumstances in which such a diet is currently appropriate. It would therefore require to be amended to make it clear that, where the accused is a child, such a diet *must* be held to ascertain whether s/he can be tried at all. A new subsection (2B) could be added stating "Where the accused is a child the court shall order that there shall be a diet before the trial diet for the purpose of ascertaining whether the child is able to be tried."

child's criminal capacity in the same, or in a separate, preliminary diet because, again, if the child is found to have no criminal capacity whatsoever, the trial will not proceed.[33] Also, the overlap mentioned above (between the community membership preconditions and the distinction between right and wrong and understanding of criminality and criminal consequences capacity points) suggests that it would be appropriate to allow all the evidence in respect of these matters to be led at once. There is a precedent, in the case of insanity in bar of trial for having two diets other than the trial diet but the second of these – the examination of the facts, is expressly intended to take the place of the trial.[34] In relation to children, there is no benefit to the accused, the court or the witnesses in separating the preliminary hearing on the preconditions from any such hearing on capacity.

On the other hand however, the likelihood is that, if the child meets the threshold for trial set by the preconditions, s/he will have *some* criminal capacity. There is, therefore, little point in consigning this issue to a preliminary hearing on the basis of a very distant possibility that it might prevent the trial going ahead. Also, and more importantly, criminal responsibility, which is based on the extent of the child's capacity, is integral to the trial process. Indeed, in a sense, the *raison d'être* of the trial is to determine whether or not the

[33] If the child meets the preconditions, this is unlikely.
[34] CP(S)A 1995 s 55(6)

accused has this, in any degree.[35] It is therefore inappropriate to sever the ascertainment of the level of capacity (and, hence, responsibility) from the trial itself.

If insanity is taken as a model, the plea in bar of trial (comparable to the preconditions) is usually dealt with in a separate, preliminary hearing.[36] Insanity as a special defence (comparable to the capacity points) on the other hand, is usually considered in the trial itself, with the jury being required to make a finding as to whether the accused is insane.[37] Overall, then, the preconditions should be referred to a preliminary hearing and the capacity points should be examined in the trial itself. This should also obviate any difficulty arising from the overlap between the *mens rea* capacity point and *mens rea* itself, because evidence on both will now be led during the trial.

With regard to the overlap between two of the preconditions and two of the capacity points, "[t]he proceedings at a preliminary diet are proceedings at the trial for the purposes of taking a record under section 93 of the [(CP(S)] 1995 Act."[38] Accordingly, all evidence given in relation to the preconditions will be available to the trial

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[35] As explained in chapter 2, for a child, criminal responsibility requires proof beyond reasonable doubt of the *actus reus* and the *mens rea*, as well as a degree of criminal capacity.

[36] See Michèle Burman and Clare Connelly *Mentally Disordered Offenders and Criminal Proceedings: The Operation of Party VI of the Criminal Procedure (Scotland) Act 1995* (Edinburgh: Scottish Office Central Research Unit, 1999) at pp 15 – 17 where it is indicated that, in all of the cases identified in their study (except one which was deserted *pro loco et tempore*), the plea in bar of trial on the ground of insanity was considered in a separate hearing from the trial.

[37] See, eg, HMA v Kidd 1960 SLT 82 which was reported solely on the charge to the jury where the accused had pled insanity.

[38] *Renton & Brown* at para 17-23

court, if there is a need to make reference to it in relation to the relevant capacity points.

Nature of Evidence

HMA v S indicates that expert testimony can be helpful in determining the child's capacity and, given the reliance placed on developmental psychology in relation to both the preconditions and the capacity points, it is likely to be necessary. A word of caution is, however, required here. Currently, where the accused pleads insanity in bar of trial, expert evidence, in the form of testimony from two medical practitioners, is required.[39] The Scottish Law Commission has recommended that this requirement be repealed on the basis that it is too restrictive and fails to take account of the actual evidence which is most helpful in deciding if the accused meets the test of insanity.[40] This often comes from psychologists. By analogy, and given that the list of capacity points set down in chapter 2 may not be exhaustive, it is too restrictive to provide for expert evidence from any specified category of professional. It ought to be equally valuable, in fact, to hear evidence on some of the preconditions and capacity points from those who interact with the child-accused on a day-to-day basis such as teachers, particularly on issues with an

[39] CP(S)A 1995 s 54(1)

[40] Scottish Law Commission *Discussion Paper on Insanity and Diminished Responsibility* (Scot Law Com No 122) (Edinburgh: TSO, 2003) at p 51, paras 4.25 and 4.26

intellectual basis such as understanding of causation.[41] In this regard, however, it is useful to consider the practice which arose around the *doli incapax* presumption.

The Example of *Doli Incapax*

The *doli incapax* doctrine was set up as a rebuttable presumption – the court *presumed* that the child was incapable of evil and the prosecution was required to lead evidence to rebut this view.[42] There were a number of difficulties with this. First and foremost, it set up, as the norm, the child as an individual who lacked understanding. This allowed the presumption to be rebutted if the prosecution led evidence that the child-accused was of "normal mental capacity."[43] As chapter 2 has argued, children develop at different rates. The notion of "*normal* mental capacity" is therefore relatively meaningless. Equally, the idea that evidence that the child-accused was a "normal" child should be sufficient to establish his/her understanding of the serious wrongfulness of his/her act does not accord with the need actually to investigate this in every case, which

[41] With regard to the *doli incapax* presumption, it was accepted by the House of Lords in C (a minor) v DPP [1995] 2 WLR 383 at p 402 that evidence from teachers and parents as well as psychiatrists could be led by the prosecution to rebut the presumption

[42] JBH & JH (minors) v O'Connell 1981 Crim LR 632 at p 633. This was an absolute requirement but, on occasion, it was ignored by the prosecution, leading to difficulties at the appeal stage. See R v Coulburn (1988) 87 Cr App R 309

[43] JBH and JH (minors) v O'Connell *supra*, note 42, at p 633. In JM (a minor) v Runeckles (1984) 79 Cr App R 255, the fact that, from the accused's handwriting and the statement she gave to the police with respect to the crime, the magistrates had deduced that she was of normal intelligence for her age, was upheld in the course of the appeal as proper evidence from which to draw a conclusion that the presumption had been rebutted.

has been advocated in this thesis. Using the "normal child" as a standard, then, was unfair to child-accused because it introduced a normative element into the assessment of their understandings. The implication was that, if a child did not, in reality, understand the wrongfulness of his/her act then, as a "normal child" of a particular age, s/he *ought* to have done, and s/he could be convicted on that basis.

Another issue which came to be meaningful, again somewhat dubiously, was whether or not the child came from a "good" or a "bad" home. The point seems first to have been raised in B v R,[44] a housebreaking carried out by two boys seeking work for Scout "Bob-A-Job" Week. In the judgment, it was stated:

"[h]ere is a child who has had apparently every opportunity in life, coming from a respectable family and properly brought up, who, one would think, would know in the ordinary sense the difference between good and evil and what he should do and he should not do."[45]

This led to a general acceptance of evidence of this nature to rebut the presumption despite the questionable assumption underlying it that there is a recognisable standard of a "good home" and that this contributed to the child's understanding of the serious wrongfulness

[44] (1960) 44 Crim App R 1
[45] *Ibid*, at p 3

of his/her act.[46] In fact, it is preferable if the investigation into capacity remains descriptive. In other words, instead of the court hearing evidence on what the child *ought* to have known or understood, it only considers evidence as to what s/he did actually understand on the point at issue. The evidence led may be wide-ranging, and personal knowledge of the child should be accorded value alongside expert testimony but, overall, no aspect of the child's understanding should be assumed.

An argument was put forward, during the period in which the *doli incapax* presumption was used, that the onus of proof should be moved to the defence so that it was presumed that the child-accused *did* know that his/her action was seriously wrong, unless evidence to the contrary was led.[47] This is helpful in that the child-accused is no longer presumed to be "abnormal" but the view is taken here that having a presumption at all unnecessarily distorts the nature of the inquiry into the child's understanding which the capacity points require. It makes it necessary to assume either that the child had understanding, or that s/he did not, and for evidence to be led only by the side on which the onus of rebutting the presumption rests. This does not sufficiently recognise the individualism, in terms of understanding, of the child-accused. In fact, it is submitted that this is one area where it might be appropriate to adopt a more inquisitorial

[46] See the judgment of Laws J in C (a minor) v DPP [1994] 3 All ER 190 at p 198 taking issue with what he characterises as discrimination against children from "good homes".

[47] See, for example, the commentary on A v DPP [1992] Crim LR 34 at p 35

style of procedure with the aim of establishing the truth, rather than the traditional adversarial idea of judging between two opposing arguments.[48] The court's role in relation to the preconditions and the capacity points is to seek to get to the truth of the child's understandings, informed by his/her developmental abilities and maturity. It is not to adjudicate on whether the prosecution or the defence has put forward the better argument. It is already sufficiently difficult for an expert witness to be asked to translate the discourse of his/her area of expertise into concepts which the criminal law can apply[49] without the additional burden of the awareness of representing either the prosecution or the defence.

Taking the onus of proof away from the prosecution upsets one of the fundamental principles of the criminal justice system – that it is not for the accused to prove his/her innocence.[50] If the whole issue is transferred into the inquisitorial context, however, this criticism loses some of its cogency. The question of the style of judging which best promotes the aims of fairness, parity and compassion to the child-

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[48] For example, in France, certain judges (*juges d'instruction*) are specifically charged with investigating matters so that the court which actually adjudicates on the case can be properly informed as to the facts. Children's judges (*juges des enfants*) fall into the other category – i.e. judges who actually take decisions in individual cases – but they have powers to instruct other bodies to investigate the child's situation (eg the social services department, psychological and psychiatric examinations) before reaching a decision in a case. See Alain Grevot *Voyage en Protection de L'Enfance: Une Comparaison Européene* (Vaucresson: Ministère de la Justice, 2001) at pp 63 - 64

[49] See, for example, Chiswick, *supra*, note 1

[50] It has been noted, in relation to English law that "'one golden thread' running through English criminal law is that the prosecution bears the burden of proving guilt." Andrew Ashworth "Is the Criminal Law A Lost Cause?" 2000 LQR 225 at p 228, quoting Viscount Sankey LC in Woolmington v DPP [1935] AC 462

accused, without losing sight of the public interest in justice being seen to be done, is also of relevance in relation to the *formality* of the proceedings, which will now be considered.

Formality

Certain action can be taken to reduce the formality, and the sense of intimidation which it may engender in a child-accused, on all occasions on which s/he appears in court. Wigs and gowns can be removed so that court personnel are dressed normally. The child may be permitted to sit with his/her counsel at the table, rather than being required to stand in the dock.

Beyond that, however, there is little doubt that, in relation to an issue as important as the establishment of criminal liability, the procedure utilised should be as robust, in terms of fairness to the child-accused and respect for his/her rights, as possible. This applies in relation to all three aspects of the mental element and to the *actus reus*. In order to ensure that this is achieved, rigour in the gathering of evidence in the first place, and in its presentation to the court, is mandated.

The only real question arising here then is whether there is any scope to render such proceedings more child-centred without losing the procedural rigour. It is submitted that it might be possible to arrange this either in relation to the child's representation or in relation to the judicial role. The child will require a legal representative but s/he might *also* benefit from a non-legally qualified interpreter or

advocate[51] whose skills would lie in communicating with children but who would also have a sufficient knowledge of the criminal process to advise the child concerning it.[52] Such an individual could act as a conduit through which the child could obtain information about aspects of the proceedings which were incomprehensible to him/her and could feed relevant points back. A proposal of this nature would obviously create some difficulties, for example, with halting the formal proceedings to allow such side discussions to take place but, overall, the benefits to the child and to the court in satisfying itself that the child's active participation was facilitated might outweigh the disadvantage.

Another possible means of infusing formal trial proceedings with child-centred practice, which could be used in conjunction with an interpreter for the child, might be to have such cases heard by specially trained children's judges or else to require the judge to sit with a member or members of the children's panel.[53] Either proposal should ensure that the decision-maker did not lose sight of the status

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[51] The CRC recognises that assistance beyond that provided by a lawyer may be necessary to a child charged with a criminal offence. Art 40(2)(b)(ii) states, "[e]very child alleged as or accused of having infringed the penal law has at least the following guarantees: ... to have legal *or other appropriate assistance* in the preparation and presentation of his or her defence." (Emphasis added)

[52] On the need for such a service generally, not only in the court setting, see Rosemary Gallagher / The Scottish Child Law Centre *Children and Young People's Voices: The Law, Legal Services, Systems and Processes in Scotland* (Edinburgh: TSO, 1999) at p 35

[53] In France, for example, these measures are combined, at least in relation to minor offences committed by children, which are tried by a children's judge (*juge des enfants*) assisted by two lay judges. For more serious offences three judges sit with nine jurors. See Brice Dickson *Introduction to French Law* (London: Pitman Publishing, 1994) at p 23

of the accused as a child and, by extension, that efforts were made to draw the child in to the proceedings. At base, however, any innovation to promote greater child-centredness would have to yield to protecting the child's position procedurally, if the two came into conflict.

Finding of Partial Criminal Responsibility

Finally, before moving on to consider children's hearings, it is necessary to look briefly at the effect of a finding that the child has some, but only some criminal responsibility. On this point, Peter Cane has noted generally, in relation to adults also, that

> "[d]egrees of capacity to avoid incurring responsibility can be expressed as degrees of fault by penalising less harshly those of lesser capacity. The principle that punishment should be relative to individual fault is one source of misgivings about mandatory sentencing. This is not to say that the sentencing process is finely tuned to individual differences of capacity. Differences between the capacities of individuals may be difficult to observe and measure. The most courts can do is to give effect to the principle in a rough and ready way."[54]

This statement highlights the fairness of the attempt to quantify capacity but, at the same time, the practical difficulties which any such exercise will encounter. It is, nonetheless, true that one of the purposes of trying to assess the level of criminal capacity in individual cases is so that the sentence can be matched to the level of responsibility which the child was actually capable of taking for

[54] Peter Cane *Responsibility in Law and Morality* (Oxford: Hart, 2002) at p 77

his/her actions. If capacity has been fully investigated, the sentencing court will be well informed about the child's responsibility and will be able both to take and to justify decisions on the basis of that information. For example, the child whose understanding of the more remote consequences of hitting another with an implement (internal injury; disablement; death) is limited, will receive, with justification, a lesser sentence than the child who understands that these outcomes are possible but who attacks in the hope of causing one or more of them. More individualised, rational and defensible sentencing practice is perceived as one of the main benefits of the investigation into capacity.

To facilitate better sentencing, the court must also become more precise, and, as a consequence, less forensic, in the language which it uses to describe the acts which it has found the child to have committed. "Guilt" can no longer be used as an absolute term.[55] Before the child can be convicted, the Crown must prove the *actus reus* and *mens rea* beyond reasonable doubt. Following that determination, the child is still only criminally responsible for those aspects of the crime and its surrounding circumstances which s/he did understand. On the other hand, once the *actus reus* and the *mens rea*

[55] Presumably in an attempt to avoid the consequences of criminal conviction for child-offenders, the CP(S)A 1995 s 165 already provides that, in summary proceedings, the words "conviction" and "sentence" are not to be used where the accused is a child but, instead, the court should refer to a "person found guilty of an offence"; a "finding of guilt" and an "order made upon such a finding".

have been properly established, then even very little understanding will impute a degree of responsibility.

This, in turn, raises the issue of sentence. This is not a primary concern of this thesis which seeks, overall, to elucidate the prior issue of responsibility. Nonetheless, it remains important and there is no reason to think that the obligation on the court to have regard to the child-offender's welfare[56] is any less relevant at this stage in the process than at any other. The court currently has a wide array of sentencing options for both adults and children ranging from admonishment to, for children, detention without limit of time.[57] At sentencing, it is important that the court should weigh the child's understanding, which it will have gone to some length to ascertain, as strongly as the offence itself. It is desirable that, if a custodial sentence is deemed necessary, it should also recognise a principle which has been used in relation to sentencing children in the English courts of "not impos[ing] a sentence which, the far end of it, would to young men [sic] like this seem completely out of sight."[58]

The current law on insanity removes the insane accused altogether from criminal sentencing (because s/he lacks the capacity to be "guilty" of a criminal offence) and provides, instead, for five possible disposals tailored to individuals with mental disorder whose actions

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[56] CP(S)A 1995 s 50(6)

[57] See K v HMA 1993 SLT 237. The power to detain children convicted on indictment generally is found in the CP(S)A 1995, s 208

[58] R v Storey and Others (1984) 6 Cr App R (S) 104 at p 107. See also R v Roberts [1989] *Crim LR* 521 and R v Simmons (1995) 16 Cr App R (S) 801, at p 803

demonstrate that there is need for the state to exercise control over them.[59] Whilst children and the insane are not perceived as comparable in this respect, because the likelihood is that children will be able to take a measure of responsibility, this still raises the question of whether the court requires similar special powers when dealing with child-offenders. The absolute discharge[60] probably serves the same function as the power to "make no order" in insanity proceedings. In deciding if an absolute discharge is appropriate, the court might bear in mind the "age-crime curve" which demonstrates that, in the majority of cases, offending "reduc[es] to a relatively small percentage by age twenty."[61] This appears to be regardless of the interventions effected in the child offenders' lives, whether these are punitive or therapeutic.

The court will, of course retain its power to refer a child who "pleads guilty to, or is found guilty of, an offence" to the hearings system.[62] Where it is considering imposing a probation order, the court would do well to bear this alternative in mind. Supervision requirements are administered by social workers specialising in children and families;

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[59] In summary these are: (1) detention in a (mental) hospital; (2) an order restricting liberty on release from such a hospital (similar to a life licence for released life prisoners); (3) an order placing the person's personal welfare under the guardianship of the local authority or of a person approved by the local authority; (4) a supervision and treatment order; and (5) no order. CP(S)A 1995, s 57(2).

[60] CP(S)A 1995, s 246. In summary proceedings, the court does not even require to proceed to conviction before discharging the accused absolutely. In solemn proceedings, the absolute discharge is "instead of sentencing".

[61] Bill Whyte "Rediscovering Juvenile Delinquency" in Andrew Lockyer and Frederick H Stone *Juvenile Justice in Scotland: Twenty-Five Years of the Welfare Approach* (Edinburgh: T&T Clark, 1998) 199 at p 200

[62] CP(S)A 1995, s 49(1)

probation orders by those on the criminal justice side. The latter are intended to be punitive; the former to be helpful. The court should weigh up the relative merits of each disposal. Of course, the children's hearing to which the case is remitted retains the right to discharge the referral[63] if it takes the view that it would be better for the child that no order should be made,[64] and the court must also take that possibility into account.

Finally, on this point, children who plead guilty to, or are convicted of murder, cannot currently be remitted to a children's hearing because, where the sentence for a crime is fixed by law, section 49 of the Criminal Procedure (Scotland) Act 1995 is expressly disapplied.[65] The sentence for murder where the accused is aged under eighteen is detention without limit of time.[66] Without seeking to enter the debate on the mandatory sentence for murder generally[67] it is submitted that, given the importance placed on the individuality of every child-offender in this thesis, it would be more appropriate to repeal this rule so that, in an appropriate case, the option of referral to a children's hearing remains. Certain aspects of sentencing practice then, would be ripe for change in response to the matters raised in this thesis

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[63] Once a referral is made to a children's hearing, the jurisdiction of the court ceases: CP(S)A 1995, s 49(4)
[64] C(S)A 1995, s 16 (3)
[65] CP(S)A 1995, s 49(5)
[66] CP(S)A 1995 s 208(2)
[67] See, for example, Lord Windlesham "Life Sentences: The Paradox of Indeterminacy" 1989 *Crim LR* 244

Children's Hearings Procedure

Finally, in this chapter, it is necessary to consider certain aspects of the role of children's hearings in dealing with children who offend. Chapter 1 demonstrated that where a child commits a heinous crime, this often engenders a public demand for a punitive response.[68] This thesis advocates a more cautious approach which bases the decision taken as to the state's response to the crime on an appraisal of the child's actual understanding of his/her action. The two positions are likely to be particularly conflicted where the child-accused fails to satisfy the preconditions, and therefore cannot be tried, but where there appears to be sufficient evidence to prove beyond reasonable doubt that s/he carried out the *actus reus* with the necessary *mens rea* on the very thin concept of *mens rea* adopted by chapter 2.[69] In these circumstances, it is submitted that the appropriate course of action would be to refer the child to a children's hearing, although this would necessitate two modifications to the hearings system which will be discussed below. The alternative, which would be simply to discharge the child from all further proceedings because of his/her

[68] See Barry Vaughan "The Government of Youth: Disorder *and* Dependence 2000 *Social and Legal Studies* 9(3), 347, at p 360

[69] This issue is demonstrated in the response to the attempted assassination of President Ronald Reagan in the United States by John W Hinckley in 1981. Hinckley was acquitted on the ground of insanity. Despite his subsequent detention in a mental hospital, the acquittal caused outcry and led to the abolition of the insanity defence in many American states. See Michael L Perlin *The Jurisprudence of the Insanity Defense* (Durham NC: Carolina Academic Press, 1994), particularly chapter 2

inability to participate actively in the trial, fails altogether to respond to the public interest in justice being seen to be done and the need to retain public confidence in the criminal justice system.[70]

The two proposed changes to the hearings system are required because the concept of the mental element, and the procedural mechanisms for ascertaining it in court, which have been proposed in this thesis, could apply to a child of any age.[71] Accordingly, for the sake of completeness, it is desirable that even a child aged seven or under should be able to be referred to a children's hearing in the circumstance just outlined. The two proposals are generally desirable anyway, and would enhance the service which the system currently provides to children referred on the offence ground if they were adopted, even in isolation from the rest of the proposals made here.

Following the case of Merrin v S,[72] no child under the age of eight can be referred to a children's hearing on the ground that s/he has committed an offence.[73] As was noted in chapter 3, the court held that the substantive rule of Scots law that children below the age of criminal responsibility were unable to formulate dole or *mens rea*

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[70] The importance of this point can be illustrated by a case which occurred in May 1993, in Sydney, Australia. A four-week old baby was killed by a three-and-a-half year old boy by dropping the baby down a flight of stairs and then dropping him off a table. The coroner's court recommended eighteen months' counselling for the older child's whole family, but this could not be enforced and the family left the area having attended two sessions. Some of the newspaper commentary is concerned with the inability to take any compulsory action both from the child's point of view and that of the baby's family. See "When a Child Kills" *Good Weekend: The Sydney Morning Herald Magazine* 8 June 1996, p 31

[71] Though, in practice, the age of criminal responsibility would operate to prevent the prosecution of a very young child.

[72] 1987 SLT 193

[73] C(S)A 1995, s 52(2)(i)

was of blanket application both to the court system and to the hearings. There was no scope to interpret the word "offence" differently, simply because a different procedure applied to it.[74]

Lord Dunpark, however, dissented, taking the view that to construe the term "offence" without reference to the purpose of the children's hearings system was to deny children whose offending behaviour indicated that they were in need of care and protection the benefits which the system could provide. In his opinion it would be artificial to require the Reporter to find another ground for referral under which the child could be referred if the true reason was offending behaviour. Despite accepting that Lord Dunpark was wrong in law, his overall point concerning the purpose served by the children's hearings system, was endorsed by John Grant at the time[75] and is equally valid today.

Welfare theory suggests that the offence is simply the trigger to the children's hearings system. As discussed in chapter 4, the hearing considers the circumstances surrounding the offence, and the accused's responsibility, in rather more detail than the pure theory suggests, but the ethos of the system – that the overarching purpose is to meet the child's needs and to act in his/her best interests – applies to referrals on the offence ground as much as to each of the other eleven grounds. On the care and protection side, children's hearings

[74] See Lord Justice Clerk Ross, *supra*,note 72 at p 196
[75] John P Grant "The Under Age Offender" 1987 SLT (News) 337

can deal with newborn children. It is submitted that there is only one reason not to extend their remit in relation to children who offend. This relates to the Rehabilitation of Offenders Act 1974 and, as will be argued next, ought, in any event to be amended.

The Court of Session held, in the case of S v Miller[76] that a child referred to a children's hearing on the offence ground is not 'charged with a criminal offence' in terms of Article 6 of the European Convention on Human Rights. One effect of the decision is that the protections which Article 6 accords to those charged with a criminal offence (such as a right to legal representation) do not apply, in all circumstances,[77] to children appearing before a children's hearing on the offence ground.[78] Despite this, S v Miller also endorses the continued application of section 3 of the Rehabilitation of Offenders Act 1974 to such children.[79] That section recognises the acceptance or establishment of a ground for referral under section 52(2)(i) of the Children (Scotland) Act 1995 as a conviction, albeit for the purpose of allowing it to become spent after a maximum of one year. The justification for endorsing this provision, given by the court, was that it conferred a benefit on the child, allowing him/her not to disclose

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[76] 2001 SLT 531

[77] Because the proceedings deal with a child's civil rights under Article 6, however, s/he is now entitled to legal representation where any question of committal to secure accommodation arises and where the issues involved are complex. For a list of the circumstances in which the court in S v Miller thought that legal representation might be required see Joe Thomson *Family Law in Scotland* (Edinburgh: Butterworths, 2002). For the actual rules as they passed into legislation see Children's Hearings (Legal Representation) (Scotland) Rules 2001 (SSI 2001/478)

[78] S v Miller, supra, note 76, at pp. 536K – 540J, 552C - 557H, 565D – 576E

[79] S v Miller, *supra*, note 76, at 538I – 539E, 553D, G-H, 574I – L

the matter after the conviction had become spent. In fact, however, it is submitted that the better course of action would be to legislate to disapply the 1974 Act to children's hearings altogether. This would place children referred on the offence ground on exactly the same footing as those who are subject to supervision requirements after referral on any of the other eleven grounds. Allowing children's hearings proceedings to lead to a "conviction", in any sense, is unfair where the child has not had access to the 'due process' rights which proceedings in a criminal court automatically attract.

These innovations would also require a change in the wording of s 52(2)(i) because, if the proceedings are to be entirely civil and not to lead to a "conviction," it is no longer appropriate to state that "the child has committed an offence." A possible alternative might be: "the child has committed an act which would have constituted a criminal offence but for the age of the child and/or the application to him of children's hearings procedure"[80]. The "age" points covers the child aged under the age of criminal responsibility. For an older child, who could have been prosecuted, the fact that s/he has been referred to a children's hearing removes him/her from the criminal sphere.

[80] See Merrin v S *supra*, note 72,, per Lord Dunpark at p. 198I.

Conclusion

All of the measures outlined in this chapter are required in order to secure the provision of fair, compassionate and equal treatment to all child-accused, whilst retaining the criminal justice system's natural focus on the public interest and the retention of public confidence. Cases involving children who commit serious crimes are inherently difficult and often distressing. The best approach is to respond to the child-accused as a whole person, taking account of his/her inherent immaturity and the difficulties which this presents in terms of understanding. It is, self-evidently, possible, if paradoxical, to be both a child and a criminal simultaneously. The legal system fails children if it cannot respond to the challenge thereby presented.

Bibliography

Books

Alanen, Leena *Modern Childhood: Exploring the 'Child Question' in Sociology* (Jyväskylä: Institute for Educational Research, 1992)

Anthony, Sylvia *The Discovery of Death in Childhood and After* (London: Penguin Press, 1971)

Archard, David *Children: Rights and Childhood* (London: Routledge, 1993)

Ariès, Philippe *Centuries of Childhood* (London: Jonathan Cape, 1962) (1973 reprint)

Ashworth, Andrew *Principles of Criminal Law* (Oxford: OUP, 2003)

Birch, Ann *Developmental Psychology From Infancy to Adulthood* (Basingstoke: Palgrave, 1997)

Blackstone, Williliam *Commentaries on the Law of England* (London: Thomas Tegg, 1830)

Bossard, James H S *The Sociology of Child Development* (London: Harpers, 1948)

Bottoms, Anthony, Brown, Phillip, McWilliams, Brenda, McWilliams, William and Nellis, Michael, in collaboration with John Pratt *Intermediate Treatment and Juvenile Justice: Key Findings and Implications from a National Survey of Intermediate Treatment Policy and Practice* (London: HMSO. 1990)

Butler, Ian and Shaw, Ian (eds) *A Case of Neglect? Children's Experiences and the Sociology of Childhood* (Aldershot: Avebury, 1996)

Cane, Peter *Responsibility in Law and Morality* (Oxford: Hart, 2002)

Clarkson C M V and Keating H M *Criminal Law: Text and Materials* (London: Sweet & Maxwell, 2003)

Cleland, Alison and Sutherland, Elaine E (eds) *Children's Rights in Scotland* (Edinburgh: W Green, 2001)

Cohen, Stanley *Folk Devils and Moral Panic: The Creation of Mods and Rockers* (Oxford: Blackwell, 1980)

Crofts, Thomas *The Criminal Responsibility of Children and Young Persons: A Comparison of English and German Law* (Aldershot: Ashgate, 2002)

Davis, Carol Ann *Children Who Kill: Profiles of Pre-Teen and Teenage Killers* (London: Allison & Busby, 2003)

Dawson, TB (ed) *Women, Law and Social Change: Core Readings and Current Issues* (North York: Captus Press, 1993)

Detrick, Sharon (ed) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (Dordrecht: Martinus Nijhoff Publishers, 1992)

Dickson, Brice *Introduction to French Law* (London: Pitman Publishing, 1994)

Donaldson, Margaret *Children's Minds* (London: Fontana Press, 1978)

Druce, Robert *The Eye of Innocence: Children and Their Poetry* (London: University of London Press, 1970)

Duff, R A *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990)

Duff, R A (ed) *Philosophy and the Criminal Law: Principle and Critique* (Cambridge: Cambridge University Press, 1998)

Duff, R A *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001)

Edwards, Susan S M *Women on Trial: A Study of the Female Suspect, Defendant and Offender in the Criminal Law and Criminal Justice System* (Manchester: Manchester University Press, 1984)

Erikson, Erik H *Childhood and Society* (New York: WW Norton & Co, 1963)

Farmer, Lindsay *Criminal Law, Tradition and Legal Order: Crime and the Genius of Scots Law, 1747 to the Present* (Cambridge: Cambridge University Press, 1997)

Farson, Richard *Birthrights* (Harmondsworth: Penguin, 1978)

Fletcher, George P *Rethinking Criminal Law* (Boston: Little Brown & Co, 1978)

Fletcher, George *Basic Concepts of Criminal Law* (Oxford: OUP, 1998)

Gale, Fay, Bailey-Harris, Rebecca and Wundersitz, Joy *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* (Cambridge: Cambridge University Press, 1990)

Garland, David *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford: OUP, 2001)

Gilligan, Carol *In A Different Voice: Psychological Theory and Women's Development* (London: Harvard University Press, 1982

Gordon, Gerald H *The Criminal Law of Scotland* (edited by Michael G A Christie) (Edinburgh: W Green, 2000) Volumes 1 and 2

Gordon, Gerald H and Gane, Christopher H W *Renton and Brown's Criminal Procedure According to the Law of Scotland* (Edinburgh: W Green, 1996 (updated 2001))

Green, Christopher *Toddler Taming: A Parents' Guide to the First Four Years* (London: Vermilion, 1990)

Grevot, Alain *Voyage en Protection de L'Enfance: Une Comparaison Européene* (Vaucresson: Ministère de la Justice, 2001)

Grisso, Thomas and Schwartz, Robert G *Youth on Trial: A Developmental Perspective on Juvenile Justice* (London: University of Chicago Press, 2000)

Hale, Matthew *Pleas of the Crown: A Methodical Summary* (Abingdon: Professional Books Ltd, 1982 (reprint) (1678))

Hardyment, Christine *Dream Babies: Child Care from Locke to Spock* (London: Jonathan Cape,1983)

Hart, HLA *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968)

Hodgson, John *The Search for the Self: Childhood in Autobiography and Fiction Since 1940* (Sheffield: Sheffield Academic Press, 1993)

Holt, John *Escape from Childhood* (Boston: Holt Associates, 1974)

Horder, Jeremy *Provocation and Responsibility* (Oxford: Clarendon Press, 1992)

Hoyles, Martin *The Politics of Childhood* (London: Journeyman, 1989)

Jackson, David *Destroying the Baby in Themselves: Why Did the Two Boys Kill James Bulger?* (Nottingham: Mushroom Publications, 1995)

James, Allison and Prout, Alan (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (London: RoutledgeFalmer, 1997)

Jenks, Chris *Childhood* (London: Routledge, 1996)

Jenks, Chris *The Sociology of Childhood: Essential Readings* (Aldershot: Gregg Revivals, 1982 (1992 reprint)

Jones, Ann *Women Who Kill* (London: Victor Gollancz, 1991)

Kearney, Brian *Children's Hearings and the Sheriff Court* (London: Butterworths, 2000)

Kennedy, Helena *Eve Was Framed: Women and British Justice* (London: Chatto and Windus, 1992)

Kenny's Outlines of Criminal Law (edited by J W Cecil Turner) (Cambridge: Cambridge University Press, 1966)

Lacey, Nicola *State Punishment: Political Principles and Community Values* (London: Routledge, 1988)

Leach, Penelope *Children First: What Our Society Must Do – and is not Doing – For Our Children Today* (London: Michael Joseph, 1994)

Lloyd, Ann *Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women* (Harmondsworth: Penguin, 1995)

Lockyer, Andrew and Stone, Frederick H *Juvenile Justice in Scotland: Twenty-Five Years of the Welfare Approach* (Edinburgh: T&T Clark, 1998)

Macdonald, John H A *Practical Treatise on the Criminal Law of Scotland* (Edinburgh: William Paterson, 1867)

Maier, Henry W *Three Theories of Child Development: The Contributions of Erik H Erikson, Jean Piaget and Robert R Sears and Their Applications* (London: Harper and Row, 1969)

Martin, F M and Murray, Kathleen (eds) *Children's Hearings* (Edinburgh: Scottish Academic Press, 1976)

McCall Smith, RAA and Sheldon, David *Scots Criminal Law* (Edinburgh: Butterworths, 1992)

Messer, David and Dockrell, Julie (eds) *Developmental Psychology: A Reader* (London: Arnold, 1998)

Minow, Martha *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990)

Morris, Allison (ed) *Women and Crime: Papers Presented to the Cropwood Round-Table Conference, December 1980* (Cambridge: Cropwood Conference Series No. 13, 1981)

Morris, Allison and Giller, Henri (eds) *Providing Criminal Justice for Children* (London: Edward Arnold, 1983)

Morrison, Blake *As If* (London: Granta Books, 1997)

Muller, Jerry Z *Adam Smith in His Time and Ours: Designing the Decent Society* (Princeton: Princeton University Press, 1993)

Muncie, John, Hughes, Gordon and McLaughlin, Eugene (eds) *Youth Justice: Critical Readings* (London: Sage, 2002)

Murray, Kathleen and Wilkinson, J Eric (eds) *Children's Rights in a Scottish Context* (London: National Children's Bureau (Scottish Group), 1987)

Newell, Peter *Children are People Too: The Case Against Physical Punishment* (London: Belford Square Press, 1989)

Norrie, Kenneth McK *Children (Scotland) Act 1995* (Edinburgh: W Green / Sweet & Maxwell, 1998)

Opie, Iona and Peter *The Lore and Language of Schoolchildren* (Oxford: OUP, 1959)

Perlin, Michael L *The Jurisprudence of the Insanity Defense* (Durham NC: Carolina Academic Press, 1994)

Piaget, Jean *The Moral Judgment of the Child* (London: Routledge and Kegan Paul, 1932 (1975))

Platt, Anthony M *The Child-Savers: The Invention of Delinquency* (London: University of Chicago Press, 1977)

Qvortrup, Jens, Bardy, Marjatta, Sgritta, Giovanni and Wintersberger, Helmut (eds) *Childhood Matters: Social Theory, Practice and Politics* (Vienna: Avebury, 1994)

Ritchie, Oscar W and Koller, Marvin R *Sociology of Childhood* (New York: Appleton-Century-Crofts, 1964

Rousseau, Jean-Jacques *Émile* (translated by Barbara Foxley) (London: Everyman, 1993 (1762))

Scottish Child Law Centre *Children and Young People's Voices: The Law, Legal Services, Systems and Processes in Scotland* (Edinburgh: HMSO, 1999)

Scoular, Jane (ed) *Family Dynamics: Contemporary Issues in Family Law* (London: Butterworths, 2001)

Sereny, Gitta *The Case of Mary Bell: A Portrait of Child Who Murdered* (London: Pimlico, 1995)

Slater, Alan and Muir, Darwin *The Blackwell Reader in Developmental Psychology* (Oxford: Blackwell, 1999)

Smith, Adam *Theory of Moral Sentiments* (edited by Knud Haakonssen) (Cambridge: Cambridge University Press, 2002)

Smith, David James *The Sleep of Reason: The James Bulger Case* (London: Arrow Books, 1994)

Smith, KJM *Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence 1800 – 1957* (Oxford: Clarendon Press, 1998)

Stair Society *An Introduction to Scottish Legal History* (Edinburgh: The Stair Society, 1958)

Stewart. Gill and Tutt, Norman *Children in Custody* (Aldershot: Avebury, 1987)

Sutherland, Elaine E *Child and Family Law* (Edinburgh: T&T Clark, 1999)

Thomas, Mark *Every Mother's Nightmare: The Killing of James Bulger* (London: Pan Books, 1993)

Thomson, Joe *Family Law in Scotland* (Edinburgh: Butterworths, 2002)

Ward, Richard *Young Offenders: Law, Practice and Procedure* (Bristol: Jordans, 2001)

Weijers, Ido and Duff, Antony (eds) *Punishing Juveniles: Principle and Critique* (Oxford: Hart Publishing, 2002)

Wiener, Martin J *Reconstructing the Criminal: Culture, Law and Policy in England 1830 – 1914* (Cambridge: Cambridge University Press, 1990)

Williams, Glanville *Criminal Law: The General Part* (London: Stevens & Sons Ltd, 1961)

Wilson, Patrick *Children Who Kill* (London: Michael Joseph, 1973)

Wootton, Barbara *Social Science and Social Pathology* (London: Allen & Unwin, 1963)

Wringe, C A *Children's Rights: A Philosophical Study* (London: Routledge and Kegan Paul, 1981)

Young, Alison *Imagining Crime: Textual Outlaws and Criminal Conversations* (London: Sage Publications, 1996)

Book Chapters

Brudner, Alan "Agency and Welfare in the Penal Law" in Stephen Shute, John Gardner and Jeremy Horder (eds) *Action and Value in Criminal Law* (Oxford: Clarendon Press, 1993)

Cairns, John W "Hamesucken and the Major Premiss in the Libel, 1972-1770: Criminal Law in the Age of Enlightenment" in Robert F Hunter (ed) *Justice and Crime: Essays in Honour of the The Right Honourable The Lord Emslie* (Edinburgh: T&T Clark, 1993) p 138

Campbell, T D "Scientific Explanation and Ethical Justification in the *Moral Sentiments*" in Andrew S Skinner and Thomas Wilson (eds) *Essays on Adam Smith* (Oxford: Clarendon Press, 1975) p 68

Chiswick, Derek "Mental Disorder and Criminal Justice" in Peter Duff and Neil Hutton (eds) *Criminal Justice in Scotland* (Aldershot: Ashgate, 1999)

Franklin, Bob and Petley, Julian "Killing the Age of Innocence: Newspaper Reporting of the Death of James Bulger" in Jane Pilcher and Stephen Wagg (eds) *Thatcher's Children? Politics, Childhood and Society in the 1980s and 1990s* (London: Falmer Press, 1996) p134

Griffiths, Anne and Kandell, Randy "Reconceiving Justice? Children and Empowerment in the Legal Process" in Simon Halliday and Peter Schmidt (eds) *Human Rights Brought Home: Some Socio-Legal Studies of Human Rights in the National Context* (Hart) (forthcoming)

Articles

Ashworth, Andrew "Is the Criminal Law a Lost Cause?" 2000 *LQR* 225

Bartlett, Kathleen "Feminist Legal Method" 1990 *Harvard Law Review* 103, 829

Bayles, Michael D "Character, Purpose, and Criminal Responsibility" 1982 *Law and Philosophy* 1, 5

Bonnie, Richard J "The Moral Basis of the Insanity Defense" 1983 *American Bar Association Journal* 69, 194

Bronfenbrenner, Urie "Developmental Research, Public Policy and the Ecology of Childhood" 1974 *Child Development* 45, 1

Bruce, Nigel and Spencer, John "Children's Hearings and the Scottish Courts: Some Lessons from the Case of Mary Cairns" 1973 *Yearbook of Social Policy in Britain* 221

Butler-Sloss, Elizabeth "Children in Society" 1989 *Current Legal Problems* 71

Chiswick, Derek "Medicine and the Law – Use and Abuse of Psychiatric Testimony" 1985 *BMJ* 290(6473), 975

Darwall, Stephen "Sympathetic Liberalism: Recent Work on Adam Smith" 1999 *Philosophy and Public Affairs* 28(2), 139

Dell, Susanne "Wanted: An Insanity Defence that Can be Used" [1983] *Criminal Law Review* 431

Duff, R A "Intention, Mens Rea and the Law Commission Report" 1980 *Criminal Law Review* 147

Duff, R A "Law, Language and Community: Some Preconditions of Criminal Liability" 1998 *OJLS* 18, 189

Fox, Sanford J "The Scottish Panels: An American Viewpoint on Children's Right to Punishment" 1975 *JLSS* 20, 78

Freeman, M D A "The Rights of Children When They Do Wrong" 1981 *Brit J of Criminol* 21(3), 210

Gardner, John "The Mark of Responsibility"(2003) *OJLS* 23(2), 157

Gorham, Deborah "'Maiden Tribute of Modern Babylon' RE-Examined: Child Prostitution and the Idea of Childhood in Late Victorian England" 1978 *Victorian Studies* 353

Grant, John P "Could Do Better: The Report on the United Kingdom's Compliance with the Convention on the Rights of the Child" 1995 *Juridical Review* 534

Grant, John P "The Under Age Offender" 1987 SLT (News) 337

Hay, Colin "Mobilization Through Interpellation: James Bulger, Juvenile Crime and the Construction of a Moral Panic" (1995) *Social and Legal Studies* 4, 197

Haydon, Donna and Scraton, Phil "'Condemn A Little More, Understand A Little Less': The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case" 2000 *Journal of Law and Society* 27(3), 416

Horder, Jeremy "Two Histories and Four Hidden Principles of Mens Rea" 1997 *LQR* 113, 95

Jefferson, Tony "Review of Messerschmidt *Masculinities and Crime*" 1995 *Brit J Criminol* 35(1), 149

Kean, A W G "The History of the Criminal Liability of Children" 1937 *LQR* 53

King, Michael "The James Bulger Murder Trial: Moral Dilemmas, and Social Solutions" 1995 *International Journal of Children's Rights* 3, 167

Lacey, Nicola "In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory" [2001] *MLR* 350

Lacey, Nicola "Responsibility and Modernity in Criminal Law" 2001 *Journal of Political Philosophy* 9(3), 249

Lacey, Nicola and Zedner, Lucia "Discourses of Community in Criminal Law" 1995 *Journal of Law and Society* 22(3), 301

Lilly, J Robert and Ball, Richard A "A Critical Analysis of the Changing Concept of Criminal Responsibility" 1982 *Criminology* 20(2), 169

Lucas, Nancy "Restitution, Rehabilitation, Prevention and Transformation: Victim-Offender Mediation for First-Time, Non-Violent, Youthful Offenders" 2001 *Hofstra Law Review* 29, 1365

MacCormick, Neil "A Special Conception of Juvenile Justice: Kilbrandon's Legacy" Fifth Kilbrandon Child Care Lecture

MacKinnon, Catherine A "Feminism, Marxism, Method and the State: An Agenda for Theory" 1982 *Signs* 7, 515

McDiarmid, Claire "Children Who Murder: What is Her Majesty's Pleasure?" 2000 *Crim LR* 547

McDiarmid, Claire "A Feminist Perspective on Children Who Kill" 1996 *Res Public* 2, 3

Minow, Martha "Rights for the Next Generation: A Feminist Approach to Children's Rights" 1986 *Harvard Women's Law Journal* 9, 1

Morris, Allison and Giller, Henri "The Juvenile Court: The Client's Perspective" 1977 *Criminal Law* Review 198

Murcott, Anne "The Social Construction of Teenage Pregnancy: A Problem in the Ideologies of Children and Reproduction" 1980 *Sociology of Health and Illness* 2, 1

Nicolson, Donald and Sanghvi, Rohit "Battered Women and Provocation: The Implications of *R v Ahluwalia*"[1993] *Crim LR* 728

Odem Mary "Single Mothers, Delinquent Daughters, and the Juvenile Court in Early Twentieth Century Los Angeles" 1991 *Journal of Social History* 27

Okin, Susan Moller "Women and the Making of the Sentimental Family" 1982 *Philosophy and Public Affairs* 11(1), 65

Parsloe, Phyllida "Social Work and the Justice Model" 1976 *British Journal of Social* Work 6, 71

Pedain, Antje "Intention and the Terrorist Example" 2003 *Crim LR* 579

Ralston, Andrew G "The Development of Reformatory and Industrial Schools in Scotland, 1832 – 1872" 1988 *Scottish Economic and Social History* 8, 40

Ralston, Andrew G "The Tron Riot of 1812" 1980 *History Today* 30

Rose, Joan "Procedure in Children's Hearings" 1994 SLT (News) 137

Scott, Peter D "Juvenile Courts: The Juvenile's Point of View" 1959 *British Journal of Delinquency*9(3), 200

Sheppard "Children's Rights to Equality: Protectin Versus Paternalism" 1992 *Annals of Health Law 1, 197*

Skolnick, Arlene "The Limits of Childhood: Conceptions of Child Development and Social Context" 1975 *Law and Contemporary Problems* 39(3), 38

Sutherland, Elaine E "The Age of Reason or the Reason for an Age: The Age of Criminal Responsibility" 2001 SLT 1

Tadros, Victor "Insanity and the Capacity for Criminal Responsibility" 2001 *Edinburgh Law Review* 5, 325

Thorne, Barrie "Re-Visioning Women: Where are the Children?" 1987 *Gender & Society* 1(1), 85

Trépanier, Jean "Juvenile Courts After 100 Years: Past and Present Orientations" 1999 *European Journal on Criminal Policy and Research* 7, 303

Vaughan, Barry "The Government of Youth: Disorder *and* Dependence" 2000 *Social and Legal Studies* 9(3), 348

Wells, Celia "Whither Insanity?" [1983] *Criminal Law Review* 787

Williams, Glanville L "The Criminal Responsibility of Children" 1954 *Criminal Law Review* 493

Windlesham, Lord "Life Sentences: The Paradox of Indeterminacy" 1989 *Criminal Law Review* 244

Witt, Philip H "Transfer of Juveniles to Adult Court: The Case of HH" 2003 *Psychology, Public Policy and Law* 9, 361

Newspaper Articles

"18 Months for Girl of Nine who Stabbed Friend" *Glasgow Herald* 19 September 1973, p 3

"Girl Aged Nine Given 18 Months Detention" *The Times* 19 September 1973, p 1

"Appeal for Girl (9) to be Released" *Glasgow Herald* 19 September 1973, p 1

"Authorities Blamed in Case of Detained Girl" *Glasgow Herald* 20 September 1973, p 1

"Judges Quash Detention Sentence on Mary Cairns but Defend Sheriff's Decision as Humane" *The Times* 6 October 1973

"What Turns Children Into Savages?" *Daily Mail*, 17 February 1993, p 6

"Daring to Agree About Our Moral Sickness" *Independent* 19 February 1993, p 19

"The Nation Searches its Soul" *Independent* 20 February 1993, p 12

"Society Tempers Justice with Mercy in Dealing with Juvenile Killers" *The Times* 20 February 1993, p 6

"Murder in Liverpool: The Fear, The Shame, The Guilt" *Independent on Sunday* 21 February 1993

"Opponents Claim Secure Units May Lead Juveniles to Commit More Crime" *The Times* 22 February 1993, p 2

"Present Imperfect: Myths of National Decline Disguise the Real Political Agenda" *The Times* 24 February 1993, p 17

"Brainwashed by Hysteria" *The Times* 24 February 1993, p 16

"Crime and Punishment" (leader) *The Times* 26 February 1993, p 15

"Liverpool Weeps as James Bulger is Buried" *Independent* 2 March 1993, p 1

"Panic Over Crime" *The Times* 3 March 1993, p 15

"The Horror of Dead Children" *Financial Times* 27 March 1993, p XXIV

"Save Us from the Cruel Truth" *Daily Mail* 5 November 1993, p 4

"The Innocent and the Evil" *Daily Mail* 25 November 1993, p 42

"How Do You Feel Now You Little Bastards?" *Daily Star*, 25 November 1993

"An Indictment of Fractured Britain" *Independent* 27 November 1993

"James Bulger: The Death of Innocence" *Independent on Sunday* 28 November 1993, p 23

"Our Children's Minds Feast on Garbage" *The Herald* 30 November 1993, p 15

"Can a Three-Year Old Child Commit Murder?" *Montreal Gazette* 9 March 1994 p A1

"James Bulger's Murderers Must get Justice from an Adult World" *Independent*, 29 May 1994, p 18

"Call of the Wild" *The Guardian* 26 July 1994, p T18

"Are Children Getting Worse?" *Sydney Morning Herald* 10 September 1994 p 8A

"A Child Murdered By Children" *Independent on Sunday* 23 April 1995, p 8

"A Woman, A Protector, A Mother ..... And A Monster" *Daily Mail* 23 November 1995, p 11

"Howard Lose Court Fight Over Jamie's Killers" *Daily Express* 3 May 1996, p 12

"This Boy is Evil" *Daily Record* 13 May 1996, p 4

"When a Child Kills" *The Sydney Morning Herald Magazine* 8 June 1996 p 31

"Author Defends Book After Criticism by Bulger Family" *The Scotsman* 6 February 1997, p 3

"Plea Over Murder Case Boy" *The Herald* 30 June 1999, p 1

"Youth With Mental Age of Nine 'Should Not Be Tried'" *The Scotsman* 30 June 1999, p 5

"Boy, 13, Cleared of Friend's Death in Landmark Court Case" *The Scotsman* 16 October 1999, p 1

"Drivers Sought in Police Hunt for Girl" *Guardian* 3 July 2000, p 4

"Murder Shook World" *The Sun* 27 October 2000

"Republic Draws Up New Laws for Children" *Belfast Telegraph* 27 June 2001

"Care Before Punishment" *Scotland on Sunday* 13 January 2002, p 16

"Criminal Age Limit May Rise" *Sunday Times* 13 January 2002

"Anger Over Plans to Take Under-12s Out of Court" *Evening News* 14 January 2002, p 2

"Beckham to Help Search for Missing Girls" *The Times* 6 August 2002, p 3

"CCTV is Not a Cure-All" *Birmingham Post* 21 August 2002

"Jim's Guilty Youth Crime Secret" *Daily Record* 3 October 2002

"The Bulger Legacy" *Daily Mail* 12 February 2003

"James Bulger: 10 Years On" *Liverpool Daily Echo* 13 February 2003

"Bulger Killers' Shame is Ours' and Not Theirs'" *Sunday Express* 16 February 2003

"Centre Hits Out Over Allegations" *Dunoon Observer & Argyllshire Standard* 18 July 2003, p3

"Sling 'Em in Boot Camp" *Daily Record* 6 September 2003

Reports and Consultation Papers

Burman, Michèle and Connelly, Clare *Mentally Disordered Offenders and Criminal Proceedings: The Operation of Part VI of the Criminal Procedure (Scotland) Act 1995* (Edinburgh: Scottish Office Central Research Unit, 1999)

Discussion Paper on Age of Criminal Responsibility (Scottish Law Commission No 115) ((Edinburgh: TSO, 2001)

Discussion Paper on Insanity and Diminished Responsibility (Scottish Law Commission Discussion Paper No 122) (Edinburgh: The Stationery Office, 2003)

Draft Criminal Code for Scotland (Edinburgh; TSO)

Gault, Iain *Study on Youth Offending in Glasgow* (Stirling: Scottish Children's Reporter Administration, 2003)

Hallett, Christine and Murray, Cathy with Jamieson, Janet and Veitch, Billy *The Evaluation of Children's Hearings in Scotland, Volume 1: Deciding in Children's Interests* (Edinburgh: The Scottish Office Central Research Unit, 1998)

Marshall, Kathleen, Tisdall, L Kay M and Cleland, Alison *'Voice of the Child' Under the Children (Scotland) Act 1995: Having Due Regard to Children's Views in All Matters That Affect Them* (Edinburgh: Scottish Executive Central Research Unit, 2002) Volume 1

Putting Our Communities First: A Strategy for Tackling Anti-Social Behaviour

Report on Age of Criminal Responsibility (Scottish Law Commission No 185) (Edinburgh: The Stationery Office, 2002)

Report on the Age of Criminal Responsibility (Law Reform Commission of Hong Kong)

Report on Children and Young Person SCOTLAND Cmnd 2306, 1964 (Kilbrandon Report)

Cases

A v Director of Public Prosecutions [1992] Crim LR 34

Advocate, H M v Kidd 1960 SLT 82

Advocate, H M v Livingston (Alexander) Maclaurin, No 55 (1749)

Advocate H M v P 2001 SLT 924

Advocate, H M v R 1996 GWD 38-2223

Advocate, H M v Ross 1991 SLT 564

Advocate, H M v S (1999) (unreported) (plea in bar of trial)
See http://www.scotcourts.gov.uk/opinions/845_99.html

Advocate, H M v S (1999) (unreported) (examination of facts)
See http://www.scotcourts.gov.uk/opinions/845a_99.html

Advocate, H M v Wilson 1942 SLT 194

Attorney-General's Reference No 24 of 1991 (Mark Anthony Wollcocks) (1992) 13 Cr App R (S) 724

B v H M Advocate 2003 SLT 662

B v R 1940 44 Cr App R 1

Brennan v H M Advocate 1977 SLT 151

C v H M Advocate 1987 SCCR 104

C v H M Advocate 1999 GWD 3-138

C (a minor) v Director of Public Prosecutions [1994] 3 All ER 190
C (a minor) v Director of Public Prosecutions [1995] 2 Cr App R 166

Cairns v H M Advocate 1950 – 1980 (1973) SCCR Supp 44

Cochrane v H M Advocate 2001 SCCR 655

Cook v H M Advocate 2001 SLT (Sh Ct) 53

Drury v H M Advocate 2001 SLT 1013

F v H M Advocate 1994 SCCR 711

Gault, In re 387 USI 1967

H v H M Advocate 1999 GWD 25-1193

Haston and Others v H M Advocate, (2003) (unreported)
See http://www.scotcourts.gov.uk/opinions/xc898_03.html

Heywood v B 1994 SCCR 554

Hogg v MacPherson 1928 JC 15

IPH v Chief Constable of South Wales [1987] Crim LR 42

JBH and JH (minors) v O'Connell [1981] Crim LR 632

John v Donnelly 1999 SCCR 802

JM (a minor) v Runeckles (1984) 79 Cr App R 255

K v H M Advocate 1993 SLT 77

K v H M Advocate 1993 SLT 237

K v H M Advocate (Dyer v Watson) 2002 SLT 229

Kane v H M Advocate 2001 SCCR 621

Livingston, Alexander v HMA 1749 Maclaurin No 55

Marsh v Loader (1863) 14 CBNS 535

Mathieson v H M Advocate 1981 SCCR 196

McDermott v H M Advocate 2000 SLT 366

McMichael v UK (1995) 20 EHRR 205

Merrin v S 1987 SLT 193

Murray and Others v H M Advocate 2000 JC 102

O v Rae 1993 SLT 570

Quinn v Lees 1994 SCCR 159

R v B; R v A [1979] 1 WLR 1185

R v Conway (1985) 7 Cr App R (S) 303

R v Cosgrove (1995) 16 Cr App R (S) 76

R v Coulburn (1988) 87 Crim App R 309

R v Frazer (1992) 13 Cr App R (S) 705

R v G, Nicola (1993) 14 Cr App R (S) 349

R v Gorrie (1919) 83 JP 136

R v Nethercote (1991) 12 Cr App R (S) 749

R v Kamali (1993) 14 Cr App R (S) 2

R v Manley (1844) 1 Cox 104

R v Nethercot (1991) 12 Cr App R (S) 749

R v Owen, Elizabeth (1830) 4 C & P 236

R v Roberts [1989] Crim LR 521

R v Secretary of State for the Home Department ex parte Venables; R v same ex parte Thompson [1997] 3 All ER 97

R v Simmons (1995) 16 Cr App R (S) 801

R v Smith, Sydney (1845) 1 Cox 260

R v Stoner and Gibbens (1995) 16 Cr App R (S) 992

R v Storey and Others (1984) 6 Cr App R (S) 104

R v Woollin [1999] 1 AC 82

S v Miller 2001 SLT 141

Stallard v H M Advocate 1989 SCCR 248

Stanford v UK *The Times* 8 March 1994

Sweet v Parsley [1970] AC 132

T v UK; V v UK (2000) 30 EHRR 121

Thompson, Re (Tariff Recommendation); Re Venables (Tariff Recommendation) [2001] 1 Cr App R 25

Venables and Another v News Group Newspapers Ltd and Others [2001] 1 All ER 908

W v H M Advocate 1982 SLT 420

W v H M Advocate 1995 SLT 685

Walker v C 2003 SLT 293

Statutes

Act for Repressing Juvenile Delinquency in the City of Glasgow 1841 (4 & 5 Vict c. xxxvi)

Adoption (Scotland) Act 1978

Age of Legal Capacity (Scotland) Act 1991

Age of Majority (Scotland) Act 1969

Children Act 1908

Children Act 1948

Children Act 1958

Children Act 1975

Children Act 1989

Children Act (1908) Amendment Act 1910

Children (Scotland) Act 1995

Children and Young Persons Act 1932

Children and Young Persons Act 1933

Children and Young Persons Act 1938

Children and Young Persons Act 1956

Children and Young Persons Act 1963

Children and Young Persons Act 1969

Children and Young Persons (Amendment) Act 1952

Children and Young Persons (Amendment) Act 1986

Children and Young Persons (Scotland) Act 1932

Children and Young Persons (Scotland) Act 1937

Criminal Justice (Scotland) Act 2003

Criminal Procedure (Scotland) Act 1995

Crime and Disorder Act 1998

Industrial Schools Act 1866 (29 & 30 Vict. c. 118)

Marriage (Scotland) Act 1977

Powers of Criminal Courts (Sentencing) Act 2000

Reformatory Schools Act 1866 (29 & 30 Vict. c 117)

Rehabilitation of Offenders Act 1974

Representation of the People Act 1983

Social Work (Scotland) Act 1968

Statutory Instruments

Children's Hearings (Legal Representation) (Scotland) Rules 2001 (SSI 2001/478)

Children's Hearings (Scotland) Rules 1996 (SI 1996/3261)

Magistrates Courts (Children and Young Persons) Rules1992 (SI 1992/2071) (L. 17)

International Instruments

United Nations Convention on the Rights of the Child (1989)

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985)

Institutional Writers

Alison, Archibald *Principles of the Criminal Law of Scotland* (London: Butterworths, 1989 (1832))

Hume, David *Commentaries on the Law of Scotland Respecting Crimes* (Edinburgh: Bell & Bradfute, 1844)

Mackenzie, Sir George of Roschaugh *The Law and Customs of Scotland in Matters Criminal Wherein is to be Seen the Civil Law and the Law and Customs of Other Nations Doth Agree With, and Supply Others* (Edinburgh: Andrew Symons, 1699)

Websites

http://www.genresearch.com/sco-crib.htm

http://www.met.police.uk/crippen.htm

http://www.penalreform.org/english/vuln_intinsjuve.htm

http://www.psr.keele.ac.uk/arca/uk/man/lab97.htm