

## **‘Catching them young’ – some reflections on the meaning of the age of criminal responsibility in England and Wales**

### **Structured abstract:**

**Purpose:** The article explores the tension between government protestations that youth justice policy is evidence-led and what the evidence implies in the context of the age of criminal responsibility

**Design/methodology/approach:** The article takes the form of a conceptual analysis of government policy and the evidence base

**Findings:** The article concludes that the current low age of criminal responsibility in England and Wales can be understood as a manifestation of the influence of underclass theory on successive governments

**Research limitations/implications (if applicable):** The article is not based on primary research

**Practical implications (if applicable):** The arguments adduced help to explain the reluctance of government to countenance any increase in the age of criminal responsibility

**Social implications (if applicable):** The analysis might help inform approaches adopted by youth justice policy makers, practitioners and academics with an interest in seeking a rise in the age of criminal responsibility

**Originality/value:** The article offers an original analysis of government intransigence on an important social issue

### **Keywords:**

Age of criminal responsibility; youth justice; underclass theory; evidence; children’s rights

### **Article classification:**

Conceptual paper

### **A remarkable political consistency**

Given declarations by successive administrations that criminal policy is informed by evidence of effectiveness, there is a curious divide on the issue of the age of criminal responsibility between the Conservative/ Liberal Democrat coalition government (and its New Labour predecessor) and a significant (and growing) number of those who are, it might be thought, well placed to determine what the evidence says. While it could, with some legitimacy, be contended that the same phenomenon can be discerned in other areas of social policy, the tension in relation to this issue is particularly stark.

The age of which children are deemed to be criminally liable in England and Wales is, at ten years of age, extremely low by international standards. Indeed, excluding other jurisdictions within the United Kingdom, it is the lowest in the European Union (Bateman, 2012a). Beyond European borders, England and Wales is also an outlier by this measure. According to one extensive international study, the average (mode) age of criminal responsibility across 90 jurisdictions was fourteen years (Hazel, 2008). Questioned in Parliament on this issue, the government has conceded that formal criminalisation of children occurs earlier in England and Wales than in much of the rest of the world, but nonetheless maintains that the current arrangement '*accurately reflects what is required by our justice system*' (McNally, 2013). This answer reflects a long-standing position on the part of government that has survived several changes of administration in the face of what has been described by the Parliamentary Office of Science and Technology (2012) as an '*increasing momentum from a wide range of organisations to raise the minimum age of criminal responsibility*'.

Examples of that momentum are not hard to come by. In December 2012, the Guardian featured a letter signed by more than fifty experts (Hibbert *et al*, 2012) arguing that the current age of criminal responsibility was contrary to the evidence and represented an infringement of children's rights. On the same day, the same signatories endorsed an open letter to the Justice Secretary, accompanied by a newly published report by the National Association for Youth Justice (Bateman, 2012a), that petitioned the government to review its position. This initiative followed closely on public criticism of the low age of criminal

responsibility by, among others, the Joint Committee on Human Rights (2009), the Children's Commissioner for England (Thompson, 2010), Barnardo's (2010), the All Party Parliamentary Group for Children (2010), the Centre for Social Justice (2012) and the All Party Parliamentary Group on Women in the Penal System (2012).

This emerging consensus extends, moreover, to the academic community. In 2013, a special edition of *Youth justice* journal was devoted to analysis of the minimum age of criminal responsibility. Each of the four substantive articles on this topic, written from a range of disciplinary perspective, concluded that the government's position was not compatible with the empirical or conceptual evidence (Delmage, 2013; Goldson, 2013; Lamb and Sim, 2013; McDiarmid, 2013).

Significantly, Liberal Democrat policy on this issue is at odds with that of their Conservative partners, endorsing an increase in the age at which children are deemed to have criminal capacity to 14 years (Jack, 2014). Moreover, Lord McNally who, in the quotation cited above, defended the current age of criminal responsibility while a government minister, has, since becoming the Chair of the Youth Justice Board for England and Wales in March 2014, shifted position, indicating his personal support for a review of the existing arrangements (Bateman, 2014 forthcoming).

The government response to this groundswell of pressure for change has been intransigence. Jeremy Wright, minister with responsibility for youth justice, declined to meet the National Association for Youth Justice to discuss the expert concerns noted above on the grounds that '*children do know the difference between right and wrong at age 10*'. Such an assessment closely echoed that offered by the incoming New Labour government some fifteen years earlier. '*No More Excuses*', the 1997 youth justice White Paper, maintained that arguing that ten-year-olds could not discriminate between '*naughtiness and serious wrongdoing*' was simply '*contrary to common sense*' (Home Office, 1997: paragraph 4.4). Such remarkable political consistency is rare and it is difficult to think of any other issue in criminal justice policy where the main political parties have espoused the same position over

such a lengthy period. The stability of policy on the age of criminal responsibility is all the more notable given that, as will be described in due course, presuppositions in relation to youth justice more generally have shifted considerably in the interim.

The purpose of the current paper is to attempt to provide an explanation of government reluctance to countenance change in the face of overwhelming evidence that change is long overdue. In so doing, it explores what the view of successive governments might imply for the construction of youth offending and the implications for how children in conflict with the law are presented in policy terms.

### **The case for change**

The case in favour of a higher age of criminal responsibility has been made extensively elsewhere (Arthur, 2012; Bateman, 2012a; Goldson, 2009) and there is no intention to repeat the details of the argument here. Nonetheless an outline of the evidence base provides a useful context in which to locate the government's disinclination towards reform.

One set of arguments focuses on the extent to which holding children to account through the imposition of criminal sanction is an effective measure for preventing further offending. From this perspective, evidence suggests that prosecution has no beneficial impact at any stage (Kemp *et al*, 2002). The underlying explanation for that lack of positive impact is that the youth justice system is itself 'criminogenic' and contact with it tends to impede the process of desistance that occurs naturally with maturity (McAra and McVie, 2007). As Barry Goldson (2013: 122) has argued, a reduced age of criminal responsibility functions as '*an apprenticeship for career criminality*'.

A second set of arguments deals with the circumstances under which it is legitimate to impute criminal culpability, which despite the government's simplistic assertions, requires rather more than knowing the difference between right and wrong (Arthur, 2012). Whereas children know that, for instance, stealing is wrong from a very young age – in most cases well before the current age of criminal responsibility – that is not the same as a '*self-*

*generated understanding of what it means to do wrong* (McDiarmid, 2013: 149). The latter involves a moral and ethical standpoint which the former does not, and it is for such reasons that membership of a jury, for instance, is not open to children from the point at which they are able to correctly identify behaviours which adult society counts as illegal (Bateman, 2012a). It follows that the age at which criminal liability can be properly ascribed should be informed by developing cognitive capacity.

In this context, recent advances in neuroscience have made a significant contribution to the debate. The frontal lobe of the brain, which is thought to be largely responsible for judgement, morality and decision-making, is subject to *'greater change during adolescence than at any other time'* but is also one of the slowest areas of the brain to reach full maturity (Delmage, 2013: 106) which is not attained until *'well in the period of young adulthood'* (Prior *et al*, 2011:35). Accordingly, by comparison with young adults, teenagers have a limited capacity for abstract thought. Moreover, since during this developmental phase parts of the brain responsible for the production of heightened emotional stimuli mature much earlier, adolescence is a period associated with a reduced ability for adopting the perspective of others, an increased propensity for risk taking and a disinterest in deferred gratification (The Royal Society, 2011). Teenagers' subjective preferences are thus more likely to lead to behaviour that, from an adult vantage point, would be deemed ill judged. The application of adult standards of culpability is accordingly inappropriate.

The imposition of criminal sanctions is moreover only justifiable to the extent that children are competent to take part in proceedings (Farmer, 2011). There is clear empirical evidence that understanding of some of the fundamental principles of the criminal justice process is less well developed in 14-15 year-olds than in 16-17 year-olds, who in turn function at a lower level in this regard than young adults (Grisso et al, 2003). Children below the age of 17 years are also more likely to confess to something that they have not done than their adult equivalents (Redlich and Goodman, 2002). Cognitive functioning thus inhibits proper participation in proceedings until a point of maturation well above the current age of criminal responsibility.

A further set of arguments emanates from a children's rights perspective. The United Nations Committee on the Rights of the Child (2007: paragraph 32) has declared that 12 years is '*the absolute minimum*' age of criminal responsibility that is acceptable by international standards. As might be anticipated, the Committee has been consistently critical of the arrangements in England and Wales and recommended reform on the three occasions that it has reviewed the UK's compliance with the United Nations Convention on the Rights of the Child (Children's Rights Alliance for England, 2013). The Government's reluctance to accommodate such recommendations has elicited concern from the United Nations Committee against Torture (2013).

Kathryn Hollingsworth (2013) has developed a sophisticated, and persuasive, rights based argument for increasing the age of criminal responsibility that points to a critical distinction between adult and children's autonomy. Within the legal system children are not regarded as '*fully autonomous rights-holders*' because childhood is conceived as a developmental phase during which '*the assets necessary for full autonomy*' are accrued (Hollingsworth, 2013: 1046). This stage requires, as a fundamental or '*foundational*' right, protection from any policies that irreparably impede the process of preparation for the acquisition of full autonomy. Since on a variety of measures, it is clear that a low age of criminal responsibility has that negative effect, protecting a child's foundational rights implies that the age at which criminal liability is attributed be raised considerably. The implications of this argument for the analysis developed in the current article are explored in due course.

### **The government response**

The current age of criminal responsibility was established in 1963 by the Children and Young Persons Act of that year, which raised it from eight to ten years. It should not however be assumed that governments have been unremittingly hostile to any further movement in the period since. The first half of the twentieth century was characterised by regular upward shifts in the age at which children were liable to criminal processes (Arthur, 2012), a tendency largely associated with the growing influence of a welfarist approach to

youth justice (Muncie, 2009). This trajectory culminated in the passage of the Children and Young Persons Act 1969 which contained provision to raise the age of criminal responsibility to fourteen years. However a change of government (from Labour to Conservative) ensured that this and, a range of other progressive measures that would have significantly reduced the ambit of – what was then known as – the juvenile justice system, were not implemented (Bottoms, 2002; Thorpe et al, 1980). Henceforth, the ascendancy of the welfare paradigm was rapidly superseded by a justice model that in its early years took a minimalistic, progressive, form before adopting a much tougher guise following a ‘punitive turn’ in the early 1990s (Muncie, 2008; Pitts, 2005). In this new climate, enthusiasm for further progress on the age of criminal responsibility abated: the relevant section of the 1969 Act remained on the statute book until it was repealed by the Criminal Justice Act 1991.

Nonetheless, until 1998, the common law principle of ‘*doli incapax*’ continued to afford a modicum of protection to children above the age of criminal liability, by requiring the prosecution, in any case involving a child aged between ten and fourteen years, to demonstrate not just that he or she had committed the offence alleged, but also that he or she understood that it was seriously wrong as opposed to mischievous or naughty (Arthur, 2012). In the tougher climate that prevailed during the early part of the 1990s, the contemporary relevance of the principle was considered by the courts. In 1996, the House of Lords confirmed that *doli incapax* should continue to apply and that any changes to it should be taken in the context of a wider review of responses to children’s offending, that might include a rise in age of criminal responsibility (Bandalli, 2000). However, the New Labour government formed the following year had little time for such learned opinion.

Keen to demonstrate that there really should be ‘no more excuses’ for children who broke the law, in conformity with the title of their 1997 White Paper, the incoming government simply declared that the principle contradicted ‘common sense’ and legislated for its abolition in the Crime and Disorder Act 1998. Implemented immediately on Royal Assent, the reform had an unambiguous and abrupt impact: in 1999, the number of ten to fourteen-

year-olds receiving a formal youth justice sanction for an indictable offence was 29 percent higher than it had been in the year prior to implementation. The equivalent figures for older children saw a fall over the same period (Bateman, 2012a). For practical purposes, the abolition of *doli incapax* thus represented a lowering of the age of criminal responsibility.

Ironically, the government's justification to the United Nations Committee on the Rights of the Child for the abandonment of the 700 year old presumption that, unless it could be proved otherwise, children under 14 were not capable of criminal intent, was given a children's rights veneer. The purpose, it was claimed, was to ensure that:

*'if a child has begun to offend, they are entitled to the earliest possible intervention to address that offending behaviour and eliminate its causes. The changes will also have the result of putting all juveniles on the same footing ... and will contribute to the right of children ... to develop responsibility for themselves'* (HM Government, 1999).

Thereafter any questioning of the low age at which a child could be criminalised was met, by both major political parties, with the familiar refrain that knowledge of right and wrong was so patently developed in children aged ten years as to obviate the need for further discussion. In 2012, for instance, Damian Green, Minister for Policing and Criminal Justice, answered a suggestion that, in order to comply with international obligations, the age of criminal responsibility be raised to 12 years with an assertion rather than a rationale, declaring that it was:

*'entirely appropriate to hold children aged 10 and over to account for their actions, and to allow the criminal courts to decide on an effective punishment when an offence has been committed. It is important to communities, and particularly important to victims, to know that young people who offend will be dealt with appropriately'* (Green, 2012).



## A partial explanation

As the commitment to a welfarist youth justice stalled during the 1970s, the political enthusiasm for any further upward movement in the age of criminal responsibility correspondingly waned, as evidenced by the failure to implement the relevant provisions of the Children and Young Persons Act 1969. By the early 1990s, the emergence of a largely media driven '*general anxiety*' (Muncie, 2009: 7) about the extent of youth crime, led to a political questioning of the philosophy of minimum necessary intervention that had supplanted the welfare ethos (Williams, 1993; Pitts, 2005), ensuring that the repeal of the provisions of the 1969 Act attracted little political dissent. From 1993 onwards, that general unease acquired a viciously punitive dynamic that led to an increasing intolerance of children who broke the law and a raft of legislative changes – including the abolition of *doli incapax* – that would see greater numbers of children pulled into the ambit of the criminal justice system and a rapid escalation in the use of custody (Muncie, 1999; Bateman, 2012b).

In this context, it is not unreasonable to see successive governments' refusal to countenance a rise in the age of criminal responsibility as an unsurprising by product of the punitive turn. As the National Association for Youth Justice, for example, has argued that political rejection of reform '*is motivated by an ideological commitment to appear tough on youth crime rather than a dispassionate review of the evidence*' (Bateman, 2000a: 2). There is undoubtedly merit in such an account, but it also has limitations.

On election, New Labour was wedded to the notion that early induction to the youth justice system was necessary to '*nip offending in the bud*' (Home Office, 1997: paragraph 5.15). Such a philosophy was consistent with theoretical notions of '*zero tolerance*' to which the Blair government was instinctively drawn (Phoenix, 2008; Pitts, 2003) and played well with populist sentiment. The maintenance of a low age of criminal responsibility as a 'common sense' response to the problem of youth crime was to be expected even if it conflicted with the weight of evidence.

But the political '*arms race*' that such populism reflected (Centre for Social Justice, 2012: 26) has since cooled to a form of *détente* and the presumption of early intervention has largely been displaced by a rediscovery of diversion (Creaney and Smith, 2014). In 2008, for reasons that are probably not entirely disconnected from the onset of financial crisis, New Labour's Youth Crime Action Plan (Home Office, 2008), while '*retaining a veneer of toughness*', also signalled a dramatic shift in responses to children in conflict with the law (Smith, 2014: 58). The introduction of a target to reduce the number of children receiving a formal sanction for the first time (so called 'first time entrants' (FTEs)) by 20 percent by 2020 was not obviously consistent with early formal intervention. Significantly, this shift enjoyed a political consensus as robust as that which had previously fixated on the necessity of toughness and presumptions of early induction to the criminal justice system. The performance measure survived the change of government to become one of the Coalition's three high-level targets for youth justice (alongside reductions in the use of child imprisonments and reducing reoffending) (Ministry of Justice, 2010).

The new target was accompanied by the emergence of a range of diversionary measures that provided alternatives to the criminal justice process, and that did not result in a criminal record. In due course, the Coalition would abolish the rigid 'three strikes' final warning system, introduced by the Crime and Disorder Act 1998, that had promoted net-widening, replacing it with a regime of youth cautioning that permitted greater flexibility and allowed the police increased discretion to take no further action (Hart, 2014).

The scale, and significance, of the change is hard to overstate. The new target was met within the first twelve months of its introduction, and between 2008/09 and 2011/12 the number of FTEs to the youth justice system fell by 65 percent (Ministry of Justice / Youth Justice Board, 2014). This reduction has been largely responsible for an equally dramatic decline in the overall volume of children formally processed for offending. The number of substantive youth justice disposals imposed on a child for an indictable offence in 2012 was 54 percent lower than the equivalent figure in 2008 (Ministry of Justice, 2013). The FTE initiative not only channelled significant numbers of children away from the youth justice

system, it was also a signifier of the reduced political significance attached to being tough on youth crime.

But recent developments pose something of a paradox. The current administration has shown itself willing to preside over a youth justice system in which the number of 10 and 11 year-olds receiving a formal disposal has fallen by more than two thirds in just two years, with just 1,175 children in that age group subject to criminal justice sanctions in 2012/13 (Ministry of Justice / Youth Justice Board, 2014). Indeed, it has actively promoted a strategy leading to that outcome and on the present trajectory further decline seems likely. How then are we to understand the continued political resistance to contemplating a rise in the age of criminal responsibility to even twelve years?

### **Constructing visions of different childhoods**

In developing '*a reasoned case*' for a heightened age of criminal responsibility, Barry Goldson points to what he terms the problem of '*intra-jurisdictional integrity*' (Goldson, 2009: 517). This consists in the tension between the age at which children are deemed capable of criminal intent and the thresholds at which other rights and safeguards are applied incrementally in the transition to adulthood. To take a few examples: children are precluded from any form of paid employment until the age of 13; they cannot consent to sex until they are 16, the age prior to which young people are also not allowed to buy a pet; provisional driving licences are not issued to persons below the age of 17 years; and before attaining the age of majority – 18 years – children are not permitted to apply for a credit card or a mortgage, go on active service in the armed forces, perform music professionally abroad, buy fireworks, get married without parental permission, vote, buy alcohol or tobacco, or sit on a jury (Bateman, 2012a). Furthermore, in recent years, the underlying trend has been to increase safeguards to a higher age, while correspondingly delaying the age at which adult type rights are enjoyed. Whether or not such increased regulatory provision is justifiable in its own terms, there is an obvious conceptual strain with attribution of adult-type responsibility from the age of ten years to children who infringe the criminal law.

Goldson contends that this strain poses a logical challenge for those who would maintain the status quo and asks:

*'How can the 'adultification' of 10 year-old children in criminal proceedings be rendered legitimate when in every other area of law, the social rights and responsibilities that adulthood conveys are reserved for [older children]?' (2009: 518).*

In his account, the question is rhetorical, a device to highlight the anomalous position of children who come to the attention of youth justice agencies. But attempting an answer may nonetheless be revealing since it has potential to demonstrate how children and childhood are constructed differently according to their circumstances.

### **Angels, devils and the underclass**

Julia Fionda (2005) has provided an insightful account of how the notion of innocence that is generally attached by adult society to childhood can easily give way to its opposite where individual children fail to live up to adult perceptions of what children should be like. This is particularly true, she argues, for those who engage in criminal activity since they have not simply transgressed the law, but also offended against normative expectations. Such children quickly lose their 'angelic' status and are ascribed to a deviant group of 'devils'. This falsely dichotomous classification framework rigidly allocates children to discrete boxes, making no allowance for the fact that all children sometimes misbehave and that, for those who do offend, criminal activity is just one – usually a minor – dimension of who they are.

While the dichotomy is misleading, it not only reflects contemporary public constructions of young people in conflict with the law, but also frames policy responses towards this group in a manner that tends to reinforce the very social exclusion of which the delinquent behaviour is often a manifestation (Fionda, 2005). From at least the mid-1990s, rights and safeguards have not been regarded as unconditional. As Tony Blair famously remarked:

*'The basis of this modern civic society is an ethic of mutual responsibility or duty. It is something for something. A society where we play by the rules'* (cited in Drakeford, 2001: 40).

Children who break the law do not on this account play by the rules; as 'devils' they, in effect, give up the safeguards and protections that are typically available to other children who demonstrate the requisite compliance with adult expectations of innocence. The problem of intra-jurisdictional integrity is thus resolved: the age of criminal responsibility is considerably lower than other thresholds because the category of child to which the former applies is constructed in different terms that allow '*adultification*' (Goldson, 2009: 518).

This analysis might be taken one stage further. As noted above, law breaking by children is relatively commonplace, but the youth justice system deals with a small subset of delinquent behaviour whose defining characteristic is that it is committed by disadvantaged, working-class, youth (Yates, 2010). There is, moreover, a long history of representing those who come to the attention of the authorities as the disadvantaged of a particular sort. The Victorian distinction between the deserving and the undeserving poor was resurrected with a modern gloss in the second half of the twentieth as underclass theory, particularly the variety for which Charles Murray (1984) was chief protagonist, but whose essentials formed as part of the neo-conservative ideological assault that began some ten years earlier (Wilson, 1975).

Permissiveness, a lack of discipline, family breakdown and welfare dependence had, according to this cannon of work, produced '*a dependent, demoralised and dangerous underclass*' who were largely responsible for the recorded increases in crime (Muncie, 2009: 143). The problem was not poverty per se, but certain categories of poor people who:

*'didn't just lack money they were defined by their behaviour. Their homes were littered and unkempt. The men in the family were unable to hold a job ... Drunkenness was common. The children grew up ill schooled and ill behaved and contributed a disproportionate share of the local juvenile delinquents'* (Murray, 1990: 1).

Significantly, given the point at which rises in the age of criminal responsibility stalled, such ideas already had a purchase on significant political figures during the early 1970s. For instance, in a speech delivered in 1974, Sir Keith Joseph, then a government spokesperson on Home Affairs contended that:

*'Our human stock is threatened... a high and rising proportion of children are being born to mothers least fitted to bring children into the world and bring them up. They are born to mother who were first pregnant in adolescence in social classes 4 and 5. Many of these girls are unmarried, many are deserted or divorced or soon will be. Some are of low intelligence, most of low educational attainment. They are unlikely to be able to give children the stable emotional background, the consistent combination of love and firmness which are more important than riches. They are producing problem children, the future unmarried mothers, delinquents, denizens of our borstals, sub-normal educational establishments, prisons, hostels for drifters'* (Joseph, 1974).

Traditional conservatism would no doubt have balked at implementing the more progressive elements of the Children and Young Persons Act 1969 which threatened to undermine the authority of the police and the courts. But it seems likely that the growing influence of neo-conservative philosophy strengthened the revolt against welfarism. The provision to raise the age of criminal responsibility was on this account an early casualty of the spread of ideas associated with underclass theory. In the interim period, such ideas have become more firmly embedded in the political consciousness, unquestioningly accepted by both main political parties as a major determinant of welfare policy (see for instance, Slater, 2012).

Accordingly, children in conflict with the law define themselves by their actions as part of the underclass who, by virtue of that classification, are not entitled to the protections generally associated with childhood. It is arguably for this reason that a low age of criminal responsibility is sacrosanct and resistance to reform so stubborn. As Michael Howard put it in 1993, when Home Secretary, children who offend become *'arrogant ... young hoodlums*

... *who are adult in everything but years*' (cited in Goldson, 2008: 263). One advantage of understanding matters in this way is that it helps to explain why political intransigence has survived the erosion of penal punitivism. As diversion from the justice system has become more prevalent, the threshold of offending required to signify membership of the underclass has risen, but for children who cross it, the political response must continue to reflect their acquisition of a status that denies their childhood and reinforces their construction as undeserving 'devils' (Fionda, 2005).

### **Concluding thoughts**

Kathryn Hollingsworth's (2013) argument, outlined above, suggests that a case for raising the age of criminal responsibility can be made in terms of articulating children's unconditional entitlement to 'foundational rights'. Whatever the logical merits of that position, it ultimately runs up against the problem that, from a neo-liberal standpoint, children who behave in particular ways can legitimately be denied the rights that would ordinarily accrue by virtue of their status as non-adults. Arguments that appeal to evidence of effectiveness are similarly undermined by an ideological construction which locates criminal children firmly in the dangerous underclass that, as Keith Joseph put it, '*threatens our human stock*'.

To the extent that the analysis developed above illuminates the question of why it has proved difficult to shift the political common sense on the appropriateness of a low age of criminal liability, making the case for raising it might need to involve, alongside consideration of children's rights, cognitive development and the harms of early criminalisation, challenging the dominant representations of children who offend.

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