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Is Immigration-Backlash Fueling a School-to-Court Pipeline?

Are Schools Stricter at the Border? Investigating the Relationships Between School Strictness, Juvenile Justice, and the Border

by Kay Varela, Janice Iwama, Miner Marchbanks, Krystlelynn Caraballo, Anthony Peguero, Jamilia Blake, John Eason, Jun Sung Hong 23(2) Journal of School Violence 165-186 (2024)

Reviewed by Stacy Calhoun

Concerns about immigration, violence, and crime along the border states have led to the implementation of increasingly harsh policies that rely heavily on control and surveillance. These policies have had a significant impact on the populations living in these areas, creating an atmosphere of fear and mistrust. These measures may also extend to schools, resulting in the development of harsh disciplinary climates that can be detrimental to student well-being and academic success. Harsh school disciplinary practices, such as zero-tolerance policies, excessive suspensions, and increased police presence have been linked to lower academic achievement, increased dropout rates, and a higher likelihood of involvement with the juvenile justice system. Given the heightened anti-immigrant sentiment and the criminalization of immigrants in

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How Prosecutors and the Courts Are Applying New Findings in Adolescent Brain Science

By Katie Jerstad

Editor's Note: In our Fall 2023 issue, Juvenile Justice Update published "The Adolescent Brain" by Katie Jerstad, a concise, accessible introduction to the current state of scientific knowledge on brain development and its relationship to youthful behavior. The article attempted to answer some of the very difficult legal questions raised by what we now know about the differences between the adult and juvenile brains. For example, if all adolescents have undeveloped parts of their brains, why aren't all adolescents committing crimes? What can a brain science expert testify to and what can't they testify to? How are generalities made about the adolescent brain affecting specific decisions being made by prosecutors and juvenile courts with respect to specific crimes? In this important follow-up, Ms. Jerstad surveys the major Supreme Court decisions that guide current practice—especially Roper v. Simmons, Graham v. Florida, Miller v. Alabama, and Jones v. Mississippi—and how these important decisions affect how prosecutors prioritize and prepare their cases.

U.S. Supreme Court Cases That Have Considered Brain Development

The U.S. Supreme Court precedence—and how the high court has treated or considered brain development in specific cases—forms the invisible backdrop in a youth or juvenile court proceeding as well as a criminal proceeding against a youth being tried or sentenced as an adult.

Any discussion of the U.S. Supreme Court's treatment of youth delinquency would be incomplete without mention of *Gault*. When the U.S. Supreme Court considered the history of the juvenile court system in its 1967 decision *In re. Gault*,[1] it determined that the informal, *parens patriae* style of juvenile proceedings were unconstitutional in their lack of due process and procedural safeguards for the youth but could still retain their rehabilitative focus. As a result of *Gault*, juvenile court systems have many of the procedural safeguards and due process rights given to adults as well as the rehabilitative focus originally intended. The Court noted,

> [o]f course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, **nothing will require that the conception of the kindly juvenile judge be replaced by its opposite**.[2]

[1] *In re. Application of* Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[2] *Gault* at 26–27, at 1443 (emphasis added).

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This assumes the juvenile will understand the proceedings.

Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. As Justice Frankfurter stated, "[c]hildren have a very special place in life which law should reflect."[3] And indeed the law does reflect this special place. Every state in the country makes some separate provision for minors.[4]

Viewing adult and juvenile systems together, the cases show that although children are generally protected by the same constitutional guarantees against governmental deprivations as are adults, the state is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, . . . sympathy, and . . . paternal attention."[5]

As the *Eddings* case later showed, courts must also take those characteristics into account as mitigating factors at sentencing, even in a case involving the murder of a police officer by a 16-year old youth who shot the officer at point-blank range.[6] Historically, courts recognized *youth* as a mitigating factor but also the background of the youth, if that background stunted growth or interfered with the youth's development. *Eddings v. Oklahoma* was one such case.

> Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.[7]

Roper v. Simmons and preceding cases

The intersection between law and adolescent mental and emotional development was further brought to the forefront in *Roper v. Simmons*[8], in which the U.S. Supreme Court ruled that it was unconstitutional to sentence a juvenile (16 or 17 years of age at the time of the crime) to death pursuant to the Eighth and Fourteenth Amendments. Although the opinion does not give a lot of weight to specific scientific studies, there is a nod to some research referenced in an amicus brief filed by the American Psychological Association.

Of all the factual scenarios for the U.S. Supreme Court to consider when weighing the constitutionality of the death penalty, the *Roper* facts shock the conscience. 17 year-old Christopher Simmons discussed with two friends a plan to burglarize and murder a particular victim whom Simmons knew from a recent car accident. One of the two friends ended up assisting him on the night of the murder. They broke into the victim's home when her husband was out of town, covered her eyes and mouth, bound her hands with duct tape, then put her in her minivan and drove to a state park where they reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning a river. They tied her hands and feet with electrical wire, wrapped her whole face in duct tape, and threw her from the bridge, drowning her. Simmons reportedly told his friends

[3] *May v. Anderson*, 345 U.S. 528, 536, 73 S.Ct. 840, 844, 97 L.Ed. 1221 (1953) (concurring opinion).

[4] *Eddings v. Oklahoma*, 455 U.S. 104, 115–16, 102 S. Ct. 869, 877 (1982), citing *In re Gault*, 387 U.S. at 14, 87 S.Ct. at 1436 (1967).

[5] *McKeiver v. Pennsylvania*, 403 U.S. 528, 550, 91 S.Ct. 1976, 1989, 29 L.Ed.2d 647 (1971) (plurality opinion), followed by *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 3044, 61 L. Ed. 2d 797 (1979).

[6] *Eddings* at 115-16, 877.

[7] *Eddings*, 455 U.S. at 116, 102 S. Ct. at 877 (1982) (emphasis added).

[8] *Roper v. Simmons*, 543 U. S. 551 (2005).

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before the murder that they would "get away with it" because they were minors. After the murder, he was heard bragging about the murder and why he did it.

Simmons was charged as an adult with numerous offenses (burglary, kidnapping, stealing, and murder in the 1st) and tried by a jury. The jury's verdict was guilty on murder. The jury recommended the death penalty and the court followed the jury's recommendation.[9]

After the U.S. Supreme Court issued its opinion in *Atkins c. Virginia*, 536 U.S. 304 (2002), that the constitution prohibited the execution of a defendant who was deemed "mentally retarded" Simmons filed a petition for state post-conviction relief, arguing that the reasoning of *Atkins* applied to juveniles as well. The Missouri Supreme Court agreed. The State appealed to the U.S. Supreme Court, which affirmed the ruling.[10]

The premeditated nature of Simmons' offense, the depravity of his actions, and his pride in his actions all point towards his unsuitability for society and the appropriateness of the death penalty as punishment under Missouri law and capital case jurisprudence. The possibility for a court to remain free of passion or prejudice against Simmons was slim. For that reason, it is largely accepted as fact that Simmons' age and the recent discoveries in adolescent brain science were influential on the Court's reasoning.

Brain science was not the only rationale however. Prior cases considered national standards of decency, not according to the medical community, but according to state legislatures. Rather than just brain science or IQ leading to the decision, the Court built its decision off the decision in not only *Atkins*, but also *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687 (1988). In *Thompson*, the Court determined that the national standards of decency do not permit the execution of any offender under the age of 16 at the time of the crime. *Thompson,* at 818-838, 108 S. Ct. at 2687. The Court was guided by relevant legislative enactments and jury determinations and the reasons why a civilized society may accept or reject the death penalty for a person of a certain age at the time of the crime. The *Thompson* court also considered the lack of juries supporting the death penalty for children under 16 and the low number of those under 16 who had been sentenced to death for murder.

The *Thompson* Court's reasoning included the view or conclusion that continues to be repeated in case after case, that juveniles have reduced culpability and imposing the death penalty on this age group with reduced culpability "does not measurably contribute to the essential purpose of the penalty." The Court already recognized juveniles, when compared to adults, as having less experience, less education, and less intelligence making a teen less able to evaluate consequences of his or her conduct and more apt to act on emotion or peer pressure.[11]

The year after the *Thompson* decision, the Court decided *Stanford v. Kentucky*, a 5-4 decision, which again considered contemporary standards of decency and concluded the 8th and 14th amendments did not prohibit the execution of juveniles over 15 but under 18. The Court, in weighing the meaning of cruel and unusual punishment, considered the fact that 22 out of 37 death penalty states permitted 16-year-old offenders to be sentenced to death and 25 permit it for 17-year-olds. In 1989, these numbers were not sufficient to convince the majority to label the particular punishment "cruel and unusual."[12]

The *Atkins* Court considered many items to be objective indicia of consensus significant in determining the national standard of decency in wading through the vague meaning of "cruel and unusual" punishment. The Court also applied the Court's independent judgment, though the dissent disagreed with this approach. The Court found that mental retardation diminishes personal culpability even if the offender can distinguish right from wrong. The Court concluded that the death penalty for a mentally retarded person does not meet the sentencing purposes of retribution or deterrence and is therefore an excessive sanction.

The *Roper* court, in following those cases before it, considered many items to be the objective indicia of consensus in weighing the national standard of decency. It considered the following:

1. The number of states that prohibited the death penalty overall, or the death penalty for all juveniles, through legislation or court decision;
2. The increase in the number of states that had prohibited the death penalty for juveniles, both at the time of *Stanford* and at the time of their consideration of *Roper*;
3. The frequency that states allowing juvenile death penalty had carried it out;
4. The rate at which these legislative enactments took place between the last case, noting that the rate of change was faster to abolish death penalty of persons deemed mentally retarded than for juveniles, but the climate or collective change in attitude towards juveniles was still significant; and
5. The lack of states reimposing the death penalty since the Court's decision to not prohibit it (*Stanford* and *Penry*).

After considering all those, the *Roper* Court referenced three general differences between youth under 18 and adults:

1. A **lack of maturity and an underdeveloped sense of responsibility**, often resulting in impetuous and ill-considered actions and decisions, citing *Johnson* and *Eddings* as well as an article on adolescent development.[13] "Adolescents are overrepresented statistically

[9] Simmons pursued writs of habeas corpus which were denied by the federal courts. Then the U.S. Supreme Court decided the case of *Atkins c. Virginia*, 536 U.S. 304 (2002), holding that the Eighth and Fourteenth amendments prohibit the execution of a mentally retarded person. The *Atkins* ruling was a departure from *Penry v. Lynbaugh*, 492 U.S. 302 (1989), which held that the constitution did not prohibit the execution of a mentally retarded person because there was not sufficient evidence of a national consensus on the issue (with just two states enacting laws specifically prohibiting their execution, and 14 states rejecting capital punishment completely). The *Atkins* court held that standards of decency had evolved since *Penry* and now demonstrate the execution of the mental retarded as cruel and unusual punishment.

[10] By affirming the Missouri Supreme Court's decision in *Roper*, the U.S. Supreme Court reversed its ruling in *Stanford v. Kentucky*, 492 U.S. 361 (1989) which held that imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age did not violate the Eighth Amendment, noting, like in *Penry*, that standards of decency have not evolved to that point yet, as evidenced by state laws in part.

[11] *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (regarding the constitutionality of requiring parental notification and consent to their unmarried pregnant child's abortion; requiring the court to make factual findings regarding the "maturity" of the youth and if she's well enough "informed"); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1.

[12] *Stanford*, 492 U.S. at 370-371, 109 S.Ct. at 2969.

[13] *Johnson v. Texas*, 509 U.S. 350, 359-362 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982).

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in virtually every category of reckless behavior."[14] The Court notes that states recognize this immaturity and irresponsibility in juveniles as almost every state prohibits those under 18 from voting, serving on juries, or marrying without parental consent.

2. Juveniles are more **vulnerable or susceptible to negative influences and outside pressures**, including peer pressure (again citing *Eddings*, 455 U.S. at 115). The Court noted juveniles have less control, and less experience with control, over their own environment.[15]
3. The third difference is that a juvenile's **character is less well-formed than an adult**. Juveniles have more transitory, less fixed personality traits. This matters to those who impose sentences and who must ask: what are the chances that this person could actually change and stop committing offenses? For adolescent offenders whose brains and characters are not done forming, **there is the potential for change**.

This is referred to by Court watchers as the "diminished culpability/enhanced potential theory" later broadened by the *Graham* decision.[16]

In summary, the *Roper* Court says juveniles have

> qualities that often result in impetuous and **ill-considered actions and decisions**; juveniles are **more vulnerable or susceptible to negative influences** and outside pressures, including **peer pressure**; and the **character** of a juvenile is **not as well formed** as that of an adult.[17]

Due to these general traits, the Court concludes that "their irresponsible conduct is **not as morally reprehensible as that of an adult**."[18] Because their identities and personalities are still developing, there is some chance of rehabilitation and the youth's depraved character causing the offense may be retrievable. Quoting an adolescent brain science article, at page 1014, "[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood."[19] The Court concludes that juveniles overall are less culpable than adults and expands the holding in *Thompson* to apply to juveniles not just under 16 but also under 18.

The *Roper* Court considered the argument that general characteristics of juveniles still leaves the possibility that a particular youth who has attained psychological maturity commits a crime demonstrative of sufficient depravity to merit a death sentence. The *Roper* Court pointed out that even in those cases, the American Psychiatric Association manual does not allow psychiatrists to diagnose a juvenile with antisocial personality disorder (one of the most, if not the most, condemning of diagnoses), and concluded that if the psychiatrists cannot diagnose a juvenile with that diagnosis, states should not be allowed to ask juries and the Courts to issue the most condemning of punishments.

Graham v. Florida

Five years after *Roper* came *Graham v. Florida*[20], in which the Court held that the Eighth Amendment prohibits a sentence of life without possibility of parole for a nonhomicide crime committed when the offender was under the age of eighteen, the majority opinion goes further than *Roper* by citing to amicus briefs from the APA and American Medical Association (AMA) regarding developments in psychology and brain science, specifically regarding the part of the brain linked to behavior control and how it continues to mature through late adolescence.[21]

The Court further explained differences between the juvenile and adult brain and the greater opportunity for reform with juveniles:

> [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as *Amici Curiae* 16–24; Brief for APA et al. as *Amici Curiae* 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U. S., at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.[22]

The Court's decision "likened life without parole for juvenile to the death penalty, thereby evoking a second line of cases"[23] requiring sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death.[24]

Miller v. Alabama

Then in 2012 came *Miller v. Alabama*, 567 U.S. 460, the confluence of the two lines of cases, in which the Court held that a *mandatory* sentence of life without parole for a juvenile convicted of homicide violated the Eighth amendment. "Such mandatory penalties, by their nature, preclude a sentencer from

[14] *Roper* at 568 citing Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992).

[15] See Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

[16] Terry A. Maroney, *Adolescent Brain Science after Graham v. Florida*, 86 Notre Dame L. Rev. 765, 782 (2013).

[17] *Roper* at 569-570.

[18] *Roper* at 570 citing *Thompson* at 835.

[19] Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003).

[20] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010).

[21] *Graham* at 68, 2026.

[22] *Graham* at 68, 2026.

[23] *Miller v. Alabama*, 567 U.S. 460, 470, 132 S. Ct. 2455, 2463 (2012).

[24] One author was convinced that *Graham* represented the extent to which the Court considered brain science of adolescents in expanding constitutional protections. In the Notre Dame Law Review article, *Adolescent Brain Science after Graham*, the author makes this observation of the Court's treatment of science in the juvenile justice context: Assessment of blameworthiness hinges partially on the degree to which the defendant's behavior was subject to deliberate control. Similarly, assessment of dangerousness hinges partially on the degree to which capacity for such control is likely to increase and be exercised. The former assessment informs moral judgment as to the offender's intent and character, while the latter informs utilitarian determination of the most effective response. More, that juveniles tend for this reason to be both less blameworthy and (eventually) less dangerous affects the likelihood that the same will be true of any given juvenile. Terry A. Maroney, *Adolescent Brain Science after Graham v. Florida*, 86 Notre Dame L. Rev. 765 (2013). http://scholarship.law.nd.edu/ndlr/vol86/iss2/6.

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taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[25]

The *Miller* case considered two Petitioners' cases, Evan Miller (in Alabama) and Kuntrell Jackson (in Arkansas), both 14 years old when convicted of murder and sentenced to a mandatory term of life imprisonment without the possibility of parole.

Jackson accompanied two other boys to rob a video store, learned one of the other two boys had a shotgun on the way to the store, and stayed outside the store for most of the robbery. Jackson eventually entered the store and soon after his co-conspirator shot and killed the store clerk. Jackson was charged as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both crimes.

After an evening of drinking and using drugs with an adult neighbor who earlier had sold drugs to Miller's mother, Miller, along with a friend, beat the neighbor and set fire to his trailer, causing the neighbor to die. Initially charged as a juvenile, his case was transferred to adult court where he was charged with murder in the course of arson and a jury found him guilty.

As the *Roper* and *Graham* decisions were being decided, Jackson and Miller's cases made their way to the U.S. Supreme Court. By the time the two cases were heard by the Court, *Roper* and *Graham* laid the groundwork.

The Court stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features-among them-immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him-and from which he cannot usually extricate himself-no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way the familial and peer pressures may have affected him. . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[26]

The reference to familiar and peer pressures was no doubt informed by the studies of adolescent brain science cited in the amicus briefs. These studies show that youth understand and appreciate risks and consequences, but set aside those considerations when, in a particular situation, there is emotionally charged situation, peer pressure or fear of rejection. And while there may be environmental factors that contribute to a youth making or resisting these choices, natural adolescent brain development, not the youth, also explain the choices to some degree because the frontal lobe has not caught up with the limbic system.

Miller discusses these four factors about adolescents: (#3 is the only one not mentioned in *Roper* but appears in *Graham*)

1. Immaturity, Impetuosity, and Risk-taking
2. Peer involvement/influence
3. Understanding Legal Proceedings, including the inability to deal with police officers or prosecutors and incapacity to assist one's own attorney
4. Greater Potential for Rehabilitation, first recognized by the Court in *Roper*

The *Miller* Court clearly accepted this brain science as reliable, undeniable and applicable.

The Court was also convinced that juveniles are more prone than adults to falsely confess to crimes, a fact attributed to immaturity of judgment that affects youths' participation in the early stage of the criminal process. Additional cases have gone further to discuss how youth's immaturity impacts their interactions with law enforcement, their understanding or consideration of *Miranda* particularly when presented with an alternative that appears to be a reward, and their ability to assist in their own defense. These studies also called into question the effect of harsher criminal sanctions on juvenile recidivism, for instance. This was referenced by the Court and treated like persuasive research.[27]

The U.S. Supreme Court made *Miller* retroactive in cases on collateral review by concluding that the *Miller* holding was a new *substantive* constitutional rule in its decision in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), which involved an inmate, incarcerated for life without parole for crimes committed before he was 18 years old. Once the U.S. Supreme Court made *Miller* retroactive, Montgomery and inmates serving similar sentences were able to go back before the sentencer for application of *Miller*.[28]

Jones v. Mississippi

This discussion would be incomplete without consideration of *Jones v. Mississippi*, 141 S. Ct. 1307 (2021), in which the U.S. Supreme Court affirmed the life without parole sentence of a juvenile convicted of a homicide offense. Jones, who was 15 years old at the time, stabbed his grandfather to death after an argument over Jones' girlfriend sleeping over in Jones' room. Jones did not call 911 after stabbing his grandfather; instead, he tried to destroy and cover up evidence, and he and his girlfriend gave the police fake names when stopped later that day at a gas station. A jury found him guilty of murder, not the lesser included offense of manslaughter.

At the time the crime of murder carried a mandatory life sentence without parole under Mississippi law, so Jones was sentenced accordingly but appealed under *Miller*. The State Supreme Court ordered a new sentencing where the judge could consider Jones' youth and exercise discretion in selecting an appropriate sentence. The Judge, with that discretion, re-sentenced Jones to life without parole and did not make any findings regarding "transient immaturity" of the youth or "permanent incorrigibility." The appeal of the re-sentencing centered around the lack of *Miller*-type findings by the re-sentencer and the U.S. Supreme Court, in a majority opinion written by Justice Cavenaugh, affirmed, with Justice Thomas concurring, and three other justices dissenting.

In light of the U.S. Supreme Court's previous rulings the effect of which was to allow courts to make certain considerations that may mitigate a youth's sentence but eliminating the mandatory life

[25] *Miller* at 476, 2467.

[26] *Miller* at 478, 2468 (Emphasis added).

[27] The APA and the Missouri Psychological Association filed an amicus brief in the *Roper* case, pointing to significant research findings from the previous three years about the correlation between adolescence and risk-taking. These briefs cited research much of which is mentioned throughout this chapter because it was also relied upon in *Graham*.

[28] NDAA's Juvenile Justice staff responds to requests for experts who can testify at *Miller* resentencing hearings.

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sentence and only impose a life sentence on a child in the rarest of circumstances, the Court's decision was a departure and a much narrower reading of *Miller* than what the dissenters propose.

Much debate continues as to whether *Jones* represents the end to expansion of Eighth amendment protections for juveniles or whether the tides could change again with the appointment of a different justice to the Supreme Court.[29]

A finding of permanent incorrigibility is an unlikely finding for even the most criminal youth, such that if the Court required such a finding in *Miller*, the Court would have prohibited all life sentences for crimes committed by those under 18, not just those imposed under the mandatory laws. The reason it would be an unlikely finding is that, generally speaking, adolescents' brains are still developing. Assigning a label or a diagnosis on an adolescent will be temporary; they need to be re-reviewed/re-assessed and professionals don't rely on them in perpetuity. Studies showed that assessments of severe antisocial behaviors in adolescents did not remain stable as those individuals grow into adulthood. Henceforth, incorrigibility, like psychopathy, also known as sociopathy, among adolescents, is an inherently problematic diagnosis in an adolescent, prone to error, and creates a risk of cruel and unusual punishment.

At the state court level, however, legislatures, sentencing procedures, and individual case decisions continue to be informed by brain science. The authors of the White Paper (2022) recommend the following criteria be considered with respect to the four *Miller* factors:

1. Immaturity, impetuosity and irresponsibility.[30] [31]
2. Family and Home, Peer Influence, including exposure to threats and exposure to deprivation.
3. Peer Involvement
4. Understanding Legal Proceedings
5. Greater potential for rehabilitation

On this point, the White Paper is clear: it is currently not possible to reliably predict an individual adolescent's future developmental trajectory based upon current presentation and past history. This is partly because of the high rates of desistance from antisocial conduct as youth mature into young adulthood and partly because behavioral, emotional, and attitudinal changes are expected components of adolescent development. It is also currently scientifically impossible to reliably predict how much or how quickly an individual will change with age based on their presumed brain development, history, or current behavioral profiles.

In U.S. Supreme Court cases, as well as some state supreme court cases, the progression of development of different parts of the brain has become a common concept relied upon for legal arguments at all levels of prosecution of older juveniles and young adults. It will be important for prosecutors to not just understand adolescent brain development and its impact on adolescent behavior in general but how it may apply to the facts of the case, particularly if peers are involved, and to retain the necessary experts if needed to articulate why this scientific theory does or does not apply to a particular set of facts.

In addition, other juvenile justice stakeholders will be discussing brain development during key decision points, and prosecutors must understand what is being discussed, the application of the theory and the limits of the theory, to make cogent arguments and rebuttals to legal positions and policy arguments. Knowledge in this area is also key to understanding expert testimony and deciding whether to present expert witness testimony.

V. Conclusion: What to do with all this information

How and when do you use this information as a Juvenile Court Prosecutor? How will adolescent brain science manifest itself in your daily work? It may be argued to you by juvenile justice partners when you are making decisions on diversion, detention, dispositions, community program evaluation, competency, and transfer. It can be offered in the courtroom through expert witnesses or indirectly through oral advocacy or submission of research.

The goal is to be familiar with the concepts, acknowledge the existence of the science and research (though always be prepared to question the specific study or generalization raised by defense counsel in court), evaluate each youth individually, assess the needs of the youth and their families and take this opportunity to have an impact on their future and the future of your community.

Adolescent brain science can explain generally what is happening to youths' brains during adolescence. This research offers a deeper understanding of the impact of not only age but also one's environment on a youth's brain development, behavior and socialization. Use this information to create better youth programs and evaluate existing programs to see if they are addressing resilience, offering mentorship and fostering executive functioning. It should not be used as a rigid framework determining what should happen in all cases. Adolescent brain science should inform program administrators, education providers and many others working with young people in their work to assist those who have found themselves involved in the youth or criminal justice system to stay out of the system in the future and to enhance, not stifle, the brain development of those when secure placements or carceral settings are court ordered.

Developmental neuroscience supports generalizations about youth as a class but is not a substitute for looking at facts and circumstances of your particular juvenile justice situation. This is referred to in the research world as the "Group to Individual" conundrum.[32] When evaluating brain development studies and/or theories, a prosecutor should keep in mind legal theories and requirements for their specific case. Adolescent brain science may inform your theory of the case or that of the defense and it may add value to the overall plan for an adolescent involved in

[29] Center for Law, Brain & Behavior at Massachusetts General Hospital (2022). White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers (January 27th, 2022). https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/.

[30] White Paper citing Laurence Steinberg et al, *Around The World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation* 21 Developmental Sci. 10.1111 (2018).

[31] Michelle Achterberg et al, *Frontostriatal White Matter Integrity Predicts Development of Delay of Gratification: A Longitudinal Study*, 36 J. Neurosci. 1954 (2016). With regard to delaying gratification, the White Paper considered how longitudinal research testing of individuals ages 8–26 demonstrates that the strengthening of white matter connections between the prefrontal cortex and striatum may also account for why individuals are better able to delay gratification as they age.

[32] Center for Law, Brain & Behavior at Massachusetts General Hospital (2022). *White Paper on the Science of Late Adolescence: A Guide for Judges, Attorneys and Policy Makers* (January 27th, 2022). P. 3. https://clbb.mgh.harvard.edu/white-paper-on-the-science-of-late-adolescence/.

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the juvenile justice system. For example, in a case where negative peer influences played a significant role in a young person's arrest, while that may be developmentally expected, depending on the nature of the offense and the risk to public safety, one will need to examine the capacity ofyouth probation, community-based organizations and secure facilities to offer positive peer groups, upstander and leadership education, and self-esteem building activities. Taking both legal and scientific information into account will lead to a more complete evaluation of a youth-involved incident as well as the overall system.[33]

VI. How to prepare for arguments or expert testimony about brain science

Anytime scientific research comes up in a case, a diligent prosecutor will need to conduct a credibility check on the study. Ask yourself: is it credible and reliable? Then conduct this 4-stage analysis.

1. Start by evaluating the publication.

   What's the title of the publication?

   Is the article published in PubMed?

   Is the journal/article peer reviewed?

2. Next, consider the author's qualifications and area of expertise.

   Is the author affiliated with a credible institution?

   Is the article's topic within the author's field or area of study?

   Is there obvious confirmation bias? Be aware of confirmation bias.

3. Then, consider the bibliography.

   Are these sources referenced from credible sources?

   Conduct a literature review.

   Do you recognize referenced works?

4. Finally, look at the funding source of the research:

   Is the funding source an indicator of bias?

   Did industry pay for the project? If so, how much control did they retain over the project?

   Does the funding present a conflict of interest with researchers?

Some of the online research journals will provide the option to "check for updates," similar to shepardizing legal cases. Take advantage of this resource if available to save time and learn of more recent research building off of others'.

When it comes to preparing for an expert witness to testify about brain science, use all the same tools you would use for any other type of expert:

- Research expert (NDAA can assist using our expert database), credentials, institutions affiliated with expert, read articles s/he authored.
- Was the research, articles, well received? Peer reviewed?
- Review prior testimony including what field s/he was previously qualified as expert in, what states has s/he testified in, what opinions have been given, etc.
- Does proposed testimony meet Daubert/Frye standard? Is this a novel discovery or opinion?
- Conduct legal research into whether courts in your jurisdiction have made findings or adopted the scientific explanation or opinion similar to the expert's.
- Consider whether you want to hire your own expert, either to consult with (e.g. be present in court room when expert is testifying or to help you prepare for cross-examination) or to call as your witness, etc.
- Evaluate whether you can utilize the expert to make points that assist your case.
- Review any reciprocal discovery such as reports prepared by the expert, etc.
- Understand limits on what brain science can/cannot tell us.

That last point will be the hardest to determine as someone not in the brain science research field because it is constantly changing. One study alone does not tell the whole story but often raises a myriad of questions that researchers then want to do more research to answer. The most challenging part will be not getting lost in the overwhelming amount of brain science research and articles out there. This article has attempted to distill and navigate that research to provide an overview in the concepts and to broaden the vocabulary of the prosecutors having to make or refute arguments about brain science in court.

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[33] Maroney, Terry A., *The False Promise of Adolescent Brain Science in Juvenile Justice* (nd.edu).

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