

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

# In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk

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Christopher Berk's article offers a critique of the developmental basis for applying mitigation to the serious crimes of juveniles offered by the Supreme Court in a series of Eighth Amendment opinions striking down harsh sentences for this category of offender (*Roper v. Simmons* (2004); *Graham v. Florida* (2010); *Miller v. Alabama* (2012, 2470)). More broadly, Berk challenges the use of a developmental approach to youth crime regulation. He agrees that juveniles should be treated differently under criminal law, but he favors an alternative rationale for applying mitigation to juvenile sentencing: juveniles should not be held fully responsible for their criminal offenses because, in other legal domains, the law treats children paternalistically, in that minors do not enjoy the full range of legal rights and privileges. As he puts it, society should not reap the benefits of paternalism without bearing the costs (Berk 2019).

Berk seems to think that if adolescence as a stage of development fails to provide a perfect proxy for reduced culpability, then it is worthless, and immaturity should be discarded altogether as a basis for mitigation. We challenge this view, but without wholly discarding Berk's alternative approach. On our view, Berk's quid pro quo justification provides a complement to the developmental argument for mitigation in criminal sentencing, but not a substitute. Indeed, the restriction of minors' rights and the protection of minors from adult responsibilities can be (and have long been) understood as reciprocal.<sup>1</sup> But Berk fails to recognize that the paternalistic legal treatment of children and their special legal status ultimately derive from a presumption of developmental immaturity—the same presumption that undergirds their diminished culpability. The law treats minors paternalistically because they are assumed to be less competent to make self-regarding choices, more dependent on others to satisfy their needs, and more vulnerable and in need of protection than are adults, *precisely because of their developmental immaturity*. Berk's alternative to the developmental model is hardly an alternative; it is the other side of the same coin.

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1. See *infra* note 4 and accompanying text.

The developmental immaturity of children has long been a source of excuse and mitigation in criminal law. Under the common law infancy defense, children under age seven were excused from criminal responsibility, while children age seven to fourteen were presumed irresponsible (Walkover 1984). During the twentieth century, criminal law philosophers paid little attention to criminal responsibility in children (in contrast to their great interest in the impact of mental illness on responsibility, for example) (Scott and Steinberg 2003). This was because most youths during this period were dealt with in a separate justice system that ostensibly eschewed punishment as its goal. Only in the 1990s, when juveniles increasingly were subject to criminal prosecution and punishment, did the question of whether excuse or mitigation should apply to their criminal acts become salient, piquing the interest of scholars, including Berk (see also Yaffe 2018). Our own analysis of this issue, adopted by the Supreme Court in the Eighth Amendment juvenile sentencing opinions, concluded that several conventional sources of mitigation in criminal law apply to the crimes of juveniles; all are linked to young offenders' developmental immaturity (Scott and Steinberg 2003; Steinberg and Scott 2003). Three elements of our analysis were echoed in the Court's rationale. First, actors who are impaired in their decision making are deemed less culpable than nonimpaired counterparts. Adolescents' criminal choices are likely to be driven by influences linked to immature brain development, such as poor impulse control and emotional regulation, and heightened reward seeking. Second, mitigation for criminal conduct applies to actors who offend under extreme exogenous pressure. This factor is relevant to the offenses of adolescents, who are subject to coercion from peers and other influences in their social context from which they cannot extricate themselves. Finally, criminal acts that are out of character are subject to mitigation. Most juvenile crimes reflect the risky experimentation of still-developing individuals—acts derived from transient immaturity, not bad character.

The Supreme Court grounded its proportionality analysis in this developmental framework. In drawing on developmental research on adolescence to support its conclusion that the sentences in question were disproportionate, the Court was applying relevant empirical knowledge to well-established mitigation doctrine, although it did not explicitly link the relevant traits of adolescence to the underlying sources of mitigation in criminal law doctrine. Despite his broad objection to the developmental framework, Berk presumably also would concur that a young child, at least, should be excused from criminal responsibility for developmental reasons, under conventional criminal law excuse doctrine.

Adolescents present a more complex picture, to be sure, and Berk challenges the Court's categorical assumption that juveniles as a group deserve mitigation on the basis of developmental immaturity. As he points out, the category is both over- and under-inclusive; the pace of development varies among same-aged individuals, and girls often mature faster than boys of the same age. Thus, some sixteen-year-olds might be mature, while many twenty-year-olds are immature and might deserve mitigation. Further, some youths are "life-course persistent" offenders (Moffitt 2003); their antisocial conduct may not be derived primarily from developmental influences of adolescence, but from other biological, social, and psychological pathologies.

Without question, the special legal status the Court creates for juvenile offenders by using age as an index of developmental immaturity is a crude proxy and not a perfect measure of reduced culpability in each juvenile offender. Berk seems to conclude that because the proxy is imperfect, it is worthless. But the law routinely uses categories

that are crude proxies; certainly in the regulation of minors this is true. The fact that maturity varies among youth of the same chronological age is no more problematic for criminal law than the fact that some individuals younger than the legal driving age are capable of driving responsibly while some who are beyond the legal driving age are disastrous behind the wheel. Over- and underinclusiveness in a bright-line age boundary does not render it useless. It is hard to see why the law would ignore a substantial body of scientific research supporting that much criminal activity of youths is driven by developmental factors—and that those decision-making influences are of a kind that has conventionally been deemed relevant to mitigation.<sup>2</sup>

As the Court pointed out in *Roper v. Simmons* (2005), a categorical approach to mitigation is particularly justified in this context, for several reasons. First, distinguishing between an adolescent whose offense is driven by transient developmental factors and the rare youth who is an incipient criminal is difficult or impossible, at least on the basis of the offense alone (Scott and Steinberg 2003). There is a high risk of a particular kind of harmful error if assessment of immaturity is conducted on an individualized basis; many youths who deserve mitigation because their crimes were the product of immaturity might be erroneously judged to be fully responsible. Second, in our justice system, there is evidence that racial bias affects judgments about maturity, such that youth of color will be deemed more mature, and more culpable, than other young offenders (Graham and Lowery 2004; Henning 2013). By comparison, the possibility that mature teenage girls might get an unwarranted break under a categorical mitigation regime seems like a relatively minor concern. It is well established in criminal law that imposing erroneous or excessive punishment is far more offensive to fairness than exercising leniency that may not be fully deserved.<sup>3</sup> Further, gender parity, an important equal protection value under our Constitution, supports a uniform approach. And the question of whether mitigation should be extended to the offenses of young adults is legitimately the subject of policy debate today, but that possibility does not undermine the legitimacy of the law's categorical treatment of juveniles (Scott, Bonnie, and Steinberg 2016).

Berk argues that the supporters of the developmental approach are inconsistent in using science to advocate for minors' right to make abortion decisions, while arguing for mitigation in criminal sentencing on the basis of immaturity. But no inconsistency exists. Developmental scientists explain that due to differences in the pace of development of different brain regions and related psychological capacities, adolescents are capable of adult-like reasoning and understanding by mid-adolescence in neutral settings, while they are subject to poor impulse control and emotional regulation, a tendency toward sensation seeking, and heightened susceptibility to peer influence through information into their twenties. Thus, it is perfectly coherent to treat adolescents as capable of making independent medical decisions about abortion or other treatments, while recognizing that their ability to make "mature" decisions about joining their friends in criminal activity is impaired by developmental deficits in adolescent brain functioning (Steinberg et al. 2009). This "maturity gap" between the timetables of

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2. It is possible that the boundaries of the category might be changed as the science is perfected, but that is not an argument against categorical classification.

3. The requirement of proof beyond a reasonable doubt embodies this priority.

intellectual and emotional development has been documented in both US and international samples (Icenogle et al. 2019).

Berk's dismissal of the developmental approach is troubling for another reason. He is correct that Court's proportionality analysis is largely deontological, focusing on the reduced culpability of juveniles. But the Court also gestured toward a utilitarian basis for its mitigation rationale in noting that juvenile offenses were often the product of an "unfortunate but transient immaturity" (*Miller v. Alabama* (2012, 2469), quoting *Roper v. Simmons* (2004, 573)). To a greater extent than Berk recognizes, the developmental model has been influential largely because it provides a guide for youth crime regulation that has the potential to reduce crime. The reason is simple: because much juvenile crime is the product of youthful immaturity, most juvenile offenders will mature out of their inclination toward criminal activities if the justice system response does not undermine their ability to do so. In the 1990s, kids who got into serious trouble were assumed to be young criminals, and incarceration was deemed the appropriate response. The Supreme Court and other contemporary lawmakers understand that most young offenders have the potential to reform and that it is in their interest and society's to facilitate their transition to noncriminal adulthood. This may be the most compelling reason to give kids a break in responding to their crimes (Scott and Steinberg 2008).

We do not question that reciprocity and parity play a role in the treatment of youth across legal domains. On our view, the argument that juvenile offenders should not be held fully responsible for their crimes in part because their rights as citizens are restricted reinforces and complements the developmental argument, at least in principle. Indeed, the Supreme Court, other lawmakers, and scholars have embraced variations of Berk's argument in support of mitigation in criminal sentences, observing that imposing adult criminal sentences on juveniles is inconsistent with their special status in virtually every other legal sphere in which they are subject to paternalistic protections and restrictions (Scott and Steinberg 2008). Notably, a concern about parity was at the heart of the movement to adopt the Eighteenth Amendment, lowering the voting age from twenty-one to eighteen. Proponents cited the unfairness of withholding the franchise from young men who were subject to the military draft in the Vietnam War.<sup>4</sup> In general, fairness dictates that the full burden of adult responsibilities should not be placed on minors who do not enjoy the full range of adult legal rights.

That said, the reciprocity model, taken to extremes, has troubling implications. A legal regime that grants to children rights that they are capable of exercising and that may benefit them as developing persons should not then be compelled to increase their legal burdens—including the burden of criminal punishment. The developmental perspective offers a rationale for setting different chronological age boundaries for different legal purposes in a way that links these boundaries to the developmental capacities of young people. Minors are granted rights—to make autonomous medical decisions, obtain contraception without parental permission, and enjoy adult driving privileges, for example—when we believe they have the maturity to make self-interested decisions in exercising those rights. It would be odd to conclude that criminal punishment should be ratcheted up in response, to maintain reciprocity.

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4. Senate Judiciary Report on Lowering the Voting Age to 18. S. Rep. No. 26, 92<sup>nd</sup> Cong., 1<sup>st</sup> Session, 5.

Fundamentally, what is missing from Berk's rationale for mitigation is any examination of why the law treats minors paternalistically. Early in the article, Berk observes that it matters *why* children should be given a break in criminal sentencing (Berk 2019)—and then he proceeds to offer his answer to the question. But he does not address *why* children are subject to paternalistic policies that restrict their legal rights and privileges. He suggests that protections and restrictions under contemporary law are grounded in a "liberal paternalist" narrative about childhood. In a different social and political context, Berk implies, we might adopt another equally valid narrative, "child liberation," under which children are granted all adult legal rights and subject to adult legal duties (Berk 2019). The idea seems to be that a defensible legal system might give seven-year-old children the right to drive motor vehicles, make medical decisions, and marry; by implication, such a regime would then be justified in subjecting them to the military draft and adult criminal sentences. To be sure, social and historical context shapes the legal construction of childhood, and adolescents may be deemed more or less adult-like in different cultures. But Berk's account of the basis of paternalistic policies under contemporary law is unsatisfying, to say the least. It is also markedly at variance with our current scientific understanding of development. Childhood and adolescence are not only social constructions—or even mainly so. As brain science has made eminently clear, these stages are also grounded in biological reality (Steinberg 2016).

Lawmakers have created a complex scheme of regulation directed at children and families that has multiple aims: to protect children from harm by their parents and other adults, to provide them with support and care, to assure that they are educated, and to limit their freedom to engage in activities that threaten harm to themselves or others (Scott 2000; Davis et al. 2014). This regulatory scheme also restricts children's rights and privileges. Often the purpose of these restrictions is solely to serve society's interest, as Berk suggests, and sometimes the rationale for the restriction seems thin; age eighteen is a somewhat arbitrary boundary for enfranchisement. But restrictions often have a dual purpose of providing a benefit or protection to both children and society. Restrictions on driving privileges, access to alcohol, medical decision making, and marriage rights protect children as well as society. The prohibition of marriage by twelve-year-olds does not seem like a burden on children, although the right is constitutionally protected for adults. It is important to ask what explains the law's paternalistic bent toward this category of citizens. The answer cannot be simply that we are gripped by a liberal paternalist narrative that is a product of capricious social forces (Huntington and Scott forthcoming 2019).

On our view, any serious effort to understand the rationale for the law's protection and restriction of children cannot avoid the realities of child and adolescent development. The law's paternalism is based on an assumption that children are immature persons who, because of their immaturity, are in need of protection and are less able to act in their own interests than are adults. Young children are physically dependent and older children and teenagers need support and protection to develop successfully. Even adolescents have vulnerabilities and are less capable decision makers in many realms than they will be as adults—because of developmental immaturity. It follows that society has an obligation to protect young persons and promote their development to healthy adulthood. Fulfillment of this obligation through paternalistic legal policies serves both society's interest and the interest of children.

What Berk's argument elides is that children have a special legal status *because* they are assumed to be developmentally immature, an assumption that has deep historical roots. Legal regulation may often be less than optimal; lawmakers may restrict children's rights unduly or impose excessive responsibility. But the justification for limiting children's rights and protecting them from harm ultimately derives from beliefs about their immaturity and resulting dependency, vulnerability, and incapacities. Just as these beliefs justify restricting child marriage, they justify mitigation in criminal sentencing. Developmental science is simply a useful tool that clarifies the differences between children and adults and allows for more informed judgments about whether these differences are important to the regulation of children as legal persons.

The developmental approach facilitates regulation that is more attuned to child well-being and social welfare than a crude notion of an exchange of rights and responsibilities. In some domains, children's rights have expanded in recent decades as lawmakers acknowledge youthful abilities, a trend that benefits young people and, sometimes, society as well. If we can agree that we live in a society in which the healthy development of children into adulthood is a common goal that also serves children's interest, then developmental knowledge can offer useful tools to accomplish these social ends.

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