Loyola of Los Angeles Law Review

Volume 46
Number 3 *Symposium: Juveniles and the Supreme Court*

Article 10

Spring 2013

Table of Contents

LOYOLA

LAW REVIEW | LOS ANGELES

SPRING 2013 VOLUME 46 NUMBER 3

TABLE OF CONTENTS

SYMPOSIUM

JUVENILES AND THE SUPREME COURT

INTRODUCTION: A NEW ERA IN JUVENILE JUSTICE
by Samantha Buckingham 793

REDUCING INCARCERATION FOR YOUTHFUL OFFENDERS WITH A DEVELOPMENTAL APPROACH TO SENTENCING
by Samantha Buckingham 801

Current sentencing practices have proven to be an ineffective method of rehabilitating criminal defendants. Such practices are unresponsive to developmental science breakthroughs, fail to promote rehabilitation, and drain society's limited resources. These deficiencies are most acute when dealing with youthful offenders. Incarcerating youthful offenders, who are amenable to rehabilitative efforts, under current sentencing practices only serves to ensure such individuals will never become productive members of society. Drawing on the author's experiences as a federal public defender, studies in developmental psychology and neuroscience, and the Supreme Court's recent line of cases that acknowledge youthful offenders' biological differences from adult offenders, the author proposes a restorative-justice approach to replace current sentencing practices. This solution includes tailoring a youthful offender's sentence to his or her developmental level and requiring a community-based mediation between victims and offenders. The proposal counteracts a major deficiency of current sentencing

practices—the failure to offer youthful offenders an opportunity to truly understand their crimes. Only by doing so will a youthful offender be in a position to rehabilitate. This Article responds to possible critiques of the proposal, including concerns about the ability to accurately measure the success of a restorative-justice sentencing model, the fear of implicating the offender's Fifth Amendment right against self incrimination, and the cost of implementing mediation-based efforts.

Ultimately, this Article determines that a developmentally appropriate, community-based sentencing scheme—with restorative justice overtones—best addresses the unique situation youthful offenders find themselves in. A sentence for a youthful offender should—indeed, must—present meaningful opportunities for the youthful offender to rehabilitate, and age-appropriate sentences grounded in restorative-justice principles will do this effectively.

ESSAY: TALKING ABOUT *CRUELTY*: THE EIGHTH AMENDMENT AND JUVENILE OFFENDERS AFTER *MILLER V. ALABAMA*

by Samuel H. Pillsbury 885

SCHOOL DISCIPLINE REFORM: INCORPORATING THE SUPREME COURT'S "AGE MATTERS" JURISPRUDENCE

by Barbara Fedders & Jason Langberg..... 933

Relying on social science, neuroscience, and common sense to elucidate the differences between childhood and adulthood, including levels of maturation, impulsivity, and susceptibility to peer pressure, the Supreme Court altered the criminal justice landscape for youth in *Roper v. Simmons*, *Graham v. Florida*, *J.D.B. v. North Carolina*, and *Miller v. Alabama*—the "age matters" cases. In this Article, we argue that these holdings should be applied outside of the criminal justice system to support efforts to reform school discipline laws, policies, and practices. Specifically, we argue that the science and common sense relied upon in the "age matters" cases similarly support eliminating punitive approaches, such as zero tolerance policies and school policing, and instead employing such developmentally appropriate approaches as positive behavioral interventions, community building in schools, robust due process for disciplinary proceedings, and adequate counselors, social workers, and psychologists. Implementing these reforms will help prevent youths from becoming ensnared in the school-to-prison pipeline.

LEGISLATING NEUROSCIENCE: THE CASE OF JUVENILE JUSTICE
by Francis X. Shen 985

Neuroscientific evidence is increasingly being introduced in legal contexts, and neurolaw scholarship is correspondingly on the rise. Yet absent from neurolaw research to date are extended examinations of neuroscience in legislative domains. This Article begins to fill that gap with a focus on the illustrative case of neuroscience and juvenile justice in state legislatures. Such examination reveals distinctions between lab neuroscience, lobbyist neuroscience, and legislator neuroscience. As neuroscience narratives are constructed in the policy stream, normative questions arise. Without courtroom evidentiary rules to guide the use of neuroscience in legislatures, these questions are complicated. For instance, to what extent should lobbyists and legislators adhere to the complexities and caveats of laboratory science? How much should lawmakers simplify and reformulate the scientific findings to achieve desired policy ends?

The Article argues that the construction of neuroscience narratives is necessary and desirable, but if the narratives diverge too greatly from actual research findings, they may ultimately undermine the efficacy of the neuroscience in policymaking.

"CHILDREN ARE DIFFERENT": IMPLICIT BIAS, REHABILITATION, AND THE "NEW" JUVENILE JURISPRUDENCE
by Robin Walker Sterling 1019

In several recent Supreme Court decisions, the Court has expanded the protections available to juvenile offenders in the criminal justice system, based on adolescent brain development research demonstrating that children merit different considerations than adults. This Article chronicles the Court's recent juvenile justice decisions from *Roper v. Simmons* to *Miller v. Alabama*, tracing the Court's increasing reliance on the "children are different" rationale. But despite this resurgence in expanded protection for adolescents, youths of color have historically been excluded from the "children are different" philosophy.

Dating back to the early nineteenth century, youths of color were subjected to disproportionate treatment in the criminal justice system as exemplified by convict leasing, lynching, and the Jim Crow era. The vestiges of the Jim Crow era eventually gave rise to the modern-day superpredator myth—a stereotype depicting youths of color as violent creatures devoid of remorse. The historical discrimination against youths of color, coupled with the rise of the superpredator myth, has inculcated an implicit bias against youths of color in the criminal justice system. This implicit bias functions as a pernicious force, hindering the inclusion of

youths of color in the "children are different" paradigm and impeding their ability to benefit from the protections mandated by the Court. This Article proposes several suggestions for mitigating the effects of implicit racial bias in juvenile life without parole proceedings, thereby extending the benefits of the "children are different" philosophy to youths of color.

STUDENT ARTICLES AND COMMENTS

THE PERRYMANDER, POLARIZATION, AND PEYOTE V. SECTION 2 OF THE VOTING RIGHTS ACT

by Rosemarie Unite 1075

The Voting Rights Act of 1965 accomplished what the Fifteenth Amendment alone could not: safeguarding minority voting rights. One of the Act's key enforcement provisions, Section 2, has helped protect not only minorities' access to the polls but also their right to an undiluted vote against potentially discriminatory means such as legislative redistricting. By prohibiting minority vote dilution even when a legislative redistricting plan is drawn strictly for political gain, Section 2 has also become one of the only checks on partisan gerrymandering. Yet a certain confluence of circumstances puts Section 2 at risk of being either struck down by the Supreme Court as unconstitutional or eviscerated, leaving the narrower interpretation of Section 2 that Chief Justice Roberts advocated when he worked at the Justice Department. These circumstances—the polarization of Congress, the ideological disposition of the Supreme Court, and the changing composition of the electorate—threaten to squelch the minority vote just as it amasses the potential to swing presidential elections and, thus, the futures of the political parties.

POSTHUMOUSLY CONCEIVED CHILDREN AND THEIR SOCIAL SECURITY BENEFITS BASED ON STATE INTESTACY LAW: HOW *ASTRUE V. CAPATO* CHANGES FUTURE SOCIAL SECURITY BENEFITS AS TECHNOLOGY ADVANCES

by Catherine Kim 1141

OWNING PROPERTY WITHOUT PRIVACY: HOW *LAVAN V. CITY OF LOS ANGELES* OFFERS INCREASED FOURTH AMENDMENT PROTECTION TO SKID ROW'S HOMELESS

by Benjamin G. Kassis 1159