

SYMBOLIC STRUGGLES IN ADVOCATING FOR JUVENILES SENTENCED TO LIFE WITHOUT PAROLE

Katie Berringer

Abstract

This paper examines the history of Juvenile Life Without Parole sentencing, both at the state level in Illinois and at the federal level, with particular attention to the power of symbolic framing and to the continued importance of two dominant frames: the juvenile 'super-predator' and the child. Paying attention to the particular actions of state actors, this paper will investigate the central role that class and race have played in the symbolic construction of these tropes, in order to understand how state actors became the vehicles to translate class and race schemas into policy. Finally, it is my hope that this analysis will also inform the efforts of advocates—social workers, mitigation specialists, defense attorneys, and the families and communities of those serving natural life sentences—as they engage, challenge, and strategically take up the symbolic and material tools that have shaped this policymaking.

On January 15, 2014 the Illinois Supreme Court held oral arguments in *People v. Davis*. Addolfo Davis was then a thirty-seven-year-old man who had been sentenced to life without the possibility of parole at the age of fourteen. His case, to determine whether he would be entitled to a resentencing hearing, was based upon the 2012 U.S. Supreme Court decision, *Miller v. Alabama*, which found mandatory Juvenile Life Without Parole (JLWOP) sentencing to be unconstitutional.¹ While the Supreme Court of the United States (SCOTUS) decision protects all young people in the United States from mandatory life sentences moving forward, the Court did not directly address the question of retroactivity, leaving this decision to individual states to decide.² On March 20, 2014, the Illinois Supreme Court recognized the retroactivity of *Miller* and vacated Davis's sentence of life without the possibility of parole, recognizing his constitutional right to a resentencing hearing (*People v. Davis* 2014). In so

doing, the state has set a far-reaching precedent that will enable JLWOP defendants throughout Illinois such an opportunity for re-sentencing.³

For these defendants, their advocates, attorneys, and families, the courts' decisions reveal the power of symbolic framing, within which individuals are made to fit a particular juridical concept, to affect individuals' lives. Throughout the history of recent JLWOP policymaking, two competing symbolic orders have dominated: that of the 'super-predator' and the child. While I will argue that the 'super-predator' trope has been central to fostering mandatory (and unvarying) sentences of life without parole, Justice Elena Kagan's decision in the *Miller* case has reasserted the primacy of punishment proportionate to the age of the offender:

By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. (*Miller v. Alabama* 2012)

With these words, Kagan not only vacated the life sentence of one young man, but also established, affirmed, and codified into law the powerful framing of the juvenile defendant as a *child*. The centrality of this idea of the child (with *age-related characteristics*) is further evidenced by Justice Samuel Alito's dissenting opinion in the *Miller* case, in which he asserts, "Even a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a 'child' and must be given a chance to persuade a judge to permit his release into society" (*Miller v. Alabama* 2012). Alito's phrasing, despite his objection through quotation marks, reveals the potency of the symbolic category *Miller* affirms, and its profound material consequences.

This paper argues that to understand how Illinois, the originator of the world's first juvenile court in 1899, came to incarcerate so many "juvenile lifers" requires attention to the symbolic production of two central tropes: the child and the juvenile 'super-predator.' Moreover, it further claims that legal and social advocacy for those awaiting re-sentencing must proceed with a clear understanding of the roots and function of these symbolic frames. The paper thus investigates the central role that class and race have played in this symbolic construction, and traces how these tropes came to be employed by particular state actors and advocates as vehicles to translate class and race schemas into policy.

In order to fully attend to the role of class and race on these symbolic formations, this paper engages Loïc Wacquant's important work, *Punishing the Poor* (2009). Recognizing the limitations of a strictly economic lens for understanding policies of punishment in the United States, Wacquant combines a materialist analysis derived from Marx and Engels with a symbolic approach inspired by Durkheim and Bourdieu to "capture the reverberating roles of the criminal justice system as cultural engine and fount of social demarcations, public norms, and moral emotions" (xviii). While Wacquant's analysis encompasses more than policymaking itself, his attempt to bring attention to the myriad "agents and devices that contribute, each on its level, to the collective work of material and symbolic construction of the penal state" (34) provides a useful lens for understanding the complicated and interactive way these policies of social control have been both formulated and implemented.

Recognizing that systems of punishment and the carceral state are contingent upon particular actions performed by particular political actors (Soss, Fording, and Schram 2011), this paper analyzes the tools and processes of policymaking around JLWOP, focusing on the material and symbolic tools employed by state and federal legislators, governors, supreme court justices and circuit court judges, and federal and state prosecutors. Finally, it is my hope that this analysis might also inform the efforts of advocates—social workers, mitigation specialists, defense attorneys, and the families and communities of those serving natural life sentences—as they engage, challenge, and strategically take up these symbolic and material tools.

'SUPER-PREDATORS' AND RACE-CODED POLICY FRAMES

The particular codification of laws mandating Juvenile Life Without Parole can be traced back to Richard Nixon's 1968 presidential campaign based on promises of "law and order." As early as the 1970s, state legislatures began to draft legislation that called for mandatory life sentences for certain crimes. By the 1990s, states had begun to pass "automatic transfer" laws to send juveniles charged with certain crimes to adult criminal courts prior to any consideration of their culpability, as well as "accountability statutes," by which juvenile accomplices would be tried and sentenced as severely as principle actors.⁴ The combination of this legislation contributed greatly to an enormous increase in youth sentenced to JLWOP in the late 1990s (Tanenhaus and Drizin 2002; Zimring 2005; Illinois Coalition for the Fair Sentencing of Children 2008). The Illinois Coalition for the Fair Sentencing of Children (2008), the main advocacy

organization opposing JLWOP in the state, reports that “in 1990, 2,234 children were convicted of murder nationwide and 2.9 percent of them received life sentences. In 2000, only 1,006 children were convicted of murder, but the rate of those who were sentenced to life more than tripled, to 9.1 percent” (32). According to Human Rights Watch and Amnesty International (2005), between 1962 and 1981, only two youth offenders were sentenced on average each year to natural life. By 1996, that number had reached 152, and has only recently begun to gradually decline.

The passing of this legislation, and the resulting exponential increase in JLWOP sentences cannot be fully understood without corresponding attention to the powerful trope emerging at the time of this surge, that of the juvenile ‘super-predator.’ First coined in 1995 by Princeton Professor John DiIulio, the concept of the ‘super-predator’ was quickly taken up by James Q. Wilson and others to support forecasts of rampant escalations in inner-city crime (Howell 2009). In “The Coming of the Super Predator,” DiIulio described “hardened, remorseless juveniles” and “elementary school youngsters who pack guns instead of lunches,” performing “homicidal violence in ‘wolf packs”” (DiIulio 1995). Moreover, he claimed that “what is really frightening everyone from [District Attorneys] to demographers, old cops to old convicts, is not what’s happening now, but what’s just around the corner,” (DiIulio 1995).

Using demographic data to foretell the coming of “at least 30,000 more murderers, rapists, and muggers on the streets” he conjured images of an uncontrollable tide that would start in “black inner-city neighborhoods” only to “spill over into upscale central-city districts, inner-ring suburbs, and even the rural heartland” (DiIulio 1995). The effects of this alarming prediction and newly-coined term were enormous even though DiIulio himself claims to have tried “to put the brakes on the super-predator theory, which had all but taken on a life of its own” (Becker 2001). James C. Howell (2009) explains that the symbolic production of the ‘super-predator’ spread quickly due in large part to the discourse of public officials and within political spheres, where “‘if you’re old enough to do the crime, you’re old enough to do the time,’ became the mantra of the leaders of the moral panic” (19). Thus “tough-on-crime” politicians and other influential actors not only adopted, but also actively contributed to the symbolic production of this trope. Moreover, as the moral panic over ‘super-predators’ increased, public attention to sensationalized cases provided a new degree of public support to prosecutors who pursued extreme sentences and to judges who handed them down, so that symbolic production of the ‘super-predator’ trope coincided with and resulted in a devastating increase in JLWOP sentences in the late 1990s.⁵

The category of the 'super-predator' that these state actors collaborated in symbolically constructing was by no means a neutral or universal category, but was actively both classed and racialized. In DiIulio's (1995) conception, "super-predators" came from a "natural" criminal environment: the particular "moral poverty" of poor, black, inner-city youth, "surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings." This conception found a place within a larger frame that assumed (and articulated) "pathologies of the urban underclass," which Soss, Fording, and Schram (2011) describe as the "primary focus of public discourse about poverty" from as early as the 1970s through the late 1990s, during which time "the race-coded underclass served as Exhibit A...for new governing arrangements" (63). This portrait of the urban underclass obviously bolstered "law and order" political campaigning and "tough-on-crime" policies. Less obvious is how this portrait of the urban poor came to re-define race itself (Wacquant 2009; Soss, Fording, and Schram 2011).

RE-FRAMING JUVENILES AS CHILDREN

In response to the increasingly punitive turn in juvenile sentencing policy, there has been a consistent effort among interest groups and state actors to challenge the social construction of the 'super-predator' at both the state and federal level. In Illinois in 2002, juvenile justice advocates at the Edwin F. Mandel Legal Clinic at the University of Chicago took on the case of a fifteen-year-old defendant who had been sentenced to life under an accountability statute. These advocates submitted an *amicus curiae* in the case of *People v. Miller*,⁶ arguing that JLWOP sentences violate the "proportionate penalties" clause of the Illinois Constitution, the Eighth Amendment of the U.S. Constitution, and international law. The circuit court found—and the appellate court upheld—that the "multiple-murder sentencing statute," with its mandatory life without parole condition, violated the Illinois Constitution when applied to a juvenile. In his decision, Judge James Linn found it "blatantly unfair and highly unconscionable" that "a 15-year-old child who was passively acting as a look-out for other people, never picked up a gun, never had much more than—perhaps less than a minute—to contemplate what this entire incident is about, and he is in the same situation as a serial killer for sentencing purposes" (*People v. Miller* 2002).

Judge Linn's decision to distinguish between "a 15-year-old child" and "a serial killer" is far from accidental, and is consistent with advocacy efforts in Illinois and throughout the country among criminal defense attorneys, judges, and advocates to draw from emerging neurological and

social scientific findings on adolescent development. Stressing in particular their increased impulsivity, susceptibility to peer pressure, and inability to measure and understand consequences (Human Rights Watch/Amnesty International 2005), these advocates are re-framing juvenile defendants as “children,” thereby highlighting their developmental vulnerability while also potentially undermining the race-coding of the previous ‘super-predator’ frame.

In their reports, “Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois” and “The Rest of Their Lives: Life without Parole for Child Offenders in the United States,” the Illinois Coalition for the Fair Sentencing of Children (2008) and Human Rights Watch (2005) both adamantly assert the JLWOP defendant’s identity as a child. They also compile figures, share photographs, and recount the life stories of the 103 individuals in Illinois and the 2,225 youth offenders in the United States who were, as of 2008 and 2004, serving natural life sentences. Traces of these advocacy efforts ultimately emerged in Justice Kagan’s opinion in the federal *Miller v. Alabama* decision. She too draws upon neurological and social science research to both accentuate a child’s lessened “moral culpability” (*Miller v. Alabama* 2012, 9) as well as their neurological capacity for reform. While Justice Alito’s dissent suggests that the distinction between the adult and juvenile defendant is arbitrary, an accidental (and incidental) matter of one’s date of birth, Kagan’s central claim is that “children are different” (*Miller v. Alabama* 2012, 17). She thus delineates multiple factors that must be considered before a child can be sentenced to JLWOP, including (1) “immaturity, impetuosity, and failure to consider risks,” (2) “the family and home environment that surrounds him,” (3) “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familiar and peer pressures may have affected him,” and (4) “the possibility of rehabilitation” (*Miller v. Alabama* 2012, 15). Social workers will recognize in Kagan’s decision the familiar theoretical framework of the ecological or “person-in-environment” perspective that is a trademark of clinical social work practice (Hepworth et al. 2009). These “*Miller* factors,” as they have been termed, emphasize the biological and psychological vulnerabilities of adolescence and introduce environmental factors, all of which will become essential to the work of sentencing mitigation.

The field of sentencing mitigation and the role of the “mitigation specialist” on legal defense teams emerged out of capital defense in death penalty cases. Unlike evidence introduced in the pre-sentencing phase of the trial, which must be relevant only to the crime itself, mitigation evidence can include any information (e.g., biological, psychological, or social) that might help to contextualize

the defendant, to place the person in his or her environment, and to explain the circumstances that led to the crime for which he or she has been convicted. The United States Supreme Court has upheld in multiple decisions that defendants in capital cases are entitled to present any evidence in the sentencing phase that might mitigate his or her sentence. Social workers, drawing from their clinical skills, mental health expertise, and ecological, person-in-environment perspective, are ideally suited for the emerging profession of the mitigation specialist, and their presence as such specialists on the legal defense team, some have argued, should be considered both a necessity and a right (Payne 2003; Schroeder 2003; Guin, Noble, and Merrill 2003; Cooley 2005).

Sentencing mitigation based upon these *Miller* factors, with attention to developmental vulnerabilities, also has the potential to de-code race and class from the symbolic construction of the juvenile defendant. At the same time, by including “home environments” and “familiar and peer pressures” Justice Kagan’s decision reintroduces poverty, race, and class into the discourse on youth and crime, in a potentially more complicated and far less limiting way. Jody Kent Lavy, director and national coordinator of the Campaign for the Fair Sentencing of Youth, in arguing for the retroactivity of *Miller*, asserts, “these facts apply to all children, including those convicted before the *Miller* ruling in June 2012” (Geiger 2014). Re-framing these young people not as ‘super-predators’ but as children, these advocates are not only increasing their sympathy, they are also attempting to explicitly remove the race-coding of the frame—affirming that these children are the same as “all children.” Julie Anderson, the mother of one JLWOP defendant, is quoted in *The Atlantic* discussing the failed 2013 efforts to pass legislation affirming *Miller*’s retroactivity,⁷ saying, “a lot of legislators don’t understand that these juveniles are capable of rehabilitation and are not monsters; they are real people with families and people who care about them” (Sutherland, Lowry, and Baliga 2013). Assertions by JLWOP advocates both effectively essentialize the category of the child—as fundamentally distinct from that of the adult—and may also actively challenge the race-coding of the juvenile justice frame, ultimately re-humanizing adolescent defendants, allowing them to be seen, as Anderson appeals to us to do, as “real people.” However, as lofty and sincere as this goal might be, the process of achieving it may warrant further scrutiny.

CONCLUSION: THE LIMITATIONS OF STRATEGIC ESSENTIALISM

Phillip A. Goff and his colleagues (2014) have found that Black boys tend to be excluded from the social categorization of “children.” Drawing from implicit bias research in the field of social psychology, they have found that Black boys are denied the perception of innocence, the need for protection, and the sense of growth and change that the category of the child affords. Moreover, this exclusion is exacerbated in contexts where Black males are subject to other forms of dehumanization. By actively and explicitly reframing JLWOP defendants as children, then, advocates are not merely offering an alternative frame, but are directly challenging and deconstructing the race-coding of the ‘super-predator’ frame.

However, as powerful as it may be to employ the trope of the child in this way, simply replacing one trope with another may also involve a number of unintended consequences—and may ultimately limit the scope of the critique advocates are able to employ. In illustrating and highlighting aspects of individuals’ backgrounds based on the *Miller* factors, be it their poverty, their history of abuse or victimization, their educational deficits, or even their experience of racial discrimination within the criminal justice system, advocates may ultimately construct one-dimensional stories that reduce the identities of JLWOP defendants. Media presentations of Addolfo Davis, for example, distill his identity to the following: “An eighth-grader from a troubled home, he had fallen in with a street gang on Chicago’s South Side” (Geiger 2014). Indeed, in presenting the *Miller* factors this way, advocates not only risk presenting these individuals as simply the “other” to be disregarded and forgotten, but also risk reifying the very claim made by DiIulio—that these young people have been so damaged by their environment as to make them unsuitable to return to society. Instead, it may be that the case for rehabilitation itself depends upon a rejection of all essentialist claims that people are tied inextricably to their identities, and fixed to the social conditions from which they come. Success in JLWOP reform may rest in advocates’ abilities to deconstruct our fixed binaries of good and evil, redeemable and irredeemable, victim and perpetrator, and even child and adult.

Finally, there is an even more pernicious unintended consequence of employing the child trope, which may ultimately reveal the limitations of this kind of legal advocacy; that is, that by removing the race-coding of the previous frame, advocates are effectively masking the race and class content of the history of JLWOP legislation altogether. In replacing what was a racialized and classed trope with a seemingly race-neutral one, advocates may succeed in achieving the best possible outcome for individuals serving JLWOP—a chance to finally tell their stories, to

present to the court a fuller and more humanizing narrative, and thereby, ultimately, to attain shorter sentences and release—but may do very little to correct or even to acknowledge the larger, systemic forces that enabled these policies in the first place. While tracing the history of the ‘super-predator’ trope may reveal a great deal about how individual bias has become enacted into law through race and class-coded schema, the kind of advocacy that would be most effective, even liberating, for those individuals affected by these laws may also effectively foreclose the possibility of constructing certain larger, systemic critiques. Indeed, the sweeping critiques that Wacquant (2009) and Soss, Fording, and Schram (2011) offer, tying the symbolic and material construction of the carceral state to contemporary neoliberal paternalism and the increasingly disciplinary turn in poverty governance, would likely not survive within the context of a JLWOP courtroom and its shifting attention to youth and adolescence as the primary narrative frame. Still, despite this potential myopia, this framing may nonetheless be the most effective for those individuals currently facing JLWOP sentences.

The original juvenile court was founded in Illinois in 1899 under the auspices of preventing “children” from being “treated as criminals” (Zimring 2005, 33). Throughout the history of juvenile justice policymaking in the United States, these kinds of frames have been incredibly influential in establishing the stereotypes and preconceived notions of state actors about the people their policies target—be they “children,” “serial killers,” “monsters,” or “super-predators.” The legitimacy of the juvenile justice system in this country has always been tied to its ability to present and construct the juvenile offender not as a criminal to be feared, but as a child to be protected, treated, and rehabilitated. While this kind of advocacy may foreclose certain kinds of broader systemic and structural critiques, it must still be revived if the court seeks to maintain its legitimacy in the future—and for Addolfo Davis and the other men and women serving JLWOP to finally come home. Nevertheless, in this process of adopting and employing alternative symbolic frames, such as that of Justice Kagan’s “child,” advocates can and should avoid the essentialist traps of contemporary public discourse, deconstructing race and class-coded stereotypes in favor of fuller, more nuanced, and ultimately more humanizing presentations of these individuals, their families, and their communities.

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¹ At the time of the *Miller* decision, around 2,570 individuals were serving JLWOP in the U.S. Worldwide, The United States and Somalia are the only countries that have not ratified the Convention on the Rights of the Child (1989), Article 37a, prohibiting JLWOP (Howell 2009, 297) and at the time of *Miller* only seven individuals outside of the U.S. were serving such sentences (Human Rights Watch/Amnesty International 2005; Illinois Coalition for the Fair Sentencing of Children 2008).

² To date, these states have responded to the *Miller* decision in resoundingly dissimilar ways. On one extreme, the legislatures of California, Wyoming, and Delaware have eliminated the practice of Juvenile Life Without Parole completely, while Pennsylvania and North Carolina's legislatures have set certain restrictions (Haniff 2014). In Iowa, Governor Terry Branstad commuted all JLWOP sentences to sixty years, a sentence that is virtually indistinguishable from natural life. In Michigan, one judge set a precedent upholding the retroactivity of JLWOP, making 350 inmates eligible for parole hearings (*ibid.*).

³ At the time of the *Miller* decision, 102 men and one woman in Illinois were serving JLWOP sentences (Illinois Coalition for the Fair Sentencing of Children 2008).

⁴ Addolfo Davis himself, who never fired a gun in the crime for which he was convicted along with two older co-defendants, is one example of a young man tried and sentenced to mandatory Life Without Parole on an accountability statute.

⁵ Criminologist Franklin Zimring (2005) explains that by 1996 violent crime rates had already declined for three years, with youth violence dropping even faster than that of adults, “from 26.5 per 100,000 in 1993 to 6.6 in 1999” (121). Academics and criminologists attempted unsuccessfully to interrupt the resulting swell of policy change and implementation. In 1999, “some 200 criminologists signed a joint letter to the US Senate...opposing [the Violent and Repeat Juvenile Offender Accountability and Rehabilitation] legislation,” which would transfer children as young as ten into adult courts (Howell 2009, 20). In 2001, the Surgeon General himself released a report declaring the ‘super-predator’ theory a myth and citing evidence opposing it (Tanenhaus and Drizin 2002).

⁶ Evan Miller, of the SCOTUS decision, is of no relation to Leon Miller, of the Illinois Appellate Court decision.

⁷ The failure of this effort has been attributed both to the many other items on the Illinois legislative agenda that session (pensions, debt, and same-sex marriage, to name a few), as well as legislators’ desire to wait for a determination from the courts (Sutherland, Lowry, and Baliga 2013).

ABOUT THE AUTHOR

Katie Berringer is a 2014 graduate of the Master’s program at the School of Social Service Administration and is currently a research project coordinator for the Chicago Center for HIV Elimination at the University of Chicago. While at SSA, Katie worked as a clinical social work intern at the Trauma Unit at John H. Stroger, Jr. Hospital of Cook County, as well as the Edwin F. Mandel Legal Aid Clinic at the University of Chicago Law School. She was also enrolled in the Graduate Program in Health Administration and Policy as well as the Violence Prevention program of study, and served as Co-Editor of *Advocates’ Forum*. Before moving to Chicago, Katie coordinated HIV interventions and counseling, testing, and referral programs for currently and formerly incarcerated women at a reentry organization in Washington, D.C. Katie received her B.A. in religion from Carleton College.