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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.

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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

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

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.

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