

Symposium on Christopher Berk's "The Troubled Foundations of *Miller v. Alabama*"

A Response to Christopher Berk's Article: "Children, Development, and the Troubled Foundations of *Miller v. Alabama*"

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In my view, the importance of Christopher Berk's article for criminal justice practitioners rests in fully understanding the underlying reasons for the *Miller v. Alabama* decision and the current controversy that surrounds the prosecution of juveniles as adults in the criminal justice system. Over the last decade, a number of organizations have called for major reform of America's juvenile justice system, arguing that it is overly harsh on juvenile offenders and that too many youth are prosecuted in adult court. Like most prosecutors in America, I do not share this view.

The changes made to state juvenile codes beginning in the late 1980s were not overly harsh on juvenile offenders, but strike a proper balance among protecting public safety, holding youth accountable for their crimes, and rehabilitating youthful offenders. Contrary to the beliefs of many who are calling for juvenile justice system reform, the vast majority of youthful offenders in America are prosecuted in juvenile court. It is a rare occurrence for a prosecutor to seek to charge as an adult a youth who has not committed a serious or violent crime, unless they have a long criminal history or have previously been prosecuted as an adult for another offense.

The existence of a fundamental difference between juveniles and adults has been acknowledged by the United States Supreme Court in a number of decisions in the last thirteen years, culminating in the 2012 *Miller v. Alabama* case that is the subject of the Berk article. The *Miller* majority prohibited mandatory life without parole (LWOP) for juveniles convicted as adults for murder (or other violent crimes) without a judicial finding that the juvenile is permanently "incurable" (*Miller v. Alabama* 2012, 8) or "irretrievably depraved" (*Miller v. Alabama* 2012, 14). Four years later, in 2016, the Court held in *Montgomery v. Louisiana* that the *Miller* decision applies retroactively, requiring the resentencing of any juvenile who previously received a mandatory LWOP sentence.

By holding that no juvenile convicted as an adult should automatically be sentenced to LWOP without further analysis,¹ the US Supreme Court appropriately

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1. Minnesota's County Attorneys support the position that a juvenile convicted of a criminal offense that would carry an LWOP sentence for an adult convicted of the same crime should be sentenced to life in

recognized what science is now telling us, that is, that the human brain is not fully developed until the early twenties (Juvenile Justice Center 2004, 2). As a result, the *Miller* decision required that before sentencing a juvenile to LWOP, additional judicial findings must be made pertaining to whether the juvenile is one of the rare offenders whose crime reflects irreparable corruption or permanent incorrigibility, rather than merely transient immaturity.² While Berk seems to find troubling the adoption of the so-called developmental approach in the analysis used by the majority of the Supreme Court's Justices in the *Miller* decision, I do not share that concern.

No decision of our nation's highest court has ever questioned the constitutionality of prosecuting juveniles as adults for the commission of violent crimes. In my view, there is an important distinction that needs to be recognized when discussing human brain development and the competency of juvenile offenders, that is, there is a fundamental difference between weighing the risks associated with one's actions and understanding right from wrong. A juvenile may not fully understand the extent of the risks associated with criminal behavior, but the vast majority of mentally competent teenagers know full well that criminal activity is wrong and they should be held appropriately accountable for their criminal conduct, including adult court sanctions when warranted.

It is also important to note that our nation's prosecutors, as reflected in the work of the National District Attorneys Association (NDAA), have long supported a balanced approach to juvenile justice that takes into consideration all relevant factors in deciding what criminal charge should be filed against a juvenile offender and whether the case should be disposed of in juvenile court, disposed of in adult court, or handled under a "blended sentencing" model in those states incorporating this middle ground approach.³ "Blended sentencing" models, which have been endorsed by the NDAA and currently exist in twenty-six states, combine juvenile and adult criminal sanctions for serious,

prison with the possibility of parole after twenty-five years, although this proposal has yet to be enacted into law by the Minnesota Legislature.

2. The so-called *Miller* factors that should be considered by judges making the factual determination as to whether LWOP is an appropriate sanction include:

- (a) The nature and circumstances of the offense committed by the defendant, including any mitigating and/or aggravating facts.
- (b) The defendant's age and intellectual capacity at the time of the offense.
- (c) The extent of the defendant's participation in the offense.
- (d) The effect, if any, of familial pressure or peer pressure on the defendant's actions at the time of the offense.
- (e) The defendant's immaturity, impetuosity, or failure to appreciate risks and consequence at the time of the offense.
- (f) The defendant's mental, emotional, and psychological health.
- (g) The defendant's background, including his or her family, home, and community environment.
- (h) The nature and extent of the defendant's prior delinquent and/or criminal history, and the defendant's prior history of delinquency programming and treatment.
- (i) Any other circumstance relevant to the determination of irreparable corruption or transient immaturity.

This list of factors was adopted by the Minnesota State Bar Association's Commission on Juvenile Sentencing for Heinous Crimes in its Final Report and Recommendations adopted on October 26, 2017.

3. By resolution adopted on March 21, 1998, NDAA's Board of Directors expressed support for a "balanced approach to address our nation's youth violence problem." See also Resolutions adopted by the NDAA on November 12, 2016, updating NDAA's National Prosecution Standards for Juvenile Justice and endorsing the Juvenile Prosecution Policy Positions and Guidelines adopted on July 5, 2016, by the National Juvenile Justice Prosecution Center.

violent, or habitual juvenile offenders whose crimes have been determined by either a prosecutor or a judge not to warrant immediate prosecution in adult court (National Center for Juvenile Justice 2007).

Prosecutors understand that rehabilitation of juvenile offenders remains an appropriate and important goal of the juvenile justice system and we thoughtfully and professionally enforce juvenile codes with fairness and impartiality every day. However, not only should mitigating factors, such as a juvenile offender's age, maturity, and amenability to treatment and probation, be considered in the decision-making process at every stage of the handling of a juvenile crime, including whether juvenile offenders should face adult court sanctions for their actions, so too must aggravating factors be considered, such as the severity of the crime, the threat to public safety, the impact upon the victims, and the offender's criminal history. These factors have been determined to be constitutional by our nation's highest court and they are properly weighed in the decision-making process each and every day by prosecutors and judges throughout our nation.

To fully understand the scientific, social, and legal analysis Berk articulates, I believe it is also essential to understand the current controversy behind those who wish to significantly reform our nation's juvenile justice system and those, like me, who believe that America's juvenile justice system is appropriately balanced. I hope this response essay sheds some light on this issue and in doing so brings more clarity to Berk's article.

REFERENCES

- Juvenile Justice Center, *Adolescence, Brain Development and Legal Culpability* (January 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.
- National Center for Juvenile Justice, *National Overviews* (2007), <http://www.ncjj.org/stateprofiles/overviews/faqbs.asp>.

CASES CITED

- Miller v. Alabama*, 567 U.S. 460 (2012).
- Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).