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REVISITING THE "UNPROVOKED FLIGHT IN A HIGH CRIME AREA" STANDARD OF ILLINOIS V. WARDLOW IN LIGHT OF RECENT DEADLY INTERACTIONS BETWEEN MINORITIES AND LAW ENFORCEMENT

Katherine I. Puzone[*]

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George Floyd, Eric Garner, Michael Brown and Freddie Gray are widely known as unarmed men of color who were killed by the police. What many people don't realize is that "1,084 people have been shot and killed by police [in the United States] in the past 12 months."[1] Since 2015, Black individuals were more than twice as likely as those who are White to be shot by police when measured in proportion to each percentage of the population.[2] Black individuals were also more than twice as likely as White individuals to be unarmed at the time of their death.[3]

This article will argue that the holding of the U.S. Supreme Court in *Illinois v. Wardlow*[4] should be revisited in light of recent events concerning interactions of minorities with law enforcement. This is especially true in the case of juveniles and young adults whose brains are not yet fully developed.[5] In *Wardlow*, the Court held that unprovoked flight in a "high-crime area" provided reasonable suspicion for a stop and a protective pat-down search for weapons.[6] Specifically, the Court stated that the unprovoked flight of the defendant upon seeing a caravan of law enforcement vehicles in an area known for heavy narcotics trafficking justified the stop and frisk of the defendant.[7] Prior to this, the court below—the Illinois Supreme Court—found that the stop and frisk was not justified because even though the defendant fled upon seeing law enforcement in an area known for narcotics trafficking, the defendant alternatively could have been choosing to simply not interact with law enforcement.[8] The Illinois Supreme Court concluded that there were "no independently suspicious circumstances to support an investigatory detention" of the defendant.[9] The U.S. Supreme Court reversed, holding that the Fourth Amendment requires law enforcement to have reasonable suspicion for an

1. *Fatal Force*, Database of Police Shootings Since 2015, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last updated Dec. 20, 2022).

2. *See id.* (showing the disparity from 2015 until March 1, 2022: 1,592 Black people were killed by police (38 per million); 1,089 Hispanic people (28 per million); 3,016 White people (15 per million); and 244 other (5 per million)).

3. *See* Jon Swaine et al., *Black Americans Killed by Police Twice as Likely to be Unarmed as White People*, THE GUARDIAN (June 1, 2015), https://www.theguardian.com/us-news/2015/jun/01/black-americans-killed-by-police-analysis.

4. Illinois v. Wardlow, 528 U.S. 119 (2000).

5. *See generally*, Roper v. Simmons, 54 U.S. 551 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the death penalty for juveniles due to their lack of maturity and identity).

6. *Wardlow*, 528 U.S. at 124–25.

7. *Id.* at 125.

8. *Id.* at 122-23.

9. *Id.*

investigatory stop and weapons pat-down, and that such suspicion was provided by the defendant's unprovoked flight in an area known for narcotics trafficking.[10]

The Court's holding followed its earlier decision in *Terry v. Ohio*,[11] which held that the Fourth Amendment allows law enforcement to conduct a brief, investigatory stop when the officer has a "reasonable, articulable suspicion that criminal activity is afoot."[12] *Wardlow* further held that flight in a high-crime area provides such reasonable suspicion.[13] However, a lot has changed since *Wardlow* was decided in 2000. In recent years, violent and sometimes fatal encounters between law enforcement and potential suspects—quite often young, Black men—have been in the news. Given the extent of recent fatal interactions between law enforcement and unarmed suspects, this article will argue against the holding above in that if a person flees upon seeing law enforcement in a high-crime neighborhood, it should no longer provide reasonable suspicion that "criminal activity may be afoot,"[14] especially if the suspect is a young, Black man. This article will argue that reasonable suspicion must be supported by something more than mere flight in a high-crime area—e.g., the holding of a suspicious package, or interaction with a known drug dealer—as such persons could have reasonably fled out of legitimate fear for their life.

This is especially true for teenagers and young adults who do not process information the same way as adults,[15] which has been acknowledged in more recent Supreme Court cases.[16] Specifically, adults process information including calculation of risk and response to a perceived threat through the prefrontal cortex.[17] The prefrontal cortex is the last part of the brain to develop and is associated with impulse control, regulation of emotions, risk assessment, and moral reasoning.[18] On the other hand, teenagers and young adults process information through the

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10. *Id.* at 124.

11. Terry v. Ohio, 392 U.S. 1 (1968).

12. *Wardlow*, 528 U.S. at 123 (quoting *Terry*, 392 U.S. at 30).

13. *Id.* at 125.

14. *Terry*, 392 U.S. at 30.

15. *See* Brief of the Am. Med. Ass'n et al., as Amici Curiae in Support of Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03–633), 2004 WL 1633549, at *5 [hereinafter *Roper Brief*]; *see also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011 (2004).

16. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 570-71 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 567 U.S. 460, 471–72 (2012).

17. *See Roper Brief* at *13–15; *see also* Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 453 (2013).

18. Brief for the Am. Psych. Ass'n et al., as Amici Curiae Supporting Petitioners, Graham v. Florida, 560 U.S. 48 (2010) (No. 08-7412), 2009 WL 2236778, at *24–27 [hereinafter *Graham Brief*].

amygdala, the area of the brain associated with primitive impulses of anger, aggression, and fear,[19] which tend to make teens prone to making poor judgments. As a group, adolescents "are risk takers" exhibiting "a disproportionate amount of reckless behavior, sensation seeking and risk taking [such as] drunk driving, unprotected sex, experimentation with drugs, or even criminal activity [and] is so pervasive that it is statistically aberrant to refrain from such risk-taking behavior during adolescence."[20]

This, combined with the many recent reports of violent, sometimes fatal interactions of civilians with law enforcement—mostly minorities—leads to the conclusion that it is not necessarily suspicious if a teenager or young adult flees upon seeing law enforcement in a high-crime area. In such areas, there is typically a significant amount of distrust between citizens and the community—a distrust that has only been heightened by recent events.[21]

I. THE COURT'S REASONING IN *ILLINOIS V. WARDLOW* IS NO LONGER APPLICAPLE IN LIGHT OF THE NUMBER OF KILLINGS OF UNARMED PERSONS—ESPECIALLY MINORITIES—AT THE HANDS OF LAW ENFORCEMENT

Wardlow was based on the Court's prior holding in *Terry v. Ohio.*[22] In *Terry,* the Court set forth the standard for which law enforcement officers may conduct a pat-down for weapons without probable cause to arrest.[23] In an opinion by Justice Warren, the Court held that:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may

19. *See* Arain, *supra* note 17, at 453; *see also Roper Brief* at *13–15.

20. *See Roper Brief* at 5; *see also* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992) ("[A]dolescents are overrepresented statistically in virtually every category of reckless behavior."); *see also* Emanuela Balocchini et al., *Adolescents: Which Risks for Their Life and Health?*, 54 J. PREVENTATIVE MED. & HYGIENE 191, 191 (2013) ("[A]s a general rule, adolescents and young adults are more likely than adults to binge drink, smoke cigarettes, have casual sex partners, engage in violent and other criminal behavior, and have fatal or serious accidents.").

21. *See* Jocelyn Fontaine et al., *Mistrust and Ambivalence Between Residents and the Police*, URB. INST. 1 (Aug. 2017), https://www.urban.org/sites/default/files/publication/92316/2017.07.31_legitimacy_brief_finalized_2.pdf (finding that there is a "fractured relationship between residents of high-crime neighborhoods and the police that serve those communities"); *see also* Aimee Ortiz, *Confidence in Police is at a Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020) (explaining that confidence in police reached an all time low following the death of George Floyd).

22. Terry v. Ohio, 392 U.S. 1 (1968).

23. *Id.* at 30–31.

> be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.[24]

The Court's reasoning in *Terry* focused on the protection of law enforcement officers and bystanders and the limited nature of the search.[25] While the holding of *Terry* is well known, for purposes of this analysis, a review of the facts upon which the opinion was based is helpful. In *Terry*, Officer McFadden—a patrol officer—"testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry" who were standing on a street corner.[26] At the hearing on the defendant's motion to suppress, Officer McFadden testified that he "had never seen the two men before."[27] Therefore, he had no knowledge about any prior criminal activity by the pair. Critically, Officer McFadden could not state with any specificity what behavior first aroused his suspicion.[28] However, Officer McFadden testified that:

> [H]e had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."[29]

Once Officer McFadden became suspicious of the two men, the facts of the case further state that:

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24. *Id.* at 31.
25. *Id.*
26. *Id.* at 5.
27. *Id.*
28. *Id.* ("[Officer McFadden] was unable to say precisely what first drew his eye to them.")
29. *Id.*

> His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.[30]

Based upon these observations, Officer McFadden testified that "he suspected the two men of 'casing a job, a stick-up,' and that he considered it his duty as a police officer to investigate further."[31] Without stating any additional facts, Officer McFadden testified that "he feared 'they may have a gun.'"[32] Officer McFadden did not elaborate on the basis for his suspicion that the defendants had a gun, which then gave rise to the subsequent search.[33] For example, he did not testify that he saw what appeared to be the butt of a gun jutting out from the defendant's pants, nor did he testify that he saw any suspicious bulge in the defendant's clothing.

Because of his suspicions—which were based largely upon gut instinct rather than articulable facts—Officer McFadden then followed the two men "and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner."[34] At this point, Officer McFadden decided "that the situation was ripe for direct action."[35]

30. *Id.* at 5–6.
31. *Id.* at 6.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

Officer McFadden approached the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.[36]

The trial court subsequently denied the defendants' motion to suppress, finding that:

> Officer McFadden, on the basis of his experience, "had reasonable cause to believe that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."[37]

36. *Id.* at 7.

37. *Id.* at 8. At the hearing on the motion to suppress, the State argued first that the evidence seized was admissible because the search had been incident to a lawful arrest. The trial court rejected that

In analyzing the Fourth Amendment issue, the United States Supreme Court began by stating the fundamental principle that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[38] The Court framed the question before it as "whether in all the circumstances of this on-the-street encounter, [the defendant's] right to personal security was violated by an unreasonable search and seizure."[39] The Court further broadened the question to "whether it is always unreasonable for a policeman to seize a person and subject [a suspect] to a limited search for weapons unless there is probable cause for an arrest."[40]

The Court stated that, "[e]ver since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct."[41] The Court further explained that "[a] ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."[42]

While *Terry* was decided in the late 1960s, a time during which relations between law enforcement and minorities were particularly strained, the Court dismissed the idea that stops and searches were used by law enforcement to harass certain groups in summary fashion.[43]

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.[44]

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argument holding that Officer McFadden did not have probable cause to arrest the defendants until after he conducted the search and found the weapons.

38. *Id.* at 9 (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

39. *Id.*

40. *Id.* at 15.

41. *Id.* at 12 (citing Weeks v. United States, 232 U.S. 383, 391–393, (1914)).

42. *Id.* at 13.

43. *Id.* at 30–31.

44. *Id.* at 14–15 ("No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still

The Court engaged in the familiar two-part inquiry to determine the legality of the stop and frisk—"whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[45] The Court specifically noted that:

"[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?[46]

The Court's citation to the requirement of "specific and articulable facts" justifying any search is striking in light of Officer McFadden's testimony which lacked any such facts.[47] Officer McFadden justified the search by testifying that, based upon almost forty years of experience in law enforcement, something about the two men "didn't look right" to him.[48] In fact, the *Terry* Court recognized that if "simple good faith" on the part of a police officer were enough to justify a search, "the protections of the Fourth Amendment would evaporate."[49]

While the Court recognized the increase in deaths of law enforcement officers as a result of being attacked by a suspect with a gun or a knife, the Court made no mention of injuries and deaths of unarmed citizens at the hands of law enforcement.[50] Nor did the Court acknowledge that violence by law enforcement

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retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.").

45. *Id.* at 20.

46. *Id.* at 21–22.

47. *Id.* at 5–7, 21.

48. *Id.* at 5.

49. *Id.* at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

50. *Id.* at 23–24 ("We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly

officers against citizens, especially minorities, could cause a person to engage in behavior that appears suspicious, but in reality is the result of the person's fear of the officer surveilling him or her.[51]

After weighing the arguments on both sides, the Court concluded:

> Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.[52]

After evaluating the conduct of Officer McFadden, the Court concluded that the stop and frisk was valid under the Fourth Amendment.[53] What is interesting in light of the prevalence of firearms in today's society, is that the Court focused on the activity of the two suspects indicating that they were planning a robbery.[54] The Court stated:

> The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, *it is reasonable to assume*, would be likely to involve the use of weapons— and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis.[55]

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and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.").

51. *See generally id.*
52. *Id.* at 27 (internal citations omitted).
53. *Id.* at 30–31.
54. *Id.* at 28–29.
55. *Id.* at 28. (emphasis added).

The suspicious conduct indicated only that the men might have been planning to rob a local business. There is not a single fact set forth in the opinion indicating that there was any reason for Officer McFadden to suspect the defendants were armed other than his *assumption* that if someone is acting in a way consistent with planning a robbery, it is likely that person is armed.

It is this article's contention that allowing law enforcement to seize and search a person based only on the *assumption* that the person has a weapon has resulted in a culture in which law enforcement officers can stop and search any person as long as officers can identify facts which could be consistent with past, ongoing or future criminal activity—even if the criminal activity identified does not require a firearm. Therefore, under *Terry*, any time law enforcement suspects anyone of past, ongoing, or future criminal activity that could *possibly* involve a firearm, the police are justified in stopping and frisking the suspect.[56] Under that analysis, if the police suspect involvement in burglary of a conveyance or dwelling, grand theft auto, robbery, assault, battery, or any other similar offenses, the police have the right to conduct a *Terry* pat down for weapons, even if it is just as likely that such offense was committed without a deadly weapon. The *Terry* Court's approval of allowing law enforcement officers to *assume* that a suspect is carrying a weapon if there is reason to believe the suspect was involved in a myriad of criminal offenses has resulted in law enforcement's ability to stop and frisk citizens with a bare minimum of articulable facts supporting the search, thus allowing extensive racial profiling and harassment of poor and minority communities.[57]

The *Terry* Court's approval of assumption-based searches continued in *Illinois v. Wardlow*,[58] more than thirty years after *Terry* was decided. In an opinion authored by Justice Rehnquist, the *Wardlow* Court held that unprovoked flight in a high crime area provides reasonable suspicion for a *Terry* pat-down.[59] In *Wardlow,* the defendant fled upon seeing a group of police vehicles in an area known for heavy narcotics trafficking.[60] Upon seeing the defendant flee, two officers chased him and, when they caught him, they engaged in a "protective pat-down search for weapons" during which they found a firearm.[61] The officer justified the pat-down by stating that in his experience, "it was common for there to be weapons in the

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56. *See generally, id.*

57. *See, e.g.*, DEBORAH RAMIREZ ET AL., U.S. DEP'T JUST., A RESEOURCE GUIDE ON RACIAL PROFILING DATA COLLECTIONS SYSTEMS: PROMOTING PRACTICES AND LESSONS LEARNED (2000); NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA (1st ed. 2014); Frank Rudy Cooper, *Cultural Context Matters: Terry's "Seesaw Effect,"* 56 OKLA. L. REV. 833, 858 (2003).

58. Illinois v. Wardlow, 528 U.S. 119 (2000).

59. *Id.* at 124–125.

60. *Id.* at 121–122.

61. *Id.*

near vicinity of narcotics transactions."[62] The Illinois Supreme Court held that the gun should have been suppressed on the ground that "flight may simply be an exercise of th[e] right to 'go on one's way,' and, thus, could not constitute reasonable suspicion justifying a *Terry* stop."[63] The Illinois Supreme Court also rejected the argument that flight combined with the fact that it occurred in a high crime area justified the stop and frisk.[64] The Illinois Supreme Court found that the "high crime area" factor standing alone did not justify the search, and that in the absence of "independently suspicious circumstances," the stop and frisk violated the Fourth Amendment.[65]

In reversing the Illinois Supreme Court, the U.S. Supreme Court cited the following standards set forth under *United States v. Sokolow*[66] and *Terry*:

While "reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity.[67]

The Court noted that the search was not based solely upon the defendant's presence in an area known for heavy narcotics trafficking, but his flight upon seeing the police that gave rise to reasonable suspicion.[68] The Court cited a string of cases holding that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion."[69] The Court went on to state:

Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.[70]

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62. *Id.* at 122.
63. *Id.* at 123.
64. *Id.*
65. *Id.*
66. United v. Sokolow, 490 U.S. 1, 7 (1989).
67. *Wardlow*, 528 U.S. at 123–24.
68. *Id.* at 124.
69. *Id.* (citing United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975); Florida v. Rodriguez, 469 U.S. 1, 6 (1984) (per curiam); *Sokolow*, 490 U.S. 1, at 8–9).
70. *Wardlow*, 528 U.S. at 124–25 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

The Court's language allowing chases, stops, and searches based on "commonsense judgments and inferences about human behavior"[71] parallels the language in *Terry* approving the officer's "assumption" that it is likely that a suspect planning a robbery has a gun.[72] While the Court recognized that a person's presence in an area of expected criminal activity does not create reasonable suspicion,[73] "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis."[74] The Court distinguished its earlier opinion in *Florida v. Royer*.[75] In *Royer*, the Court recognized that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has the right to ignore the police and go about her business.[76] The *Wardlow* Court stated that flight represented more than a simple refusal to speak with law enforcement officers:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business" in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.[77]

The holdings of *Royer* and *Wardlow*—both post-*Terry* cases—are in tension with each other in light of recent events. While *Terry* brushed aside the possibility that some stops are motivated by racial animus rather than reasonable suspicion of criminal activity,[78] *Wardlow* did not address race or ethnicity at all.[79] None of these cases include the race of the officers or the defendants in the statement of facts.[80] Therefore, the possibility of racially-motivated stops is not included in the analysis. The analysis of *Terry* and *Wardlow* gives police wide authority to conduct stops and searches based on assumptions and "judgments and inferences" about human behavior.[81] These "judgments and inferences" are all based on the *behavior of the*

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71. *Id.* at 125.
72. *See* Terry v. Ohio, 392 U.S. 1, 28 (1968).
73. *See Wardlow,* 528 U.S. at 124 (citing Brown v. Texas, 443 U.S. 47, 99 (1979)).
74. *Id.* (citing Adams v. Williams, 407 U.S. 143, 144, 147–148 (1972)).
75. Florida v. Royer, 460 U.S. 491 (1983).
76. *See generally, id.*
77. *Wardlow*, 528 U.S. at 125.
78. Terry v. Ohio, 392 U.S. 1, 30 (1968).
79. *See id.* at 124 (addressing only that flight in a high crime area "aroused the officers' suspicion").
80. *Compare Wardlow*, 528 U.S. at 121-24, *with Terry*, 392 U.S. at 5–8, *and Royer*, 460 U.S. at 493-96.
81. *Wardlow*, 538 U.S. at 125; *see Terry*, 392 U.S. at 22 ("[I]n determining whether the officer acted reasonably in such circumtances, due weight must be given, not to his inchoate and

suspect.[82] None of the majority decisions in any of the cases address the history of racial profiling by law enforcement.[83] While the cases tell law enforcement officers when they may stop and search a suspect,[84] the cases do not state that such assumptions, judgments, and inferences *may not be based on race.*[85]

In light of recent events, it is perfectly reasonable that a young Black man in a low-income neighborhood (often seen as synonymous with high crime) would become nervous and evasive upon seeing the police. It is also reasonable for that same young Black man to flee rather than take the risk of being shot, if he felt that the police were watching him. News footage contains many videos of Black men being shot in the back while fleeing the police.[86] In light of that, "headlong flight" is not necessarily an act of evasion;[87] it might also be a desperate act of self-preservation in a society in which hundreds of shootings of minorities occur with very few resulting in disciplinary action against, or prosecution of, the law enforcement officer who pulled the trigger.[88] In light of the reasonable fear many minorities hold of the police, especially in low-income/high crime areas, what has previously been viewed as "unprovoked flight" by the courts can no longer be seen as such, and courts should require more evidence to justify a stop and search. Flight in many circumstances is now provoked by the presence of law enforcement in light of the astonishing number of shootings, beatings, and arrests of unarmed and often

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unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

82. *Wardlow*, 528 U.S. at 125.

83. *See generally Terry*, 392 U.S. at 4–31; *Royer*, 460 U.S. at 493–508; *Wardlow*, 528 U.S. at 119–26 (noting that Justice Stevens's concurrence in part and dissent in part in *Wardlow* does briefly address this topic).

84. *Terry*, 392 U.S. at 21; *Wardlow*, 528 U.S. at 125.

85. *See generally Terry*, 392 U.S. at 4-31; *Wardlow*, 528 U.S. at 119–26. A separate body of law holds that if a stop is clearly a pretext for race, the stop and search violates the Equal Protection Clause of the Fourteenth Amendment. *E.g.*, Whren v. United States, 517 U.S. 806, 813 (1996); United States v. Brooks, 987 F.3d 593, 599 (6th Cir. 2013). Additionally, 34 U.S.C. § 12601 and Title VI of the Civil Rights Act of 1964 allow suits against police departments for racial profiling. However, proving pretext is nearly impossible under controlling law. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993) (cititation omitted) ("[A] reason cannot be proved to be 'a pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.") (emphasis in original).

86. *See, e.g.*, Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Nov. 16, 2021), https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html; Laura J. Nelson, *San Bernardino Police Shot Robert Adams Seven Times from Behind, Autopsy Suggests*, L.A. TIMES (Aug. 20, 2022, 4:35 PM), https://www.latimes.com/california/story/2022-08-20/autopsy-shows-san-bernardino-man-robert-adams-shot-seven-times-police; Andrea Simakis et al., *Akron Police Release Video of Officers Shooting Black Man Dozens of Times*, WASH. POST (July 4, 2022, 12:25 AM), https://www.washingtonpost.com/nation/2022/07/03/akron-police-jayland-walker-video/.

87. *Wardlow*, 528 U.S. at 124.

88. *See generally, Fatal Force*, *supra* note 1.

innocent men and women.[89] This article proposes that the *Terry* and *Wardlow* analyses be revisited, and that police should not be allowed to search people based solely on flight in a high crime area when there is a history of violent interactions between the police and citizens in that area. In such circumstances, police should be required to demonstrate articulable facts supporting reasonable suspicion that the person was, is, or is about to be involved in criminal activity. Only in this way can stops and searches of innocent, unarmed minorities be curtailed.

II. RECENT SUPREME COURT CASES RECOGNIZING HOW ADOLESCENT BRAIN DEVELOPMENT AFFECTS BEHAVIOR COMBINED WITH RECENT EVENTS INVOLVING FATAL ENCOUNTERS BETWEEN LAW ENFORCEMENT AND UNARMED PURPORTED SUSPECTS LEADS TO THE CONCLUSION THAT FLIGHT IN A HIGH-CRIME AREA DOES NOT PROVIDE REASONABLE SUSPICION FOR A STOP AND FRISK OF A JUVENILE SUSPECT

When analyzing the behavior of juvenile suspects, it is critical to take into account the differences in brain function between adults and adolescents.[90] Adolescents could easily perceive a threat and run where an adult would not in the same circumstances.[91] Black teenage boys are routinely chased and stopped by the police in situations in which a White teenager would be left alone.[92] Teenagers see media reports of violent encounters between unarmed suspects and the police which makes it much more likely that their brain will perceive a threat upon seeing law enforcement officers present in a low income area.[93] Failing to take adolescent

89. *See id.*

90. *See* Graham v. Florida, 560 U.S. 48, 68 (2010).

91. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 271-272 (2011) (citing Stansbury v. California, 511 U.S. 318, 325 (1994)) (noting that an adolescent's age can affect their perception of whether or not they have the freedom to leave during police questioning); Steinberg & Scott, *supra* note 15, at 1014 (noting that adolescents are more impulsive than adults, requiring less of a threat to provoke an aggressive response from juveniles); Kristen Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1551–52 (2018).

92. *See generally*, Robert A. Brown, *Black, White, and Unequal: Examining Situational Determinants of Arrest Decisions from Police-Suspect Encounters*, 18 CRIM. JUST. STUDS.: CRITICAL J. CRIME, L. & SOC'Y. 51 (2005) (noting that black and minority youths are more likely to be stopped, questioned, and arrested than whites); Darlene J. Conley, *Adding Color to a Black and White Picture: Using Qualitative Data to Explain Racial Disproportionality in the Juvenile Justice System*, 31 J. RSCH. CRIME & DELINQ. 135 (1994); Craig B. Futterman et al., *Youth/Police Encounters on Chicago's South Side: Acknowledging the Realities*, 2016 U. CHI. LEGAL. F. 125, 167–68 (2016).

93. *See* Francie Diep, *Police are Most Likely to Use Deadly Force in Poorer, More Highly Segregated Neighborhoods*, PAC. STANDARD (Jan. 24, 2019), https://psmag.com/news/police-are-most-likely-to-use-deadly-force-in-poorer-more-highly-segregated-neighborhoods (noting that communities with the lowest socioeconomic status are most likely to witness deadly police encounters); *see also* Bradley T. Brick et al., *Juvenile Attitudes Towards the Police: The Importance of Subcultural Involvement and Community Ties*, 37 J. CRIM. JUST. 488 (2009) (noting that youth who

brain development into account in evaluating whether the behavior of teenagers is suspicious can result in violation of the rights of young people.[94] When teenagers consistently see the police treat their family, friends, and neighbors in a disrespectful and often violent manner, they are conditioned to respond as if that behavior is directed at them upon seeing law enforcement.[95] This article proposes that juvenile judges, defense attorneys, and prosecutors be trained in the basics of adolescent brain development and that all evaluations of whether adolescent behavior is "suspicious" address the unique way adolescents process information.

The Supreme Court has recognized in a recent series of cases that the brains of even "normal" children function entirely differently than those of "normal" adults.[96]

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interact more frequently with police hold less favorable attitudes toward law enforcement); Todd J. Clark et al., *Trauma: Community of Color Exposure to the Criminal Justice System as an Adverse Childhood Experience*, 90 U. CIN. L. REV. 857, 904 (2022).

94. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding that imposing the death penalty against juveniles violates the Eighth Amendment's ban on cruel and unusual punishment because juveniles lack maturity, are more vulnerable to outside pressures, and have less developed character than adults); *see also Graham*, 560 U.S. at 68 (holding that life without parole for a nonhomicide offense violates the Eighth Amendment because of the fundamental brain differences between juveniles and adults).

95. *See* NAT'L RSCH. COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE (Wesley Skogan & Kathleen Frydl eds., 4th ed. 2004) (finding that police anticipate more danger in areas with high crime, resulting in officers more frequently using physical restraint, authority, and arrests); *see also* Illinois v. Wardlow, 528 U.S. 119, 132 (2000) ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence.").

96. The U.S. Supreme Court has decided three landmark cases recently that recognize the fundamental principle that children are different. *See Roper*, 543 U.S. 551 (abolishing the juvenile death penalty); *Graham*, 560 U.S. 48 (abolishing life without parole for children convicted of crimes other than homicide); J.D.B. v. North Carolina, 564 U.S. 261 (2011) (holding that a child's age must be taken into account in determining whether a child was in custody for purposes of Miranda v. Arizona, 384 U.S. 436 (1966)). Each of these cases relied to a large extent on developing science demonstrating that children's brains function in a fundamentally different way than do the brains of adults. As Professor Barry Feld noted: "The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people." Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 692–93 (1991).

An amicus brief relied upon by the *Graham* court explains succinctly how children's brains are different: "Research in developmental psychology and neuroscience—including the research presented to the Court in [*Roper*] and additional research conducted since [*Roper*] was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action

Many of the adolescents living in low-income/high-crime areas are victims of social and economic deprivation and are often the victims of abuse as well.[97]

Recent Supreme Court cases have recognized the science underlying the common sense notion that children are not "miniature adults."[98] Their brains function in a completely different manner than those of adults.[99] Further, in 2005 the Supreme Court abolished the juvenile death penalty recognizing that those under the age of eighteen should not be subject to the ultimate punishment due to the fundamental immaturity of their brains.[100] Later cases (discussed in depth below) followed similar reasoning in abolishing life without parole for non-homicides for juvenile offenders[101] and in holding that juvenile offenders cannot be subjected to a mandatory life sentence, even for homicide.[102]

Delinquency proceedings in juvenile court occur when children are charged with "delinquent acts"—the juvenile equivalent of an adult crime. In most states, the law provides that delinquent acts are not crimes.[103] While every state has a juvenile court system today, the role of juvenile court has changed over time—"[a]t the dawn of the twentieth century, progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare

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and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that 'juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,' while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. [*Roper*], 543 U.S. at 569. Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the 'signature'—and transient—'qualities of youth' itself, *id.* at 570, rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not." *Graham Brief*, at *3–4. As the science of juvenile brain development has advanced considerably, there have not been any corresponding major changes in delinquency court.

97. *See* Racheal Lefebvre et al., *Examing the Relationship Between Economic Hardship and Child Maltreatment Using Data from the Ontario Incidence Study of Report Child Abuse and Neglect-2013*, 7 BEHAV. SCI. 6 (2017) ("In the United States, children living in financially strained households are at five times greater risk for child abuse and neglect compared to children from families with higher socio-economic status.").

98. *See, e.g.*, *J.D.B.*, 564 U.S. at 274 (stating that children should not be viewed as "miniature adults").

99. *See Roper*, 543 U.S. at 573–74.

100. *See id.*

101. *Graham*, 560 U.S. at 68–69, 80.

102. Miller v. Alabama, 567 U.S. 460, 479–480, 489 (2012).

103. *See, e.g.*, FLA. STAT. ANN. § 985.35(6) (West 2007); GA. CODE ANN. § 15-11-606 (West 2014); N.Y. FAM. CT. ACT § 380.1 (McKinney 2007).

alternative to criminal courts to treat criminal and noncriminal misconduct by youth."[104] After several decades of reform, delinquency courts now closely resemble adult criminal courts.[105] Barry Feld has identified three types of reform affecting the juvenile court system: jurisdictional, jurisprudential, and procedural.[106] Recent years have seen an increase in society's desire to criminalize the conduct of children.[107] Penalties have become harsher and juvenile sanctions have become more like criminal sanctions, even though juvenile courts are not required to provide children with the same protections afforded to adult defendants.[108] According to Feld, "[a]lthough theoretically, juvenile courts' procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults."[109] Feld further argues:

> The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.[110]

Historically, youth in delinquency court were not afforded all of the protections given to adults facing criminal charges.[111] This was because juvenile court was seen as a way for the state to step in where children were engaging in socially

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104. Feld, *The Transformation of the Juvenile Court*, *supra* note 96 at 691.

105. *Id.*

106. *Id.* at 692.

107. *Id.*

108. *Id.* at 718.

109. *Id.*at 692.

110. *Id.* at 692–93.

111. *See In re Gault*, 387 U.S. 1, 15 (1967) ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable.").

unacceptable behavior, often due to lack of supervision at home.[112] Some have noted a distinct class element to early juvenile courts, arguing that such courts were a way for society to exercise control over "lower-class" youth.[113] A report submitted by the Cook County Illinois Bar Association to the Illinois state legislature in support of the creation of the first juvenile court stated:

> The fundamental idea of the Juvenile Court Law is that the State must step in and exercise guardianship over a child found under adverse social or individual conditions . . . It proposes a plan whereby [the child] may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state.[114]

Over time, however, the courts, including the U.S. Supreme Court, began to recognize that the ideal of kindly juvenile judges who used their wide discretion to help at-risk children was far from the reality faced every day by children in delinquency court.[115] Juvenile proceedings are now essentially criminal proceedings where the trial is held in front of a judge rather than a jury.[116] Failing to recognize fundamental differences between adolescents and adults puts at-risk teenagers in danger of being convicted of a crime based on behavior that was a normal reaction to the circumstances in which the adolescent found him or herself.[117]

As noted above, the U.S. Supreme Court has recently decided several landmark cases recognizing the fundamental principle that children are different from adults.[118] Each of these cases relied to a large extent on developing science

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112. William W. Booth, *History and Philosophy of the Juvenile Court*, in FLA. JUV. L. AND PRAC. 1–6 (11th ed. 2009).

113. *Id.* ("Early juvenile law generally grew from citizen concern for children who, lacking parental control, discipline, and supervision, were coming before the criminal court for truancy, begging, homelessness, and petty criminal activity. There were distinct social phenomena that contributed to these problems, including a large population of children from broken families in the aftermath of the Civil War, latchkey children of parents who were unable to provide supervision during long work hours, lack of child care, and lack of free or compulsory education for children.").

114. *Id.* at 2.

115. *See Gault*, 387 U.S. at 13–18 (tracing the historical development of juvenile delinquency court and demonstrating that as the consequences of a juvenile adjudication of delinquency become more severe, procedures similar to those used in adult criminal court might be required by the Due Process Clause).

116. *See id.* at 68.

117. *See* J.D.B. v. North Carolina, 564 U.S. 261, 271–72 (2011).

118. *See id.* at 277 (holding that a child's age must be taken into account in determining whether a child was in custody when "[it] was known . . . or would have been objectively apparent to the reasonable officer" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966)); *see also* Graham v. Florida, 560 U.S. 48, 82 (2011) (abolishing life without parole for children convicted of crimes other than homicide); Roper v. Simmons, 543 U.S. 551, 578 (2005) (abolishing the juvenile death penalty).

demonstrating that children's brains function in a fundamentally different manner than those of adults. As the *Roper* Court noted, teenagers are generally less mature, more prone to reckless behavior, and much more susceptible to negative influences than adults; the possibility of rehabilitation is also greater for teenagers than for adults.[119] An amicus brief relied upon by the *Graham* court explains succinctly how children's brains are different. For example, even older adolescents "are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions."[120] Teenagers are much more likely to be influenced by negative peers and because they are not adults, lack the autonomy to escape such influences even if they desire to do so.[121] Because a significant amount of juvenile criminal behavior is attributable to the transient characteristics of youth, research has shown that the vast majority of youthful offenders do not continue to engage in criminal behavior as adults.[122] Yet as the science of the juvenile brain development has advanced considerably, there have not been any corresponding major changes in the way cases are transferred from delinquency court to adult criminal court.

The Court has long recognized that cognitive functioning is relevant to an Eighth Amendment analysis of a particular punishment.[123] In the context of the death penalty, the Court specifically recognized that youth is a mitigating factor that must be considered by the sentencing jury.[124] In 1982, prior to the recent progress in developmental neuroscience, the Supreme Court recognized the fundamental, common sense fact that children are different than adults.[125] The Court stated that "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."[126]

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119. *See Roper*, 543 U.S. at 569–70.

120. *See Graham Brief*, at *4.

121. *Id.*

122. *Id.*

123. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires a capital sentencing jury to be allowed to consider "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); Gregg v. Georgia, 428 U.S. 153, 163–64 (1976) (holding that in order to comply with the Eighth Amendment, a jury must consider any mitigating circumstances). While *Lockett* and *Gregg* were capital cases, their recognition that the Eighth Amendment requires consideration of any relevant mitigating factors is applicable to the analysis that follows.

124. *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982).

125. *Id.* at 115–16.

126. *Id.* at 116.

Further, in 2002, the Court expressly recognized the link between cognitive functioning and criminal culpability.[127] In holding that the Eighth Amendment bars the execution of the mentally retarded, the Court held that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, [mentally retarded offenders] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[128] This holding provided the basis for the Court's decision in *Roper*, which banned the juvenile death penalty.[129] In *Roper*, the Court recognized that developmental neuroscience has demonstrated that the brains of teenagers are fundamentally different from those of adults in ways that directly affect culpability,[130] noting that "[t]he susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[131] Further, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[132] In *Graham*, the Court—relying on *Roper*—recognized that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[133]

In *Roper*, the Court relied on several scientific studies analyzing juvenile brain development.[134] Several professional associations wrote and submitted an amicus brief to the *Roper* Court.[135] The *Roper Brief* detailed the ways in which the brains of youth differ in structure and functioning from those of adults.[136] The authors explained that the regions of the brain associated with impulse control, regulation of emotions, risk assessment, and moral reasoning are among the last to develop, and often are not fully developed until the early to mid-twenties.[137] The authors

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127. *See* Atkins v. Virginia, 536 U.S. 304, 306 (2002) (holding that the Eighth Amendment bars the execution of the intellectually disabled).

128. *Id.*

129. Roper v. Simmons, 543 U.S. 551, 578 (2005).

130. *Id.* at 570 (noting that the personality traits of children are less formed than those of adults).

131. *Id.*

132. *Id.*

133. Graham v. Florida, 560 U.S. 48, 73 (2011).

134. See *Roper*, 543 U.S. at 569 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 15 at 1014).

135. *See generally*, *Roper Brief*.

136. *See id.* at *4.

137. *Id.* (noting that the tests that formed the basis of its conclusions were performed on healthy adolescents and that those in the criminal justice system often "suffer from serious psychological disturbances that substantially exacerbate the already existing vulnerabilities of youth, [such that] they can be expected to function at sub-standard levels").

also found that "psychosocial maturity is incomplete until age 19."[138] In a finding of particular relevance to youth involved in the juvenile justice system, the authors cited studies showing that "the deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors—such as stress, emotions and peer pressure—enter the equation.[139] These factors . . . operate on the adolescent mind differently and with special force."[140]

Further, scientists confirm that "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains."[141] Studies have shown that adolescents rely more than adults on the amygdala, the area of the brain associated with the primitive impulses of anger, aggression, and fear.[142] In contrast, "[a]dults [] tend to process similar information through the frontal cortex, a cerebral area associated with impulse control and good judgment."[143] The frontal and pre-frontal cortex, critical areas of the brain that control impulse, judgment, risk-taking, and weighing consequences, are among the last to develop and, often, are not fully developed until the mid-twenties.[144]

Researchers at the National Institute of Health, the National Institute of Mental Health, and the University of California at Los Angeles conducted a decade-long study using magnetic resonance imaging to track the development of the brain.[145] The study concluded that "'higher-order' brain centers, such as the prefrontal cortex, don't fully develop until young adulthood[,] as grey matter[146] wanes in a

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138. *Id.* at *7 ("Adolescents score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others and they have more difficulty restraining their aggressive impulses." (quoting Elizabeth Cauffman & Laurence Steinberg, *Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 759 (2000)).

139. *Id.*

140. *Id.* at *7–8 ("Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought. But adolescents are more susceptible to stress from daily events than adults, which translates into further distortion of the already skewed cost-benefit analysis.").

141. *Id.* at *10.

142. *Id.* at *11.

143. *Id.*

144. *Id.* at *16.

145. *The Adolescent Brain – Why Teenagers Think and Act Differently*, EDINFORMICS, https://www.edinformatics.com/news/why-do-teenagers-think-differently-than-adults.html (last visited Sept. 26, 2022).

146. *See Roper Brief*, at *18–20. One of the last parts of the brain to mature is the pre-frontal cortex. *Id.* at 16. This process is known as "pruning"—pruning of gray matter improves the functioning of the brain's reasoning centers by establishing some pathways while extinguishing others, thereby enhancing brain functioning. *Id.* at 18.

back-to-front wave as the brain matures and neural connections are pruned."[147] In MRI scans, "red indicates more grey matter, blue less grey matter."[148] As any adult can attest, teenagers lack the "brakes" that keep them from engaging in impulsive and reckless activities.[149] The "brakes" are located in the frontal lobe—the last part of the brain to develop.[150] Many other changes take place in the brain between birth and adulthood.[151]

As noted above, these conclusions were drawn from studies performed on the brains of normal adolescents. Many of the youth facing charges in delinquency court are at-risk youth who are either in foster care or unstable, often violent

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See Roper Brief*, at *15–17 ("[T]he limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala and . . . the frontal lobes of the adolescent brain are less active . . . [A]s teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes . . . [T]he brain's frontal lobes are still structurally immature well into late adolescence. The prefrontal cortex (which [is] associated with impulse control, risk assessment and moral reasoning) is 'one of the last brain regions to mature' . . . [Additionally,] [m]yelination is the process by which the brain's axons are coated with a fatty white substance called myelin . . . 'The presence of myelin makes communication between different parts of the brain faster and more reliable. Myelination . . . continues through adolescence and into adulthood.'") (quoting B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCH. 241, 243 (2000)).

homes[152]—if they attend school at all, they attend alternative schools.[153] It is also well documented that poor and minority children are substantially over-represented in the delinquency population.[154]

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152. *See* Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 4–7 (2003) ("Of the 100,000 children who are arrested and incarcerated each year, as many as 50 percent suffer from a mental or emotional disturbance."). Tulman powerfully summarizes the situation concerning children with education-related disabilities in the delinquency system, noting that "Poor educational performance among children in the delinquency system is, in significant part, a function of the high percentage of children in that system who have education-related disabilities and who, more particularly, have not received the benefit of appropriate, and effective special education services. Indeed, the majority of children in the juvenile delinquency system are children with education-related disabilities. The delinquency system disproportionately attracts children with education-related disabilities both because those children are more likely to engage in delinquent conduct than their non-disabled peers and because the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent. Poor educational outcomes that are pervasive among children in the delinquency system constitute, in several respects, compelling evidence that school system and delinquency system personnel are failing to deliver appropriate educational services and failing to accommodate children with disabilities. The outcomes also, however, often reflect failure by school system and delinquency system personnel even to recognize education-related disabilities. These outcomes suggest, furthermore, that decision-makers guarding the gates to the delinquency system generally, and to incarceration facilities particularly, treat children with education-related disabilities differently than children who are not disabled. In vastly disproportionate numbers, children who are poor and who are members of racial and ethnic minority groups populate the delinquency system. The disproportionate numbers, moreover, reflect the harsh reality that society imposes unequal and discriminatory treatment upon poor children of color. Researchers and journalists have documented the disproportionate representation and disparate, discriminatory treatment of children based upon race and class. In contrast, disproportionate representation and disparate, discriminatory treatment within the delinquency system of children with disabilities has not been sufficiently studied and documented. Estimates of the correlation between delinquency and disabilities vary widely." *Id.* at 4–5.

153. The term "alternative school" is used to describe schools where students are transferred for disciplinary reasons or because they have been suspended or expelled from mainstream schools. *See* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 904-05 (2011) ("In a typical disciplinary transfer case, the student has been involuntary [sic] transferred from a mainstream school to an alternative program without the procedural safeguards that accompany formal expulsions. Many alternative schools used for this purpose have limited classroom instruction, strict disciplinary procedures, and no extracurricular activities. Often, the only students attending an alternative school are those placed involuntarily for disciplinary or remedial reasons. Students attending disciplinary programs face a dramatically higher risk of violence than those attending mainstream schools. Moreover, because of curricular differences, students returning to a mainstream school from an alternative program may be unable to advance to the next grade or to graduate with their peers.").

154. *See* HEIDI M. HSIA ET AL., U.S. DEP'T OF JUST., OFFICE OF JUV. JUST. & DELINQ. PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE iii (2004) ("Although minority youth account for about one-third of the U.S. juvenile population, they comprise two-thirds of the juvenile detention/corrections population."); *see also* CARL E. POPE ET AL., U.S. DEP'T OF JUST., OFFICE OF JUV. JUST. & DELINQ. PREVENTION, DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 (2002).

Many children facing charges in delinquency court are also in dependency proceedings, meaning that they have been abused, abandoned, or neglected by their parent(s).[155] Many other juvenile defendants have been victims of serious—often violent—physical, sexual, and emotional abuse.[156] This type of abuse has a direct impact on the functioning of the areas of the brain that control impulsive, risky, and unlawful behavior.[157]

Even before recent advances in neuroscience, psychologists recognized that adolescents do not form intent in the same manner as adults.[158] As Dr. Marty Beyer, a leading expert in the area, explained: "[f]rom a psychological perspective, intention in children is a complex area, particularly considering their limited capacity to think ahead to the unforeseen long-term consequences of their immediate action."[159] Critically, Dr. Beyer concluded "that from the standpoint of cognitive development, young people have diminished capacity to intend harm to others or anticipate harm as an unintended outcome of their actions."[160] Teenagers often demonstrate a disconnect between their actions and the resulting consequence.[161] Many teenagers see their behavior as the only option in a certain situation, but fail to recognize their responsibility for putting themselves in the situation in the first place.[162] This "adolescent disconnect between one action and another goes to the heart of culpability and results from an immature thought process (not anticipating unintended consequences; reacting to threat) and incomplete moral development."[163]

Abuse (including emotional abuse), trauma, and neglect further impact a young person's ability to form intent, as these factors can significantly alter brain development.[164] After conducting extensive research, Dr. Martin Teicher—one of the leading neurobiologists to study the behavior of adolescents—concluded that "early maltreatment, even exclusively psychological abuse, has enduring negative

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155. *See generally* Denise C. Herz et al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305 (2010).

156. *Id.*

157. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS., UNDERSTANDING THE EFFECTS OF MALTREATMENT ON BRAIN DEVELOPMENT (2009), https://www.childwelfare.gov/pubs/issue_briefs/brain_development/effects.cfm.

158. *See* Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16 (1999) ("Carrying a weapon and even using a weapon does not mean a child had adult intent to harm.").

159. *Id.* at 18.

160. *Id.*

161. *Id.*

162. *Id.* at 17–18.

163. *Id.* at 18–19.

164. *See* Martin Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, 2 CEREBRUM: THE DANA F. ON BRAIN SCI., Jan. 2000, at 1.

effects on brain development."[165] In an observation particularly relevant to the appropriate punishment for young offenders, Dr. Teicher explained:

> Physical, sexual, and psychological trauma in childhood may lead to psychiatric difficulties that show up in childhood, adolescence, or adulthood. The victim's anger, shame, and despair can be directed inward to spawn symptoms such as depression, anxiety, suicidal ideation, and post-traumatic stress, or directed outward as aggression, impulsiveness, delinquency, hyperactivity, and substance abuse.[166]

Some of the disorders strongly associated with child abuse are those that may cause unlawful behavior, such as borderline personality disorder or dissociative identity disorder.[167] Similarly, victims of child abuse may suffer from post-traumatic stress disorder ("PTSD"), the symptoms of which include "irritability or outbursts of anger" and "an exaggerated startle response."[168] Dr. Teicher argues that "the trauma of abuse induces a cascade of effects, including changes in hormones and neurotransmitters that mediate development of vulnerable brain regions."[169] Dr. Teicher and other scientists have identified "a constellation of brain abnormalities associated with childhood abuse," including limbic irritability,[170] deficient development, "differentiation of the left hemisphere,"[171] "deficient left-right hemisphere integration,"[172] and "abnormal activity in the cerebellar vermis (the middle strip between the two hemispheres of the brain)."[173] Of particular relevance here are the effects of abuse on the development of the hippocampus, which is involved in regulating memory and emotion.[174] Dr. Teicher's findings

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165. *Id.*

166. *Id.* at 3.

167. *Id.* at 4.

168. *Id.*

169. *Id.* at 5.

170. *Id.* at 5–6 ("[Limbic irritability is] manifested by markedly increased prevalence of symptoms suggestive of temporal lobe epilepsy (TLE) and by an increased incidence of clinically significant EEG (brain wave) abnormalities.").

171. *Id.* at 6 ("[This process is] manifested throughout the cerebral cortex and the hippocampus, which is involved in memory retrieval.").

172. *Id.* ("[This process is] indicated by marked shifts in hemispheric activity during memory recall and by underdevelopment of the middle portions of the corpus callosum, the primary pathway connecting the two hemispheres.").

173. *Id.* ("[This] appears to play an important role in emotional and attentional balance and regulates electrical activity within the limbic system.").

174. *Id.* at 8 ("Cells in the hippocampus have an unusually large number of receptors that respond to the stress hormone cortisol. Since animal studies show that exposure to high levels of stress hormones like cortisol has toxic effects on the developing hippocampus, this brain region may be adversely affected by severe stress in childhood.")

demonstrate that child abuse has a direct impact on the ability of a youthful offender to form intent:

> To be convicted of a crime in the United States, one must have the capacity both to know right from wrong and to control one's behavior. Those with a history of childhood abuse may know right from wrong, but their brains may be so irritable and the connections from the logical, rational hemispheres so weak that intense negative (right-hemisphere) emotions may incapacitate their use of logic and reason to control their aggressive impulses. Is it just to hold people criminally responsible for actions that they lack the neurological capacity to control?[175]

While studies demonstrate that every child's brain develops differently,[176] such development directly impacts the child's ability to react in a split second.[177] Thus, in making the decision to flee upon seeing law enforcement, ultimately, the decision about whether the adolescents' behavior constitutes reasonable suspicion is made by a patrol officer with no training in adolescent behavior. Current law fails to acknowledge that behavior is suspicious if committed by an adult may not be suspicious when committed by a scared fourteen-year old.

For the same reasons that youth is a mitigating factor, it should also be taken into account in determining if a teenager's conduct is suspicious. In *Eddings v. Oklahoma*,[178] the Supreme Court recognized that youth is a mitigating factor that must be taken into account at sentencing in a capital case:

> 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.[179]

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175. *Id.* at 16 (emphasis added).

176. *See generally* UNDERSTANDING THE EFFECTS OF MALTREATMENT ON BRAIN DEVELOPMENT, *supra* note 157.

177. *See* Teicher, *supra* note 164, at 6 ("Teenagers may rely on their more primitive limbic system in interpreting emotions and reacting, since they lack the more mature cortex that can override the limbic response.").

178. Eddings v. Oklahoma, 455 U.S. 104 (1984).

179. *Id.* at 116 ("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's mental and emotional development were at a level several years below his chronological age.").

In 1989, the Supreme Court reversed a death sentence because the then-applicable jury instructions did not allow the jury to give effect to the compelling mitigating evidence presented of childhood trauma and intellectual disability.[180] The Court explained the concept of mitigation: "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[181] The court held that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime."[182]

In *Atkins*, the Court followed its reasoning in *Penry I*, and held that the Eighth Amendment precluded the imposition of the ultimate penalty on the intellectually disabled.[183] As the Court noted, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[184] In *Roper*,[185] the Court recognized that this reasoning was directly applicable to juvenile offenders and held that the imposition of the death penalty on offenders who were under eighteen at the time of the crime violates the Eighth Amendment: "[The] differences [between adults and kids] render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[186] In language directly applicable to the argument that adolescent brain development be taken into account in determining if a teenager's behavior is suspicious, the Court stated in *Roper* that a "[juvenile's] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[187] The Court specifically noted that "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled[, and] only a relatively small proportion of adolescents who experiment in risky or illegal

180. *See* Penry v. Lynaugh, 492 U.S. 302 (1989) (overruled on other grounds by Atkins v. Virginia, 536 U.S. 304 (2002)).

181. *Id.* at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

182. *Id.*

183. See *Atkins*, 536 U.S. at 310-21.

184. *Id.*at 321.

185. Roper v. Simmons, 543 U.S. 551 (2005).

186. *Id.* at 570 (quoting Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

187. *Id.*

activities develop entrenched patterns of problem behavior that persist into adulthood."[188]

In 2010, the Supreme Court decided that juvenile offenders cannot be sentenced to life without the possibility of parole for a nonhomicide.[189] The Court further elaborated on the difference between the culpability of juvenile and adult offenders:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility;" they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and their characters are " not as well formed."[190]

In 2012, the Court continued this line of cases when it held that juvenile offenders cannot be subject to mandatory life without parole even for a homicide.[191] As noted in *Miller*, "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[192]

As Dr. Teicher has explained, the link between child abuse and delinquent behavior is well-documented:

> [E]arly maltreatment, even exclusively psychological abuse, has enduring negative effects on brain development. We see specific kinds of brain abnormalities in psychiatric patients who were abused as children. We are also beginning to understand how these abnormalities may account directly for the personality traits and other symptoms that patients manifest. . . . Physical, sexual and psychological trauma in childhood may lead to psychiatric difficulties that show up in childhood, adolescence, or adulthood. The victim's anger, shame and despair can be directed inward to spawn symptoms such as depression, anxiety, suicidal ideation, and post-traumatic stress, or directed outward as aggression, impulsiveness, delinquency, hyperactivity and substance abuse.[193]

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188. *Id.* (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 15 at 1014).
189. Graham v. Florida, 560 U.S. 48, 82.
190. *Id.* at 68 (citing *Roper*, 543 U.S. at 569–70).
191. Miller v. Alabama, 567 U.S. 460, 470 (2012).
192. *Id.* at 472.
193. Teicher, *supra* note 164.

Other experts have documented the impact of toxic stress on the developing brain,[194] and it has been established that "[e]arly experiences determine whether a child's developing brain architecture provides a strong or weak foundation for all future learning, behavior, and health."[195] Exposure to what experts describe as "toxic stress" often associated with abuse and socio-economic deprivation can have lifelong negative effects on a developing brain.[196] Psychologists describe toxic stress as follows:

> Toxic stress is associated with strong and prolonged activation of the body's stress response systems in the absence of the buffering protection of adult support. Stressors include recurrent child abuse or neglect, severe maternal depression, parental substance abuse, or family violence. Under such circumstances, persistent elevations of stress hormones and altered levels of key brain chemicals produce an internal physiological state that disrupts the architecture and chemistry of the developing brain.

Studies of at-risk children conclude that "[c]urrent knowledge about brain and child development, as well as empirical data from cost-benefit studies, presents a compelling case for early public investments targeted toward children who are at greatest risk for failure in school, in the workplace, and in society at large."[197]

Studies on the impact of abuse and socio-economic deprivation on the brain development and behavior of at-risk youth support the argument that it is fundamentally unjust to deem a teenager's behavior suspicious simply because the same behavior would be suspicious if committed by an adult.[198]

In conclusion, in light of the "fight or flight" response dominant in the adolescent brain, it is critical that courts reevaluate the rule that unprovoked flight in high-crime areas constitutes reasonable suspicion to conduct a *Terry* stop-and-frisk. In addition, the law in this area needs to be reevaluated concerning adults in light of extensive media coverage of shootings, beatings, and arrests of unarmed and often innocent citizens who are all-too-often minorities. Allowing police to stop and search a suspect, especially a juvenile suspect, based solely on what judges, police, and prosecutors see as "unprovoked flight" in a low-income/high-crime area essentially allows searches to be based on the suspect's very reasonable fear that

194. *See* CTR. ON THE DEVELOPING CHILD AT HARV. UNIV., NAT'L F. ON EARLY CHILDHOOD PROGRAM EVALUATION, A SCIENCE-BASED FRAMEWORK FOR EARLY CHILDHOOD POLICY, USING EVIDENCE TO IMPROVE OUTCOMES IN LEARNING, BEHAVIOR, AND HEALTH FOR VULNERABLE CHILDREN (2007).

195. *Id.* at 2.

196. *Id.* at 9.

197. *Id.* at 28.

198. *See id.* at 4, 7.

they will be assaulted by a police officer for no other reason than the color of their skin and the neighborhood in which they live.