

HEINONLINE

Citation: 29 S. Afr. J. on Hum. Rts. 314 2013



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue May 17 04:30:29 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0258-7203](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0258-7203)

BALANCING THE BEST INTERESTS OF THE CHILD AND THE INTERESTS OF SOCIETY WHEN SENTENCING YOUTH OFFENDERS AND PRIMARY CAREGIVERS IN SOUTH AFRICA

ADMARK MOYO*

ABSTRACT

In the context of sentencing children in conflict with the law, the need to balance the best interests of the child and the interests of society replays the ideological tension between the welfare model and the justice model of juvenile justice. The welfare model of juvenile justice emphasises the rehabilitation needs of the offender and the justice model stresses due process and accountability for one's conduct. Yet, sentences imposed on many offenders usually carry elements of both models and there are indications that South Africa has adopted another emerging model of juvenile justice – the restorative justice model. Generally, the type of sentence to be meted out is determined by the nature and gravity of the offence; the circumstances of the offender; and the interests of society. This triadic method has been codified in the Child Justice Act as the criteria for determining sentences that balance the interests of the child and those of society. When sentencing primary caregivers, the courts are also required to balance the interests of society and the best interests of the child(ren) of the primary caregiver. In this instance, the courts should be mindful that it is not the child who has committed an offence, but an adult who has the capacity to understand the implications of his or her conduct for the social, moral, intellectual and physical development of their child. However, the bench is bound to ensure that the interests of the child are not severely negatively affected by the imposition of custodial sentences where other non-residential alternatives could be appropriate for the offence committed by the primary caregiver. In the two cases that were decided by the Constitutional Court, much turned on the availability or otherwise of other appropriate caregivers who were willing to take care of the children during their mothers' incarceration.

Keywords: criminal law, children, juvenile justice

I INTRODUCTION

It is now over a century since Juvenile Court Judge Tuthill J, in 1904, made the following observation regarding the law's tough-on-crime response to youth criminality:

No matter how young, these children were indicted, prosecuted, and confined as criminals in prisons, just the same as were adults pending and after a hearing, and thus were branded as criminals before they knew what crime was. The State kept these little ones in police cells

* PhD candidate, University of Cape Town (UCT). I wish to thank the two anonymous reviewers of *SAJHR* for their scholarly feedback on the initial version of this article. I also wish to thank Professor Jonathan Burchell of UCT for his incisive and helpful comments on earlier drafts of this article.

and jails among the worst men and women to be found in the vilest parts of the city and town. Under such treatment they developed rapidly, and the natural result was that they were thus educated in crime and when discharged were well fitted to become the expert criminals and outlaws who have crowded our penitentiaries and jails. The State had educated *innocent children* in crime, and the harvest was great.¹

Over the last 40 years, juvenile justice reformers have condemned unnecessarily harsh penalties and equated places of institutional confinement to schools for crime that damage innocent children. They, too, have suggested that it is time the juvenile justice system caused less harm than the traditional criminal processes.² Much is a result of the realisation that custodial sentences rarely create the desired effects (deterrence and crime prevention). In countries that still have the death penalty, for example the United States, the highest courts or the legislatures have abolished its application to juvenile offenders on moral grounds.³ Further, scholars and judges, particularly in the US, have also condemned life imprisonment without the possibility of parole as ‘cruel and unusual punishment’ which should not be imposed on juveniles convicted of criminal offences.⁴ These developments emerge at a time when youth offenders continue to be accused or convicted of committing serious offences.⁵

In response to the perceived tidal wave of youth crime, the South African public have begun to ask some serious questions. Are South African children ‘super predators’ deserving of a tough-on-crime response from the legislature and the local courts? Have the courts been excessively lenient or excessively harsh when sentencing juvenile offenders? What has the legislature done and how should the courts respond to the proposals codified in the Child Justice Act 75 of 2008? In the final analysis, have we got the right balance between the best interests of the child and the interests of society in the sentencing context? In this article, I cast the need to balance the best interests of the child

1 RS Tuthill ‘History of the Children’s Court in Chicago’ in SJ Burrows (ed) *Children’s Courts in the US: Their Origin, Development and Results* (1973) 1, 1.

2 See FE Zimring ‘The Common Thread: Diversion in Juvenile Justice’ (2000) 88 *Cal LR* 2477, 2481.

3 See *Roper v Simmons* 543 US 551 (2005).

4 See for instance Equal Justice Initiative *Cruel and Unusual: Sentencing 13 and 14 year Olds to Die in Prison* (2007); J Fagan ‘End Natural Life Sentences for Juveniles’ (2007) 6 *Criminology and Public Policy* 735; Human Rights Watch *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States in 2008* (2008); HJ Massey ‘Deposing of Children: The Eight Amendment and Juvenile Life Without Parole After *Roper*’ (2006) 47 *Boston College LR* 1083; WA Logan ‘Proportionality and Punishment: Imposing Life Without Parole on Juveniles’ (1998) 33 *Wake Forest LR* 681; see also *Graham v Florida* 130 S. Ct. 2011 (2010) where the US Supreme Court abolished the sentence of life imprisonment without the possibility of parole for juveniles convicted of non-capital offences.

5 See P de Vos ‘On the Jules High School Case’ (19 November 2010) <<http://constitutionallyspeaking.co.za/on-the-jules-high-school-case/>>, querying the state’s decision to charge teenagers for engaging in sex and describing consensual teenage sex as an ‘epidemic’. See also T Harbour ‘Schoolgirls Suffer in Silence: Bill of Rights Notwithstanding, Gender-based Violence at Schools is as Prevalent as Ever’ *Mail & Guardian* (12–18 November 2010); see M O’Donovan & J Redpath *The Impact of Minimum Sentencing in South Africa Report 2* (2006) 16 fn 39, noting that at the end of December 2005, 38 per cent of all prisoners under the age of 18 years had been imprisoned for sexual offences.

and the interests of society as a reflection of the tension between the need to dispense justice and the need to treat the 'innocent' child. Part II of this article construes the philosophical dimension of this debate as a clash between two theoretical models of juvenile justice. On one side is the welfare model, which emphasises the investigation of the root causes of juvenile delinquency and the importance of community or institution-based therapy for youths in trouble with the law. On the other is the justice model, which proposes that the meting out of sentences proportionate to crimes is the most important function to be performed by the criminal justice system. It is argued that these models should not be viewed as polar opposites where the operation of one automatically leads to the exclusion of the other, but as theoretical propositions with particular points of convergence where the best interests of the child meet the interests of society to curb youth crime.

In part III I explore the age-competence-punishment nexus and argue that the evolving capacities of the child play an important role in locating culpability and the appropriateness of criminal sanctions. With particular reference to case law, part IV reaffirms the well-known South African legal position that the determination of an appropriate sentence largely turns on the nature and gravity of the offence, the personal circumstances of the offender and the interests of society. In part V I investigate the extent to which the new Child Justice Act codifies the common law triadic formula of the offender, the offence, and the interests of society.

The best interests of the child is affected not only when children are sent to prison, but also when parents, caregivers and other holders of parental responsibilities are sentenced to some form of institutional confinement; especially imprisonment. It is common cause that parenting from prison does not meet the standard of care expected to be extended to children. The lack of direct physical contact between the child and the caregiver means that the caregiver cannot exercise physical control of the child. It also means that children do not have the benefit of direct guidance and instruction from the caregiver. Further, the caregiver cannot modify his or her instruction and guidance to suit the changing needs, evolving capacities and best interests of the child. Given that the interests of children are implicated when a primary caregiver is sentenced to incarceration, part VI explores the developing jurisprudence on the sentencing of primary caregivers by the superior courts and the Constitutional Court itself. In light of the primary caregiver's inclination to re-offend, it is shown that the Court in *S v M*⁶ appears to have over-emphasised the interests of the child at the expense and to the detriment of the interests of society. It is further shown that in *S v S*⁷ the Court sentenced the accused to imprisonment because it was evident that other appropriate caregivers had indicated their willingness to look after the children during their mother's incarceration. Much turned on this fact and the Court distinguished the two cases on this basis. In this part, I also identify the

6 *S v M* 2008 (3) SA 232 (CC).

7 2011 (2) SACR 88 (CC); 2011 (7) BCLR 740 (CC).

factors that should guide courts in sentencing primary caregivers in a manner that balances the interests of children and the interests of society. I show how the courts should make a value judgment; reconciling the interests of the child to be cared for by parents and the interests of the state in punishing offenders. Part VII closes the discussion.

II TENSIONS AND CONVERGENCES BETWEEN THE WELFARE MODEL AND THE JUSTICE MODEL OF JUVENILE JUSTICE

Academic literature suggests that innovative sentences such as community supervision, restorative justice sentences and non-residential alternatives are preferable and more effective than, for instance, the death penalty, life imprisonment (with or without the possibility of parole), compulsory minimum sentences and lengthy periods of incarceration.⁸ Empirical data and other writings on the subject unambiguously lead to the same conclusion: juveniles tried and punished as adults or sentenced to lengthy periods of imprisonment are better candidates for recidivism than those diverted away from the criminal justice system or sentenced to less harsh sentences.⁹ This confirms Judge Tuthill's view that jails are commanding centres of criminal education and implicates the relevance of such legal concepts as mental competence, penal proportionality and deterrence to determining appropriate sentences.

Traditionally, the two most influential models of juvenile justice were the welfare model – emphasising the rehabilitation needs of the offender – and the justice model – stressing due process and accountability for one's conduct.¹⁰ The welfare model focuses on the welfare of the child rather than on the rights of the child and casts rehabilitation and treatment as the ultimate goals of the criminal justice system. The welfare model is mainly concerned with the needs rather than the deeds of the child. Under this model, individual responsibility is viewed as an incomplete explanation for criminal behaviour. Thus, the welfare model de-emphasises individual choice; questions the idea of free will on which the criminal justice system is built and portrays crime and poverty as environmental problems that need to be understood and resolved.¹¹ The child, being innocent and in need of treatment and rehabilitation, is not fully responsible for the crime he or she has committed. Whilst the welfare model emphasises procedural informalities, generic referrals, individualised and indeterminate sentencing, the justice model stresses due process, the act of offending, least restrictive interventions and determinate sentencing. For the welfare model, the task is to provide an accurate diagnoses of the

8 JD Wooldredge 'Differentiating the Effects of Juvenile Court Sentences on Eliminating Recidivism' (1988) 25 *J of Research on Crime & Delinquency* 264, 283.

9 See N Frederique 'The Impact of Sentence Length on the Recidivism of Violent Offenders: An Exploratory Analysis of Pennsylvania Data, 1997–2001'. Thesis submitted to the Faculty of the Graduate School of the University of Maryland, College Park, in partial fulfilment of the requirements for the degree of Masters of Arts (2005).

10 For a fuller discussion of these models, see J Wundersitz 'Juvenile Justice' in K Hazlehurst (ed) *Crime and Justice: An Australian Textbook in Criminology* (1996) 118–23.

11 See D Garland *Punishment and Welfare: A History of Penal Strategies* (1985) 27–32.

problem, but for the justice model, the task is to punish the offender by meting out proportionate or just deserts. The former model views the problem as psychological and the latter views the problem as a matter of individual responsibility. The purpose of welfarist interventions is to provide treatment, but the purpose of just deserts is to sanction behaviour.¹² The welfare model responds to the child offender's broad needs, but the justice model respects the individual rights and *responsibilities* of the offender.¹³

Driven partly by the myth that all children are innocent, the welfare model portrays children as innocent and vulnerable persons in need of protection by the state. In other words, youth crime is taken not as evidence of the child's anti-social behaviour, but as a reflection of underlying family or societal problems for which the child does not bear full responsibility.¹⁴ Accordingly, it is deemed in the interests of children that the criminal justice system construes such interests as the need for the courts to diagnose the underlying problems confronting children who commit crimes and to treat these problems in some therapeutic way (diversion, correctional supervision and restorative justice for instance). Under this model, children should not be punished as criminals, but should be restored to childhood innocence.

Welfarist lawyers are not concerned with examining the state of mind that inspired a child to contravene the law; but rather view the child as innocent and in need of therapeutic treatment.¹⁵ For that reason, 'there was no need to determine whether the child had the capacity to act in a culpable fashion'¹⁶ because the concepts of competence, culpability and minimum age of criminal responsibility are not very relevant to determining appropriate treatment for those in conflict with the law. Here, the province of the best interests which ultimately emerges constructs the child as innocent and vulnerable – an 'object' whose needs and interests should be secured, emphasised and protected.

Dating back to the 18th century, this ideology of childhood has given rise to the philanthropic concern to save children.¹⁷ By the 19th century, welfare-oriented individuals and organisations had established reformatories and industrial schools as alternatives to prison for children in conflict with the law.¹⁸ Another notable effect of the welfare model was the development of separate courts for children in trouble with the law. These courts were made to function as 'welfare institutions' and the procedures were informal, inquisitorial and child-friendly. The development of separate courts for juvenile offenders was

12 See JPJ Coetzer 'Sentencing: The Training of Judicial Officers' in *Proceedings of the Conference on Law, Crime and Community* (April 1975) 113, 114.

13 For a summary of the two models, see I O'Connor 'Models of Juvenile Justice' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* (1997) 43.

14 See JO Midgley 'Treatment of Juvenile Offenders' in *Proceedings of the Conference on Law, Crime and Community* (April 1975) 179, 183.

15 See M King & C Piper *How the Law Thinks About Children 2* ed (1995) 4–5 & 108–9.

16 A Walkover 'The Infancy Defence in the New Juvenile Court' (1984) 31 *UCLA LR* 503, 516.

17 See D Platt *The Child Savers* (1989).

18 For a history on the development of the juvenile courts in the US, see BC Feld *Bad Kids: Race and the Transformation of the Juvenile Court* (1999) 51.

intended to protect children from the harsh effects of adversarial litigation in adult criminal courts. Whilst these developments may have influenced South African criminal law, it must be noted that South Africa never adopted the welfare model of juvenile justice. Part of the reason has always been the possibility of transferring the child offender to the care system. Over the years, this option has been underutilised. In *S v B*, the Supreme Court of Appeal (SCA) observed: ‘Historically, 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’.¹⁹ While the privacy of children was protected through in-camera provisions and a prohibition on publishing their names, separate juvenile courts were not established in South Africa and children charged with crimes continued to appear in adult criminal courts.²⁰ According to Ann Skelton, ‘South Africa introduced ... different procedures and options relating to children incrementally, some through the development of the common law and others through various uncoordinated pieces of legislation representing waves of reformist thinking that created ad hoc improvements for children’.²¹ Although age has always been a mitigating factor in determining criminal responsibility and appropriate sentences, the notion of the ‘innocent child’ never prominently featured in the South African criminal justice system.

Claire Breen observes that the notion of the innocent child whose best interests must be protected arose from social and legal constructs depicting children as inherently good and innocent.²² There are two main problems associated with the concept of the idealised innocent child. First, children who do not conform to the standard by which children’s compliance with the moral code is to be measured are characterised as deviant, troublesome, problematic or delinquent. In other words, the child who does not fit in with the tradition of the innocent child is ‘othered’ and pathologised. Thus, children who have a propensity to commit serious crimes are construed as the ‘other’ category of children who are failing to conform to adult perceptions of appropriate social behaviour. Second, metaphors of children as a vulnerable and innocent class may result in the imposition of disproportionately low sentences for particularly serious crimes. According to the narrow definition of the best interests standard, youth offenders are viewed as helpless victims of circumstances in need of rehabilitation so that they can be returned to some sort of innocence. Based on the myth of the innocent child, the construction of the best interests of the child in juvenile justice circles has tended to result in either the imposition of disproportionately lenient sentences or the enactment of laws raising the minimum age of criminal responsibility. For the law to

19 *S v B* 2006 (1) SACR 311 (SCA).

20 A Skelton ‘Children, Young Persons and the Criminal Procedure’ in JA Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 161, 172.

21 A Skelton ‘From Cook County to Pretoria: A Long Way to Justice for Children’ (2011) 6 *North Western J of L & Social Policy* 417–8.

22 C Breen *The Standard of the Best Interest of the Child* (2002) 3.

reflect at the sentencing stage the standard of the best interests of the child, particularly the idea that the child is an innocent human being, the sentencing court must not be hard on the convicted criminal who is a child. However, public safety concerns and the interests of society are equally important when sentencing children who commit serious crimes. The welfare model needs to be viewed in light of the interests of society in maintaining public order and protecting innocent citizens belonging in a political community.

The justice model views the repression of criminal activity as the most important purpose of the criminal process. As such, the failure of law enforcement to bring criminal conduct under tight control is seen as leading to the breakdown of public order and to the disappearance of a pivotal condition on human freedom.²³ Beneath this objective is public concern that if the laws go unenforced or if it is perceived that the criminal process is failing to respond to one of the prevailing scourges of our time – crime – a general disdain of legal controls of human behaviour will develop.²⁴

To some extent, the justice model resurrects the traditional view, ideologically dominant in the earliest of times, that the youth offender is a very ‘bad’ or ‘sinful’ person whose behaviour is attributable to ‘sheer wickedness’. In describing this model, James Fitzjames Stephen once submitted that ‘the criminal law proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it’.²⁵ Just like the welfare model, the justice model has a labelling effect; it tells society and the offender that the latter is a ‘criminal’. Over the centuries, the justice model has seen courts and other law enforcement agents administer heavy and often inhuman punishment on the criminal, whether young or mature. While the modern trend towards non-custodial dispositions and the international and constitutional norm of imprisonment as a last resort and for the shortest appropriate period of time no doubt suggest a move away from institutional punitive responses to youth crime, it is common cause that a consistent system of punishment is essential for the peaceful and safe existence of all communities. It is also common cause that every society reveres norms, customs and laws the deliberate transgression of which attracts severe penalties such as the removal of the transgressor from the community and his or her detention in prison. Punishment, especially in the form of imprisonment, serves as a temporary protection of the community and its interests. More than 35 years ago, JP Roux expressed:

Because imprisonment deprives a person of his most precious possession, ie individual freedom, imprisonment also contains, in addition, elements of revenge, retribution, penance and deterrence. Notwithstanding the fact that we are living in an enlightened age, it is still the case that the community wants revenge and retribution for crimes committed. Revenge, retribution and penance are indicative of a symbolic restitution to society, in spite of the fact that some crimes, eg murder, can never be compensated for. Should imprisonment

23 HL Packer *The Limits of the Criminal Sanction* (1968) 149–73.

24 Ibid 158.

25 JF Stephen *The History of the Criminal Law in England* (1893) cited in J Samaha *Criminal Law* (2013) 24–5.

as a deterrent have as a consequence that all criminals and potential criminals withhold themselves from committing crimes, it could be a valuable method, but many criminals, especially psychopaths are never deterred, and lapse into crime repeatedly.²⁶

That punishment generally and imprisonment in particular serve an important deterrent and preventive social function is beyond question. However, the fundamental problem with the obsession to punish criminals is that it is often an emotional and ill-thought response to criminality. This obsession is often reflective of political over-responsiveness to public attitudes; ill-considered responses to recent but isolated incidents of serious crime; the desire to fulfil campaign promises to be 'tough on crime'; practical responses to pressure from citizens clamouring for action and the need to create an appearance of aggressiveness towards crime.²⁷ When crime and punishment law and policy are merely a product of and a desire to appease public sentiment, the effectiveness of the criminal justice system becomes questionable and limited.

Yet, a measure of deterrence, reasonably independent of popular opinion and distant from the demands of the masses, is needed in the criminal code. Although it is difficult to measure the deterrent effect of incarceration and other heavy sentences,²⁸ we can safely assume that the possibility of being detained and losing one's individual freedom is serious enough to discourage criminals' propensity towards criminal conduct. Yet, here is the problem: deterrence as a justification for the imposition of heavy sentences on youth offenders fails to achieve its purpose because juveniles, lacking maturity and a sense of responsibility, are less likely to take a possible punishment into consideration when making decisions to commit a crime.²⁹ Punishment alone, no matter how hard and painful, is often insufficient to ensure the safety of the community because, sooner or later, many offenders return to the community. All offenders regain their freedom at the end of their sentences except those who are subjected to the death penalty (which has been abolished in South Africa),³⁰ those serving sentences of life imprisonment without parole (which no longer applies to youth offenders in South Africa),³¹ and, lastly, those who die in prison (very few compared to those who are released at the end of their

26 JP Roux 'The Treatment of Offenders' in *Proceedings of the Conference on Law, Crime and Community* (April 1975) 144, 146.

27 See WJ Stuntz 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan LR* 505, 509; ES Scott & L Steinberg 'Blaming Youth' (2003) 81 *Texas LR* 799; EF Emens 'Aggravating Youth: *Roper v. Simmons* and Age Discrimination' (2005) *Supreme Ct R* 51; L Bazelon 'Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court' (2000) 75 *New York Univ LR* 159; WA Logan 'Proportionality and Punishment: Imposing Life without Parole on Juveniles' (1998) 33 *Wake Forest LR* 681.

28 On the uncertainties of deterrence as a function of punishment, see RS Frase 'Punishment Purposes' (2005) 58 *Stanford LR* 67; see also J Sloth-Nielsen & L Ehlers 'Mandatory and Minimum Sentences in South Africa' (2005) 14 *SA Crime Quarterly* 15, illustrating that crime levels rose for a number of years soon after the enactment of minimum sentences and that serious crimes such as murder registered a significant decline after the abolition of the death penalty in South Africa.

29 See KD Tunnell 'Choosing Crime: Close Your Eyes and Take Your Chances' (1990) 7 *Justice Quarterly* 673.

30 See *S v Makwanyane* 1995 (3) SA 391 (CC).

31 See Child Justice Act s 77(6).

sentences). Given that imprisonment and the deterrence associated with it do not indefinitely suspend the commission of crimes, and therefore, only protect the interests of society for the duration of the offender's prison term, it is essential for the justice model to share some vision with the welfare model to ensure that dispositions promote as the core function the rehabilitation and reintegration of the offender.

It must not be thought that the welfare model and the justice model are polar opposites – the operation of one of which excludes that of the other. They form part of a continuum with particular points of convergences and divergences. In similar parlance, the interests of society and the best interests of the child are not necessarily conflicting concepts. The best interests principle is a constitutional right and principle. While it may have originated from the welfare model, it has since 1989 been elevated to a right and principle in international law and, since the adoption of the interim Constitution in 1993,³² it has been a constitutional right and a principle. The values and interests of society are reflected in the Constitution of the Republic of South Africa, 1996. The best interests of the child is one of those values. Thus, society does not only value crime prevention, it also values the best interests of the child and the central role children play in ensuring the survival of the community now and in the future. Both interests are valid. While the interests of the child, on one hand, and the need to impose proportionate sentences, on the other, may point to different directions, the best interests of the child should not be conceptualised as a concept that is totally divorced from the 'interests of society'. It is one of the interests society seeks to protect and promote by taking account of the adverse impact a particular sentence is likely to visit on the child.

In order to protect the community effectively against criminal conduct, the justice model should agree with the welfare model that behavioural change has to be engendered in the offender, since detention in prison in itself does not guarantee the long-term interests and safety of the community. In fact, there are indications, from leading academics such as Skelton,³³ that South Africa has moved to another emerging model of juvenile justice – the restorative justice model. This model combines elements of the welfare and justice models. Restorative justice is defined in the Child Justice Act as 'an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation'.³⁴ The Child Justice Act is aimed at, among other things, expanding and entrenching the principles of restorative justice for children in conflict with the law, while ensuring their responsibility and

32 Constitution of the Republic of South Africa Act 200 of 1993.

33 See A Skelton 'Restorative Justice as a Framework for Juvenile Justice Reform' (2002) 42 *British J of Criminology* 496.

34 Child Justice Act s 1.

accountability for crimes committed; recognising the present realities of crime in the country and the need to prevent crime by placing increased emphasis on the effective rehabilitation of children in order to minimise the potential for re-offending; and balancing the interests of children and those of society, with due regard to the rights of victims.

The diversion of matters involving children who have committed offences away from the criminal justice system is a central feature of the Act. At the sentencing phase, the Act binds the courts to give children a second chance by imposing on the child sentences that promote restorative justice, rehabilitation and the reintegration of the child offender. These include community-based sentences;³⁵ sentences involving correctional supervision,³⁶ and restorative justice sentences (family group conferences and victim-offender mediation).³⁷ The degree to which judicial officers are bound to impose these sentences or opt for sentences that have a punitive or residential dimension is determined by the triadic formula of the offence, the offender, and the interests of society. As discussed below, the capacities and needs of the offender also remain pivotal in determining the nature of the sentence. In determining appropriate sentences for children in conflict with the law, the still-developing capacities of the offender; the constitutionalisation of the best interests of the child and the requirement that the child be imprisoned as a last resort, cry for the kind of attention that must be placed on rehabilitation and reintegration. Nonetheless, it will be a misconception for advocates of the welfare model to suppose that treatment holds in equal measure for all youth offenders. There are not one, but many categories of offenders. Marguerite Warren once submitted that in the field of delinquency, one of the few agreed upon facts is that 'delinquents are not all alike – they are different from each other in the reasons for their delinquency and, in the expression of their delinquency and in their capacity for change towards non-delinquent patterns'.³⁸

First, there are offenders who in light of all considerations have the best possibility of positively reacting to the ordinary methods of therapy and rehabilitation. Second, there are those who are mentally disabled, but nevertheless have a subnormal intellectual ability and where it is evident that the person's lapse into crime should be, to a larger extent, attributed to a lack of intellectual capacities. Third, there are psychopathic offenders, on whom the ordinary methods of punishment and therapy have clearly no effect. Psychopaths are perpetually and repeatedly in conflict with the social norms of the community and therefore with the legal code. Fourth, there are offenders who belong to an open group and do not fit into any of the categories stated above. Yet, by any measure, these categories are more pronounced among adult offenders since youth offenders would not have lived long enough to be

35 Ibid s 72.

36 Ibid s 75.

37 Ibid s 73.

38 MQ Warren 'The Case for Differential Treatment of Delinquents' (1970) 12 *Canadian J of Corrections* 1, 1.

strictly labelled as, for instance, ‘psychopaths’. However, in so far as it draws the sentencer to the realisation that there are many categories of offenders, the distinction is necessary and bears persuasive value in the sentencing context.

Owing to the differences among these categories of offenders, it will be a misconception of the nature of youth criminality and the reasons behind it for the justice model to approach all offenders as if they deliberately chose a life in crime or for the welfare model to suppose that all juvenile offenders can be restored to a life free from crime without resorting to sanctions that have a punitive dimension. Different offenders require different responses from the criminal justice system; some require therapy-based solutions, some would show a commitment to reform when society shows them that it is very serious about enforcing the criminal code; and yet the majority require both. Hence the need for the individuation of sentences and the need to harmonise the interests of society embodied in the justice model and the interests of the child embedded in the welfare model. Yet, much depends on the age and capacities of the child. Punishment, being a response to the mental aspect of the act, which constitutes a crime, should mirror the degree to which a particular child is culpable.

III REFLECTIONS ON THE AGE-COMPETENCE-PUNISHMENT NEXUS

Generally, children are more inclined (than adults) to make decisions based on emotions rather than on rationality and reflective judgment.³⁹ They also have very short time horizons (looking only a few days into the future),⁴⁰ tend to be present-oriented and to discount future implications of their actions.⁴¹ More often, adolescents’ aversion to risk, vulnerability to peer pressure and focus on immediate gains rather than future losses translates into immature judgment.⁴² Adolescents’ involvement in risky behaviour such as criminality, unprotected sex and drug and alcohol abuse also arise from their social immaturity.⁴³ Limited cognitive abilities and limited experiences explain why adolescents regard consequences that are likely to happen in the future (including possible criminal sanctions) as events too remote to deserve immediate attention.⁴⁴ These factors affect not only the level of blame to be attached to children’s criminal conduct, but also the sentence to be imposed for such conduct.

39 See T Grisso ‘What We Know About Youth’s Capacities’ in T Grisso & RG Schwartz (eds) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (2000) 267–9.

40 See AL Green ‘Future-time Perspective in Adolescence: The Present of Things Future Revisited’ (1986) 15 *J of Youth & Adolescence* 99.

41 W Gardner & J Harman ‘Adolescents’ AIDS Risk-taking: A Rational Choice Perspective’ in W Gardner, SG Millstein & BL Wilcox (eds) *Adolescents in the AIDS Epidemic* (1990) 19, 25–6.

42 See ES Scott, D Reppucci & JL Woolard ‘Evaluating Adolescent Decision-making In Legal Contexts’ (1995) 19 *Law & Human Behaviour* 221; J Nurmi ‘How do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning’ (1991) 11 *Developmental Review* 1, 47–9.

43 See J Arnett ‘Reckless Behaviour in Adolescence: A Developmental Perspective’ (1992) 12 *Developmental Review* 339, 339–43.

44 ES Scott & T Grisso ‘The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform’ (1997) 88 *J of Crim L & Criminology* 137, especially 137–41 & 153–89.

Youth offenders are unlikely to consider sentence severity as a deterrent when making decisions to commit crime. Therefore, age and immaturity are grounds for extending special protection to children in the sentencing context. Hence the constitutional injunctions of imprisonment as a last resort and for the shortest appropriate period of time and the constitutional protection of the standard of the best interests of the child. Although vulnerability decreases with age and capacities develop at different rates for different children, the youth offender's chronological age is usually an indicator of both im(maturity) and the appropriateness of various sentences for youth crime.

In *Centre for Child Law v Minister of Constitutional Development*,⁴⁵ the Constitutional Court was called to determine whether the minimum sentencing regime for juvenile offenders was inconsistent with s 28(1)(g) of the Constitution, which states that 'every child has the right not to be detained except as a measure of last resort, in which case ... the child may be detained only for the shortest appropriate period of time'. The Constitutional Court reiterated the need to be cognisant of children's physical and psychological vulnerabilities and the need to ensure that children are protected from severe punishment for serious crimes. Abolishing mandatory minimum sentences for youth offenders, Cameron J, for the majority, held:

The Constitution draws [a] sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults. These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults. These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. 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.⁴⁶

These sweeping remarks about lack of maturity and the vulnerability of children echo the myth of childhood innocence inherent in the welfare model.⁴⁷ Elsewhere, I have argued that the sweeping generalisations made by the Constitutional Court in *Centre for Child Law* depict children of all ages as if they are equally vulnerable and as if they have similar competences regardless of age and level of maturity.⁴⁸ John Baker once noted that mens rea requirements strengthen the normative force of the criminal law and

45 2009 (6) SA 632 (CC).

46 Ibid paras 26–8.

47 While Cameron J's observations echo elements of the welfare model, it cannot be argued that one paragraph amounts to a shift to such model.

48 A Moyo 'Youth, Competence and Punishment: Reflections on South Africa's Minimum Sentencing Regime for Juvenile Offenders' (2011) 26 *SAPL* 1.

help us to distinguish between those who are truly deserving of community condemnation.⁴⁹ South Africa recently extended the Minimum Age of Criminal Responsibility (MACR), historically set at seven years of age at common law, to ten years.⁵⁰ The setting of the MACR is a legal ploy designed to avoid intricate empirical arguments about the capacities of the individual child. Legal age divisions tend to be closed and rigid. Arguably, different ages of criminal responsibility are designed to ensure both that children with limited capacity are protected from sentences meant for 'hardened' criminals and that youth offenders with the required cognitive threshold are fairly punished when they commit crimes. The use by the law of closed age categories stands as a strategic response to external 'scientific' knowledge regarding the probable moral, intellectual and emotional capacities of children at various stages in their development. For children under the biological age of ten years, South African law is not concerned with examining the state of mind that inspired a particular child to commit an offence. Instead, the law assumes that the child does not have legal capacity. It follows that the state cannot, as a matter of principle, furnish evidence in any court of law to prove that a child below the age of ten has committed a crime, even if the child factually commits one and had the necessary mental competence.

Children between the ages of ten and 14 are rebuttably presumed to lack the competence to commit crimes and the prosecution shoulders the burden to defeat the presumption by showing that the child understood the nature and wrongfulness of his conduct.⁵¹ Adolescents 14 years and older are treated as if they are adults and are therefore fully responsible for their conduct. It is commonplace that the presumption of incompetence is stronger for children who are aged ten but weaker for those nearing their 14th birthday. Here is the point: the construction of culpability based on chronological age serves two purposes. First, it ensures that the best interests of the child and the interests of society are promoted by reducing the punishment stakes where the child convicted of crime has been shown to be significantly vulnerable to error, impulse and influence by others due to his/her still evolving capacities.⁵² Second, it ensures that children's interests and society's interests are balanced by, for instance, requiring the court to impose sentences that mirror society's sharp disapproval of the child's behaviour where the child offender is convicted of a serious and pre-meditated crime committed under aggravating circumstances.

While children do commit heinous crimes and may have to be imprisoned for such crimes, the best interests of the child requires courts to impose a sentence of imprisonment only as a last resort and for the shortest appropriate time. Children's vulnerability to impulse, error and external

49 JS Baker Jr 'Revising the Explosive Growth of Federal Crimes' (2008) 26 *Heritage Foundation Legal Memorandum* 6–7.

50 See Child Justice Act s 7.

51 *Ibid* s 7(2) read with s 11.

52 For the protective element of the child's evolving capacities, see G Lansdown *The Evolving Capacities of the Child* UNICEF Innocenti Research Centre, Florence (2005) 15.

influence decreases with age. Very young children need more protection than adolescents who are on the verge of maturity. Generally, the latter category of children are more sophisticated and mentally mature than other categories of children and this fact should be reflected in the way adolescents are sentenced. Due to the fact that some crimes are so heinous and some juvenile offenders so highly culpable, it is difficult to make a categorical statement on the way sentencing laws should respond to youth crime and on what forms of institutional punishment, when imposed, may or may not be constitutionally permissible. In South Africa, as elsewhere, there is an argument to be made that dispositions that are grossly disproportionate to the severity of the offence and the culpability of the offender are not in the best interests of the child and are therefore unconstitutional.⁵³

Absent homogenous mental competences among all children under 18, it is important to make justifiable distinctions between various categories of children. For instance, it cannot be insisted that the capacities of 16 and 17 year olds are still developing as to excuse them from the ‘full rigour of adult punishment’.⁵⁴ To ensure disproportionately low sentences are not imposed on children, the principle of penal proportionality would exert upward pressure on sentences imposed on children for serious crimes. Where the youth offender has the psychological capacity to fully appreciate the wrongfulness of his/her act and to act in accordance with that appreciation, it is not in his/her interest to be spared from a heavier sentence than is legislatively prescribed.⁵⁵ Every child is unique. The nature of the proceedings, the level of maturity of the child, the independence of the child and the circumstances under which the crime was committed, normally dictate the sentence to which the child should be subjected.⁵⁶ Psychological maturity is vital in locating youth offenders’ measure of criminal responsibility and the degree of blame to be communicated to them through sentencing laws.⁵⁷ Criminal sanctions should be commensurate not only to the harm caused, but to the moral blameworthiness of the offender.⁵⁸ Legal systems often recognise the age-competence-punishment connection through legal age limits that mark the boundaries between ‘childhood’ in the strictest sense and adolescence. As children approach the age of majority and their capacities evolve, the case

53 For an American analysis on this area of law, see Y Lee ‘The Constitutional Right Against Excessive Punishment’ (2005) 91 *Va LR* 677. See also *Cooker v Georgia* 433 US 584, 592 (1977), holding that the Eighth Amendment prohibition on ‘excessive’ punishments forbids those punishments that are at odds with evolving standards of decency or that are grossly disproportionate to the crime.

54 See *Centre for Child Law* (note 45 above) paras 35–8.

55 On how legal responsibility should reflect the individual capacities – presumed or actual – of the agent, see SR Perry ‘Risk, Harm and Responsibility’ in DG Owen (ed) *Philosophical Foundations of Tort Law* (1997) 321.

56 See *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) paras 123–5.

57 See KW Simons ‘Negligence’ in EF Paul, FD Miller & J Paul (eds) *Responsibility* (1999) 52, 88 fn 90.

58 J Burchell *Principles of Criminal Law* 3 ed (2005) 68–9 & 72–3; CR Snyman *Criminal Law* (1981) 130–3.

for deeming them fully criminally responsible is as strong as the case for subjecting them to heavier sentences when convicted of heinous crimes.

To the extent that children are not mentally homogenous and deserve differential treatment, courts should probe the importance of mental competence in sentencing offenders. It is common cause that children over the age of 14 years have some minimal level of rationality and that they can act accordingly.⁵⁹ Since children over 14 are presumed competent to obey the law, criminal responsibility (for them) follows autonomous choices and they are presumed to have such a degree of ownership, causation and power of command as to justify the assignment of criminal responsibility and the imposition of proportional sentences on them.⁶⁰ For over 14s, age and level of maturity are only re-examined as mitigating factors in locating the breadth of punishment and not as factors exempting youth from some sentences. Exercising benevolent maternalism over adolescents is not an appropriate response to the rights of adolescents as moral agents capable of understanding and assuming accountability for personal choices. According to Hirsch, we sentence offenders to (a) mark the significance of the rights that have been breached; and (b) to address the criminal as a moral agent, by appealing to his/her sense of right and wrong.⁶¹ Apart from assuming that our disapproval of the offender's conduct, through hard treatment, will keep his/her predatory behaviour at bay or within reasonable limits at least, we also believe that punishment serves an educative purpose. Thus, our disapproval should give the youth offender, as an agent capable of moral deliberation, the opportunity to reflect on the blameworthiness of their conduct and the drive to abandon morally bad deeds in future.

To Gerhard Mueller, the imposition of punishment for wrongdoing implies the restoration and re-assertion of the law-protected value which the perpetrator has violated. Punishment should therefore mirror the importance of the law-protected value and the legal rule in which the value is embodied. Viewed thus, argues Mueller, 'punishment is a public demonstration that society's statement of commands is not an idle gesture, but is a matter of continuing validity'.⁶² These observations apply to all offenders – whether young or old. Whilst the characteristics that distinguish adolescents from adults do not disappear when an individual reaches the age of majority, some adolescents reach a level of maturity some adults will never attain. Psychological development does not follow a fixed trajectory (toward maturity) culminating in the acquisition of adult competences when children reach the age of majority.⁶³ For this reason, South African law requires courts to adopt an individualised approach (to sentencing) that factors in every child's interests and level of maturity.

59 See SJ Morse 'Immaturity and Responsibility' (1997) 88 *J of Crim L & Criminology* 15.

60 See HLA Hart *Punishment and Responsibility: Essays in the Political Philosophy of Law* (1968).

61 A Von Hirsch 'Proportionate Sentences: A Desert Perspective' in A Ashworth, A Von Hirsch & JV Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* 3 ed (2009) 115, 116.

62 GOW Mueller 'Punishment, Corrections and the Law' (1966) 45 *Nebraska LR* 58, 67.

63 See E Buss 'Rethinking the Connection between Developmental Science and Juvenile Justice' (2009) 76 *Univ of Chicago LR* 493, 508.

However, the importance of children's rights and best interests, suggests that the Constitution does not require a 'strict proportionality' between sentences and crimes committed by children whose capacities are still evolving.

IV BALANCING THE BEST INTERESTS OF THE CHILD AND THE INTERESTS OF SOCIETY WHEN SENTENCING JUVENILE OFFENDERS

In the context of sentencing youth offenders, the best interests of children, though important, are not determinative of the sentencing option to be adopted by the court. In the aftermath of *S v Zinn*,⁶⁴ it is commonly accepted that the sentencing court must consider the 'triad consisting of the crime, the offender, and the interests of society' in determining the appropriate response to adult and youth crime. The rationale for penal proportionality arises from the general motivations behind sentencing offenders. Whatever penal sanction is visited upon the offender should mirror the degree to which the offender's conduct is socially unacceptable, otherwise law-abiding citizens and criminals for that matter, would have no incentive to desist from breaking the law.⁶⁵ Balancing moral blameworthiness and the severity of punishment reflects society's attempt to ensure fairness and consistency in sentencing criminals of all ages.

Ordinal proportionality binds courts to impose sentences of comparable severity on criminals convicted of similar offences. In relation to sentencing youth offenders, international law requires the sentencing authority to be guided by the principle that '[t]he reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society'.⁶⁶ Consequently, the requirements of ordinal proportionality are breached 'when equally reprehensible conduct is punished markedly unequally'.⁶⁷ For juveniles, the principle of proportionality suggests that the circumstances of the offender should influence the manner and form of the response to the crime he/she has committed.

It should be underlined that the appropriateness of a particular sentence for a particular offender depends not only upon society's interests as embodied in the length of the incarceration prescribed in sentencing legislation, but also on the goals the sentencing judge wishes to achieve by imposing a particular sentence. Where the main goal is to rehabilitate the offender through therapeutic treatment, the duration of institutionalisation may be longer than when it is simply meant to punish him for the 'fouls' he has committed on 'society'. It is not difficult to imagine cases in which the juvenile must at

64 1969 (2) SA 537 (A) F-G.

65 However, this does not explain why a murderer serving life without the possibility of parole, should not murder while in prison. See R Posner 'Optimal Sanctions: An Upper Limit?' in Von Hirsch (note 61 above) 64, 66-7.

66 Rule 17(1)(a) of the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) adopted by General Assembly res 40/33 of 29 November 1985.

67 Von Hirsch (note 61 above) 120.

least, in the circumstances, be committed to a custodial institution (jail for instance) and what is left for discussion is the appropriate duration of custody. Consistent with international law regulating the sentencing of children,⁶⁸ s 28(1)(g) of the Constitution envisages that the sentence imposed on the child should reflect the desirability of promoting the child's reintegration and assuming a constructive role in society. In sentencing youth offenders, courts should place emphasis on rehabilitation rather than retribution, and alternatives to institutionalisation rather than institutionalisation itself.⁶⁹ For that reason, the law places restrictions on the period for which children can be deprived of their liberty.⁷⁰

Section 28 of the Constitution now requires that children be imprisoned as a last resort and for the shortest appropriate period of time. In *S v Brandt*,⁷¹ the SCA observed that youthfulness in and of itself limits the discretion of the court to impose minimum sentences, which will be otherwise appropriate when imposed on adult offenders who have committed similar crimes. The general principle of the best interests of the child clearly indicates that child offenders are deserving of special protection, especially in the sphere of sentencing.⁷² In light of the safeguards contained in the Constitution and recent developments in juvenile justice reform, youth offenders should not be treated as undersized versions of adult offenders.⁷³ In the view of the court:

The traditional aims of punishment, particularly in respect of child offenders, therefore have to be re-appraised and developed to accord with the spirit and purport of the Constitution. *International documents on child justice emphasise the re-integration of the child into society. Indeed the aims of re-socialisation and re-education must now be regarded as complementary to the judicial aims of punishment applicable to adult offenders. A child charged with an offence must be dealt with in a manner which takes into account his/her age, circumstances, maturity as well as intellectual and emotional capacity.*⁷⁴

The dominant message in the Constitution and international law is that child offenders should not be deprived of their liberty except as a measure of last resort and, where imprisonment must occur, the sentence must be individualised with the objective of preparing the child offender (from the time he enters into a detention facility) for his or her ultimate return to society.⁷⁵ In an ideal world, observed the Court, no child should be caged,⁷⁶ but practice reveals that there will always be cases that are so serious that incarceration would be the sole appropriate punishment.⁷⁷ For adult offenders, held the

68 See art 40(1) of the Convention on the Rights of the Child (CRC).

69 See commentary to Rule 17 of the Beijing Rules and *Ibid*.

70 Compare s 28(1)(g) with art 37(b) of the CRC and Beijing Rules.

71 [2005] 2 All SA 1 (SCA).

72 *Ibid* para 13.

73 *Ibid* para 14.

74 *Ibid* para 15.

75 *Ibid* para 19.

76 See also J Sloth-Nielsen 'No Child Should be Caged – Closing Doors on the Detention of Children' (1995) 8 *SACJ* 47.

77 *Brandt* (note 71 above) para 13.

court, the starting point is the statutorily ordained minimum sentences, but for youth offenders, the court starts with a 'clean slate'.⁷⁸

More importantly, it was held in *S v Brandt* that in determining the appropriate sentence, the presiding officer must be guided by the principle of proportionality; the best interests of the child; and the least possible restrictive deprivation of the child's liberty.⁷⁹ Adherence to the principle of imprisonment as a last resort and for the shortest appropriate period of time implies a limitation on certain forms of sentencing such as the abolition of life imprisonment without parole sentences for juvenile offenders. To broaden the horizon of the best interests principle, regard must also be had to whether a youth offender had a childhood characterised by neglect, ill-discipline and ineffective parenting; had been raised in an atmosphere of social and emotional deprivation; had abused alcohol and other dependence-producing substances or whether the social and economic environment encouraged clashes with the law at an early age and whether the child had generally been failed by parents, the community and society.⁸⁰

In changing a sentence of life imprisonment to one of 18 years' imprisonment, the court in *S v Brandt* held that the offence of murder itself is particularly heinous; that the deceased, a defenceless elderly lady, had been murdered in the sanctity of her home by the appellant who entered under some false pretext to commit a robbery; that the appellant's motive in killing the deceased was to avoid detection since he realised that the deceased had identified him during the robbery. Ultimately, the contrition and remorse shown by the appellant in pleading guilty, and the personal mitigating circumstances of the appellant referred to above, had to be counterbalanced against the enormity of the crime and the public interest in an appropriately severe punishment.⁸¹ In light of the appellant's relative youthfulness, rehabilitation remained a real possibility even after a fairly long period of imprisonment. Given all the factors referred to above, and not losing sight of the fact that the legislature had ordained that the ordinarily appropriate sentence for murder is life imprisonment, the court deemed an 18-year imprisonment period appropriate.⁸²

Thus, the fact that it is in the best interests of the youth offender to be imprisoned only as a last resort and, even then, for the shortest appropriate period of time 'does not preclude sending child offenders to jail' in appropriate circumstances.⁸³ In *Director of Public Prosecutions, KwaZulu-Natal v P*,⁸⁴ the SCA once held that the Constitution and international law do not prohibit the incarceration of children in certain circumstances, but merely require that the child be detained for the shortest *appropriate* period of time.⁸⁵ Either way,

78 Ibid paras 10 & 11.

79 Ibid para 20.

80 Ibid para 25.

81 Ibid para 26.

82 Ibid.

83 *Centre for Child Law* (note 45 above) para 29.

84 2006 (3) SA 515 (SCA).

85 Ibid para 19.

it is a rule of thumb that 'disproportionate sentences are not to be imposed and that courts are not vehicles for injustice'.⁸⁶ The desire to rehabilitate and reintegrate the child should always be counter-balanced with public safety concerns and the enduring value of proportionality.

While punitive motives should not outweigh the rehabilitative purpose of the law when sanctioning decisions are made in the child justice courts, it is not difficult to imagine circumstances in which the interests of society demand that a youth offender be seriously punished for committing certain crimes. For instance, community supervision is rarely an heroic intervention for pre-meditated murder since it does not take extensive power over the life of the young offender when compared to prisons and other forms of institutionalisation. The treatment, with a view to rehabilitation, of a youth offender who adapted easily through his or her life and who largely accepted social norms and values, but who, on the brink of celebrating his or her 18th birthday, commits a heinous crime as a consequence of emotional, personal and environmental factors, should differ from that of another youth offender whose 'whole' life was characterised by an enduring pattern of repeated antisocial and criminal behaviour.

In the former case, it is evidently a matter of facilitating a return or reorientation to a previous higher level of functioning, but the latter case requires an engine overhaul. In the latter case, it is a matter of reconstructing the entire personality structure and the way of life of the youth offender. Such a task requires the adoption and implementation of more intensive, difficult and lengthy processes and programmes targeted at addressing the social background, school environment, home conditions, family adaptation and many other factors which form part of the child's life circumstances. Where a harsh sentence is imposed for a very serious offence, especially one that involves violence against another person, or where the personal and social harm caused by the offence are maximal, the court often has no option except to commit the youth offender to prison. There are more complicated problems in defining violent and non-violent offences (this leaves drug offences in the zone of nightfall between the two) or finding a sensible method for evaluating offence gravity, resulting injury and the degree of blame. DH Lee makes a modest proposal in which she identifies offence gravity factors as, among others, harm, culpability, violence and magnitude, and sentence severity factors such as the offender's 'real sentence', in addition to the possible age and life opportunities upon release from prison.⁸⁷

Violence and its magnitude should not simply be construed to mean death-resulting physical attack or assault with intent to cause grievous bodily harm or offences committed with the help of a dangerous weapon such as a gun, but should be construed widely to include non-death-resulting treason or espionage, aggravated rape and other crimes. In the end, much turns on

⁸⁶ *S v Vilakazi* [2008] 4 All SA 396 (SCA) para 18.

⁸⁷ DH Lee 'Resuscitating Proportionality in Noncapital Criminal Sentencing' (2008) 40 *Arizona State LJ* 527, 557–79.

whether reasonable people in the political community could find that the crimes involve substantial personal and social harms and moral culpability that they meet the threshold of harm for justifying the most severe punishment.⁸⁸ Although prisons are the least suitable places where personality development and behaviour changes can be stimulated, it would be unsophisticated and unrealistic to expect that prison as a social institution for the protection of the community should disappear altogether; especially for youth and adult defendants with an alarming criminal history. Regardless of the numbers of treatment facilities and professional personnel available, there will always be offenders who just cannot adjust to the requirements of the community's moral code. One has in mind the psychopaths who cannot imagine a life without crime. In fact, it is in the best interests of children and society that youth offenders become aware that if they contravene the law, they will be required to account for non-compliance. Whilst the principles and judgments discussed above remain relevant in determining appropriate sentences, it must be emphasised that the Child Justice Act is now governing the sentencing of youth in conflict with the law.

V THE CHILD JUSTICE ACT: BALANCING COMPETING INTERESTS

The *Zinn* triad is now codified in the Child Justice Act, which states that 'all consequences arising from the commission of an offence should be *proportionate* to the circumstances of the child, the nature of the offence and the interests of society'.⁸⁹ Following the passage of the Child Justice Act, South African law now formally recognises the vulnerability and special needs of children in conflict with the law as well as the special responses that must be implemented to curb youth criminality. However, even before the enactment of the Child Justice Act, the supreme law of the land entrenched every child's right not to be detained, except as a measure of last resort, and even then, only for the shortest appropriate period of time.⁹⁰ More importantly, however, the establishment of a separate justice system for children in trouble with the law marks the advent of a new chapter in the way the criminal justice system views and treats children. For instance, the Act aims to balance the interests of children and those of society, with due regard to the rights of victims. It also aims to expand and entrench the principles of restorative justice in the criminal justice system for children while ensuring their responsibility and accountability for crime.⁹¹ One of the objectives of the Act is to promote the spirit of ubuntu through reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community.⁹²

88 JR Broughton 'Some Reflections on Conservative Politics and the Limits of the Criminal Sanction' (2010) 4 *Charleston LR* 537, 555.

89 Child Justice Act s 3(a); see also ss 54(d) & 55(1).

90 Constitution s 28(1)(g).

91 Child Justice Act, Preamble.

92 *Ibid* s 2(a).

A detailed list of the objectives of sentencing is found in Chapter 10 of the Child Justice Act. The objectives are, among others, to encourage the child to understand the implications of his/her conduct and to be held accountable for the harm caused.⁹³ Sentencing should also ‘promote an individualised response which *strikes a balance between the circumstances of the child, and the interests of society*’.⁹⁴ While the constitutionalisation of children’s right to have their best interests considered in all matters concerning them has tilted the balance in favour of the reintegration of the child into the family and in favour of the use of imprisonment as a last resort and for the shortest appropriate period of time, there is no doubt that the interests of society stand as a check on and balance against the judicial misinterpretation of the best interests of the child. A child justice court, when considering the imposition of a sentence involving compulsory residence in a child and youth care centre, must consider whether the offence is of such a serious nature that it shows that the child has a propensity towards damaging behaviour; whether the extent of the damage caused by the offence *can be apportioned to the culpability of the child* in causing or risking the harm; and whether the child needs a particular service provided by the child and youth care centre.⁹⁵ Recidivist youth offenders who commit serious offences or refuse to take part in educational programmes as ordered by the courts or manifestly show a general unwillingness to respond positively to non-residential alternatives, are likely to be imprisoned to protect other individuals and the community.

The fact that the extent of the damage caused by the offence must be ‘apportioned to the culpability of the child’ also suggest that the age-competence-punishment nexus remains one of the ways of balancing the best interests of the child and the interests of society as discussed above. Besides the considerations mentioned above, the Child Justice Act provides that when considering the imposition of a sentence involving imprisonment in terms of s 77, child justice courts must take into account a string of factors, including:

- (a) the seriousness of the offence, with due regard to (i) the amount of harm done or risked through the offence; and (ii) the culpability of the child in causing or risking the harm; (b) the protection of the community; (c) the severity of the impact of the offence on the victim; (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and (e) the desirability of keeping the child out of prison.⁹⁶

Apart from emphasising the centrality of cognitive competence in determining the ‘appropriate’ sentences, these factors show that the best interests of the child can be limited by other competing interests and the rights of others. Factors such as the protection of the community, the severity of the impact of the offence on the victim and the previous failure to respond to non-residential alternatives, embody societal interests and goals as well as the interests of those directly wronged by the child offender. A strictly

93 Ibid s 69(1)(a).

94 Ibid s 69(1)(b).

95 Ibid s 69(3)(a)–(d).

96 Ibid s 69(4).

punitive approach is no doubt outlawed by the Child Justice Act, but the Act does not bind courts to sacrifice proportionality and public safety on the altar of reintegration, rehabilitation and restoration.

In *S v M*,⁹⁷ the Constitutional Court of South Africa held that the ‘expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular’.⁹⁸ It proceeded to hold that ‘[t]he word “paramount” is emphatic’ and that if interpreted literally, the phrase ‘in every matter concerning the child’ would virtually embrace all laws and forms of public action, ‘since very few measures would not have a direct or indirect impact on children and thereby concern them’.⁹⁹ Such a sweeping construction of the paramountcy principle could not have been intended by the framers of the Constitution since all rights therein are limitable. The Court observed that the paramountcy principle should not be applied in a manner that could unduly obliterate other valuable and constitutionally protected interests.¹⁰⁰ It held that the welfare principle is not an ‘overbearing and unrealistic trump of other rights’ and that it is ‘capable of limitation’.¹⁰¹ Consequently, ‘the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights ... their operation has to take into account their relationship to other rights, which might require that their ambit be limited’.¹⁰²

The paramountcy principle does not mean that where state action has the potential to affect children negatively, then the principle would necessarily override other considerations.¹⁰³ In other words, the best interests of the child, like other rights in the Bill of Rights, is subject to limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁰⁴ In the end, much depends on the level of maturity and culpability that can be ascribed to the youth offender, the circumstances under which the crime was committed and the level of harm suffered by the victims of the youth offender’s criminal conduct.

Today, the circumstances under which and the degree to which societal interests and the rights of others can limit the best interests of the child have been circumscribed by Parliament in the context of custodial sentences. First, it has been demonstrated that children of all ages should be imprisoned as a last resort and for the shortest period of time. Second, a child justice court is statutorily denied the jurisdiction to impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence.¹⁰⁵ When sentencing children 14 years or older at the time of

97 *S v M* (note 6 above).

98 *Ibid* para 23.

99 *Ibid* para 25.

100 *Ibid*.

101 *Ibid* para 26.

102 *Ibid*.

103 *Ibid*.

104 Constitution s 36; see also A Skelton ‘Constitutional Protection of Children’s Rights’ in T Boezaart (ed) *Child Law in South Africa* (2009) 280–2.

105 Child Justice Act s 77(a).

being sentenced, the court is explicitly bound to do so as a measure of last resort and for the shortest appropriate time. Children over 14 years of age may only be sentenced to imprisonment if certain conditions are met.¹⁰⁶ Even when sentenced to imprisonment under s 77(3) of the Child Justice Act, youth offenders 14 years or older may not be imprisoned to a period exceeding 25 years. Third, there are sentencing practices that have been deemed inappropriate and inconsistent with South Africa's international obligations. Life imprisonment without the possibility of parole falls within this category of sentences.

Life imprisonment without the possibility of parole is unlawful and invalid if imposed on children. To make the case for attitudinal change in sentencing children and to encourage the move towards 'keeping children out of prison', the Child Justice Act stipulates that 'no law' may permit life imprisonment of a child offender without the possibility of parole. The Child Justice Act provides that in 'compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment'.¹⁰⁷ This reinforces the notion that the not-yet-fully-formedness of the child requires that the child be given another chance for rehabilitation and re-integration.

VI SENTENCING PRIMARY CAREGIVERS

Trends in punishment for crime indicate that community-based alternatives to incarceration can handle the institutional candidate at least as effectively as imprisonment, without serious risk to public safety, at minimal fiscal cost and with limited destructive impact on the convict and *their family*.¹⁰⁸ At the heart of the desirability of alternatives to incarceration is the idea that individual freedom should be preserved unless there is conclusive evidence that the actions of the convict create threats of violence against others.¹⁰⁹ Prisons have never been less than terrible places and should only be used when confinement is strictly necessary to fulfil the objectives of the criminal sanction. Incarcerative treatment, particularly lengthy imprisonment, does not deter crime or recidivism¹¹⁰ and has been shown to be incompatible with rehabilitative objectives.¹¹¹ Yet, the deinstitutionalisation (in the interests of the children affected) of caregivers who would otherwise be candidates for

106 Ibid s 77(3).

107 Ibid s 77(6).

108 N Klapmuts 'Community Alternatives to Imprisonment' in CR Dodge (ed) *A Nation Without Prisons* (1975) 101, 113.

109 See Citizen's Inquiry on Parole and Criminal Justice, Inc 'Prison without Walls: Report on New York Parole' in Dodge Ibid 79, 79.

110 See California Legislature, Assembly Committee on Criminal Procedure *Deterrent Effects of Criminal Sanctions* (1968).

111 Sloth-Nielsen & Ehlers (note 28 above); SS Terblanche 'Mandatory and Minimum Sentences: Considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194.

incarceration in prisons is inconsistent with the ordinary aims of the criminal process. This part of the article investigates the correctness of two leading Constitutional Court cases concerning the sentencing of primary caregivers and closes by investigating the appropriate way of reconciling competing interests in such cases.

(a) *S v M* and the imaginary construction of the best interests of the child

In *S v M*, the Constitutional Court was called to determine the duties of the court, in light of s 28(2) of the Constitution and any relevant statutory provisions, when the person being sentenced is the primary caregiver of minor children. The facts of the case were that an unmarried and recidivist mother had committed up to 38 counts of fraud; some of them while she was on probation and the Court had to determine whether it was in the best interests of the child to require her to serve a custodial sentence. Sachs J observed that the comprehensive and emphatic language of the best interests standard indicates that 'law enforcement must always be child sensitive; that statutes must be interpreted and the common law developed in a manner which favours advancing the interests of children, and that courts must function in a manner which at all times show due respect for children's rights'.¹¹² Although courts have no constitutional duty to shield children from the perils associated with unstable families, the court system can use the law to create conditions to protect children from abuse and to maximise opportunities for children to lead cheerful and productive lives.¹¹³ Accordingly, held the Court, s 28 requires the law to make the best efforts to avoid, where probable, any breakdown of family life or parental care that may threaten to put children at increased risk.¹¹⁴

When confronted by the inevitable disintegration of the family, the state is under an obligation, where it can, to minimise the adverse impact on children of such disintegration.¹¹⁵ The list of factors competing for the heart of the best interests of the child is endless and is often determined by the individual circumstances of the child of a primary caregiver. A principled child-centred approach to making a proper value judgment requires an individualised examination of the circumstances of the child and the facts of each particular case.¹¹⁶ Sachs J acknowledged that the problem consists in *determining how to apply the best interests principle in a meaningful way without wiping out other valuable and constitutionally protected interests*.¹¹⁷ Sentencing courts must be in a position adequately to harmonise all the different interests involved, including the interests of children at risk.¹¹⁸ Sachs J was at pains to

112 *S v M* (note 6 above) para 15.

113 *Ibid* para 19.

114 *Ibid*.

115 *Ibid*.

116 *Ibid* para 24.

117 *Ibid* para 25.

118 *Ibid* para 33.

stress that the interests of children should become a standard preoccupation of all sentencing courts and that proper regard for constitutional requirements demands a degree of transformation in judicial mindset.¹¹⁹ Considered attention should always be had to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children; in light of the range of alternatives available to the court.¹²⁰

Then, the Court reiterated that the issue was not whether parents should be allowed to use their children as a pretext for escaping the punitive consequences of their own mistakes. Instead, the point is that s 28 recognises the important role parents play in providing, to children, guidance on how to deal with disappointments and make difficult choices. Children have the right to learn from their primary caregivers that people make independent moral choices for which society holds them to account.¹²¹ Consequently, the reason behind the importance placed on the duty of the sentencing court to 'acknowledge the interests of children is ... to protect *innocent children* as much as is reasonably possible in the circumstances from avoidable harm'.¹²² The Court observed that there is need to balance competing interests and that much depends on context and proportionality. According to the Court, there are two competing factors to be weighed by the court when sentencing a caregiver. On one side of the ledger, the sentencing Court must consider the importance of maintaining the integrity of family care, and, on the other, the duty of the state to punish criminal misconduct.¹²³ In light of the test laid down by the Court, referred to above, a sentencing court must sentence a primary caregiver to prison if on the ordinary triad adopted in *Zinn* a custodial sentence is the proper punishment.¹²⁴ In the words of the Court:

The children will weigh as an independent factor to be placed on the sentencing scale only if there could be more than one appropriate sentence on the *Zinn* approach, one of which is a non-custodial sentence. For the rest, the approach merely requires a sentencing court to consider the situation of children when a custodial sentence is imposed and not to ignore them. The tension lies between maintaining family care wherever possible, on the one hand, and the duty of the State to deal firmly with criminal misconduct, on the other. As the *Zinn* triad recognises, the community has a great interest in seeing that its laws are obeyed and that criminal conduct is appropriately prosecuted, denounced and penalised. *Indeed, it is profoundly in the interests of children that they grow up in a world of moral accountability where self-centred and anti-social criminality is appropriately and publicly repudiated.* In practical terms, then, the difficulty is how appropriately and on a case by case basis to balance three interests as required by *Zinn*, without disregarding the peremptory provisions of section 28.¹²⁵

Drawing inspiration from the submissions of the amicus, the Court noted that children's needs and rights tend to receive limited attention when a primary

119 Ibid.

120 Ibid.

121 Ibid paras 34–5.

122 Ibid para 35.

123 Ibid paras 38–9.

124 Ibid para 39.

125 Ibid paras 39–40.

caregiver is sent to prison.¹²⁶ This is despite the collateral and profound damage the imprisonment of the caregiver may cause on the children. While the best interests principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration, it does not necessitate overriding all other factors and interests.¹²⁷ The Court reasoned that the courts *quo had* paid scant attention to the quality of alternative care the children would receive if the mother had been sent to jail and that it was not clear who would maintain the children in their mother's absence.¹²⁸ It held that both the Regional Magistrates' Court and the High Court had passed sentence without giving adequate independent and informed consideration (as required by s 28) of the impact on the children of sending their mother to prison.¹²⁹ Yet, 'the starting point must always be that M has defrauded members of the community not once, not twice but three times, and done so over a period of years, apparently having been unable to control her dishonest impulses while under a suspended sentence and then later while released on bail'.¹³⁰ Having explained the negative impact of a custodial sentence on the children and having outlined the advantages of non-custodial sentences in great detail,¹³¹ the Court came to the conclusion that:

[w]ith the extra evidence made available to us, what is called for is backdating the sentence already served, suspending the rest of the sentence so that she need not go back to prison after this order is issued, and adding a correctional supervision order made by this Court under section 276(1)(h) of the Criminal Procedure Act. In coming to this conclusion, I am influenced by the fact that, as the reports indicate, it is in the interests of the children that they continue to receive primary care from their mother. This Court has not one but three reports ... It is clear that M is a single parent who *is almost totally responsible for the care and upbringing of her sons*. Ms Cawood's report indicates that all three boys rely on M as their primary source of emotional security, and that imprisonment of M would be emotionally, developmentally, physically, materially, educationally and socially disadvantageous to them ... The evidence made available to us establishes that, despite the bad example M has set, *she is in a better position than anyone else to see to it that the children continue with their schooling and resist the pressures and temptations that would be intensified by the deprivation of her care in a socially fragile environment. It is not just a question of whether they would be out on the street. And it is not just M and the children who have an interest in the continuity of her guidance. It is to the benefit of the community, as well as of her children and herself, that their links with her not be severed if at all possible.*¹³²

These observations, held the Court, should not be seen as diminishing the seriousness of the offences for which the primary caregiver has been convicted or as disregarding the prejudice to the victims of the primary caregiver's criminal conduct. Given the circumstances of the case, held the Court, the convicted caregiver; her children; the community and the victims who would be repaid from the earnings of the convicted mother, stood to benefit more

126 *Ibid* para 42.

127 *Ibid*.

128 *Ibid* para 46.

129 *Ibid* para 48.

130 *Ibid* para 52.

131 *Ibid* paras 57–64.

132 *Ibid* paras 66, 67 & 70.

from her being placed under correctional supervision than from her being jailed.

(i) *Commentary*

It is a bit of a stretch for a court to derive, from the protection of family care and the best interests of the child, a right for every child to learn directly from their biological parents and a duty for the courts to ensure that they do not easily interfere with the exercise of such right when a primary caregiver is being sentenced. To the extent that it overlooked the primary caregiver's inclination towards anti-social behaviour, the Court gave limited attention to an important part of the *Zinn* triad and underestimated the degree to which the law – through harsh sentences for harsh crimes – can teach offenders of all ages about the seriousness with which it regards certain kinds of unacceptable behaviour. The Court over-emphasised the need for the law to show that it is more concerned with the moral and social restoration of the offender and under-emphasised the role of the law to deter criminals and others surrounding them, including children, from earning a living out of criminal conduct.

In balancing the interests of the child and the interests of society when sentencing a primary caregiver, the court should always be mindful that it is not the child who has committed an offence but an adult who has the capacity to understand the implications of his or her conduct for the social, moral, intellectual and physical development of his or her child. When sentencing a primary caregiver, the question is not just whether the time to be spent in prison would have adverse effects on children. The answer to this question is always in the affirmative even if the offender is incarcerated for the shortest appropriate time. Relying solely and decisively on the advice of the helping professions,¹³³ the Court places much emphasis on the fact that alternative care may cause enormous psychological damage on the children affected. However, this is beside the point since it is common cause that custodial sentences would adversely affect those associated with the offender, whether young or old. As will be discussed below, where a primary caregiver continues to reflect an inclination to re-offend, such an inclination should weigh heavily in the determination of an appropriate sentence and often point to the desirability of a custodial sentence.

To some extent, the Court was more concerned with the moral restoration of the offender than the interests of children and the interests of society. This is evident from the lengthy analysis about how the caregiver's character had changed over time and how restorative justice would enable the caregiver to be reintegrated into the community. While the restoration of the offender is itself an important social interest and serves to promote the long-term interests of the child, an over-emphasis on restorative justice overrides the importance of other elements of the triad and tampers with the duty of the court to 'strive to accomplish and arrive at a judicious counterbalance between

133 Ibid paras 67–70.

these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others'.¹³⁴ The bench was at pains to stress that requiring the primary caregiver to re-pay the victims of her crime would enable her to look the victim into the eye, to acknowledge responsibility, to restore the relationship that would otherwise remain broken, to foster reconciliation, to remove the brand of criminality that imprisonment would bring and to facilitate the restoration of trust and reintegration into the community.¹³⁵ While one can safely assume that it is in the best interests of the child to grow up in a community that promotes these goals and values, the Court did not even pretend to link these goals to the best interests of the child.

Credit card fraud, proceeded the Court, destroys the moral fabric of society and the primary caregiver should be required to do a substantial amount of community service to mark the degree to which society condemns her behaviour. In this light, the Court recommended counselling and held, without showing how, that the convicted caregiver, her children and society could only benefit if the caregiver gained insight into what led her to prey deceitfully and recklessly on shop after shop.¹³⁶ Surprisingly enough, the Court relies on the caregiver's ability to re-organise herself and lead a successful entrepreneurial life in the past seven years as sufficient reason to conclude that she is a suitable candidate for correctional service.¹³⁷ Clearly, this argument was meant to show that the convict had developed positive character traits than that she better understood the far-reaching impact her criminal behaviour would cause on her children. The fact that she was a repeat offender and the possibility that the sentence hanging over her head could have influenced her to feign character transformation did not matter much to the apex Court. Nor did it matter that the report from the Department of Social Development had shown that many relatives of the children had indicated that they would take care of the children's financial needs and daily care during the mother's incarceration.¹³⁸ Given that the primary caregiver herself had indicated to the Department of Social Development that her relatives had looked after the children during her previous time in prison, the Court should have given due regard to that factor in its finding.

(b) *S v S*

In *S v S*, a 33-year-old married mother of two children sought to argue that the SCA and the Regional Court had failed to establish that she was the primary caregiver of the children with the result that the sentence imposed on her paid scant attention to the best interests of the child. In essence, the petitioner argued that she should be spared from the five-year sentence of imprisonment

134 *S v Banda* 1991 (2) SA 352 (B) 355A–C.

135 *S v M* (note 6 above) para 72.

136 *Ibid* para 74.

137 *Ibid* para 75.

138 See Madala J's dissenting judgment in *S v M* (note 6 above) para 107.

imposed on her on the basis that her incarceration would infringe the best interests of her children.

In her minority judgment, Khampepe J held that it would not be in the best interests of the children to separate them from their mother by imposing a custodial sentence because Mrs S was the primary caregiver who could adequately look after the needs of the children.¹³⁹ This was so for various reasons. First, the alternative care the children would receive in the absence of their mother was inadequate because Mrs S's mother-in-law was no longer staying in the same household as the children and there was no one to look after the children's daily needs.¹⁴⁰ As such, the proposed joint care between Mrs S's mother-in-law and Mr S (the father) was inappropriate.¹⁴¹ The report commissioned by the Constitutional Court had indicated that the mother was the primary caregiver and attended to the children's day-to-day activities such as preparing them for school.¹⁴² The mother was also the primary source of the children's emotional security and her incarceration would have a deleterious effect on the children's emotional and material development.¹⁴³ Khampepe J observed that there was no inquiry on who would fetch the children to and from school, nor was there any consideration given to how the children would maintain a relationship with their mother while she was in prison and which prison would facilitate contact between the mother and the children.¹⁴⁴

Second, the children's father had, from the evidence, been portrayed as an unsuitable alternative caregiver who would periodically leave the matrimonial home to liaise with his paramour. Even when present at home, the father would not play any significant role with regard to the special care and attention his young and sickly children cried for.¹⁴⁵ It became patent from the report that Mr S would, as a result of his long working hours,¹⁴⁶ be unable to care for his children. Further, the report also indicated that Mr S's employer had refused to alter his conditions of service.¹⁴⁷ The fact that Mrs S was married to an almost absent father who played no significant role in the upbringing of their children meant that she was as disadvantaged as the mother in *S v M* who was not married to any of the absent fathers of her children.¹⁴⁸ To Khampepe J, the fact that a primary caregiver is married and residing with a partner, though important, is not a decisive factor in considering the appropriate sentence to be imposed on such caregiver.¹⁴⁹ As the sentencing court is bound to look at

139 *S v S* (note 7 above) para 50.

140 Khampepe drew inspiration from a report the Constitutional Court had commissioned to ensure clarity on the impact that the imposition of a custodial sentence (on the mother) would have on the children.

141 *S v S* (note 7 above) para 38.

142 *Ibid* para 42.

143 *Ibid*.

144 *Ibid* para 36.

145 *Ibid* paras 37, 44 & 46.

146 According to the report, he worked from 05:00 to 19:00 from Monday to Friday.

147 *S v S* (note 7 above) para 44.

148 *Ibid* para 47.

149 *Ibid*.

the living realities of family life, ‘the physical presence of the father does not mean that the father will be able to take adequate care of the children’.¹⁵⁰ The fact that courts are bound ‘to start their analysis from the best interests of the children, not just the mere interests of children’,¹⁵¹ implied that the mother should be sentenced to correctional supervision to ensure uninterrupted contact between her and her children. This is what an over-emphasis on the paramountcy principle will always yield in the sentencing context – an unjustifiable disregard of the seriousness of the offence and the interests of society as a whole. Such an approach would suggest that nothing else but the best interests of the child are decisive and paramount.

However, it is vital to note that the minority judgment had earlier stated that a sentencing court is not required to protect children, at all costs, from the negative consequences of being separated from their primary caregivers. It had stated that the sentencing court is required only to pay appropriate attention to the interests of children and to take reasonable steps to minimise damage.¹⁵² It had further observed, quite appropriately, that this requires a balancing exercise that takes account of the competing interests.¹⁵³ In this case, the competing interests are society’s responsibility for maintaining the integrity of the family and the state’s duty to punish criminal misconduct. Furthermore, it had observed that the father loved his children and that the children would not be left on the street because the father would take care of them.¹⁵⁴ These observations demonstrate that the best interests standard is not determinative as regard should be had to other important social interests. In fact, it is counter-intuitive and honestly untrue to suggest that where a caregiver realistically faces incarceration due to criminal misconduct, such caregiver has a lesser interest in regaining her own personal freedom than she has a desire to ensure that the best interests of the child are promoted.

Cameron J, for the majority, held that Mrs S’s argument could not stand for two reasons. First, he reasoned that although the petitioner’s children were emotionally attached to her and needed her care, she was by no means the sole caregiver. She was united with the father – the children’s co-resident parent – who had professed his willingness to take care of them during his wife’s incarceration. Although he had a very tight schedule, explained the Court, there was nothing to indicate that he would not be able to engage the childcare resources needed to ensure his children’s welfare during his working hours.¹⁵⁵ This meant that a custodial sentence would (i) promote the interests of society; and (ii) not severely negatively affect the best interests of the children affected.

Second, the Court held that the Regional Court had ample information addressing the position of children and their care during their mother’s imprisonment. This could not be compared to *S v M* where such information

150 Ibid.

151 Ibid para 48.

152 Ibid paras 35 & 45.

153 Ibid para 35.

154 Ibid para 44.

155 Ibid para 63.

was entirely lacking. In *S v S*, the High Court and the SCA had the benefit of a probation officer's report and a second report later commissioned by the family. The Constitutional Court had a third report from a curator. Since none of these reports suggested that the children's fundamental needs would be inadequately catered for if the mother were to be incarcerated, the courts had the desired basis for holding that the accused should be incarcerated.¹⁵⁶ In its order, the Constitutional Court directed the Department of Correctional Services to ensure that a social worker visits the children and furnishes the department with a report on the well-being of the children once every month.¹⁵⁷ Much in *S v S* turned on the availability of other appropriate caregivers, especially the father, who were willing to take care of the children during their mother's incarceration. Evidenced by reports from the helping professions, the availability of potential caregivers gave the Court the basis to hold that the imposition of a custodial sentence would not adversely affect the interests of children as severely as it would if there were no other appropriate caregivers. In *S v M* the children did not have an appropriate alternative caregiver (all the 'absent' fathers were found to be inappropriate). In *S v S* they had a present father and a grandmother who were willing to care for the children. Thus, while the sentences meted out were different in the two cases, it can be argued that the Court in both cases did not ignore the importance of the best interests of the child.

In fact, one can argue that the Court also protected the interests of society in both cases. In *S v M*, the Court protects the best interests of society by ensuring both that vulnerable children are protected and that adult offenders are punished in a way that promotes this important objective. In *S v S*, the Court protects the interests of society in punishing criminal behaviour by imposing custodial sentences when such sentences are deserving and the interests of children by ensuring that custodial sentences are imposed only in circumstances where such interests will not be severely negatively affected. Courts should be mindful that the best interests of the child is part of the interests which South African society and the Constitution regard to be important. Thus, while the interests of the child is not always determinative of the outcome of cases in which primary caregivers have been convicted, regard must also be had to the interest of society in ensuring that the relationship between the child and the caregiver is not unreasonably severed.

(c) Sentencing primary caregivers in a manner that balances the best interests of the child and the interests of society

Primary caregivers who have been properly convicted of serious offences should not necessarily escape imprisonment just because they have children. Where the circumstances of the case indicate that the children will not suffer hardship, a primary caregiver should be incarcerated unless there are other

¹⁵⁶ Ibid paras 64–5.

¹⁵⁷ Ibid para 66.

compelling factors justifying the imposition of a non-custodial sentence. It is beyond doubt that the best interests of the child are paramount and that the sentencing court must be mindful of this constitutional position in framing an appropriate response to an adult offender who happens to be a primary caregiver. However, the best interests of the child should not be an overriding consideration in determining whether or not a primary caregiver should be sent to prison.¹⁵⁸ Part of the reason is that the best interests of the child is not synonymous with the best interests of the primary caregiver or the interests of society. Dissenting in *S v M*, Madala J wrote:

In a case where a primary caregiver's sentence is being considered, the sentencing officer must go beyond the *Zinn* triad requirements. It would be proper, in deserving cases, to take into account the impact of imprisonment on dependants. This, however, does not imply that the primary caregiver will always escape imprisonment so as to protect the rights and best interests of the minor children. There must be circumstances justifying an alternative before the sentencing officer may decide the otherwise appropriate sentence.¹⁵⁹

The inquiry goes well beyond the best interests of the child to include factors such as the ages and special needs of children; the character of the primary caregiver; the seriousness and frequency of the offence committed; the degree of moral blameworthiness on the part of the accused¹⁶⁰ and whether the accused has shown a commitment to reform. Madala J once held:

In a case where the primary caregiver is a first offender, has committed a relatively minor offence, has shown remorse and contrition and the children are of a tender age requiring special attention, the sentencing officer will be wary to send such a person to prison. Where ... the primary caregiver is a recidivist who continues to commit crimes of a similar nature whilst on bail and the children are relatively closer to their teens, it would be folly and a show of 'maudlin sympathy' to impose a non-custodial sentence ... In my view, section 28(2) of the Constitution provides that a child's best interests must prevail *unless* the infringement of those rights can be justified in terms of section 36 of the Constitution.¹⁶¹

The best interests of the child, like all rights in the Bill of Rights, is subject to limitations that are just and reasonable in an open and democratic society based on human dignity, equality and freedom. For instance, the interests of society in punishing a recidivist and unrepentant primary caregiver would likely justify the imprisonment of such caregiver even if such a sentence would result in children being taken into alternative care. Where a primary caregiver is shown to have refused to learn from his or her previous brushes with the law, it would be in the interests of society to limit children's right to parental care and, by so doing, limit the best interests of the child. To this end, regard must be had to the degree to which the primary caregiver has shown either authentic remorse or considerable drive and capacity to commit further offences with the full knowledge of the negative impact his or her cold-hearted action would have on her children. Central to the sentencing court's analysis must be the fact that the court is not about to sentence a youth offender with

158 *Ibid* para 107.

159 *S v M* (note 6 above) para 109.

160 *Ibid*.

161 *Ibid* paras 110 & 112.

limited capacities to think through the far-reaching consequences of his or her criminal behaviour, but with an adult who has such capacities. Murray J once held in *Hodder v The Queen*:

Where serious offences are committed, it is inevitable that more severe punishment will be involved and that will be expected in almost every case to cause hardship to innocent persons associated with the offender and the commission of the offence, as victims or otherwise. *It is right then that only in an exceptional case, quite out of the ordinary, should the hardship which a proper sentencing disposition will occasion to innocent third parties be allowed to substantially mitigate the court's sentencing disposition.* The court should not lose sight of the fact that the hardship occasioned by the sentencing process is, in truth, caused by the offender who commits offences and visits upon himself or herself the punishment of the court. Even so, the court ... should be prepared to draw back in mercy where it would, in effect, be inhuman to refuse to do so.¹⁶²

The sentencing court must remain loyal to its task; namely to foster public confidence in the criminal justice system by maintaining a delicate equilibrium between the interests of society and the best interests of the children to be affected by the sentence imposed on the primary caregiver. As discussed above, the sentence imposed should neither be excessively harsh nor disproportionately lenient.¹⁶³ In this respect, Madala J is of the correct view that sentencing courts should be wary of creating the impression that they:

will give primary caregivers a sentence that is disproportionate to what they deserve and which encourages them to use the interests of children as a tool in the judicial process ... [T]here can be no doubt that the children's interests must be considered, but this enquiry becomes tainted once those interests are elevated at the expense of other important relevant considerations such as ... the seriousness and gravity of the offence'.¹⁶⁴

Courts should not 'completely sacrifice the interests of society which is served by the criminal justice system for the interests of the children'.¹⁶⁵

It is important to send a clear message to all South Africans that the judiciary will not allow convicted caregivers to use the best interest standard to evade punishments that they ordinarily deserve. Similarly, courts should be mindful of the fact that it is inappropriate to visit developmental harm on innocent children just because their caregiver has committed a minor offence. Depending on the gravity of the offence and its impact on the victims of such offence, it is possible to send a first offender primary caregiver to prison to protect the public, to defend the interests of society and to express societal disapproval of the crime for which the caregiver has been found guilty. Conversely, the fact that a primary caregiver is a second, third or fourth time offender does not necessarily mean that he or she should automatically

162 *Hodder v The Queen* (1995) 15 WAR 264, 287 as cited in *S v The Queen* 2003 WL 23002572 (WASC); [2003] WASCA 309; see also *S v Prinsloo* 1998 (2) SACR 669 (W) 672 I, holding that it is beyond doubt that 'detection, apprehension and punishment in the way of imprisonment are prospects which a person embarking on this sort of crime must always foresee'.

163 See *R v Hamilton* (2003) 172 CCC (3d) 114, 159 stating that '[a] legal system that condones excessively harsh, or for that matter, lenient sentences, will eventually lose the support of many members of the community'.

164 *S v M* (note 6 above) paras 117 & 119.

165 *Ibid* para 122.

be caged. Nearly four decades ago, MJ Mahoney's empirical research demonstrated that the 'repeat offender is the forgotten person in the criminal justice system'.¹⁶⁶ Nevertheless, it must be noted that first time offenders are usually given a second chance at life outside places of punitive custody and that recidivism is usually considered to be an indication of a deliberate failure to suppress one's inclination towards a life of crime.

In *S v Howells*,¹⁶⁷ the Cape High Court imposed a custodial sentence on a mother of three who had been convicted of defrauding her employer of R100,000 in the course of two years. Van Heerden AJ held that:

the seriousness of the crime and the interests of society warranted the sentence ultimately imposed. The crime committed by the appellant was a very serious one, involving the betrayal of a position of trust by means of a systematic and calculated course of conduct continuing over a period of more than two years.¹⁶⁸

Given the dramatic rise of white-collar crimes such as fraud and theft committed by people in fiduciary positions, and the concomitant need to deter the relevant individuals and the public generally, it would be a call of duty for the courts to impose appropriate custodial sentences where such crimes are detected.¹⁶⁹ In *S v Howells*, the court held that based on the facts of the case:

it would appear that there is a real risk that, should the appellant be imprisoned, her children will have to be taken into care. This is obviously highly regrettable and makes this Court reluctant to condemn appellant to prison ... In casu the magistrate considered that because of the nature and magnitude of the appellant's offence, the interests of society outweighed the interests of [the caregiver] and her children. I am not satisfied that the magistrate misdirected herself in any way in this regard. The sentence imposed by the magistrate was in my view necessary to serve the interests of society and an element of deterrence needed to curb the increasing incidence of white-collar crime in this country. This court is nevertheless keenly aware of the need to protect the interests of the appellant's minor children and will in its order include provisions designed to achieve this end as best as possible.¹⁷⁰

Ultimately, the court concluded that despite the importance of the best interests of the child in determining an appropriate sentence for a primary caregiver, it had to impose a custodial sentence to mark public contempt of white-collar crime and to show the importance of the interests of society in the sentencing context. Yet, the Constitution and the Criminal Procedure Act require judicial officers to limit, where possible, the damaging impact on children of imposing custodial sentences on primary caregivers. When it becomes apparent to the sentencing court that a custodial sentence is the only appropriate sentence, the court often limits the damaging impact, on

166 MJ Mahoney 'Instead of Prison' in Dodge (note 108 above) 147, 147.

167 *S v Howells* 1999 (1) SACR 675 (C).

168 *Ibid* para 239.

169 See *S v Prinsloo* (note 162 above) 672B-E, where Leveson J indicated that 'theft from an employer must be heavily penalised. The employer is entitled to expect unanswering honesty from the employee in return for the wages he pays and benefits he gives him ... the employer is in a particularly vulnerable position in relation to employees who choose to deal dishonestly with the employer's assets. I consider it *the duty of the courts whenever this sort of misdemeanour is detected to send out the message that such conduct will be severely punished*'.

170 *Howells* (note 167 above) para 240.

children, of custodial sentences by requiring the relevant state department to take all the necessary steps to ensure that the children are properly cared for during the caregiver's period of incarceration; to maintain regular contact between the primary caregiver and the children during the former's period of incarceration; to devise mechanisms of ensuring the reunification of those concerned after the primary caregiver's release from prison and to promote the interests of the family thereafter.¹⁷¹ In the end, it is a matter of balancing the best interests of children and the interests of society in light of the factors discussed above and the enduring value of ordinal proportionality.

VII CONCLUSION

The potential tension between the best interests of the child and the interests of society is a reflection of the underlying tension between the welfare model and the justice model of juvenile justice. Behind this potential tension lies a claim, by proponents of both models, of knowledge of human nature and how best to deal with antisocial behaviour. Where the welfare model characterises youth offenders as 'sick' people who should not be fully held accountable for their crimes, the justice model construes youth offenders as hardened criminals who can only be changed by the administration of proportionate punishment. This contribution has contended that the ideal approach cannot be found in either of the two models but somewhere between them. While the judiciary as sentencer should reflect the value system and laws of the society of which it is part, the constitutionally protected interests of children cry for the kind of special attention society should place on their protection. Yet, the court should remain mindful that the best interests of the child, especially in the new South Africa, have been constitutionally made part of society's interests and value system. It cannot be argued, in light of the value the Constitution places on children, that punishing criminals is of higher value than protecting children. The concept of the best interests of the child comes not only from the welfare paradigm, but also from a species survival paradigm. If society does not ensure that its young are protected and allowed to survive and develop to the maximum potential, society itself is at risk of survival. However, these observations should not be read to suggest that all youth offenders are suitable candidates for rehabilitation and other therapeutic interventions. While many countries tend to employ a welfare-based model characterised by procedural informality and interventions based on the best interests of the young person, international developments suggest that 'there is a growing trend towards *hybrid* juvenile justice systems incorporating elements of both justice and welfare models'.¹⁷²

The need to balance competing interests has been acknowledged in the elements of the *Zinn* triad consisting of the offender, the offence and the

¹⁷¹ Ibid para 241.

¹⁷² P Murphy, A McGinness & T McDermott *Review of Effective Practice in Juvenile Justice: Report to the Minister of Justice* (2010) 4. See also B Gladstone, I Kessler & A Stevens *Review of Good Practices in Preventing Juvenile Crime in the European Union* (2006).

interests of society. All elements of the triad have now been codified in the new Child Justice Act and remain pivotal in sentencing youth and adult offenders. With regard to child offenders, however, the Constitution and the Act call for a change in judicial mindset. In light of the constitutional protection of the best interests of the child and the constitutional injunction of imprisonment as a last resort, age and the evolving capacities of the child play a central role in determining the appropriate sentence for a child offender.

That prisons certainly do more harm than good and create crime rather than treat criminals is indisputable and calls for a change of perspective. This change of perspective, centred upon the best interests of the child, calls for the abandonment of what Mueller names the old penology. The old penology, revolving 'around the hanging tree, the gallows and the maximum security prison, is a matter of the past'¹⁷³ and should be replaced by a new penology permitting the institutionalisation of the youth offender only when this is necessary for the protection of others and their property. However, even the most fervent supporters of sentencing reform agree that non-custodial dispositions may give rise to great insecurity and that the caging of 'dangerous' human beings should remain a penal option for those exhibiting extreme forms of antisocial behaviour.¹⁷⁴ However, given that society and the judiciary do not actually know the effect of different punishments on potential or actual offenders, neither proponents of the justice model nor those of the welfare model can claim special knowledge on how youth offenders respond to, say, punishments for which deterrence, rehabilitation, prevention or reintegration is the major aim. What the law can do is to anticipate, based on the little information it has, the potential effect of various dispositions and find ways of limiting the adverse impact such dispositions would have on children.

Sentencing is still a very long way from being a science and the best way to limit the harm excessively lenient or excessively harsh sentences will cause on children, caregivers and society, is to maintain a fair balance between the interests of the child and the interests of society. In attempting to maintain this balance, decision-makers should always remember that the interests of the child and the interests of society are not polar opposites, but are parts of a continuum with particular points of convergences and divergences. Thus, punishments should serve multiple purposes with elements of both models of juvenile justice.

With regard to sentencing caregivers, it has been submitted, with inspiration from Madala J's dissent in *S v M*, the majority judgment in *S v S*, and other sources, that the best interests of the child should not be unduly stretched and that the court should be mindful that it is not sentencing a child offender but an adult offender who has capacities – real or presumed – to think through the consequences of his or her criminal behaviour. However, it has not been argued that primary caregivers must be caged even if it is in the interests of

173 See GOW Mueller 'Imprisonment and its Alternatives: The present System' 4–5 cited by Dodge (note 108 above) 233, 235.

174 Dodge *Ibid* 246–8.

the child that they be spared from custodial sentences. What has been argued is that the sentencer must always be mindful that the interests of the child, just like all other rights in the South African Bill of Rights, are capable of being reasonably and justifiably limited by the interests of society in curbing youth and adult crime. Mindful of this 'painful' fact, of the adverse impact the sentence will have on the interests of children and of the limits custodial sentences will have on the child's right to parental care and the parent's ability to exercise effective parenting from a distance, the sentencer will fashion an appropriate sentence in light of the circumstances of each case. Whether sentencing primary caregivers or juvenile offenders, the correct choice of punishment generally consists in the intelligent blending of the deterrent and the reformatory; the values of proportionate justice and the objectives of therapeutic alternatives; and an appreciation that the matter concerns not only the court and the offender, but the public and society at large.