

# **THE CRIMINAL RESPONSIBILITY OF CHILDREN AND YOUNG PERSONS**

**A COMPARISON OF ENGLISH  
AND GERMAN LAW**

**THOMAS CROFTS**

# The Criminal Responsibility of Children and Young Persons

A comparison of English and German law

THOMAS CROFTS

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**Ashgate**

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AND YOUNG PERSONS

*For Jake and in memory of Amelia*

# Abbreviations

<b>AC</b>	Appeal Cases Law Reports
<b>All ER</b>	All England Law Reports
<b>Art.</b>	Article
<b>BIGK</b>	Blätter für Gefängniskunde
<b>BrJCr</b>	British Journal of Criminology
<b>C/Cm/Cmnd/</b>	Command Paper
<b>Cnd</b>	
<b>CA</b>	Court of Appeal
<b>CCC</b>	Constitutio Criminalis Carolina
<b>CFLQ</b>	Child and Family Law Quarterly
<b>CJ</b>	Criminal Justice
<b>Col</b>	column
<b>Cr App R</b>	Criminal Appeal Reports
<b>Crim LR</b>	Criminal Law Review
<b>CYPA</b>	Children and Young Persons Act
<b>CJPOA</b>	Criminal Justice and Public Order Act
<b>DC</b>	Divisional Court of the Queen's Bench
<b>Diss</b>	Dissertation
<b>DJ</b>	Deutsche Justiz
<b>DR</b>	Deutsches Recht
<b>DVJJ-J</b>	Zeitschrift für Jugendkriminalrecht und Jugendhilfe
<b>EJCPR</b>	European Journal on Criminal Policy and Research
<b>ed(s)</b>	editor(s)
<b>edn</b>	edition
<b>ER</b>	English Reports
<b>FLR</b>	Family Law Reports
<b>fn</b>	footnote
<b>GA</b>	Goltdammer's Archiv für Strafrecht
<b>GDR</b>	German Democratic Republic
<b>HC</b>	House of Commons
<b>HJCJ</b>	Howard Journal of Criminal Justice
<b>HL</b>	House of Lords
<b>IJAP</b>	International Journal of Applied Philosophy
<b>JP</b>	Justice of the Peace Reports
<b>JPJo</b>	Justice of the Peace Journal
<b>JR</b>	Juristische Rundschau
<b>Jura</b>	Juristische Ausbildung
<b>JZ</b>	Juristen Zeitung
<b>LQR</b>	Law Quarterly Review
<b>MDR</b>	Monatsschrift für Deutsches Recht

<b>MLR</b>	Modern Law Review
<b>MschrKrim</b>	Monatsschrift für Kriminologie und Strafrechtsreform
<b>NJ</b>	Neue Justiz
<b>NJW</b>	Neue Juristische Wochenschrift
<b>NLJ</b>	New Law Journal
<b>NStZ</b>	Neue Zeitschrift für Strafrecht
<b>QB</b>	Queen's Bench Division Law Reports
<b>para(s)</b>	paragraph(s)
<b>RdJB</b>	Recht der Jugend und des Bildungswesens
<b>RGBI</b>	Reichsgesetzblatt
<b>S</b>	Sentence
<b>SJ</b>	Solicitor's Journal
<b>StV</b>	Strafverteidiger
<b>Vol</b>	volume
<b>ZAkDR</b>	Zeitschrift der Akademie für deutsches Recht
<b>ZblJugR/ZfJ</b>	Zentralblatt für Jugendrecht und Jugendwohlfahrt
<b>ZRP</b>	Zeitschrift für Rechtspolitik
<b>ZStW</b>	Zeitschrift für die gesamte Strafrechtswissenschaft

# Abbreviations and Translations

<b>BayObLG</b>	Bayerisches Oberstes Landesgericht	<i>Bavarian Court of Appeal</i>
<b>BayObLGSt</b>	Entscheidungen des Bayerischen Obersten Landesgerichts in Strafsachen	<i>Decisions of the Bavarian Supreme Court in criminal matters</i>
<b>Bem.</b>	Bemerkung	<i>note</i>
<b>BGB</b>	Bürgerliches Gesetzbuch	<i>Civil Code</i>
<b>BGH</b>	Bundesgerichtshof	<i>Federal Supreme Court</i>
<b>BGHSt</b>	Entscheidungen des Bundes- gerichtshofs im Strafsachen	<i>Decisions of the Federal Supreme Court in criminal matters</i>
<b>BVerfG</b>	Bundesverfassungsgericht	<i>Federal Constitutional Court</i>
<b>BVerfGE</b>	Entscheidungen des Bundesverfassungsgerichts	<i>Decisions of the Federal Constitutional Court</i>
<b>DDR</b>	Deutsche Demokratische Republik	<i>German Democratic Republic (GDR)</i>
<b>DVJJ</b>	Deutsche Vereinigung für Jugend- gerichte und Jugendgerichtshilfen e.V	<i>German Association for Youth Courts and Youth Court Services</i>
<b>Einl. z.</b>	Einleitung zu	<i>introduction to</i>
<b>FDJ</b>	Freie Deutsche Jugend	<i>Free German Youth (youth organisation of the GDR)</i>
<b>GG</b>	Grundgesetz	<i>Basic Law (Constitution)</i>
<b>Grdl. z.</b>	Grundlegung zu	<i>foundations of</i>
<b>JGG</b>	Jugendgerichtsgesetz	<i>Youth Court Act</i>
<b>JGG-DDR</b>	Jugendgerichtsgesetz der Deutschen Demokratischen Republik	<i>Youth Court Act of the German Democratic Republic</i>
<b>JWG</b>	Jugendwohlfahrtsgesetz	<i>Youth Welfare Act</i>
<b>KJHG</b>	Kinder- und Jugendhilfegesetz	<i>Child and Youth Help Act</i>
<b>Nr.</b>	Nummer	<i>number</i>
<b>OG-DDR</b>	Oberstes Gericht der Deutschen Demokratischen Republik	<i>Supreme Court of the German Democratic Republic</i>
<b>OLG</b>	Oberlandesgericht	<i>State Court of Appeal</i>
<b>RG</b>	Reichsgericht	<i>Imperial Court</i>
<b>RGSt</b>	Entscheidungen des Reichsgerichts im Strafsachen	<i>Decisions of the Imperial Court in criminal matters</i>



<b>RJGG</b>	Reichsjugendgerichtsgesetz	<i>Imperial Youth Court Act</i>
<b>RL</b>	Richtlinien (zum JGG)	<i>Guidelines (on the JGG)</i>
<b>Rn.</b>	Randnummer	<i>section/note number</i>
<b>RStGB</b>	Reichsstrafgesetzbuch	<i>Imperial Criminal Code</i>
<b>SGB</b>	Sozialgesetzbuch	<i>Social Code</i>
<b>StGB</b>	Strafgesetzbuch	<i>Criminal Code</i>
<b>StGB-DDR</b>	Strafgesetzbuch der Deutschen Demokratischen Republik	<i>Criminal Code of the German Democratic Republic</i>
<b>StPO</b>	Strafprozessordnung	<i>Code of Criminal Procedure</i>

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Perth, Western Australia  
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# Introduction

Do children in England develop more quickly than their counterparts in Germany? The difference in the age levels and provisions concerning the criminal responsibility of children and young persons in England and Germany may give this impression. In England a child under the age of ten is irrebuttably presumed criminally incapable. Until 1998 a child aged ten but not yet fourteen was also presumed to be *doli incapax*, that is incapable of forming a guilty mind. This presumption could be rebutted if it were proven that the child had understood that what he or she<sup>1</sup> was doing was seriously wrong. The rebuttable presumption of *doli incapax* was, however, abolished by the *Crime and Disorder Act 1998* which means that in England children are now regarded as fully criminally responsible from the age of ten. In contrast, in Germany below the age of fourteen a child is irrebuttably presumed criminally incapable and cannot be dealt with by the criminal system at all. Between the ages of fourteen and eighteen a young person can only be convicted of a criminal offence if it is proven that she was criminally responsible at the time of the act.

English and German law have strikingly different age limits of criminal responsibility and requirements for establishing whether the youth was criminally responsible. The removal of the presumption of *doli incapax* in England in 1998 (following its abolition and reinstatement in the case of *C v DPP*)<sup>2</sup> widens these differences and has been the spur for this work. The basic question which arises from the change in England is whether there really is no longer a need for an individual assessment of the criminal responsibility of children. If it is found that there is still a need the issue arises of how such a test of criminal responsibility could be best formulated. These questions will be examined on the basis of an exploration of the provisions in England and Germany leading to a comparative analysis and reform suggestions. Germany has been chosen for comparison for a number of reasons: As early as 1923 it enacted a separate *Youth Court Act* independent of the general *Criminal Code*. Perhaps as a result of this it has also developed a substantive field of youth criminal law aside from dealing with the issues concerning youth crime in the field of criminology or other social sciences.

The structure of parts I and II is similar. They each start with an examination of how the age levels of, and tests for, criminal responsibility historically developed in each country. This will involve looking at when the age levels of criminal responsibility became fixed and upon what basis this occurred. There will also necessarily be an examination of the development of the systems for dealing with young offenders in each country and how this affected the

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<sup>1</sup> In the following to avoid the clumsiness of 'he or she' the masculine and feminine form will be used in alternate chapters, except when referring to specific examples or citations.

<sup>2</sup> [1995] 1 Cr App R 118 (DC): abolition; [1995] 2 All ER 43 (HL): reinstatement.

provisions concerning criminal responsibility. Following the history, the law in England until 1998 and the present law in Germany concerning the age levels and proof of criminal responsibility will be discussed along with an analysis of the factors taken to establish criminal responsibility. The criticisms of these laws in each country will also be examined. This will reveal why the presumption of *doli incapax* was abolished in England and what reform suggestions are made in Germany.

In the final part of this work, the material discovered by examining each country will be evaluated and compared in order to address the question of whether there really is no longer a need for an individual assessment of whether the young are criminally responsible before they can be dealt with in the criminal justice system. This will involve analysing the historical reasons for the development of the tests, whether these still hold today and what factors speak for and against the necessity of proof that the young offender was criminally responsible. Examining the German situation together with the situation in England will allow a better evaluation of recent changes in England. Comparison will also allow a picture to be gained of what similarities and differences there are in each country and to what degree legal differences are balanced out by actual practice. On this basis, a new approach will be recommended primarily for England but consideration could equally be given to adopting this proposal in Germany.

**PART I**  
**ENGLAND**





## Chapter 1

# Historical Development of the Criminal Liability of the Young

Concern for the correct way of dealing with the young who are accused of committing criminal acts is not new. Throughout history, consideration has been given as to whether, on what basis and to what degree children should be punished in the same way as adults. An examination of the historical evolvement of the special provisions concerning the criminal responsibility of children will reveal how it came about that there was felt to be a need for an individual assessment of the criminal capacity of the young and how this ability was assessed. It will also reveal how the purpose of the criminal law has changed especially in relation to the young and what effect such changes have had on the provisions of the criminal law dealing with the young. Against this background a better analysis can be undertaken as to whether there really is no longer a need for an individual assessment of the child's criminal responsibility as a precondition to dealing with him in the criminal justice system.

### Ancient Law

Special concern for the treatment of young offenders can be found as early as ancient Anglo-Saxon law. For instance, the *Laws of King Ine* (688 AD – 725 AD) state that a boy of ten could be privy to theft,<sup>1</sup> which suggests that below this age he could not be found guilty of theft. Similarly, the *Laws of King Aethelstan* (925 – 935 AD) provide that a thief caught stealing could not be spared punishment if above the age of twelve and the value of the stolen item was over eight pence.<sup>2</sup> Blackstone takes this to mean that “[b]y the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first understanding might open”.<sup>3</sup> However, this provision merely appears to have meant that until the age of twelve a child should not be subject to full punishment. Being under this age was not an absolute protection, as Blackstone seems to suggest, because if the offender defended himself or attempted to flee then he was not to be spared punishment.<sup>4</sup> This makes clear that young age was not regarded as a defence, but

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<sup>1</sup> *Laws of King Ine* 7.2 reproduced in Sanders (1970), 3.

<sup>2</sup> *Laws of King Aethelstan (Council of Greatanlea)* reproduced in Sanders (1970), 3.

<sup>3</sup> Blackstone (1769), IV 23.

<sup>4</sup> *Laws of King Aethelstan (Council of Greatanlea)* reproduced in Sanders (1970), 3.