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Symposium: Justice for the Child*

From Cook County to Pretoria: A Long Walk to Justice for Children

Dr. Ann Skelton**

I. INTRODUCTION

¶1 This Article begins by recording the history of the development of juvenile justice in the United States and explores the extent to which that system influenced South Africa's child justice system. The Article argues that because South Africa never fully embraced a separate juvenile justice model children were subjected to the mainstream criminal justice system in South Africa during the whole of the twentieth century.¹ The end of apartheid, however, created opportunities for transformation of the law. This Article explains why, at that time, the United States was not setting a positive example for reformers to follow. Finally, this article explores more positive developments in both countries since 2005, particularly in relation to sentencing children for serious crimes.

II. EARLY CHILD JUSTICE REFORM

¶2 Sociologist Ellen Key, writing at the turn of the century, predicted that the twentieth century would be the "century of the child."² During the preceding century, welfare-oriented individuals and organizations had founded reformatories and industrial schools as alternatives to prison or deportation for children who had committed crimes.³ By 1867, sixty-four reformatories had been established in England, Scotland, and Wales. During the same period, seventy-nine industrial schools had been created.⁴ In 1867, New Zealand passed the Neglected and Criminal Children's Act, empowering provincial authorities to found industrial schools.⁵ Massachusetts had developed a probation

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¹ In many respects children were treated like smaller versions of adult offenders, with some special provisions relating to privacy, the possibility of referral to the care system, the recognition of youth as a mitigating factor in sentencing, and some special sentencing provisions.

² ELLEN KEY, *THE CENTURY OF THE CHILD* 45 (1909).

³ See BARRY C. FELD, *BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT* 51 (1999) (describing these early reforms as important because, although they were later criticized for over-reliance on institutionalization, the reformers insisted on the separation of child and adult offenders within those institutions, recognized the inter-connectedness of delinquency and neglect and stressed the responsibility of the state towards its children).

⁴ JAMES MIDGLEY, *CHILDREN ON TRIAL: A STUDY OF JUVENILE JUSTICE* 16 (1975).

⁵ *Id.* at 19.

system, and by 1891, the state required court-employed probation officers to be appointed in criminal cases involving children.⁶

¶3 The people behind these reforms were known as “child savers,” and as the twentieth century drew to a close, two of them, Lucy Flower and Julia Lathrop, worked tirelessly to introduce the first juvenile court in the world in Cook County, Illinois.⁷ It is now well understood that the central idea of this movement, embodied in the Illinois Juvenile Court Act of 1899, was that neglected, dependent, and delinquent children should all be dealt with in a separate children’s court: “A sympathetic judge could now use his discretion to apply individualized treatments to rehabilitate children, instead of punish them.”⁸

¶4 The first ideas about a separate justice system for children were thus firmly rooted in a welfarist approach,⁹ the rise of which coincided with the rise of behavioral sciences such as social work and psychology.¹⁰ A related transatlantic social movement in the 1880s and 1890s was concerned about the effect of market processes and industrialization on the social lives of urban populations.¹¹ Its advocates viewed individual responsibility as an incomplete explanation for the widespread disorder in modern cities.¹² They questioned the conception of free will on which the liberal state was being built, de-emphasized individual choice, and re-described crime and poverty as environmental problems, the root causes of which needed to be understood and resolved.¹³ Thus it is often said that the welfarist approach focused on the child’s needs rather than on the child’s deeds.¹⁴ Welfarism promoted the idea that children should be separated from adults, both in court and in institutions, and that they should be treated according to different procedures from those used for adults. The movement relied heavily on the involvement of social workers and probation officers.

⁶ David Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of the Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42, 47 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002).

⁷ The first juvenile court was inspired by two women, and the driving forces behind it in its early years were two other women, Jane Addams and Florence Kelley. One of the first probation officers at the court was also a woman, Ida Barnett Wells. Its first woman judge, Mary Bartelme, adjudicated girls cases from 1913 and was appointed as the presiding judge for the Chicago Juvenile Court in the 1920s. See Bernardine Dohrn, *All Ellas: Girls Locked Up*, 30 *FEMINIST STUD.* 302 (2004).

⁸ Tanenhaus, *supra* note 6, at 42.

⁹ Although the Chicago model, also known as the “Cook County” model, is considered the most influential in juvenile justice reform, it is clear that welfarist thinking was already underway in many parts of the world. Midgley points out that

[t]he Norwegian Act of 1896 which established that country’s child welfare panels was drafted in 1892. Johnson argued that were it not for certain administrative delays, Canada would have created a juvenile court before Cook County. South Australia established children’s courts by ministerial order in 1889 and placed these on a legislative footing in 1895.

MIDGLEY, *supra* note 4, at 19 (citing A. Johnson, *A Report on the Juvenile Court of Canada*, 21 *AM. J. CORRECTIONS* (1959)).

¹⁰ Julia Sloth-Nielsen, *The Role of International Human Rights Law in the Development of South Africa’s Legislation on Juvenile Justice* 54 (2001) (Unpublished LLD thesis, University of the Western Cape) (on file with author).

¹¹ DAVID TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 5 (2004).

¹² *Id.*

¹³ See DAVID GARLAND, *PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES* 27–32 (1985).

¹⁴ JOHN MUNCIE, *YOUTH AND CRIME* 257 (1999).

¶5 A legal concept underpinning the welfarist approach was that of *parens patriae*, an English legal doctrine that allowed the monarch to protect vulnerable parties, usually in issues of inheritance or guardianship.¹⁵ The doctrine was applied more broadly in the United States, allowing for the state to act as a “kind and just parent.” The doctrine focused on the welfare of the child rather than on the rights of either the child or the parents and made rehabilitation and treatment the goals of the system.¹⁶ The first annual report of the Juvenile Court of Cook County,¹⁷ published in June 1900, proudly announced:

The law, this Court, this idea of a separate court to administer justice like a kind and just parent ought to treat his children has gone beyond the experimental stage and attracted the attention of the entire world.¹⁸

III. THE JUVENILE COURTS MODEL PROLIFERATES

¶6 The essential features of the juvenile court were not all included in the initial law that established the Cook County’s Juvenile Court.¹⁹ Legal historian David Tanenhaus explains how the system developed and evolved during the early twentieth century: “Juvenile courts, including Chicago’s model court, were not immaculate constructions; they were built over time.”²⁰ By 1923, the idea of a juvenile court, and what distinguished it from an adult court, was well entrenched.

¶7 The new juvenile justice courts model spread throughout the United States²¹ and was also influential in other parts of the world.²² Canada was one of the first countries to adopt a similarly welfarist approach. The child-saving influence was evident in the Youthful Offenders Act of 1894, which changed the country’s tendency to treat child offenders in the same manner as adults.²³ Canada also introduced a measure to allow the state to intervene when families were deemed to have failed to raise their children correctly. The essence of the legislation was that a child should not be punished in the same manner as adult offenders but rather be treated as a “misdirected and misguided

¹⁵ Sloth-Nielsen, *supra* note 10, at 56 n.21.

¹⁶ JEFFREY SHOOK & ROSEMARY SARRI, INSTITUTE FOR SOCIAL RESEARCH, HUMAN RIGHTS AND JUVENILE JUSTICE IN THE UNITED STATES 11 (2003), available at http://www.aclu.org/hrc/JuvenileJustice_Sarri.pdf.

¹⁷ Cook County is the area in which the Chicago court operated.

¹⁸ WILLIAM AYERS, A KIND AND JUST PARENT: THE CHILDREN OF THE JUVENILE COURT v (1997).

¹⁹ Illinois Juvenile Court Act of 1899, 1899 ILL. LAWS 131 (1899).

²⁰ Tanenhaus, *supra* note 6, at 43 (“Most of the features that later became the hallmarks of progressive juvenile justice—private hearings, confidential records, the complaint system, detention homes, and probation officers—were either omitted entirely from the initial law or were included without any provisions for public funding.”).

²¹ *See id.* at 45 (“By 1925 . . . every state except Maine and Wyoming at least had a juvenile court law, and juvenile courts were operating in all American cities with more than 100,000 people.”).

²² Bernardine Dohrn, *Foreword*, in DAVID TANENHAUS, JUVENILE JUSTICE IN THE MAKING, *supra* note 11, at vii, viii (2004) (“The invention of a distinctive court for children, a legal polity described by Professor Francis Allen as ‘the greatest legal institution ever invented in the United States’ spread like a prairie fire across the U.S. and throughout the world.”); *see also* Julia Sloth-Nielsen, *supra* note 10, at 56–57 (“The Illinois court was followed rapidly by other states in the USA setting up their own separate juvenile courts, and thereafter by statutes establishing juvenile justice systems in a number of other countries. In England and Canada, for instance the juvenile court dates from 1908.”).

²³ An Act Respecting Arrest, Trial and Imprisonment of Youthful Offenders, S.C. 1894, c. 58 (Can.).

child.”²⁴ In 1908, Canada passed the Juvenile Delinquents Act,²⁵ which set out guidelines for juvenile courts and “encompassed a number of key philosophical elements that strongly reflected its treatment philosophy . . . widely referred to as *parens patriae*.”²⁶ The system was clearly welfarist in its approach, with wide discretionary powers for officials and indeterminate sentencing powers for judges.

According to internationally recognized children’s rights expert, Jaap Doek, [t]he introduction of juvenile courts in Europe was clearly connected to developments in the United States,²⁷ but the development of different countries’ systems has since diverged with the French system remaining the closest to a welfare-based approach.²⁸ Although the United Kingdom established separate juvenile courts in 1908, British criminal justice scholar Anthony Bottoms explains that the model was not fully welfarist.²⁹ He describes the system as having been a “modified criminal court” model³⁰ until the 1960s, when Scotland³¹ and then England and Wales introduced welfare-oriented models.³² The model in England and Wales has undergone many changes since then,³³ while the

²⁴ D. OWEN CARRIGAN, *JUVENILE DELINQUENCY IN CANADA: A HISTORY* 124 (1998).

²⁵ An Act Respecting Juvenile Delinquents, S.C. 1908, c. 40 (Can.).

²⁶ John Winterdyk, *Juvenile Justice and Young Offenders: An Overview of Canada*, in *JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES* 61, 64 (2002).

²⁷ Jaap Doek, *Modern Juvenile Justice in Europe*, in *A CENTURY OF JUVENILE JUSTICE* 505 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002); see also *id.* at 509–11 (noting that juvenile courts in Germany and France, established in 1908 and 1912 respectively, were influenced by the Chicago model).

²⁸ *Id.* at 515.

²⁹ See generally Anthony Bottoms, *The Divergent Development of Juvenile Justice Policy and Practice in England and Scotland*, in *A CENTURY OF JUVENILE JUSTICE* 413 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002); see also Loraine Gelsthorpe & Vicky Kemp, *Comparative Juvenile Justice: England and Wales*, in *JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES* 131 (Winterdyk ed., 2002) (observing that from the outset the “welfarism” approach was tempered with a crime-control approach).

³⁰ Bottoms, *supra* note 29, at 415. See ADAM CRAWFORD & TIM NEWBURN, *YOUTH OFFENDING AND RESTORATIVE JUSTICE: IMPLEMENTING REFORM IN YOUTH JUSTICE* 6–8 (2003), for a slightly different view. Referring to the period between the two world wars, the authors observed:

At this period the focus remained firmly upon the ‘welfare’ of young offenders and ‘treatment’ necessary to reclaim or reform them. The subsequent Children and Young Persons Act 1933 reaffirmed both the principle of a separate juvenile justice system and the assumption that the system should work in a way that promoted the welfare of young people.

Id.

³¹ Scotland’s famous “Children’s Hearing System” was introduced by the Social Work (Scotland) Act 1968 following the report of the Kilbrandon Committee. Lesley McAra, *The Scottish Juvenile Justice System: Policy and Practice*, in *JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES*, *supra* note 29, at 441, 446 (“The overall aim of the new juvenile justice system was to deal with the child’s needs, with the best interest of the child to be paramount in decision-making.”).

³² CRAWFORD & NEWBURN, *supra* note 30, at 7 (“The ‘high point’ of welfarism in juvenile justice was reached in the late 1960s.”).

³³ See JOHN PITTS, *THE POLITICS OF JUVENILE CRIME* 110 (1988). Pitts observes that the process was not typified by each generation of reformers learning from previous generations, but rather by waves of popularization of new ideas, many inspired by political agendas. *Id.*

Scottish children's hearing system remains one of the few welfarist models of child justice still operating in the world today.³⁴

¶9 Welfarism was also the basis of the early models of child justice in New Zealand and Australia. According to children's rights author Julia Sloth-Nielsen, the Australian system bore many hallmarks of welfarism, including judicial powers over those children deemed to be "uncontrollable," the power of indeterminate sentencing, and a system characterized by a more informal atmosphere and focused on the rehabilitative ideal.³⁵ New Zealand formally established a separate juvenile court system in 1925, "founded on the principle that young offenders were victims of their environment and in need of help rather than punishment."³⁶

IV. THE INFLUENCE OF THE CHILD SAVING MOVEMENT IN SOUTH AFRICA

¶10 Children's rights champion Bernardine Dohrn has described this widespread proliferation of the Cook County model as a "prairie fire."³⁷ However, the prairie fire did not develop into a "veld fire" in South Africa. Although the influence of the child saving movement can clearly be seen in South Africa during the end of the nineteenth and the early twentieth century, a separate, welfarist model was never adopted.

¶11 The South African Supreme Court of Appeal has noted that "[h]istorically the South African justice system has never had a separate, self-contained and compartmentalised system for dealing with child offenders. Our justice system has generally treated child offenders as smaller versions of adult offenders."³⁸ Indeed, separate juvenile courts were not established in South Africa and children charged with crimes continued to appear in the adult criminal courts, although their privacy was protected through in-camera provisions and a ban on publishing their names.³⁹ The child-saving movement exerted its influence on the system from the last two decades of the 19th century to the 1930s. The South African law has historically treated children in the criminal justice system differently from adults in a number of ways. Age has long been a mitigating factor in relation to criminal responsibility⁴⁰ and to sentencing.⁴¹ South Africa introduced these different procedures and options relating to children incrementally, some through the development of the common law, and others through various

³⁴ See STEWART ASQUITH, CHILDREN AND JUSTICE: DECISION MAKING IN CHILDREN'S HEARINGS AND JUVENILE COURTS 12–21 (1983); ANDREW LOCKYER & FREDERICK STONE, JUVENILE JUSTICE IN SCOTLAND: TWENTY FIVE YEARS OF THE WELFARE APPROACH 238 (1998). But see A. Cleland, Under Threat: Scotland's Unique Welfare-Based Forum for Decisions About Children (Mar. 20, 2005) (unpublished manuscript), <http://www.childjustice.org/docs/cleland2005.pdf> (raising concerns that the welfarist approach has been diluted by the introduction of the Antisocial Behaviour (Scotland) Act 2004).

³⁵ Sloth-Nielsen, *supra* note 10, at 63.

³⁶ Emily Watt, *A History of Youth Justice in New Zealand 2* (Dep't of the Courts, Research Paper 2003), available at <http://www2.justice.govt.nz/youth/about-youth/overview.asp>.

³⁷ Dohrn, *supra* note 22, at viii.

³⁸ S v B 2006 (1) SACR 311 (S. Afr.).

³⁹ Ann Skelton, *Children, Young Persons and the Criminal Procedure*, in THE LAW OF CHILDREN AND YOUNG PERSONS IN SOUTH AFRICA 161, 172 (J.A. Robinson ed., 1997).

⁴⁰ The relevance of age in relation to criminal capacity and sentencing goes back to Roman law. Dawid De Villiers, *Die Straftogtelike Verantwoordelikheid van Kinders 276–77* (LLD thesis 1988, University of Pretoria) (on file with Tambo Library, University of Pretoria).

⁴¹ S.S. TERBLANCHE, THE GUIDE TO SENTENCING IN SOUTH AFRICA 153 (1999).

uncoordinated pieces of legislation representing waves of reformist thinking that created ad hoc improvements for children.⁴²

¶12 There is probably no better evidence that the child-saving movement drifted across the Atlantic to South Africa than the establishment of reform schools, and later, industrial schools. William Porter, the Attorney General of the Cape Colony, left 20,000 pounds in his will for the establishment of “a reformatory for juvenile offenders.”⁴³ This led to The Reformatory Institutions Act in 1879 and the subsequent establishment of Porter Reformatory in Cape Town.⁴⁴ Porter, along with other social reformers in England and America at that time, strongly believed that character was shaped by environmental influences. The Porter Reformatory was modeled on the British reformatories of Redhill and Parkhurst,⁴⁵ and it enforced a strict regime of work and discipline. Apprenticeship was an integral part of the operation of the institution, providing domestic and agricultural labor for local farmers.⁴⁶ Initially, Porter Reformatory was for all races,⁴⁷ though by 1909 the dormitories were segregated.⁴⁸ In the same year, Houtpoort Reformatory was established at Heidelberg in the Transvaal.

¶13 Industrial schools developed in a different manner. These facilities were not developed as places of detention or correction, but rather to provide state-controlled, practical, industrial education in response to a shift from an agrarian to an industrial economy.⁴⁹ The first school was established by the colonial government in Cape Town in 1894, and another at Uitenhage in 1895. By 1902 there were nine industrial schools in the Cape Colony. In the rest of the country, industrial schools were established after the South African war.⁵⁰ They were aimed more specifically at “poor whites.” Although the facilities were supposed to be for children in need of care, the early institutions became “a half-way house between the school and the reformatory.”⁵¹

¶14 Criminologist James Midgley records that in 1897 the report of the Chief of Prisons caused public concern when it was revealed that considerable numbers of children were

⁴² See, e.g., First Offenders Act of 1906 (S. Afr.); Prisons and Reformatories Act 13 of 1911 (S. Afr.); Children’s Protection Act 25 of 1913 (S. Afr.); Children’s Protection Act 25 of 1917 (S. Afr.); Criminal Procedure and Evidence Act 31 of 1917 (S. Afr.); Children’s Act of 1937 (S. Afr.).

⁴³ J.A. SAFFY, *A Historical Perspective of the Youthful Offender*, in CHILD AND YOUTH MISBEHAVIOUR IN SOUTH AFRICA 18, 18 (Christiaan Bezuidenhout & Sandra Joubert eds., 2003).

⁴⁴ *Id.* Porter was for boys only. There was no reformatory for girls, and it was not until 1897 that a dormitory was set aside in the Cape Town female prison for seven girls between the ages of thirteen and twenty-one years. *Id.*

⁴⁵ *Id.* Reformatories in England were established to train convicted youths in agriculture, who would mostly be sent to the colonies.

⁴⁶ Linda Chisolm, *Reformatories and Industrial Schools in South Africa: A study in Class, Colour and Gender, 1882–1939* (1989) (unpublished Ph.D. thesis, University of Witwatersrand) (on file with University of Witwatersrand library). The educational programme in the early years at Porter was minimal, and the majority of children had not previously attended school. *Id.* at 38.

⁴⁷ Sloth-Nielsen, *supra* note 10, at 337 n.12 (observing that Porter Reformatory was intended for the detention and rehabilitation of children of all races under the age of sixteen years).

⁴⁸ Chisolm, *supra* note 46, at 47.

⁴⁹ *Id.* at 55.

⁵⁰ Also called the Anglo Boer War, 1899–1902.

⁵¹ H.J. Simons, *Crime and Punishment with Reference to the Native Population of South Africa* 31 (1931) (unpublished M.A. dissertation, University of South Africa) (on file with the University of Witwatersrand library).

being detained in prisons.⁵² The Boer Republic of the Transvaal government decided to establish industrial schools in that region, but the plans were derailed due to the outbreak of the South African war. After the war, the matter was taken up by the British Authorities, and in 1907 the first industrial school was established at Standerton, followed by a second one near Heidelberg in 1909.⁵³

¶15 In 1934, the South African government appointed a committee to consider whether it was desirable to dispense with the criminal procedure as applied to juvenile delinquents, and instead to deal with them “paternally, on the lines of the procedure adopted in administering the Children’s Act.”⁵⁴ The committee’s report indicates that they were fully aware of developments in the United States and other countries, but ultimately they decided not to take the welfarist route.⁵⁵ Instead, they drafted the Young Offenders Bill, which framed a specialized criminal justice process for children. This bill never passed, so children continued to be taken through the mainstream criminal justice process, with a few special measures giving recognition to their youthfulness. These measures include closed court proceedings, assistance from parents or guardians, and additional sentencing measures such as referral to a reform school.⁵⁶

¶16 In 1948 the National Party came to power, and the building blocks for apartheid were put in place. The decades that followed were a bleak time for child offenders, with few positive developments in the law or practice. Corporal punishment and imprisonment continued to be used throughout these years.⁵⁷

V. THE 1990S

¶17 South Africa only emerged from apartheid in the early 1990s. By that time, many countries were in the grip of a “law and order” approach, with the United States once again leading the way. However, the United States was not then providing any example that a new, developing democracy like South Africa would have wanted to follow. The situation in the United States at that time has been described by a number of writers as an “assault”⁵⁸ or “attack on the juvenile justice system,”⁵⁹ a “threat to juvenile justice,”⁶⁰ and a “crackdown”⁶¹ on child offenders.⁶²

⁵² MIDGELY, *supra* note 4, at 53–54.

⁵³ *Id.* Initially for both girls and boys, the Standerton industrial school was confined to girls after the school at Heidelberg was developed. *Id.*

⁵⁴ UNITED GOVERNMENT, REPORT OF THE INTER-DEPARTMENTAL COMMITTEE ON DESTITUTE, NEGLECTED, MALADJUSTED OR DELINQUENT CHILDREN AND YOUNG PERSONS 1934–1937 38 (1937).

⁵⁵ *Id.* at 13.

⁵⁶ Ann Skelton, *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (2005) (unpublished LLD thesis, University of Pretoria) (on file with author).

⁵⁷ DON PINNOCK, *GANGS, RITUALS AND RIGHTS OF PASSAGE* (1997) (“Until lashings as a court imposed sentence were abolished as a result of a Constitutional Court decision in 1995, between 32,000 and 35,000 young people were beaten annually through the 1990s.”).

⁵⁸ Penelope Lemov, *The Assault on Juvenile Justice*, 8 GOVERNING 26 (1994); Sloth-Nielsen, *supra* note 10, at 83; Franklin Zimring, *Diversion in the Jurisprudence of Juvenile Courts*, in *A CENTURY OF JUVENILE JUSTICE* 155 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002).

⁵⁹ Gordon Bazemore, *Three Paradigms for Juvenile Justice*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 37–68 (B. Galaway & J. Hudson eds., 1996); Gordon Bazemore & Mark Umbreit,

¶18 One line of fire was directed at the institution of the juvenile court itself. American juvenile justice expert Franklin E. Zimring argued that the juvenile court has been remarkably resilient.⁶³ The irony of the 1990s is that:

“[T]he juvenile courts were under constant assault not because they had failed in their youth serving mission, but because they had succeeded in protecting their clientele from the new orthodoxy in crime control.”⁶⁴

¶19 Zimring wrote that the enormous political pressure on the juvenile courts in the United States during the 1990s derived from the fact that the authorities wanted the expansion of imprisonment experienced in the adult criminal justice system to extend to the juvenile justice sphere.⁶⁵ These forces did not succeed in dismantling the juvenile court model, but the transfer of children out of the juvenile court to adult court nevertheless effectively removed many children from protection.⁶⁶

¶20 The most disconcerting feature of the law and order agenda for children in the U.S. criminal justice system has been the tendency to include increasing numbers of children (at increasingly younger ages, down to 13 in some states) into the adult criminal justice system. This is often referred to as “waiver,” meaning waiver of the jurisdiction of the juvenile court. Many of these waiver provisions give increased power to prosecutors who have the discretion to make the transfer,⁶⁷ while other systems rely on judicial waiver. Many waiver systems are offense-driven; although waiver was originally aimed at dealing with the most serious crimes, such as murder, the tendency has been to add to the list of offenses that lead to children being transferred to the adult system or to being eligible for tough sentencing laws on less serious offenses. Governance commentator Penelope Lemov described the phenomenon thus:

Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime, 41 CRIME AND DELINQUENCY 296, 296–316 (1995).

⁶⁰ Margaret K. Rosenheim, *The Modern American Juvenile Court*, in A CENTURY OF JUVENILE JUSTICE 357 (Margaret K. Rosenheim, Franklin E. Zimring, David S. Tanenhaus & Bernardine Dohrn eds., 2002).

⁶¹ Mark Stafford & Tracey Kyckelhahn, *Delinquency and Juvenile Justice in the United States*, in JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES 529–56 (John Winterdyk ed., 2002).

⁶² An extreme example of the rhetoric of this attack is typified by the often quoted tirade by Bennet et al.:

America is now home to thickening ranks of ‘super-predators’—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and created serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.

WILLIAM BENNET ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS 27 (1996).

⁶³ Lemov, *supra* note 58, at 154–55.

⁶⁴ *Id.* at 154.

⁶⁵ *Id.*

⁶⁶ See generally JEFFREY FAGAN & FRANKLIN ZIMRING, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURTS (2000).

⁶⁷ Rosenheim, *supra* note 60, at 356–57 (commenting that despite the fact that almost all states have passed waiver laws the majority of children are still dealt with by the juvenile courts). However, she cautions that “[t]here is strong political pressure to make the juvenile court more punishment-centred than in early eras and to replace the power of judges and probation staff with greater prosecutor hegemony.” *Id.*

“No state begins with the explicit intention of dragging non-violent teenagers into the net of adult court and sentencing. Rather, a kind of bracket creep takes place. The first round of legislation carefully targets youths who commit violent crimes. In the next round, as public pressure builds, lesser categories of crime are added.”⁶⁸

¶21 Within a century, the system in the United States had moved radically away from one in which a focus on the “needs” of the child eclipsed the “deeds” of the child. By the end of the 1990s, deeds had become all important, because the system was offense-driven, with the type of offense determining whether the child must be tried as a child or as an adult.⁶⁹ As leading juvenile justice scholar Barry Feld observed, this approach does not properly recognize differences in development, maturity, capacity, and culpability between children and adults.⁷⁰

¶22 A deeply worrying result of children being referred to adult court is that minimum sentencing laws initially aimed at adult offenders thus become applicable to children, rendering them vulnerable to extremely long sentences, such as life imprisonment. In 2005, fifteen-year-old Christopher Pittman was sentenced to thirty years for the murder of his grandparents in Charleston, South Carolina.⁷¹ He was twelve years old when the offense was committed.⁷² He served the first two years of his sentence in a prison for juveniles before being transferred to an adult penitentiary at the age of seventeen.⁷³ As noted by legal academic Johan Van der Vyver, the institution of minimum sentences for juvenile offenders places the American criminal justice system at odds with international standards.⁷⁴ Around the same time as Pittman’s conviction, a twelve-year-old girl was

⁶⁸ Lemov, *supra* note 58, at 28. The author comments further that in Florida, which first began to lower the age at which children could be tried as adults, the biggest increase in children being transferred to adult status has been for non-violent drug offences. *Id.* Something as trivial as possession of alcohol can be waived into adult court. *See id.*

⁶⁹ PATRICK GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 17 (1998) (reporting that in addition to the offence-based system, by 1997, thirty-one states had “once an adult, always an adult” exclusion provisions which require that once a child had been tried in adult court, all subsequent cases involving him would be tried by the adult court).

⁷⁰ Barry Feld, *Rehabilitation, Retribution and Restorative Justice: Alternative Conceptions of Juvenile Justice*, in RESTORATIVE JUSTICE FOR JUVENILES: REPAIRING THE HARM OF YOUTH CRIME 17, 59 (Gordon Bazemore & Lode Walgrave eds., 1999).

⁷¹ State v. Pittman, 647 S.E.2d 144, 151 (S.C. 2007).

⁷² Pitmann’s lawyers raised the defense that he was taking an anti-depressant (Zoloft) at the time of the murder, but the jury dismissed this, and the child was convicted of two counts of murder on February 16, 2005. *Id.* at 152. Imprisonment for a period of thirty years is the minimum sentence for murder in the state of South Carolina, and it applies to children as well as adults. *See* Meg Kinnard, *New Trial Granted in Zoloft Case Due to Defense Team Errors*, ASSOCIATED PRESS, July 28, 2010, available at www.law.com/jsp/article.jsp?id=1202463958848.

⁷³ However, on July 27, 2010, the Court of Common Pleas for the Sixth Judicial Circuit granted Pittman post conviction relief based on the fact that his Counsel was constitutionally ineffective for failing to pursue a plea agreement where Pittman could have pled guilty to voluntary manslaughter and potentially received a lighter sentence. Thus, Pittman’s convictions have been vacated, and a new trial ordered. Order granting Appellant’s Petition for Post-Conviction Relief, Pittman v. State, No. 07-CP.12-00444 (Ct. Comm. Pl. 2010).

⁷⁴ Johan D. Van der Vyver, *International Standards for the Promotion and Protection of Children’s Rights: American and South African Dimensions*, 15 BUFF. HUM. RTS. L. REV. 81, 84 (2009).

also convicted of her grandmother's murder in South Africa in the case of *DPP KZN v. P*.⁷⁵ The Supreme Court of Appeal sentenced her to seven years of imprisonment, which was suspended for five years, plus correctional supervision under the terms of Section 276(1)(h) of the Criminal Procedure Act 51 of 1977 for a period of thirty-six months, during which time she was put under house arrest in the care and custody of her mother.⁷⁶ Unlike the U.S. case of *Pittman*, the South African court, in light of the best interests of the child criterion, placed emphasis on rehabilitation and the child's reintegration into society.⁷⁷ Thus, more than anything else, the girl's age was the main factor of consideration for not committing her to detention. Under the South African Constitution, a child has the right not to be detained except as a matter of last resort, and must be detained only for the shortest appropriate period of time.⁷⁸

VI. POSITIVE DEVELOPMENTS SINCE 2005

¶23

Recently, there have been a few optimistic notes in the United States sentencing arena with regard to young offenders. Until 2005, the United States was one of the few countries in the world that retained the death penalty for children on its statute books and continued to execute offenders who were below the age of 18 years at the commission of their offense. In 2005, the Supreme Court was presented with an opportunity to rule on the constitutionality of the death penalty for juveniles in the case of Christopher Simmons, who was on death row for a murder that he committed when he was seventeen.⁷⁹ On March 1, 2005, the United States Supreme Court, by a vote of five to four, held that it was unconstitutional to execute offenders who were under the age of eighteen at the time of the commission of the crime.⁸⁰ Technically, the Court made its decision on the basis of the prohibition on "cruel and unusual punishment."⁸¹ First, the Court said that in deciding whether a punishment is cruel and unusual, it is necessary to consider public views, as reflected in "evolving standards of decency," and that the emerging consensus in the United States was that the death penalty should not be applicable to juveniles. Second, the Court argued that the sentence of death for a juvenile is disproportionately severe. Third, the Court found that virtually all other countries in the world have abolished capital punishment for persons under the age of eighteen. In this regard the Court also considered international sentiment against the death penalty for children.⁸² This ruling affected seventy-two young offenders in twelve states.⁸³ After the

⁷⁵ *Director of Public Prosecutions Kwa Zulu Natal v. P* 2006 (3) SA 515 (CC) (S. Afr.).

⁷⁶ *Id.* at para. 28.

⁷⁷ Van der Vyver, *supra* note 74, at 82.

⁷⁸ S. AFR. CONST., 1996 § 28(1)(g).

⁷⁹ It was not the Supreme Court's first opportunity to consider this issue. In 1989, the Court upheld the constitutionality of the death penalty for juveniles in *Stanford v Kentucky*, 492 U.S. 361, 380 (1989).

⁸⁰ *Roper v Simmons*, 543 U.S. 551, 567 (2005).

⁸¹ Dirk van Zyl Smit, *The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States of America. What Next?*, 2005 HUMAN. RTS. L. REV. 393, 394 (2005), available at <http://hrlr.oxfordjournals.org/content/5/2/393.citation?related-urls=yes&legid=hrlr;5/2/393> (follow "Full Text (PDF)" hyperlink).

⁸² *Cf. id.* at 607–08 (Scalia, J., dissenting) (arguing that the law of the United States is fundamentally different from that of other countries, and therefore it was beyond his comprehension why the laws of other countries and international trends in the sentencing of children were considered at all).

ruling, however, they faced the penalty of life imprisonment without parole, which is also prohibited as a sentence for a child by the United Nations Convention on the Rights of the Child.⁸⁴

¶24 *Roper v. Simmons* was cited in a recent South African Constitutional Court case that dealt with the constitutionality of minimum sentences (including life imprisonment) for sixteen and seventeen-year-olds. The Criminal Law Amendment Act 105 of 1997 introduced minimum sentences.⁸⁵ When the Act was promulgated, it excluded all children below the age of sixteen from its operation. Sixteen and seventeen-year-olds were included in the ambit of the Act, but the procedure for them was different from the procedure for adults.⁸⁶

¶25 The courts debated the interpretation of the provisions relating to sixteen and seventeen-year olds.⁸⁷ The question of applicability of minimum sentences appeared to have been finally resolved by the Supreme Court of Appeal in *S v. B*, which held that minimum sentences do not apply to sixteen and seventeen-year-olds.⁸⁸ That case involved a seventeen-year-old boy who had been convicted of murder and sentenced to the minimum sentence of life imprisonment. His appeal against this sentence was upheld on the basis that, in the opinion of the Court, minimum sentences did not automatically apply to persons below the age of eighteen. Any sentencing court must have discretion when sentencing a child and should thus start with a “clean slate” when sentencing a child offender.⁸⁹ The Court found that minimum sentences do not accord with the principle of detention as a measure of last resort.⁹⁰ Following this case however, the Criminal Law (Sentencing) Amendment Act, Act 38 of 2007 was passed, which unambiguously applied minimum sentences to sixteen and seventeen-year-olds, a move that invited constitutional challenge.⁹¹

⁸³ *U. S. Supreme Court: Roper v. Simmons, No. 03-633*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/u-s-supreme-court-roper-v-simmons-no-03-633>. The USA is one of the only two remaining countries in the world that have not ratified the United Nations Convention on the Rights of the Child.

⁸⁴ United Nations Convention on the Rights of the Child, Ga Res. 44/25, at Art. 37(a) (Nov. 20, 1989) [hereinafter UNCRIC], available at <http://www2.ohchr.org/english/law/crc.htm> (“Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”).

⁸⁵ Criminal Law Amendment Act of 1997 (S. Afr.). Sections 51, 52 and 53 of the Criminal Law Amendment Act 105 of 1997, came into operation on May 1, 1998. The amendment was initially intended to be a short-term measure, but was further amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007 (S. Afr.).

⁸⁶ *Id.* at § 51(3)(b) (“If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.”).

⁸⁷ See, e.g., *Direkteur van Openbare Vervolgings, Transvaal v. Makwetsja* 2003 2 All SA 249 (S. Afr.); *S v. Nkosi* 2002 (1) SA 494 (S. Afr.); *S v S* 2001 (1) SACR 79 (W); *S v Blaauw* 2001 3 All SA 588 (CC) (S. Afr.); *S v Malgas* 2001 3 All SA 220 (S. Afr.); *S v N* 2000 (1) SACR 209 (W).

⁸⁸ *S v B* 2006 (1) SACR 311 (S. Afr.).

⁸⁹ *Id.* at para. 11.

⁹⁰ *Id.* at para. 22.

⁹¹ Ann Skelton, *Constitutional Protection of Children*, in *CHILD LAW IN SOUTH AFRICA* 288 (Trynie Boezaart ed., 2009).

¶26 That invitation was answered by the Centre for Child Law. In an application to the Constitutional Court, the Centre argued that the Constitution provides that children should not be detained except as a last resort and that a minimum sentence implies a first resort of imprisonment. The court held that the traditional aims of punishment for child offenders have to be reappraised in the light of international instruments. Any sentencing court must have discretion when sentencing a child, in order to give effect to the requirements of international law for individualization.⁹²

¶27 The Constitutional Court ruled that the Constitution prohibits minimum sentencing legislation from being applied to sixteen and seventeen-year-olds.⁹³ The court confirmed the order of constitutional invalidity handed down by the High Court and declared sections of the Criminal Law Amendment Act (as amended) invalid.⁹⁴ The majority of the Constitutional Court found that the minimum sentencing regime limits the discretion of sentencing officers by orienting them away from non-custodial options, by interfering with the individualization of sentences, and by giving rise to longer prison sentences. This breaches young offenders' rights in terms of section 28(1)(g), and the court found that no adequate justification had been provided for the limitation.⁹⁵

¶28 The Court went on to acknowledge that children can and do commit very serious crimes, and that the legislature has legitimate concerns about violent crimes committed by children under the age of eighteen.⁹⁶ The court pointed out that the Constitution does not prohibit Parliament from dealing effectively with such offenders: The fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary.⁹⁷ However, the Bill of Rights mitigates the circumstances in which such imprisonment can happen—it must be a last (not first or intermediate) resort, and it must be for the shortest appropriate period.⁹⁸

¶29 Further recent developments in both the United States and South Africa show gradual improvements in the law with regard to life imprisonment of children. In *Graham v. Florida*, the U.S. Supreme Court ruled by a 5-4 majority that sentencing juveniles to life without the possibility of parole for non-homicide cases is impermissible under the Eighth Amendment's cruel and unusual punishment clause.⁹⁹

¶30 In this case, Terrance Jamar Graham, the petitioner, committed armed burglary and attempted armed robbery at the age of sixteen, together with two other defendants. Within the discretion of the prosecutor, according to Florida laws, Graham was charged as an adult.¹⁰⁰ Graham entered into a plea agreement under which the Florida trial court placed him on three years probation and withheld adjudication of guilt. Less than six months into his probation, Graham participated in a home invasion robbery and was

⁹² CENTRE FOR CHILD LAW ANNUAL REPORT 2010 4–6, available at www.centreforchildlaw.com.

⁹³ Brief for National Institute for Crime Prevention and Reintegration of Offenders as Amicus Curiae Supporting Petitioners, *Centre for Child Law v. Minister of Justice and Constitutional Development and Others*, 2009 2 SACR 477 (CC) (S. Afr.).

⁹⁴ *Centre for Child Law v. Minister of Justice and Constitutional Development and Others*, JDR 1377 (T) (2008).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Graham v. Florida*, 130 S. Ct. 2011, 2018, 2030 (2011) was handed down on May 17, 2010. Justice Kennedy delivered the opinion of the Court. *Id.*

¹⁰⁰ FLA. STAT. § 985.227(1)(b) (2003) (renumbered at § 985.557(1)(b) (2007)).

arrested again. The trial court found that Graham had violated the terms of his probation by committing additional crimes. The court made an adjudication of guilt on Graham's earlier offenses and revoked his probation. The court sentenced him to the maximum penalty of life in prison without parole for the burglary.¹⁰¹ Thus, there was no possibility of release from prison except in the rare case of being granted executive clemency.

¶31 Graham challenged his sentence under the Eighth Amendment's cruel and unusual punishment clause, but his conviction was affirmed by the state's First District Court of Appeal.¹⁰² On appeal, the United States Supreme Court considered the sentencing practice of life without parole for juveniles who commit non-homicide offenses to be cruel and unusual. The Court based its decision on arguments that penal theories used to justify such punishments are inadequate, that juvenile offenders have limited culpability, and that the sentence in question was severe in any context.¹⁰³ Relying on such cases as *Roper v. Simmons*,¹⁰⁴ *Atkins v. Virginia*,¹⁰⁵ and *Kennedy v. Louisiana*,¹⁰⁶ the Court looked at categorical prohibitions against certain types of sentences for certain types of defendants, and held that because this case implicated a particular type of sentence as applied to an entire class of offenders who have committed a range of crimes, the appropriate analysis would be the categorical approach.¹⁰⁷ Under this approach, the Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice," so as to determine if a national consensus against the sentencing practice at issue exists.¹⁰⁸ Then, looking to "the standards elaborated by controlling precedents and by the Court's own interpretation of the Eighth Amendment,"¹⁰⁹ the Court determines by way of independent judgment whether the punishment in question violates the Constitution.¹¹⁰ In the words of the Court, a categorical rule barring sentences of life imprisonment without parole "gives all juvenile non-homicide offenders a chance to demonstrate maturity and reform. The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential."¹¹¹ The Court observed that *Roper* abolished the death penalty for juveniles who commit murder, thereby leaving life without parole as the maximum sentence for a juvenile convicted of homicide. As such, Graham's sentence of life without parole placed him in the same category of punishment as if he had committed a murder at age sixteen. In addition, actual sentencing practices in jurisdictions that allowed life without parole for juvenile non-homicide offenders

¹⁰¹ *Graham*, 130 S. Ct. at 2019. This was despite the prosecutor having recommended sentences of thirty years and fifteen years, respectively, on the two charges. The defense counsel was seeking a five-year sentence, and the pre-sentence report prepared for the court recommended a four-year sentence.

¹⁰² U.S. CONST. amend. XIII. The Eighth Amendment to the United States Constitution provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

¹⁰³ *Graham*, 130 S. Ct. at 2030.

¹⁰⁴ *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing the death penalty for juveniles).

¹⁰⁵ *Atkins v. Virginia*, 536 U.S. 304 (2002) (abolishing the death penalty for persons with low range intellectual functioning).

¹⁰⁶ *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (abolishing the death penalty for non-homicide crimes).

¹⁰⁷ *Graham*, 130 S. Ct. at 2023.

¹⁰⁸ *Roper*, 543 U.S. at 552.

¹⁰⁹ *Kennedy*, 554 U.S. at 421.

¹¹⁰ *Roper*, 543 U.S. at 564.

¹¹¹ *Graham*, 130 S. Ct. at 2032.

suggested that there was a consensus against the sentence because there were only 129 juvenile offenders nationwide serving the sentence.¹¹²

¶32 Finally, while acknowledging that the judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment, the Court considered the absence of such sentences in other countries. The United States, the Court observed, was the only nation that imposed this type of sentence on the demographic in question.¹¹³ Relying on these considerations, the Court issued a broad ruling that expanded the reach of the Eighth Amendment by creating a new categorical sentencing prohibition forbidding the sentence of life without parole for non-homicide offenses committed by a juvenile.

¶33 In light of the decision in *Graham*, the Supreme Court, in a *per curiam* opinion, dismissed a writ of certiorari in *Sullivan v. Florida* as improvidently granted.¹¹⁴ Joe Harris Sullivan, thirty-three, was also serving a sentence of life in prison without parole for a non-homicide offense that he committed at the age of thirteen. As such, the *Graham* ruling entitled him to a new sentence.

¶34 In South Africa, there are approximately 100 young men serving life sentences for crimes that they committed while under the age of eighteen years.¹¹⁵ Under South African law, life imprisonment does allow for the possibility of parole, and the pre-parole period is twenty-five years.¹¹⁶ This means that the young person serving life, like his or her adult counterpart, cannot be considered for parole until twenty-five years of the sentence have been served. The Child Justice Act 75 of 2008 sets twenty-five years as the maximum period of imprisonment to which a child (fourteen years or older) can be sentenced.¹¹⁷ Such prisoners are entitled to be considered for parole after spending half of their sentences in prison, which would be twelve and a half years for the maximum possible sentence.

¶35 This new provision thus effectively does away with life imprisonment for juvenile offenders, which was a sentence under the common law. Together with the striking down of minimum sentences as described earlier in this Article, this new law represents a positive step forward in relation to the sentencing of child offenders with respect to serious crimes.

¹¹² *Id.* at 2023–25. According to the Court, of the 129 juveniles serving this sentence, seventy-seven were imprisoned in Florida and fifty-two in ten states and in the Federal System. This means that only twelve jurisdictions nationwide, in fact, imposed life without parole sentences on juvenile non-homicide offenders. Life without parole sentences for juvenile offenders was available in six jurisdictions. Seven jurisdictions permitted it but only for homicide crimes and thirty-seven states, the District of Columbia, and the Federal system permitted it for a juvenile non-homicide offender in some circumstances. (Thus, twenty-six states and the District of Columbia did not impose the sentence despite apparent statutory authorization).

¹¹³ *Id.* at 2034. This approach, of referring to other counties, has been used before in Eighth Amendment cases. See, e.g., *Roper*, 543 U.S. at 575–78.

¹¹⁴ *Sullivan v. Florida*, 130 S. Ct. 2059 (2010).

¹¹⁵ CTR. FOR CHILD LAW, REPORT ON PRISONERS SERVING LIFE SENTENCES FOR CRIMES COMMITTED WHILST THEY WERE CHILDREN (2010), available at www.centreforchildlaw.com.

¹¹⁶ See UNCRC, *supra* note 84. This is in line with the article 37 of the United Nations Convention on the Rights of the Child which requires states not to subject children to the death penalty, nor to life without parole. *Id.*

¹¹⁷ Child Justice Act of 2008 (S. Afr.). The Act came into operation on April 1, 2010 after a lengthy process of drafting, consultation and parliamentary debate.

VII. CONCLUSION

¶36 The turn of a century represents a time of new beginnings. As the nineteenth century drew to a close, the Cook County, Illinois, juvenile justice model was born, and the first decade of the twentieth century was a time of great social innovation for juvenile justice in the United States and in many other countries that established similar systems. In 1910 the Union government of South Africa came to power. This followed the South African War, and ended the divisions between the former British colonies and the Boer Republics. The legislative developments of the Union government were optimistic and indicated a commitment to treating children differently, although the efforts were piecemeal and fell short of separate juvenile justice system. The end of the 1940s saw South Africa slip into a deeply negative era. The apartheid years yielded nothing positive for juvenile justice. A free South Africa re-awakened when Nelson Mandela became President in 1994, inaugurated at the Union Buildings in Pretoria, built for that Union government in 1910. South Africa in 1994 was brimming with positive law reform possibilities. By then the United States was attempting to extend its negative war on crime to the juvenile justice system, which made it an example to eschew rather than emulate.

¶37 The turn of the twentieth century has again been a time for renewal. The first decade of the twenty-first century has seen positive developments for child offenders in both countries. The cases of *Roper*, *Graham*, and *Sullivan* in the United States, and the case of *Centre for Child Law v. Minister of Justice* in South Africa indicate recognition from the highest courts that children are different from adults; they are less mature, less culpable, and need to be treated in accordance with that reality. The work is not complete. Child rights and criminal justice campaigners in both countries must strive to steer a more restorative, proportionate response to child offenders.

¶38 Life imprisonment has been abolished in South Africa, but lengthy prison sentences have survived into the new Child Justice Act 75 of 2010, and many young people sentenced under the previous law continue to serve life sentences. Life without parole for children, still a stark reality for so many young offenders in the United States, violates international standards. The struggle to abolish life without parole for all offenders who were below eighteen years at the commission of their crimes—not only those who fit into the category of *Graham* and *Sullivan*—must continue.