WAS THE ABOLITION OF THE DOCTRINE OF DOLI INCAPAX NECESSARY?

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Abstract: This article considers how the 1997 New Labour election has changed what it means to hold children criminally responsible in the criminal law. In order to do so, this article will focus on examining New Labour’s decision to abolish the longstanding doctrinal defence of doli incapax via asking whether the abolition of the doctrine of doli incapax was necessary and founded upon proper grounds given the low age of criminal responsibility imposed. As a result of such an enquiry it will be revealed legal academics are still questioning the doctrine’s existence in the criminal law more than 15 years after its abolition.

I – Introduction
Since New Labour succeeded as the new elected Government in 1997 the Youth Justice System in England and Wales has been subjected to numerous changes. One of the biggest changes to the youth justice system came in the immediate aftermath of the 1997 Government election when, the then Shadow Home Secretary, Jack Straw MP, proposed a ‘six point policy plan for juvenile crime and disorder’. In his speech, Jack Straw proposed that the ‘New Labour’ Government were determined to encapsulate a future where ‘young offenders plans to promote better parenting in the family home to tackling anti-social behaviour’. It was the Government’s decision to endorse a ‘No More Excuses’ mentality through axing the common law defence of doli incapax which is the focus of this article. The reason why this decision was greeted with such widespread concern was because the Government was moving away from thinking of children as victims in need of ‘welfare’ protection within the law, for a political inspired conception of children which encompassed a promise: ‘tough on crime, tough on the causes of crime’. Jack Straw presented the above agenda through New Labour’s fourth policy point as follows:

“At present we have medieval law-doli incapax- which assumes that youngsters 10-13 are “incapable of evil” unless the prosecution can prove the reverse. This legal presumption makes it very difficult for youth courts to convict young offenders and start the process of changing their offending behaviour.”

When it was announced the doctrine of doli incapax would be removed from the remit of the criminal law, as mentioned, it caused much widespread concern in the legal

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1 The Independent Commission on Youth Crime and Antisocial Behaviour, Responding to Crime and Antisocial Behaviour, 2010, pp.11-12
3 Supra note. 2
4 Home Office, No More Excuses, (HMSO, 1997a) p.1
6 Home Office, No More Excuses, (HMSO, 1997a) p. 1
7 Supra note. 4
II – The Minimum Age of Criminal Responsibility

The age of criminal responsibility connotes the age at which the criminal justice system can bring proceedings against an autonomous person for a criminal offence. When the criminal court convicts the defendant of a crime, the defendant is to be held criminally responsible and punished for breaking the criminal law. In England and Wales the minimum age of criminal responsibility is 10 years of age contrary to Section 34 of The Crime and Disorder Act (1998). Any child under 10 years of age is therefore deemed to have legal immunity from the full rigours of the criminal justice system.

Legal commentators have regularly made reference in youth crime literature to the assumption that children below 10 years of age are subsequently ‘incapable of committing evil’. Yet no reference has been made as to what sort of ‘evil’ acts the child was incapable of committing or how incompetent the child typically would have been below 10 years of age to make them fully immune from the criminal law. Traditionally, this line of thinking derived from the establishment of the ‘right and wrong’ responsibility tests implemented by 14th century common law judges in order

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11 The Criminal Justice Act (1963)


14 Tadros. V, Criminal Responsibility, Oxford University Press, 2005, p.21

15 Supra note. 14

16 Section 16 of The Children and Young Persons Act (1969)

to determine the child’s competency between positive acts and crimes.  

For Blackstone the determination of criminal responsibility rested with a test which considered whether the child defendant was able to discern between ‘good and evil’ based on the strength of the child’s mental processing of judgement and the capacity of understanding the difference between the two. Arguably, this does not mean that a child of 7 years as a consequence is incapable of committing a crime if the child is morally unaware of what is ‘right and wrong’ or ‘good and evil’ today, merely because legislation supports children from 10 years of age as legally blameworthy for breaking the criminal law: this can be quite the opposite. From 32 out of 43 police forces around the country in 2007 revealed that almost 3,000 crimes were committed by children under 10 years of age. Yet given the statutory age of criminal responsibility in England and Wales a child below 10 years of age will continue to be held unaccountable for committing crimes.

Compared with the rest of Europe, England and Wales can be considered to have one of the lowest thresholds for criminal responsibility: currently 10 years of age. This is indicative when in contrast other countries such as; Norway (15 years), Spain (16 years) and Belgium (18 years of age). Even the United Nations Committee on the Rights of the Child in 2007 expressed that a minimum age of criminal responsibility below that of 12 years of age is to be considered ‘internationally unacceptable’. To the United Nations this is because children respectively under 12 years of age do not have the capacity, ability and maturity to infringe the law akin the reasonable adult offender. Yet the criminal justice system in this country will punish children for crimes at the age of 10 irrespective of international recommendations and European practices. From the child’s point of view, the child will be held criminally responsible for breaking the law alike the adult offender; yet unlike the adult offender, the child may only have limited and or inaccessibility to legal right of passages in England and Wales. Legislation prohibits a child from purchasing small animals until 16 years of age, buy fireworks and similarly buy alcohol until 18 years of age. This is perhaps why there has been much concern with regards to the decision to abolish the doctrine of doli incapax; given the fact that New Labour may have failed to take into account what it means to be entirely responsible in the law. In this case, it not only

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19 Blackstone, 1769:23-4
22 Section 16 of The Children and Young Persons Act (1969)
26 Contrary to The Animal Welfare Act (2007)
27 The Fireworks Regulation (2004) Section. 4
28 The Licensing Act (2003) Section. 145
means that one is to be held to a standard of criminal responsibility for not upholding the law but it also means that one has a certain level of individual autonomy to perform justified actions which are entitlements and arguably a testament to one’s age and degree of responsibility within society. Today there is a considerable age-gap and discrepancies between the degrees of responsibility a child must be expected to uphold, as opposed to what the child will receive in return for being subjected to criminal responsibility. This is clearly evident with how the rest of Europe rationalises a higher age of criminal responsibility and responds in the criminal law in contrast to England and Wales.

III – The Legal Theory of Criminal Responsibility

When reconciling the attachment of criminal responsibility theorist Dubber transcribes the criminal law should be concerned with answering one single question: ‘who is liable for what?’ From this style of questioning within the criminal law it is easy to contend with why Jack Straw articulated that the doctrine ought to be removed. Generally, when the criminal court convicts a defendant for an offence the defendant is held to be criminal responsible for his conduct. From this it can be contended that the idea of being held to a standard of criminal responsibility is central to the criminal justice system. The reason why can to some extent be considered simple; most theorists hypothesise that the criminal law’s primary concern is to prevent harm and to do so involves determining the defendant’s degree of culpability, so as to bestow a proportionate punishment for the commission of the offence.

Some theorists further speculate that the criminal law should act retributively or employ a theory of restorative utilitarianism to prevent harm from occurring in the future. A retributivist theorist, for example, would be concerned with determining the degree of the defendant’s criminal responsibility from the ethos of ‘no one can justly be punished unless he is morally responsible’. In contrast, Tadros believes that it may not be morally ‘just’ to punish the young or mentally fragile agents for crimes, when it could be argued they did not possess a sound and competent mind. Clearly, it is plausibly within the remit of a child to make a rational choice, for example to steal money so he can buy food, or kill a man out of an emotional loss of self control as seen in DPP v Camplin. Nevertheless, the question that is persistently being raised in criminal law literature is whether the law should hold either of these children (given their situations) as morally responsible agents for their lacking in moral emotions and understanding of right and wrong? For Arenella, the justification for attributing criminal responsibility falls onto the ideological notion of justice that

36 DPP v Camplin (1978) AC 705
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the criminal law is to punish on the basis of what the offender deserves. Subsequently this would mean that regardless of the age of the defendant, if it is known that a defendant fulfilled the actus reus and mens reus of an offence, they deserve punishment because of the harm that has been produced. This is perhaps regardless of the England and Wales minimum age of criminal responsibility.

Yet as Elliott contemplates there is a difference between accountability and responsibility for the purposes of attaching criminal liability. This is due to the fact that there are specific preconditions for imposing criminal responsibility which do not solely relate to what can be proven through what the defendant performed with regards to sufficing the actus reus of the crime. This can be seen from Hart’s paradigm of criminal responsibility:

“Those...we punish should have had, when they acted, the normal capacities, physical and mental, for abstaining from what it forbids, and a fair opportunity to exercise these capacities.”

When courts determine the defendant’s degree of criminal responsibility, Hart has demonstrated that two limbs are necessary; the defendant must possess the minimum levels of mental and physical capacities and have a fair opportunity to perform the defendant’s attributed capabilities. Presuming, that a defendant did in fact have a ‘fair opportunity’ to act in accordance with their capabilities, what is of crucial importance in determining criminality, as opposed to moral accountability for one’s actions; arguably comes from questioning and determining the characteristics of the defendant. It may be that these characteristics are obvious when one generally compares children to adults. For instance, a child of 12 years of age may be considerably smaller in height and weight in contrast to that of a 40 year old muscular 6ft tall man. Neuroscience research reflects these observations because biologically a child of 10 years of age does not have the same physical composition to that of an adult. An average adult’s height and weight ratios physically differ to that of a child. An adult has greater muscle mass to protect their organs from many severe injuries. Children on the other hand have smaller pliable skeleton systems which account for their small bones and physical appearance. These physical dissimilarities

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40 Ibid note. 39
42 Ibid note. 41
44 Ibid note. 43
47 Ibid note. 46
independent from any other information affirm that children are not on-par so-to-speak to the average adult.

Notwithstanding the noticeable physiological differences, it could be correspondingly stated that children are different to adults when one examines the mental and emotional characteristics of both children and adults. The latest neuroscience research provides that up until the age of at least 20 years children undergo many comparable changes in mental, emotion and physical functioning such as: decision-making, impulsivity, memory and puberty.\textsuperscript{48} Although it may be the case that in some court proceedings a child may exhibit the same mental and physical attributes, or as Hart refers ‘normal capacities’ to that of an adult offender.\textsuperscript{49} Yet questioning who the defendant is can be of crucial importance, because whether the defendant is in fact a child of 11 years of age as opposed to an adult offender of 25 years of age. This could potentially effect and determine how the defendant acts, because their mental and physical attributes may significantly differ. If a child of 10 years struggles to communicate to another child in a playground how can such a child be considered to have the same normal capacities akin to the average adult for the purposes of attaching criminal responsibility and punishment? This is perhaps why there has been such widespread scrutiny and warning since the abolition as the doctrine understood and protected children who exhibited less than ‘normal’ mental, emotional and physical capacities.\textsuperscript{50} Today, a child who exhibits less than normal adult capacities would be left without a doli incapax defence.

\textbf{IV – The Meaning of doli incapax}

The doctrine of doli incapax operated in England and Wales as a tool with two significant purposes. Firstly, it bestowed children below the minimum age of criminal responsibility with exemption from the criminal law.\textsuperscript{51} Secondly, it provided children from the minimum age of criminal responsibly to 13 years of age with a defence which recognised the possibility that some children (emphasis placed on some, and not all children) were incapable of understanding the truancy of his or her(s) criminal actions because they did not have the prerequisite ‘normal’\textsuperscript{52} capacities akin to the adult offender. This was encapsulated through the use of a rebuttable presumption.\textsuperscript{53}

The rebuttable presumption sanctioned the prosecution to adduce evidence to infer that the youth offender had the knowledge and an understanding of the seriousness of their actions in order to attach criminal responsibility.\textsuperscript{54} In order to do so, Goff LJ in \textit{JM (A Minor) v Runeckles (1984)}\textsuperscript{55} illustrated in finding the child mentally and physically capable akin to the adult offender, the prosecution were prohibited from revealing evidence of the child’s actions as being naughty or mischievous. The

\textsuperscript{49} Hart. H. L. A, (2008), p. 152
\textsuperscript{50} Refer to discussion on page one
\textsuperscript{51} S.34 of The Crime and Disorder Act (1998)
\textsuperscript{52} Hart. H. L. A, (2008), p. 152
\textsuperscript{54} Pickford. J, Youth Justice: Theory and Practice, Cavendish Publishing, 2000, p. 56
\textsuperscript{55} JM (A Minor) v Runeckles (1984) 79 Cr App R 255
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evidence must have gravitated towards adducing the seriousness and graveness of the child’s actions as confirmed in R v Gorrie.56 It is worth to note that evidence of observation cannot deduce evidence of the child’s criminality: A v DPP (1992)57 bequests as much. So the courts were informed to avoid:

“The trap of applying the presumption of normality.. that any child of the appellant’s age in today’s society would know perfectly well that to behave in this way was to behave in a way that was seriously wrong”.58

The presumption was on the prosecution to find if the child was fully capable and aware of the serious nature of their actions. Only then would the child take criminal responsibility for their actions barring the above procedural determinations.59 The famous publicised case of the murder of James Bulger shows the rebuttable presumption in practice. From the psychiatric assessments of the two co-defendants, Thompson and Venables, the prosecution revealed that both children were capable of knowing right from wrong.60 To Jack Straw ‘both children were appropriately made responsible for their actions’.61 The two co-defendants, Thompson and Venables, were charged with murdering James Bulger. Their guilt was not merely weighted upon the presumption that they were capable of understanding the truancy of their actions. Both defendants were judged by 12 jurors who were instructed to assess their blameworthiness according to the standard of proof of ‘beyond reasonable doubt’ for the death of James Bulger.62 From the 12 jurors’ assessment of evidence provided by the defence and prosecution, the two defendants were held criminally responsible.

From this perspective it is hard to assimilate at this stage, why the government decided to abolish the doctrine of doli incapax. Historically, the doctrine had dealt with hundreds of youth cases in its time, concluding when necessary (upon the individual merits of the child) whether a child was capable of understanding the nature of his actions to be held criminally culpable.63

Thus far, it could be claimed the doctrine of doli incapax served its purpose in relation to Straw’s proposition in being able to punish young offenders for committing criminal offences. The murder convictions of Venables and Thompson was clearly indicative of the doctrine’s ability to perform in a manner which inculpates rather exculpates children for their criminal behaviour.64 Even if it could have been established (with the use of the doctrine of doli incapax) the defendants’ did not understand their heinous actions, the doctrine of doli incapax upon this basis could

56 Gorrie (1918) 83 J.P 136
57 A v DPP (1992) Crim LR 34
58 W (A Minor) v DPP (1996) Crim LR 320
59 Ibid note. 58
60 R v Secretary of State for the Home Department, ex parte Venables; R v Secretary of State for the Home Department, ex parte Thompson (1997) 4 LRC 411
61 Ibid note. 60
62 Ibid note. 60
63 See A v DPP (1992) Crim LR 34
64 Supra note. 60
have exculpated the youths for the killing of Bulger. Although this was not the case, the doctrine plausibly served its purpose with regards to its basic core functions: to either provide a defence or inculpate on the basis of the rebuttable presumption for the co-defendants. Yet New Labour were of the opinion that it was still necessary to remove the doctrine’s defence and presumption from the remit of the criminal law because they were of the belief that it failed to make young offenders as criminally responsible for their conduct when in operation.65

V – The Emergence of ‘New Labour’

‘New Labour’ in an attempt to learn from the administrational mistakes of the previous elected party conveyed a message to the public in relation to youth crime in England and Wales.66 The message was that Labour was to take action by ‘getting a grip on youth crime’.67 A 1997Home Office White Paper titled: ‘Tackling Youth Crime’ maintained the changes Labour wished to undertake. The paper concluded that New Labour’s agenda was to modernise the youth justice system by abolishing the doctrine of doli incapax.68 One of the reasons why is presented in paragraph 14, the government believed at that particular time there would be practical difficulties if the rebuttable presumption existed because there would be an increase in youth offenders relying on the defence of doli incapax.69

Ironically, the rebuttable presumption undermined any ‘benevolent protection’ which was recognised by the defence of doli incapax.70 Bandalli suggested that academic opinion was swayed toward the doctrine being misconceived, because public and media outlets connoted the child as being ‘misspent’71 and capable at the age of 5 years of age of knowing the difference between right and wrong.72 The representation of the ‘misspent’ child merely reflects how the new agenda was interwoven in the judicial system. As Lord Lowry in C v DPP73 observed that when the courts lacked cogent evidence; the courts ‘often treat the rebuttal as a formality’. And in the magistrates’ courts ‘in practice, juvenile courts rarely look(ed)74 at the doli incapax requirement’.75 This is further evidenced by a 1992 police sample which showed 76.2 percent of juvenile suspects confessed their guilt in police interviews; and at this

65 Supra note. 4
66 Supra note. 4
69 Ibid n. 68
71 Audit Commission, Misspent Youth... Young People and Crime, London, Audit Commission, 1996
73 C (A Minor) v DPP (1995) 2 All ER 43, p.63D-F; Manchester 1986:8
74 Word Added
75 Ibid n. 68

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phase it is worth highlighting that in the criminal justice process the rebuttable presumption could only be used when in court.\textsuperscript{76}

This information may have supported New Labour’s core incentives to make young offenders criminally responsible for their actions in a way which excluded the doctrine of doli incapax. Yet taking into consideration that the doctrine was only used in court, the apparent ineffectiveness of the doctrine could not have been justified simply from the number of guilty pleas given in police stations.\textsuperscript{77} This line of reasoning was evidentially weak, even if the doctrine was applicable and used by children in the police processing stages prior to it being used in the courts as a defence. From the evidence presented above, the Government’s claim that the doctrine’s functionality was hindering criminal prosecution may not have had anything to do with fearing that the doctrine was inadequate or ineffective when it tried to inculpate with regards to the presumption. In the House of Lords decision of \textit{C (A Minor) v DPP} Lord Lowry was of a similar belief when he inscribed that there were ‘popular and political overtones’\textsuperscript{78} which surrounded the abolition.\textsuperscript{79} To note there was a possibility that further use of the doctrine would subject children to a future defence in criminal proceedings, if not abolished in 1998. However research has advocated that no such problem existed whereby more children would have relied on the doctrine: the presumption was rarely used. The portion of youth offenders pleading guilty in the magistrates was 81 percent and a mere 7 percent was due to a shortage of trials in 1995.\textsuperscript{80} This in itself infers that perhaps the problems New Labour where justifying were imagined since Lord Parker CJ in \textit{B v R} was still of the belief that ‘the lower the child in the scale between 10 and 14, the stronger the evidence necessary to rebut the presumption’.\textsuperscript{81}

\textbf{VI – Was the Abolition Necessary?}

It would seem reasonable to assume that the decision to remove the doctrine of doli incapax from the law would have been one of conclusiveness. The doctrine of doli incapax was thought to be an irrelevant tool the criminal law no longer needed given Jack Straw’s opinion of it being a ‘medieval law... which assumed that youngsters between 10-13 were “incapable of evil”.\textsuperscript{82} Yet for the courts to still be subjected to questioning, replying and presiding over the doctrine of doli incapax, even though S.34 clearly stated that the doctrine, including the presumption, was abolished in 1998 merely reveals that the courts are still struggling to bridge the gap between imposing criminality liability and young offenders when taking into account the physiological, mental and emotional underdevelopments of children.\textsuperscript{83}

\begin{thebibliography}{99}
\item Eva, R., ‘\textit{The Conduct of Police Interviews with Juveniles}’, The Royal Commission on Criminal Justice Research, Study 8, London: HMSO
\item Loc cit note 4
\item \textit{C (A Minor) v DPP} (1995) 2 W.L.R. 383
\item Home Office, Criminal Statistics For England and Wales, 1995, table 6.2
\item \textit{B v R} (1958) 44 Cr App R1
\item Jack Straw, Labour Government Speech to Police Federation, 21/05/1997
\item Supra note. 10
\end{thebibliography}
This was clearly evident in *R v JTB (2009)*. The appellant (charged with committing several counts of sexual activities) sought advice from the House of Lords because he believed that he was unaware of the wrongness of his actions.\(^84\) To note in 2009 it was generally explicit to the courts from Section 13 of The Sexual Offences Act (2003) that the youth (from the evidence presented) had committed the identified counts of sexual activities. Yet this criminal offence once rested upon a rebuttable presumption, akin to that of the doctrine of doli incapax. A presumption was implemented to minors under the 14 years of age in order to relieve children from criminal responsibility. Alike the doctrine of doli incapax’s abolition in 1998 this presumption was removed from the ambit of the criminal law by the way of The Sexual Offences Act (1993).

If doing away with the doctrine of doli incapax was the correct and necessary decision since it was regarded as no longer needed; then, why would the appellant seek advice in relation to the doctrine when it had been clearly discontinued for 11 years? This was the problem in *Crown Prosecution Service v P (2007)*\(^85\) when it was contended that *P* did not have a sufficient level of maturity and capacity to understand criminal proceedings or an ability to understand the serious nature of his actions.\(^86\) Several psychiatric reports concluded *P* was unfit to stand the trial process.\(^87\) However many judges were still of the belief that the doctrine existed, *Smith L.J* is an example of this when he reconciled that if ‘the effect of s.34 [of the Crime and Disorder Act (1998)] is to abolish the presumption that a child is doli incapax but not the defence itself.’\(^88\) If, as Jack Straw mentioned New Labour’s aim was to hold youth offenders criminally responsible in a way that ‘gets a grip on youth crime’,\(^89\) presumably, parliament ought to have enshrined a clear intention to abolish the doctrine: including the defence and presumption in 1998. The then Solicitor- General gave a different opinion on the matter in the second reading of *Crown v P*:

> 'The possibility is not ruled out, where there is a child who has genuine learning difficulties and who is genuinely at sea on the question of right and wrong, of seeking to run that as a special defence. All that the provision does is to remove the presumption that the child is incapable of wrong.'\(^90\)

Clearly, it is obvious from the Solicitor-General’s opinion in *Crown v P* there was (perhaps still is an) imperative to hold on to the defence of the doctrine of doli incapax, because it is possible children do not possess the minimum capacity standards to be held criminally responsible. If the government’s aspirations were to ‘get a grip on crime’, as it has been frequently referenced as such in this article it seems precarious given the above judicial interpretations of S. 34 and the New Labour’s aims and objectives (to abolish the doctrine) that their true intentions were

\(^84\) *R v JTB (2009)* UKHL 20

\(^85\) *Crown Prosecution Service v P (2007)* EWHC 946

\(^86\) Ibid note. 85

\(^87\) Ibid note. 85

\(^88\) (2007) 171.JP 349 at 351


\(^90\) (Hansard, HL, vol. 584, cols 595-596, 16 December 1997).
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not clearly specified in legislation. Arguably, it could be retained there were clear indicators as to parliament’s underlying intentions. Crofts determined from a Home Office circular that children from the minimum age of criminal responsibility (10 years) will be treated as the same as any other adult offender. Yet this report could not have singlehandedly justified the intended construal and meaning of S.34. This is visibly indicative when one considers the then Solicitor-General’s reasoning of the possibility that the underlying doctrinal principle may have even evaded abolition. To Williams regardless of the mischief interpretation of S.34 the criminal law comes down to a simple annotation:

“As a matter of policy it is highly desirable that a child who has committed what, for an adult, would be a crime, should be put to answer, even if he is afterwards acquitted on the ground that he did not know his act to be wrong”.

The logic of Williams’ statement envisions a strong retributivist node of thinking, which it could be argued would contravene with Article 6(2) of the European Convention on Human Rights (ECHR) because ‘everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. If the child must be ‘put to answer’ in a manner which would neglect Hart’s preconditions of criminal responsibility, there could be a motivation which initially infers guilt for the crime performed, based upon who the defendant is. This could be the case as Williams’ remarks it could be ‘just’ to articulate that the law ought to respond to attaching criminal responsibility from political policy standpoints; but would Williams strong view differ if the defendant was P?

It could be maintained that for a defendant like P being ‘put to answer’ may not be the correct approach. A fair trial can only appropriately function when there is a defendant who has the understanding and capacity to identify the rationale of the court trial itself and inter alia comprehend the wrongness of their actions. The European Court of Human Rights similarly advocates the same rationale that a defendant should be fit to stand trial contrary to Article 6. As a result in P it was the Divisional Court decided that court proceedings were premature in the light of the defendant’s lack of capacity to distinguish right from wrong.

Therefore, can Williams’ desirable imperative to impose court proceedings upon a minor who has below the minimum mental and physical capacities as P benefit the criminal law? A weak retributivist who places consequentialist considerations at the

91 Walker, N., ‘The End of an Old Song’, NLJ (1999) 149 at 64
93 supra n. 85
95 Article 6(2) of The European Convention of Human Rights
98 SC v United Kingdom (2004) 40 EHRR 10
99 R v JTB UKHL 20
heart of the criminal law may support Williams’ contention to make a young offender stand trial.\(^{100}\) Presumably, if the young offender had the pertinent level of understanding to withstand the trial process with an ability to convey the truancy of their actions, then perhaps Williams’ proposal could be conducive. Yet unless there is an additional good benefit to make a defendant like \(P\) be ‘put to answer’, Williams may fail to receive support from a retributivist.\(^{101}\) When the doctrine of doli incapax was in operation the doctrine (defence and presumption) shielded the child from the damage ensued from the criminal justice system.\(^{102}\) Whether or not the presumption itself actually made or prevented convictions can only be a matter of fact. Keating claimed the presumption served as a broad shielding ensemble ‘marking the transition stage of a child’s life as special’.\(^{103}\) Subsequently, once the abolition of the doctrine of doli incapax materialised the protective function ceased to exist. Today youth offenders like \(P\) and \(R\ v\ G\ (2003)\)\(^{104}\) will be as a result subjected to the full rigours of the criminal law.

The doctrinal test is unquestionably flawed, it cannot be denied that the doctrine did not go through a process of uncertainty with regards to developing a test to determine if a youth was aware of the seriousness of his/her actions, as opposed to being naughty and mischievous.\(^{105}\) The doctrine (presumption) has never been consistently applied in practice as a result the doctrine was akin to inconsistent verdicts.\(^{106}\) It follows then that Laws J observed in \(C\ (A\ Minor)\) that the presumption was a ‘disservice to the criminal law’.\(^{107}\) At the time the abolition of the doctrine of doli incapax may have been the correct decision, because it has been argued it was an outdated concept that could not reflect the improvements to formal education and the knowledge acquired through schooling.\(^{108}\) It has been contended by several academics that the child today may have greater access to education consequently youths are more likely to be aware of the seriousness of their actions, but this questionably does not infer that all children can distinguish right from wrong or comprehend the seriousness of his actions.\(^{109}\)

The doctrine represented a universal perception to which it can and has been declared some children should not be called to answer for their wrongdoing because of their diminished understanding and capacities of acting. The recent case of \(R\ v\ CM\ (2011)\)\(^{110}\) supports that the doctrine is considered as a lost tool within the criminal justice system as a safeguard for the young offender who was likely to re-offend, who

\(^{100}\) Crime and Culpability, (2009), p. 7
\(^{101}\) Supra n. 94
\(^{103}\) Ibid note above. 102
\(^{104}\) R v G (2003) UKHL 50; (2004) 1 AC 1034 HL
\(^{105}\) Supra note. 54
\(^{106}\) C (A Minor) v DPP (1995) 1 AC 1, 33 39
\(^{107}\) C (A Minor) v DPP (1995) 1 Cr App R 118
\(^{108}\) Supra note. 53
\(^{109}\) Association of Child Welfare Agencies, Newsletter 2000
\(^{110}\) R v CM (2011) NICCS8
also lacked consequential thinking, capacity and control.\textsuperscript{111} For Duff he believed it is perfectly acceptable for society to desire that both the juvenile and adult offender should be held to answer for their criminal actions because harm has still ensued.\textsuperscript{112} Nonetheless, Duff have even questioned whether a child with diminished capacities (or lack there-of) ought to be the object of the court processes, be held liable and open to punishment as a result.\textsuperscript{113}

\section*{VII – Conclusion}

It has been made clear that 10 years of age has emblematic significance in the criminal justice system as the starting age for criminal responsibility. This may be why it has been sympathetically pleasing to an academic to claim that the doctrine or rather the rebuttable presumption, in fact co-existed, acting as an intermediary for the low age of criminal responsibility. As Smith proclaimed the criminal law 'holds that a person is completely irresponsible on the day before his tenth birthday, and fully responsible as soon as the jelly and ice-cream have been cleared away the following day'.\textsuperscript{114} As a result, it may well be perfectly acceptable to hold onto traditional childhood concepts of ‘innocence’ and ‘frailty’; because it ought to be thought that a safeguard should be in place to shelter the child from the criminal law. The doctrine of doli incapax operated by revealing evidence of a child’s cognitive development, thus liability if any could be affixed upon the child for the unlawful acts performed. Then again as Douglas noted, social attitudes towards children have changed since the uprising of political overtones, tension have mounted children are not considered innocent or merely naughty.\textsuperscript{115} Social retribution and ‘using the criminal law as a weapon’ has taken focus.\textsuperscript{116} To that end criminal responsibility now does not solely rest upon the child’s development as the doctrine of doli incapax once did: the issue is one of policy and policy considerations.\textsuperscript{117}

Those in favour of the return of the doctrine of doli incapax propose that the doctrine could have been modified to manifest a positive attitude of judicial consistency and certainty.\textsuperscript{118} Perhaps, the presumption and defence could have coexisted amicably. The White Paper ‘Tackling Crime’ proposed changes to the doctrine: the paper concluded that there were two options available. Firstly, the presumption could remain if the rebuttable onus shifted onto the defence, where the defence had to prove upon the balance of probabilities that the child did not know that his actions were seriously wrong.\textsuperscript{119} This preference was openly favoured in \textit{JBH & JH (Minors) v O’Connell (1981)\textsuperscript{120} and by Williams.\textsuperscript{121} However the shift of the burden may still

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\textsuperscript{111} Ibid note above. 110
\textsuperscript{112} Duff (2002) p. 131
\textsuperscript{113} Ibid note. 112
\textsuperscript{114} Smith. A.T.H, ‘Doli Incapax under Threat’ (1994) CLJ 426, at 427
\textsuperscript{116} Keating, H, (2007) at 195
\textsuperscript{117} Keating, H, (2007) at 189
\textsuperscript{118} Duff, (2002). p. 131
\textsuperscript{119} Supra note. 57
\textsuperscript{120} \textit{JBH & JH (Minors) v O’Connell (1981) Crim LR 632
\end{flushleft}
create practical difficulties because securing a conviction may lead to the child in
every case relying on the defence of doli incapax. Ultimately this is why it was
determined that the doctrine should respectfully be abolished.

If the doctrine is not the answer, Duff has proposed that the courts should reverently
have reservations not about whether the juvenile should be punished, but how the
juvenile is punished. A radical enquiry into this may well shed light on the need to
reform and restore the juvenile’s life and educate them on right and wrong; as
opposed to retributively punishing and casting the child into abyss. Inevitably this
could still provide inconsistent punishments, if the courts were presiding over
Venable and Thompson again, the heinousness of the crime and the retributive public
outrage may well place Williams policy reasons and the spectacle of ‘putting them to
answer’ before the restorative reconciliation vision by Duff.

In this article there has been a spirit of political substance infused right the way
through which may well have provided the incentive to abolish the doctrine of doli
incapax. There have been strong views in favour of the doctrines restoration and
contrasting views contending that the doctrine reverently created an evading facade
for not making youth offenders’ criminally responsible for their actions. Both Fionda
and Keating have concurrently determined that the abolition and the youth justice
system have been shaped by policy incentives. Therefore the future challenge is not
with debating if the youth had or did not have capacity, but how policy can be aptly
shaped in the future. Keating further suggested that if policy is the core incentive
behind any change the question that needs to be answered is ‘why is it inappropriate
to punish a youth?’ This question it could be contended has aptly been applied in $R
v CM$, notwithstanding the youth’s diminished mental capacity mentioned previously,
the court still found an incentive (whether or not the conviction was politically
motivated is uncertain) the youth was convicted and punished for the crimes
committed. This may reflect policy being shaped too strongly by retributivism,
however it may be perfectly understandable to impose liability to the deserving for the
harm caused regardless of the underlining stimulus. On the other hand policy
should also delve into the value and benefit of punishment when it concerns youth
offenders. Perhaps the reason why Keating has posed the above question is because
retributivism, punishment and political undertones are unavoidable. It is possible the
only way forward is to accept that the future of the youth criminal justice system has
no doli incapax-type defence. In the end it could be summarised that the doctrine of
doli incapax, the shield and presumption, could be a lost cause.

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121 Williams, G., (1954) at 498
122 Bandalli, S., (1998) at 115
124 Supra n. 30
125 Keating, (2007) at 189
126 Ibid note above. 125
127 Ibid n. 125
128 Supra n. 110
129 Supra note. 30