
BALANCING AUTONOMY AND PROTECTION IN CHILDREN'S RIGHTS: A SOUTH AFRICAN ACCOUNT

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I. INTRODUCTION

The good news of *Roper v. Simmons*¹ reached South Africa immediately after the decision was handed down in 2005. Child justice advocates in South Africa read the judgment with great interest and saw the judicial nod of acknowledgment toward neuroscience and its validation of what Americans already instinctively knew and shared with the world more than a century before: that children are different from adults. We joined the virtual celebration with the United States and other juvenile justice advocates around the globe. Capital punishment for those who committed crimes while still under the age of eighteen years was finally dead in the country that sentenced more children to death than any other in the years leading up to *Roper*.²

Prior to *Roper* we had heard about what the discoveries in brain science³ had added to prior knowledge of child developmental theory,⁴ and the efforts being made in the United States to apply this academic knowledge to the courts' decisions.⁵ We were intrigued by how these new forays into neuroscience were used as an adjunct to helping courts find scientific rationales for holding young offenders less culpable and were glad to see that the arguments made on behalf of the defendant and by many amici curiae had been recognized—even if only to a limited extent—in the *Roper* judgment.

This Article tells the story of two South African Constitutional Court cases. The first dealt with minimum sentences for sixteen- and seventeen-year-olds, the

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1. 543 U.S. 551 (2005).

2. Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 SANTA CLARA L. REV. 1041, 1042 (2002).

3. E.g., BARBARA STRAUCH, *THE PRIMAL TEEN: WHAT THE NEW DISCOVERIES ABOUT THE TEENAGE BRAIN TELL US ABOUT OUR KIDS* 29–36 (2003); Thomas Grisso & Laurence Steinberg, *Between a Rock and a Soft Place: Developmental Research and the Child Advocacy Process*, 34 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 619, 620–21 (2005); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141–44 (1997).

4. For example, CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES* (1984); and JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932), were (and still are) taught as standard texts on child development in South African universities.

5. See Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009), for a description of the many ways in which neuroscientific brain development studies have been used in and by the courts, legislatures, academia, and popular media.

second with the criminalization of consensual sex between adolescents aged twelve to sixteen years. The decision about whether to rely on neuroscientific evidence in the first case was affected by the fact that the legal team already knew that the second case would be brought. This Article explores the considerations that were at play in deciding on a winning strategy for both cases. The author was a member of the legal team in both cases, and the Article therefore provides insights about these questions from a unique perspective. Is the kind of decision making under the spotlight in these two cases sufficiently different to warrant a different approach in each matter? Alternatively, is it the consequences of the action arising from each decision that warrant different approaches in both? What theoretical approach is sufficiently flexible to allow for different approaches in each case? These questions relating to the two South African cases are explored against the backdrop of relevant U.S. jurisprudence.

II. A STRATEGY FOR A CONSTITUTIONAL ATTACK ON MINIMUM SENTENCES FOR SIXTEEN- AND SEVENTEEN-YEAR-OLDS

Soon after *Roper*, South African strategic litigators were building their own case that would reach the Constitutional Court in 2009. The case, *Centre for Child Law v. Minister for Justice & Constitutional Development*,⁶ was a constitutional challenge to the application of a new, tough minimum sentencing regime to sixteen- and seventeen-year-olds.⁷ The impugned provisions included the automatic imposition of lengthy sentences (including life imprisonment) linked to specific crime categories.⁸ It excluded only children below the age of sixteen years at the time of the commission of the offense in its ambit. However, under South Africa's Constitution, a child is a person below the age of eighteen years, and the Bill of Rights expressly provides that a child must not be detained except as a measure of last resort and for the shortest appropriate period of time.⁹ The minimum sentencing law allowed a court to depart from the minimum

6. 2009 (6) SA 632 (CC) (S. Afr.).

7. The Centre for Child Law challenged the Criminal Law (Sentencing) Amendment Act 38 of 2007 (S. Afr.), which had applied the minimum sentence provisions of the Criminal Law Amendment Act 105 of 1997 (S. Afr.) to individuals sixteen- and seventeen-years-old at the time of the offense. *See* 2009 (6) SA 632 (CC) at para. 2 (S. Afr.).

8. The enactment of the law followed the visit to South Africa of New York City Chief of Police William Bratten, who preached a zero-tolerance sermon which apparently impressed the South African legislature. In addition to longer sentences, the prisoners sentenced under this law had to serve four-fifths of their sentences before being considered for parole, in contrast to South Africa's usual practice, which allowed consideration after a prisoner served half of his sentence. Life imprisonment in South Africa requires that a prisoner serve twenty-five years in prison before being released on parole.

9. Section 28(1)(g) of the South African Constitution states that:

[E]very child has the right . . . not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—(i) kept separately from detained persons over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age.

S. AFR. CONST., 1996, § 28(1)(g). The section is modeled on Article 37 of the United Nations

sentence in any case where the accused proved that there were “substantial and compelling circumstances” warranting such departure,¹⁰ a design no doubt aimed to conform with the constitutional rights of offenders; indeed, the law had survived a constitutional challenge in respect of adult offenders.¹¹ The central thrust of the legal challenge made on behalf of all young offenders who were sixteen and seventeen years old at the time of the commission of the offense, therefore, was that the law violated children’s rights to be detained as a measure of last resort because, by requiring the minimum sentence to be set as a first resort, it reversed the order of the sentencing process.¹² In other words, it enjoined a court sentencing an offender who had committed an offense while sixteen or seventeen years old from starting with the consideration firstly of a lengthy period of imprisonment (including a life sentence for certain crimes¹³) and then working backwards.

III. REASONS FOR THE DECISION NOT TO RELY CENTRALLY ON NEUROSCIENTIFIC EVIDENCE

In deciding the legal strategy of the case, the *Centre for Child Law* legal team had to decide whether or not to base its case on neuroscientific evidence. On the one hand, we saw its power to strengthen the case by reinforcing the claims that would be made about the rationale for a different sentencing approach for offenders below the age of eighteen years. On the other hand, we saw dangers looming that we feared would affect other areas of the law for children, and, in particular, another case that the Centre for Child Law was in the early stages of developing. The plan for that case, which would later be reported as *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development*,¹⁴ was to challenge new amendments to the Sexual Offences Act¹⁵ that criminalized consensual sexual activity between adolescents aged twelve to sixteen years. We already knew that an important argument in that case would be based on children’s autonomy. We were therefore concerned that if *Centre for Child Law*, the minimum sentences case, was won on the basis of neuroscientific evidence that showed diminished decision-making capacity, it would be more difficult to argue in the *Teddy Bear Clinic* case that children’s

Convention on the Rights of the Child. See UNICEF, THE STATE OF THE WORLD’S CHILDREN: CELEBRATING 20 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD 14 (2009), http://www.unicef.org/rightsite/sowc/pdfs/SOWC_Spec%20Ed_CRC_Main%20Report_EN_090409.pdf (noting that “the architects of the new South Africa embedded [the Convention’s] precepts into their country’s constitution”).

10. Criminal Law Amendment Act 105 of 1997 § 51(a)(3)(aA) (S. Afr.).

11. *S. v. Dodo* 2001 (3) SA 382 (CC) at para. 40 (S. Afr.).

12. *Ctr. for Child Law v. Minister for Justice & Constitutional Dev.* 2009 (6) SA 632 (CC) at para. 2 (S. Afr.).

13. There is no life sentence without parole in South Africa, but any person sentenced to a life sentence must serve twenty-five years in prison before he or she can be considered for parole.

14. 2014 (2) SA 168 (CC) (S. Afr.).

15. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 §§ 15–16 (S. Afr.).

decisions about whether to engage in sexual conduct should be respected as belonging to a private sphere of their lives.

The legal team read *Roper* again, trying to decide what to do. Justice Kennedy's opinion did not focus on neuroscience, but rather on behavioral differences between adolescents and adults. The opinion's dicta on neuroscience were no doubt disappointingly "thin" to those who had spent so much time and intellectual effort in placing the important evidence before the Supreme Court. What the Court, in essence, said was that the science seemed to confirm what we knew already. Laurence Steinberg et al. observe that "[d]evelopmental science was front and center in the Court's ruling,"¹⁶ but this is not apparent from the *Roper* opinion. A more accurate assessment is given by Elizabeth Scott et al. who state that it was in *Miller v. Alabama*¹⁷ that "neuroscience was front and center."¹⁸ Scott et al. observe that although adolescent brain development had been discussed in oral arguments, "it was not referenced in the Court's [previous] opinions."¹⁹ Of course, at the time the *Centre for Child Law* legal team was deliberating, neither *Graham v. Florida*²⁰ nor *Miller* had yet been handed down.

We were concerned by the acerbic observation by Justice Scalia in his dissenting opinion in *Roper* that the American Psychological Association (APA), which claimed that scientific evidence showed persons under eighteen years of age lack the ability to take moral responsibility for their decisions, had "previously taken precisely the opposite position"²¹ in the Supreme Court case of *Hodgson v. Minnesota*,²² which dealt with adolescent decision making with respect to abortion. Although Steinberg et al. have subsequently explained that the APA's respective positions in *Hodgson* and *Roper* do not amount to a "flip-flop,"²³ their explanation only partially answers the concerns that are raised

16. Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOL. 583, 583 (2009).

17. 132 S. Ct. 2455 (2012).

18. Elizabeth Scott, Thomas Grisso, Marsha Levick & Laurence Steinberg, *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675 (2016).

19. *Id.*

20. 560 U.S. 48 (2010).

21. *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

22. 497 U.S. 417 (1990). In *Hodgson*, the APA stated that by age fourteen adolescents have developed adultlike intellectual and social capacities. See Brief for Amicus Curiae American Psychological Association National Association of Social Workers, Inc., and the American Jewish Committee in Support of Petitioners/Cross-Respondents in Nos. 88-1125, 88-1309 and in Support of Appellees in No. 88-805, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (Nos. 88-805, 88-1125, 88-1309), 1989 WL 1127529, at *18-19. In *Roper*, the APA's position was that sixteen- and seventeen-year-olds, as a group, are less mature developmentally than adults and should therefore not be subject to capital punishment. See Brief for the American Psychological Association, and the Missouri Psychological Association as Amici Curiae Supporting Respondent at 14-15, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

23. Steinberg et al., *supra* note 16, at 593 (noting that the different positions merely "emphasize different aspects of maturity, in accordance with the differing nature of the decision-making scenarios involved in each case").

when the APA's *Roper* arguments are applied to sexual decision making (as opposed to medical decision making, which is what *Hodgson* dealt with)—a discussion to which I will return later in this Article.

In essence, there were four reasons that the South African legal team fighting for the removal of minimum sentences for sixteen- and seventeen-year-olds eventually decided not to rely centrally on neuroscientific evidence.

The first reason was the risk that such reliance would erode the concept of “evolving capacity.” This concept is captured in Article 5 of the United Nations Convention on the Rights of the Child, which states that children should be provided with guidance on their rights in a manner that reflects their growing maturity “in a manner consistent with the evolving capacities of the child.”²⁴ The concept had been given recognition in various spheres in South African law, and it was considered important to protect it wherever it had been attained in our law. Prior to 2007, in South Africa, children remained minors until the age of twenty-one years. The ushering in of a new Bill of Rights, and the influence of international law, resulted in law reform making eighteen the new age of majority. The Children's Act²⁵ had ushered in a range of progressive new laws recognizing children's developing capacities during adolescence. In addition to a general provision allowing for participation of children in all decisions made about them, the law set new, empowering age limits. These included healthcare decision making, such as the right to consent to medical treatment (other than surgery) from the age of twelve years,²⁶ to obtain condoms at twelve years, and to obtain other reproductive services at twelve years, provided that a medical examination has been carried out.²⁷ The law allows access to HIV testing for children as young as twelve years without parental consent.²⁸ Girls have the right to decide (without parental consent) to terminate their pregnancies under the Choice on Termination of Pregnancy Act, and this is not subject to any age limitation.²⁹ Sixteen is the age of consent to sexual activity,³⁰ and this of course led directly to the concerns about the case that the *Centre for Child Law* legal team knew was in the planning stages at the time of the minimum sentences case.

The second reason the team did not rely on neuroscience in *Centre for Child Law* was the concern that the use of neuroscience could be seized upon by conservative lobby groups, such as Doctors for Life or the Christian Lawyers Association, and used against children's rights arguments in the future. As noted

24. Convention on the Rights of the Child, Nov. 20, 1989, 1557 U.N.T.S. 3 [hereinafter UN Convention on the Rights of the Child]. South Africa ratified the Convention on June 16, 1995. See also GERISON LANSDOWN, UNICEF INNOCENTI RESEARCH CTR., *THE EVOLVING CAPACITIES OF THE CHILD* 3–7 (2005), www.unicef-irc.org/publications/pdf/evolving-eng.pdf.

25. Children's Act 38 of 2005 (S. Afr.).

26. *Id.* ch. 7, § 129.

27. *Id.* ch. 7, § 134.

28. *Id.* ch. 7, § 133.

29. Choice on Termination of Pregnancy Act 92 of 1996 § 5(3) (S. Afr.). A girl must be advised to seek parental assistance, but cannot be refused access to a termination if she does not wish to do so. *Id.*

30. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.).

by scholars such as Brian Tamanaha, strategic litigation can raise the risk of a countermobilization by such organizations.³¹ “Liberals have painfully learned that instruments can be used in your favor, or against you, with equal facility. The tide has turned against liberals so much that a once-favored tool—cause litigation—has come to look like a fearsome weapon for the other side.”³²

Douglas NeJaime has dubbed this as a “countermovement,” and he describes it as an external effect of strategic litigation, which those seeking social change through litigation have little control over.³³ This trend toward countermobilization has been observed by South African writers Steven Budlender et al. who note a recent “backlash,” or resistance, to the social change sought to be achieved by progressive public interest litigation in South Africa and the rise of more conservative role players in the field.³⁴

The third reason was that the South African courts already knew that adolescents were different. The applicants’ papers demonstrated that South African law had a long line of judgments finding that children were less culpable than adults.³⁵ Thus, we calculated that the courts did not need to be convinced by neuroscience that sentencing policy should view child offenders as less culpable than adults; it was a matter of law.

It was also a matter of rights—and this was the fourth reason. South Africa has ratified the Convention on the Rights of the Child³⁶ and the African Charter on Rights and Welfare of the Child.³⁷ The South African courts are thus required to interpret rights within the international framework and to prefer legal interpretations that accord with international law. Section 28(1)(g) of the South African Constitution³⁸—requiring detention of children as a measure of last resort and for the shortest appropriate period of time—is based on the wording of Article 37(b) of the Convention on the Rights of the Child.³⁹ Due to the strength of the constitutional provision itself, as well as its backing in international law, the team was confident that the case could be won on constitutional grounds.

The legal team’s final strategy was that if the case could be won without

31. *E.g.*, BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 161–63 (2006).

32. *Id.* at 163.

33. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 961–62 (2011).

34. STEVEN BUDLENDER, GILBERT MARCUS SC & NICK FERREIRA, PUBLIC INTEREST LITIGATION AND SOCIAL CHANGE IN SOUTH AFRICA: STRATEGIES, TACTICS AND LESSONS 13–14 (2014), <http://www.atlanticphilanthropies.org/app/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>.

35. *See* Applicant’s Written Argument at 8–12, *Centre for Child Law v. Minister of Justice & Constitutional Dev.*, Case No. 98/08 (Constitutional Ct. S. Afr. July 14, 2009).

36. *See* UN Convention on the Rights of the Child, *supra* note 24.

37. African Charter on the Rights and Welfare of the Child, July 1, 1990, OAU Doc. CAB/LEG/153/Rev.2 (entered into force Nov. 29, 1999).

38. *See supra* note 9.

39. Article 37(b) is broader—it requires arrest, detention, and imprisonment to be in conformity with law, used as a last resort, and used only for the shortest appropriate period of time. UN Convention on the Rights of the Child, *supra* note 24, art. 37(b).

reliance on neuroscience, the flexibility of the “evolving capacity” approach would be conserved, allowing us to make the arguments about adolescent decision making in the context of consensual sexual activity on another day.⁴⁰ However, although this meant that the applicant would not utilize any neuroscientific evidence, a decision was made to include a reference to the *Roper* opinion. It was a highly significant precedent on the world stage, and the majority opinion had much to offer in terms of its reasoning about why children are less culpable than adults.

In the applicant’s heads of argument in *Centre for Child Law*,⁴¹ the reference to *Roper* was linked to the general principles of sentencing of child offenders in South African law. In a line of cases that began almost half a century before the adoption of the new constitution, South African courts had developed a series of principles for sentencing children. Judicial officers were to “bear in mind” the objective of keeping youth out of prison wherever reasonably possible,⁴² and, where incarceration could not be avoided, it should be as short in duration as possible.⁴³ Courts were to pay particular attention to the youthfulness of the offender when determining a sentence,⁴⁴ irrespective of the gravity of the offense,⁴⁵ and youthfulness “tend[ed] to mitigate the severity of punishment.”⁴⁶ Courts accepted that children under eighteen could not necessarily be judged on the same scale as adults even where the offense indicated much sophistication on the part of the young offender.⁴⁷ Youthfulness implies “immaturity, lack of experience, . . . and capacity for being influenced.”⁴⁸ Youthfulness indicates an incomplete personality, where aspects of adult characteristics like insight, self-control, judgment, and responsibility toward others are either lacking or merely in the early stages of development.⁴⁹

Immediately after outlining these principles, the applicant’s heads of argument noted that similar sentiments were expressed by the U.S. Supreme Court in *Roper*. The argument went on to say that Justice Kennedy (writing for the majority) held that the death penalty was not constitutionally permissible. The argument continued; Justice Kennedy, in his explanation of the majority holding, relied on scientific evidence and academic literature and pointed to

40. In fact, the legal team had to dissuade the National Institute of Crime Prevention and Reintegration of Offenders (NICRO), which applied to enter as *amicus curiae*, not to make arguments based on neuroscience, which it had planned to do. NICRO instead made submissions about the responsiveness of young offenders to rehabilitation.

41. Applicant’s Written Argument at 14, *Centre for Child Law v. Minister of Justice & Constitutional Dev.*, Case No. 98/08 (Constitutional Ct. S. Afr. July 14, 2009).

42. *R. v. M.* 1958 (3) SA 681 (SR) (S. Afr.).

43. *See S. v. B* 2006 (1) SACR 311 (SCA) at para. 18 (citing S. AFR. CONST., 1996, § 28(1)(g)).

44. *E.g.*, *S. v. Mohlobane* 1969 (1) SA 561 (AD) (S. Afr.).

45. *E.g.*, *S. v. Theron* 1986 (1) SA 884 (AD) (S. Afr.).

46. *E.g.*, *S. v. Whitehead* 1970 (4) SA 424 (AD) (S. Afr.).

47. *E.g.*, *S. v. Maimela* 1976 (2) SA 597 (AD) (S. Afr.).

48. *S. v. Van Rooi* 1976 (2) SA 580 (AD) (S. Afr.); *see also S. v. Lehnberg* 1975 (4) SA 553 (AD) (S. Afr.).

49. *S. v. J.* 1975 (3) SA 146 (OPA) (S. Afr.).

three general differences between child offenders and adult offenders: first, that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young”; second, “that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and third, “that the character of a juvenile is not as well formed as that of an adult,” and that “[t]he personality traits of juveniles are more transitory, less fixed.”⁵⁰

The strategy selected by the *Centre for Child Law* legal team paid off: both cases were won in the Constitutional Court. The Constitutional Court’s approach in each case is discussed below, and then the Article moves on to a discussion about the difficulties with finding a theoretical approach that can be applied to both sentencing of young offenders and decision making about consensual sex between adolescents.

IV. MINIMUM SENTENCES

A. *Arguments Put Forward by the Parties*

In *Centre for Child Law*, the applicant argued that subjecting children sixteen and seventeen years of age to the minimum sentencing regime was in breach of the constitution and South Africa’s international law obligations. Although the applicant acknowledged that long sentences of imprisonment might sometimes be necessary when sixteen- and seventeen-year-olds commit very serious crimes, it submitted that such sentences should be determined by the court in accordance with the constitutional principles of “last resort” and “shortest appropriate period of time,” as well as the principles of proportionality, individualization, and the best interests of the child. A court sentencing a child offender should start with a “clean slate” and not be prescribed by a minimum sentencing law. Even though the law empowers a court to depart from the minimum sentence if it finds substantial and compelling reasons to do so, it nevertheless set up long terms of imprisonment as the first (and not the last) resort. Accordingly, the impugned provisions failed to require that imprisonment be imposed for the shortest possible time; indeed, they required the opposite. The minimum sentencing regime was also unconstitutional because it did not allow or require a sentencing judge to consider the principles of individuality and proportionality. Finally, the law was constitutionally impermissible because it treated children aged sixteen and seventeen the same as adults, at least with respect to sentencing.

The applicant’s argument was bolstered by the use of comparative foreign law. The only country which could be found that imposed minimum sentencing regimes on children in the same manner as adults was the United States,⁵¹ which

50. See *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

51. This was prior to *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Scott et al. point out that in the post-*Miller* era, laws that subject juveniles to mandatory minimum sentences on the same bases as adult offenders are problematic on proportionality grounds and are likely to be the focus of future reforms. Scott et al., *supra* note 18, at 707. The authors point to *State v. Lyle*, 854 N.W.2d 378, 392–93

was one of only two countries in the world at the time that had not ratified the Convention on the Rights of the Child.⁵² The applicant pointed out that those countries that had undertaken law reforms since the advent of the Convention on the Rights of the Child had ensured that minimum sentences either did not apply to child offenders or, if they did, the sentences were for shorter periods of time than those applicable to adults. An important comparative example included in the heads of argument was Canada, where the Court of Appeal for Ontario had found that minimum sentences were inconsistent with the principles of youth justice and that children should not be held accountable or punished in the same way as adults.⁵³ A presumptive sentencing provision under the Youth Justice Act had been declared unconstitutional by the Supreme Court of Canada in the case of *R. v. D.B.*⁵⁴ Other comparative examples that also did not apply minimum sentences to child offenders were Australia, Germany, England and Wales, Uganda, Ghana, Kenya, and Zambia.⁵⁵ Many of these countries in fact had set maximum sentences for child offenders, which were well below the maximum sentencing jurisdiction for adult offenders.

The Minister of Justice took the position that the law was not unconstitutional because it respected the “last resort” and “shortest appropriate period” principles, but that Parliament had determined how those principles should be applied—namely to sixteen- and seventeen-year-olds and in the scheduled crimes.⁵⁶ Furthermore, certain features of the law—particularly the ability of the Court to depart from the minimum sentence—ameliorated the effects of the law in a way that would benefit child offenders. Their youthfulness, it was argued, would often amount to a substantial and compelling circumstance. The Minister of Justice also argued that the law was not in breach of international law principles because the Convention on the Rights of the Child prohibits only life imprisonment without the possibility of parole, which does not exist in South Africa.⁵⁷

B. *The Majority Opinion*

The majority opinion of the Constitutional Court (Court),⁵⁸ written by

(Iowa 2014), which found that mandatory adult sentences exclude the consideration of juvenile offenders' immaturity, which is against the principle set down in *Miller. Id.* at 707–08.

52. Since 2015, when Somalia became the 196th state to ratify the CRC, the United States stands as the only country that has not ratified the Convention.

53. *R. v. H.*, [1992] 10 O.R. 3d 723 (Can. Ont. C.A.).

54. [2008] 2 S.C.R. 3 (Can.).

55. All states include the principle that detention is a last resort for child offenders, and, where minimum sentences are applicable, offenders are expressly excluded.

56. See *Ctr. for Child Law v. Minister of Justice & Constitutional Dev.* 2009 (6) SA 1 (CC) at para. 43 (S. Afr.).

57. The applicants countered this argument by pointing out that the Committee on the Rights of the Child called upon states' parties “to abolish all forms of life imprisonment for offences committed by persons under the age of 18” years. Comm. on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, ¶ 77, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

58. The Court split seven to four.

Justice Cameron, held that the minimum sentencing legislation should not apply to children aged sixteen and seventeen years old. The majority of the Constitutional Court found that the minimum sentencing legislation limited the discretion of sentencing courts by directing them to hand down long sentences (including life imprisonment) as a first resort. Furthermore, the legislation discouraged the use of noncustodial options, it prevented courts from individualizing sentences, and was likely to cause longer prison sentences. All of these features of the law amounted to an infringement of child offenders' rights in terms of Section 28(1)(g) of the South African Constitution, and the Court found that no adequate justification had been provided for the limitation.⁵⁹ The Court found that children should be treated differently from adults, not for sentimental reasons, but because of their greater physical and psychological vulnerability and the fact that they are more open to influence and pressure from others. The Court found it to be vitally important that child offenders are generally more capable of rehabilitation than adults. "These are the premises," the Court said, "on which the Constitution requires the courts and Parliament to differentiate child offenders from adults."⁶⁰ The Court went on to explain:

We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.⁶¹

The Court acknowledged that children can and do commit very serious crimes, and that the legislature has legitimate concerns about violent crimes committed by young offenders below the age of eighteen. The Court pointed out that the constitution does not prohibit Parliament from dealing effectively with such offenders—the fact that detention must be used as only a last resort in itself implies that imprisonment is sometimes necessary.⁶²

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.

If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for

59. The Court did not rule out the possibility that such justification might exist, but said that [l]egislation cannot take away the right of 16 and 17 year olds to be detained only as a last resort, and for the shortest appropriate period of time, without reasons being provided that specifically relate to this group and explain the need to change the constitutional disposition applying to them.

Ctr. for Child Law v. Minister of Justice & Constitutional Dev. 2009 (6) SA 1 (CC) at para. 63 (S. Afr.).

60. *Id.* at para. 28.

61. *Id.*

62. *Id.* at para. 29.

the shortest possible period of time.⁶³

The Court found that Section 28(1)(g) of the constitution “requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced.”⁶⁴ A “supervening legislatively imposed determination of what would be ‘appropriate’” is impermissible.⁶⁵

The opinion cites *Roper*, quoting the paragraph that starts with the now famous words: “as any parent knows and as scientific and sociological studies . . . tend to confirm . . .”⁶⁶ The Court underlined the *Roper* findings that lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and that youth are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”⁶⁷ The Court reiterated the finding of the U.S. Supreme Court in *Roper* that young offenders’ “comparative lack of control” means that they “have a greater claim than adults to be forgiven for failing to escape negative influences.”⁶⁸ The Court concluded its *Roper* summary by quoting the following paragraph from the judgment: “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁶⁹

The Court went on to say that the Supreme Court of Canada “had similarly found that because of their heightened vulnerability, relative lack of maturity, and reduced capacity for moral judgment,” children are to be presumed to have “diminished moral culpability.”⁷⁰ The Supreme Court of Canada had thus heard a constitutional challenge to a statute that required adult sentences to be imposed on child offenders convicted of certain violent crimes, unless such an offender “could justify why an adult sentence should not be imposed.”⁷¹

In its order, the South African Constitutional Court declared the minimum sentencing law invalid to the extent that it referred to sixteen- and seventeen-year-olds.⁷² Therefore, neither minimum sentences nor any form of sentencing of children to life imprisonment applies to offenders who were below the age

63. *Id.* at para. 31.

64. *Id.* at para. 32.

65. *Id.*

66. *Id.* at para. 33 (quoting *Roper v. Simmons*, 543 U.S. 551, 567 (2004)).

67. *Id.* at para. 34 (quoting *Roper*, 543 U.S. at 569).

68. *Id.* at para. 35 (quoting *Roper*, 543 U.S. at 570).

69. *Id.* (quoting *Roper*, 543 U.S. at 570).

70. *Id.* at para. 36 (quoting *R. v. D.B.*, [2008] 2 S.C.R. 25 (Can.)).

71. *Id.* (quoting [2008] 2 S.C.R. 25).

72. The Court, quoting the motion of the Centre for Child Law, found that to remedy its inconsistency with the South African Constitution,

section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended [by the Criminal Law (Sentencing) Amendment Act 38 of 2007], [should be] read as though it provides as follows: “This section does not apply in respect of an accused person who was under 18 at the time of the commission of an offence contemplated in subsection (1) or (2).”

Id. at para. 70.

eighteen when the crimes were committed.

V. THE CASE ABOUT DECRIMINALIZING CONSENSUAL SEXUAL ACTIVITY

A. *The Relevant Legal Provisions*

South Africa's new sexual offenses legislation had good intentions of protecting children from sexual abuse, but it went too far by criminalizing all consensual sexual activity from kissing to intercourse between adolescents aged twelve to sixteen years. This was linked to a mandatory reporting provision, so parents, teachers, and counselors who knew about such activities had to inform the police. The law exposed adolescents to the risk of prosecution, and if convicted, their names would be placed on the sex offenders register. Two children's rights organizations, Teddy Bear Clinic for Abused Children and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), legally represented by the Centre for Child Law, challenged this law on the basis that it unjustifiably infringed the rights of children to dignity, privacy, sexual autonomy, and to have their best interests considered paramount. The Constitutional Court handed down a judgment in October 2013, declaring the law unconstitutional, and therefore effectively decriminalizing consensual sex between adolescents.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (Sexual Offences Act) was heralded a great step forward in the ongoing struggle against sexual violence in South Africa, especially given the prevalence of such crimes against children. However, the legislature included a requirement that when children who are both between the ages of twelve and sixteen years indulge in any form of sexual violation (penetrative or nonpenetrative) and a decision is taken to prosecute them, then both must be prosecuted.⁷³

While the protection of children from sexual advances by adults is clearly beneficial and had long been part of South African law, the idea that two children between the ages of twelve and sixteen who engaged in consensual sexual activity committed a crime due to their inability to consent was a concerning innovation.

B. *Arguments Made by Various Parties*

In papers before the Court, the applicants made the following points:

Adolescents (twelve to sixteen years of age) are in a special position. Physiologically, they are rapidly developing and maturing, but psychologically they are not yet fully developed and are still vulnerable to the influences of adults. It is for this reason that the applicants accepted that the legal provisions were constitutionally permissible, insofar as they criminalized the sexual conduct of *adults*. However, the applicants contended that, to the extent that the sections

73. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 §§ 15(2), 16(2) (S. Afr.).

criminalize the sexual conduct of *children*, they were unconstitutional.

The applicants' founding affidavit placed reliance on the expert opinion by Professor Alan Flisher and Ms. Annik Gevers, which showed that the onset of puberty generally occurs before or around twelve years of age, while most other physical indications of sexual maturity manifest between the ages of twelve and sixteen years. Furthermore, intimate relationships between adolescents are "developmentally normative," with up to eighty-seven percent of a cross section of grade eight and grade eleven pupils in one study indicating they were or had been in an intimate relationship.

The founding affidavit also drew attention to further anomalies in our laws. Whilst section 15 of the Sexual Offences Act makes it a crime for children to engage in sexual intercourse, section 134 of the Children's Act provides that no person may refuse to sell or provide condoms to a child over the age of twelve years. Other contraceptives can be provided on request by a child if the child is at least twelve years of age and has been physically examined. These children are entitled to confidentiality under the Children's Act, but under the Sexual Offences Act a person who knows that a sexual offense is being committed in terms of sections 15 and 16 (consensual sexual activity) has a duty to report it to the police. Furthermore, the Termination of Pregnancy Act allows girls of any age to decide to terminate their pregnancy without parental consent, provided they have had counseling. However, if they discuss their pregnancy with anyone, that person is required to report a sexual offense.

The Court papers pointed out that the abovementioned provisions aimed to make reproductive health services available to children who need them, but are in stark contrast to the reporting requirements under the Sexual Offences Act.

In essence, the applicants' case was that while it might be reasonable for the state to take an interest in discouraging sexual activity among children between the ages of twelve and sixteen years, this could be achieved through educative approaches. There was no need for the law to criminalize sex between teenagers.

The response by the respondent (the Minister of Justice and Constitutional Development) focused on moral concerns as well as concerns about teenage pregnancy and sexually transmitted diseases. The measures, according to the Minister of Justice, were necessary in order to protect children from their own immature judgment. The Minister of Justice also claimed that although the law authorized prosecution, it did not require it, and the children could, under the Child Justice Act, be diverted from the criminal justice system. This ameliorated the effects of the impugned provisions.

The fact that children will often be diverted to child justice courts (in terms of the Child Justice Act⁷⁴) once a decision to prosecute has been made does not avoid the substantial trauma and harm that they will endure. Before being diverted, children will be exposed to the earlier processes of the criminal justice system, such as arrest, being required to provide detailed statements about their sexual conduct, being questioned by police and other authorities about their

74. Child Justice Act 75 of 2008 (S. Afr.).

sexual conduct, or even being detained in police cells.

The concerns of the legal team that more conservative forces might try to intervene in this case turned out to be valid. The Justice Alliance of South Africa, a conservative Christian organization, supported the respondent and asserted that the infringement of children's rights to dignity and privacy were reasonable and justifiable given the rates of teenage pregnancy, sexually transmitted diseases, and psychological harm caused by early sexual intercourse. They presented the view that parents would be assisted in their guidance of their children by having the "back up" of the criminal justice system. However, due to the decision that had been made not to rely on neuroscience in *Centre for Child Law*, they could not point to any ruling by the Constitutional Court based on neuroscience.

C. Ruling by the Constitutional Court

On October 3, 2013, the Constitutional Court handed down a unanimous judgment that found the impugned provisions infringed adolescents' rights of dignity and privacy and further violated the best interests principle.⁷⁵ The Court relied on the expert evidence adduced by the applicants and concluded that the impugned provisions criminalized developmentally normative conduct for adolescents and negatively affected the very children the law sought to protect. Thus, the law was not rationally connected to its purpose. Justice Khampepe, who penned the judgment, said that it was important to stress what the case was not about. It was not about whether children should engage in sexual conduct, nor was it about setting a lower age of consent. The case was about the narrow issue of whether it was constitutionally permissible to criminalize child sexual activity to deter early sexual intimacy and combat the associated risks.

Justice Khampepe underlined the dignity of children, describing the law as having placed youthful transgressors in a "state of disgrace."⁷⁶ She clearly recognized that sexual intimacy and sexual choices are part of the innermost sanctity of a person's dignity, and she included children's intimacy within that constitutionally protected ambit. She also clearly stated that the impugned provisions, by prohibiting consensual intimate relationships, intruded into the core of adolescents' privacy. Furthermore, in discussing children's best interests she found that the impugned provisions ran contrary to the best interests principle because they harmed children. She went on to say, "Indeed, it strikes me as fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices."⁷⁷

75. *The Teddy Bear Clinic for Abused Children v. Minister of Justice & Constitutional Dev.* 2014 (2) SA 168 (CC) (S. Afr.).

76. *Id.* at para. 55.

77. *Id.* at para. 79.

VI. DISCUSSION

Was the *Centre for Child Law* legal team being overly cautious when it feared neuroscientific arguments could be marshaled against progressive social change in later cases such as the *Teddy Bear Clinic* case? The experience in the United States suggests not. The concern had actually been expressed by some in the United States some years before *Roper*. Mark Stafford and Tracey Kyckelhahn provide a striking example of the “inevitable tension from granting both protective and liberating rights to juveniles” in the problem faced by the American Civil Liberties Union (ACLU) in 1989.⁷⁸ ACLU lawyers had prepared a draft brief for the Supreme Court arguing that teenagers were “ineligible for the death penalty because they lack capacity to make effective choices about committing capital offenses.”⁷⁹ At the same time, other ACLU lawyers were arguing before the Supreme Court in an abortion case that teenage girls do have the capacity to make effective choices about abortion.⁸⁰ Recognizing the difficulty of arguing both positions, the ACLU declined to file a brief in the death penalty case.⁸¹

Steinberg et al. point out that although Laurence Steinberg met with the Executive Committee of the Society for Research on Adolescence to seek its support of the position the APA would be putting forward in *Roper*, the Committee members were unpersuaded.⁸² Their caution arose from a fear that the argument that adolescents are not as mature as adults and should therefore escape the harshest punishment under the law “would come back to haunt those who had worked so hard to secure the abortion rights of young women.”⁸³

Post-*Roper*, the judgment was in fact very soon used by the anti-abortion lobby to support a law which required parental involvement in adolescent decisions to terminate pregnancy in the Supreme Court case of *Ayotte v. Planned Parenthood of Northern New England*.⁸⁴ Steinberg et al. point out that “[o]pponents of adolescents’ autonomous abortion rights had taken the Court’s characterization of adolescent immaturity in the juvenile death penalty case and used it to argue in favor of parental involvement requirements.”⁸⁵

However, Steinberg et al. reject criticisms that the APA took contradictory

78. Mark Christopher Stafford & Tracey L. Kyckelhahn, *Delinquency and Juvenile Justice in the United States*, in *JUVENILE JUSTICE SYSTEMS: INTERNATIONAL PERSPECTIVES* 529, 552 (John Winterdyk ed., 2d ed. 2002).

79. *Id.* This was being prepared for the Supreme Court case of *Stanford v. Kentucky*, 492 U.S. 361 (1989), which upheld the constitutionality of the death penalty for sixteen- and seventeen-year-olds.

80. The abortion case was *Hodgson v. Minnesota*, 497 U.S. 417 (1990), which was about whether an adolescent girl should be able to make the decision to terminate her pregnancy without parental involvement.

81. Stafford & Kyckelhahn, *supra* note 78, at 552.

82. Steinberg et al., *supra* note 16, at 584.

83. *Id.*

84. 546 U.S. 320 (2006).

85. Steinberg et al., *supra* note 16, at 584.

positions in the cases of *Hodgson* and *Roper*.⁸⁶ The positions that they took in each case did differ and might seem on the face of it to be a “flip-flop,” but this was because the type of decision making that each case dealt with was different. The Steinberg et al. article explains the findings from the MacArthur Juvenile Capacity Study, which administered various tests to measure “psychosocial maturity” and a battery of other tests that considered “cognitive capacity.”⁸⁷ They conclude that it is unwise to “make sweeping statements about the relative maturity of adolescents and adults” because whether adolescents are as mature as adults depends on what type of decision making is under discussion.⁸⁸ The authors find that “[b]y age 16, adolescents’ general cognitive abilities are essentially indistinguishable from those of adults, but adolescents’ psychosocial functioning, even at the age of 18, is significantly *less mature* than that of individuals in their mid-20s.”⁸⁹

Steinberg et al. identify two broad types of decision making: “those that allow for unhurried, logical reflection and those that do not.”⁹⁰ When it comes to decision making that is more deliberative and reasoned, where there is room for them to be counseled and weigh their options, then adolescents, at least by the age of sixteen, are as capable of making decisions as adults.⁹¹ The types of decisions that are included here are medical decision making (where health practitioners can advise), legal decision making (where lawyers can advise), and participation in research studies (where research investigators can advise).⁹²

The other type of decision making involves decisions characterized by “impulsivity,” “emotional arousal,” or “social coercion,” and where it is unlikely that an adult will be present who can provide advice.⁹³ The types of decisions included here are situations where adolescents are emotionally aroused, are acting in groups, and where short-term rewards outweigh consideration of longer-term consequences.⁹⁴ In these situations, adolescents’ decision making, at least until they have turned eighteen years, is likely to be less mature than adults. Most crimes and health-compromising behaviors, including having unprotected sex, are included here.⁹⁵

Having explained these differences, Steinberg et al. conclude that the seemingly conflictual positions taken by the APA were not contradictory because each assessment was accurately applied to the type of decision making in each case.⁹⁶ This argument is satisfactory when applied to *Hodgson* (medical

86. *Id.* at 584–85.

87. *Id.* at 585–86.

88. *Id.* at 584–85.

89. *Id.* at 592 (emphasis added).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 593.

decision making) and *Roper* (juvenile crime) because each case dealt with decision making falling into the two different types. However, this argument provides little assistance to the comparison of *Centre for Child Law* (juvenile crime) and *Teddy Bear Clinic* (consensual sex) because the two activities at issue in the respective cases fall into the same type of decision making. Steinberg et al. conclude that “[s]cience alone cannot dictate public policy, although it can, and should, inform it.”⁹⁷ If lawyers want to find an easy, consistent answer to all questions about where to “draw the line between adolescence and adulthood,” they will be disappointed, because psychological development is “asynchronous.”⁹⁸

Terry Maroney highlights possible dangers of “tethering” law to science because the science positively applied in one context can have negative effects in another context.⁹⁹ She raises a thought-provoking example: As adolescent girls can be scientifically shown to mature more quickly than boys, should they be held criminally responsible at an earlier age?¹⁰⁰ This shows that the law cannot and should not “track” neuroscience—sometimes other values are as or more important. Maroney also observes that “[u]ndue emphasis on the immature brain also might alter our societal commitment to allow teens incrementally greater control over important aspects of their lives.”¹⁰¹ She acknowledges that it can be, and has been, argued that it is possible to distinguish between different types of decision making, but she nevertheless states that “a strong and simple message about brain immaturity poses a challenge to making complicated and contingent claims about autonomy.”¹⁰²

It thus appears to have been a wise strategy not to tie the central thrust of the *Centre for Child Law* case to neuroscientific evidence, because it is quite likely that it would have worked against a positive outcome in the *Teddy Bear Clinic* case.

VI. CONCLUSION

The dilemma of “autonomy versus protection” is an ever-present tension in children’s rights. A durable theory of children’s rights must be flexible enough to encompass protection for children against harsh treatment and punishment when they commit crimes, while at the same time allow for their evolving capacities to be recognized so that they can begin to make appropriate decisions as they move through adolescence. A problem in this field is that many people and organizations advocating for either child protection or children’s autonomy are drawn to only half of the argument. For example, those wanting to use neuroscience to show why adolescent offenders should not be fully culpable for their criminal acts usually do not want such arguments to be used in support of

97. *Id.*

98. *Id.*

99. Maroney, *supra* note 5, at 165–66.

100. *Id.* at 157.

101. *Id.* at 159.

102. *Id.*

curtailing freedom of expression (for example, preventing children from playing violent video games) or in making inroads in children's privacy and dignity (such as in medical decision making, reproductive health choices, and consensual sexual expression). Conversely, those who do want to argue children must be protected at all costs are often in the same conservative lobby as those who want tougher treatment of adolescent offenders.¹⁰³ It is evident, therefore, that policymaking in the field of children's rights is value laden.

Even if current neuroscience wisdom places juvenile crime into the same type of decision making as consensual sex between adolescents, the values base will decide what measures should be taken. With regard to crime, protection from harsh forms of punishment and creating situations that allow children the best possible chances for rehabilitation and reintegration is the approach that most children's rights advocates would choose. When it comes to consensual sexual activity between teenagers, crime and punishment should not come into it. As the *Teddy Bear Clinic* case found, such behavior is normative. If the state wants to play a role in delaying sexual debut, its tools should not be police and courts, but rather increased provision of education, counseling, and reproductive health services. Understood within a children's rights framework, these two approaches are compatible.

What then are the ingredients to a durable approach? The Convention on the Rights of the Child upholds privacy, dignity, and freedom of expression, as well as detention as a last resort and for the shortest appropriate period of time. Through its recognition of "evolving capacity," the Convention manages to bridge the eighteen years of childhood, recognizing that children need protection throughout childhood and adolescence, but must also be given the space to grow and mature into adults. In the words of former Constitutional Court justice, Justice Albie Sachs:

Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood.¹⁰⁴

103. Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695, 740–41.

104. *S v. M* 2008 (3) SA 232 (CC) at para. 19 (S. Afr.).