CRUEL AND UNUSUAL TRAUMA: HOW EIGHTH AMENDMENT PRINCIPLES GOVERNING CONDITIONS OF CONFINEMENT SHOULD APPLY TO JUVENILE STRIP SEARCHES

Meg Gould*

TABLE OF CONTENTS

---

* J.D. Candidate 2021, Columbia Law School; B.A. 2015, University of Virginia. I am indebted to Professor Elizabeth Scott, whose guidance and expertise were invaluable for writing this Note. I would also like to thank the entire editorial staff of the *Columbia Human Rights Law Review* for their generous time and thoughtful feedback in preparing this Note for publication. Lastly, I thank every advocate and activist dedicated to protecting and strengthening the rights of justice-involved youth.

INTRODUCTION

S.K., a biracial girl from Winnebago County, Wisconsin, was fifteen years old when she was first admitted to Copper Lake School for Girls, a secure juvenile corrections institution.[1] One day, guards accused her of possessing stolen gummy worms. As a consequence of the alleged theft, she was sent to solitary confinement.[2] S.K. was sent to solitary on several occasions while at Copper Lake—one time for passing notes to other youths in her unit.[3] Upon initial intake, after being transferred to solitary, and each time a family member visited, the guards would subject her to strip searches.[4] They required her to take off all of her clothes, ran their hands through her hair, made her display her private parts to them, and mandated that she squat and cough while unclothed.[5] At least some strip searches took place in a room where there was a one-way mirror and a camera: later, she could be watched on video (by any guard, including male guards), and people outside the room could see her naked body through the mirror. On one occasion, a guard strip-searching her wore an activated body camera.[6]

Had S.K. been a fifteen-year-old girl from St. Joseph, Missouri, she would have experienced an almost unrecognizable scenario compared to the one she faced at Copper Lake in Wisconsin. In Missouri she could have been placed to serve her sentence at Riverbend Treatment Center, a secure juvenile facility with an entirely different approach to treating its residents.[7] There, even

---

1. Amended Complaint at 36, J.J. v. Litscher, No. 17-CV-47 (W.D. Wis. July 10, 2017), ECF No. 13 [hereinafter *Litscher* Complaint]. S.K. was first admitted in 2015; she was most recently admitted in July 2016. *Id.* at 36.

2. *Id*.

3. *Id.*

4. *Id.* at 2.

5. *Id.* at 25. One of the other juvenile girls in the lawsuit, A.P., was also subjected to strip searches when she was taken to "solitary [confinement], after family visits, and if someone reported something missing." She stated that "having the guards stare at her naked body makes her feel dirty." *Id.* at 38.

6. *Id.* at 36.

7. RICHARD MENDEL, ANNIE E. CASEY FOUND., THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS 27 (2010), https://www.njjn.org/uploads/digital-library/model.pdf [https://perma.cc/6BJW-XJUJ]. Secure facilities (also known as "long-term secure facilities," "training schools," or "juvenile correctional facilities") are institutions that "provide strict confinement and have construction fixtures or staffing models designed to restrict the movements and activities placed in the facility." JUVENILE RESIDENTIAL PROGRAMS, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION 6 (2019),

juveniles who commit a serious offense while residing at the center benefit from an "intentionally humane" environment.[8] In other words, a juvenile like S.K. could have acted out, but the youth specialists would nonetheless treat her empathetically and safely when she did;[9] she could even call a "circle" in order to discuss with the group any problematic (or positive) behaviors or attitudes she experienced.[10] In stark contrast with Copper Lake, solitary confinement is never used as punishment at Riverbend.[11] S.K. would never have been subject to the use of pepper spray as she was at Copper Lake,[12] and strip searches are strictly prohibited.[13]

Children[14] have no control over whether they were born in Winnebago County or the city of St. Joseph, yet if a child happens to spend any time in a correctional facility, location matters. Location determines whether a child might be forced to take part in a "body cavity search" upon intake at a juvenile correctional facility,[15] or whether a child will never have to know what those words mean.

---

https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/residential.pdf [https://perma.cc/3U33-LYPE]. Juveniles housed at these facilities are usually those who have been tried for "serious, violent, or chronic" offenses and "present . . . multiple psychological, social, behavioral, and intellectual needs." *Id.* at 7. These facilities often have features like external gates or walls with razor wire, deploy mechanical restraints, or make use of some sort of exclusion; additionally, most of these facilities provide treatment for mental health and substance abuse. *Id.* at 6–7. In Missouri, youth are sentenced to Missouri Department of Youth Services (DYS) custody—and could be placed at Riverbend Treatment Center—if they committed a "sufficiently serious" infraction and caused "significantly severe" harm. MENDEL, *supra* note 7, at 27.

8. MENDEL, *supra* note 7, at 27.

9. The Missouri Model describes how, in lieu of training staff as traditional guards or correctional officers, the Missouri DYS instead has redefined the role of frontline workers as "youth specialists," charged with ensuring the "safety, personal conduct, care, and therapy" of juveniles in their care. These youth specialists are intensively recruited for possessing certain personality traits, including listening skills, empathy, and clear speaking styles; for embodying racial and ethnic diversity; and for having a base level of at least sixty hours of college experience before being hired. *Id.* at 28, 31.

10. *Id.* at 29.

11. *Id.* at 27.

12. *Litscher* Complaint, *supra* note 1, at 36.

13. MENDEL, *supra* note 7, at 27.

14. This Note follows Justice Kagan in *Miller v. Alabama,* where she used the terms "children" and "juvenile" interchangeably. *See* 567 U.S. 460 (2012).

15. WIS. STAT. § 968.255 (2015); CAL. STAT. § 4031 (2017); *see also* William Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L. REV. 665, 665 (2000) (describing the procedure of a visual body cavity search, in this instance applied to adults).

While trauma can still occur in institutions designed with the best interests of a child in mind, location ultimately determines whether and how trauma might be structurally enforced.

Although comparatively humane juvenile facilities like Riverbend do exist, strip searches are employed in most juvenile detention and correctional centers across the United States notwithstanding the consequences—in particular, trauma—they may cause.[16] Despite the frequency of the use of strip searches and the increase in claims challenging the constitutionality of certain juvenile conditions of confinement,[17] the Supreme Court has yet to establish a constitutional standard regarding the use of strip searches in juvenile detention or correctional facilities. Outside of conditions of confinement, however, many other constitutional issues related to juveniles have been litigated before the Supreme Court.[18] One principle that has emerged in this jurisprudence is that "children are different"—that children's vulnerability to harm and susceptibility to

16. Rhode Island, Maryland, Washington, Indiana, Kentucky, Oregon, Mississippi, Texas, California, Georgia, Virginia, West Virginia, Alabama, Wyoming, Massachusetts, Ohio, Utah, and Delaware, among other states, use strip searches; a full list is on file with the *Columbia Human Rights Law Review*.

17. Many juvenile conditions of confinement have been challenged in courts over the past two decades as advocates, organizers, family members, and activists have elevated the issue of children's vulnerability to harms within detention facilities. *See, e.g.*, A.T. ex rel. Tilman v. Harder, 298 F. Supp. 3d 391, 416 (N.D.N.Y. 2018) (challenging the constitutionality of the use of solitary confinement on youth); J.J. v. Litscher, No. 17-cv-47 (W.D. Wis. July 11, 2017) (challenging the use of solitary confinement, physical restraints, and pepper spray on youth); Doe v. Hommrich, No. 3-16-0799, 2017 WL 1091864, at *1 (M.D. Tenn. Mar. 22, 2017) (challenging the use of punitive solitary confinement on youth).

18. *See, e.g.*, In re Winship, 397 U.S. 358 (1970) (holding that a juvenile charged with conduct for which s/he would be criminally liable as an adult has a due process right for the elements of the offense to be proved beyond a reasonable doubt); Kent v. United States, 383 U.S. 541 (1966) (determining whether a juvenile can be waived to adult court); In re Gault, 387 U.S. 1 (1967) (ascertaining what legal rights juveniles have in criminal court); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (establishing the right to trial by jury for juveniles and other due process requirements); Breed v. Jones, 421 U.S. 519 (1975) (applying double jeopardy protections to adjudicatory hearings); Roper v. Simmons, 543 U.S. 551 (2005) (considering the imposition of the death penalty); Graham v. Florida, 560 U.S. 48 (2010) (considering the imposition of life imprisonment without the possibility of parole); Miller v. Alabama, 567 U.S. 460 (2012) (finding unconstitutional a mandatory sentence of life without the possibility of parole for juvenile offenders.); J.D.B. v. North Carolina, 564 U.S. 261 (2011) (determining whether age is a factor for *Miranda* purposes); Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009) (deciding the constitutionality of strip searches imposed on juveniles in public schools).

outside influences are different from those of adults.[19] This principle was primarily formed through cases evaluating the constitutionality of harsh sentences imposed on juveniles under the Eighth Amendment, but its implications are much broader.[20]

This Note argues that the Supreme Court's "children are different" principle should apply to the constitutionality of the practice of strip-searching youth in juvenile facilities. By acknowledging the unique vulnerabilities of youth to harm caused by strip searches, courts must emphasize the extreme intrusion to a juvenile's privacy rights. Assigning weight to that extreme intrusion would serve to restrict the scope of how and when strip searches should be implemented, justified only by a serious government interest in conducting such an invasive search. In other words, an individualized reasonable suspicion that a youth presented an imminent threat to herself or to others would have to exist before a strip search was conducted.

Part I of this Note describes how trauma resulting from the use of strip searches specifically harms youth. This Part then outlines the lack of a consistent constitutional standard for challenging the use of strip searches in juvenile detention centers under the Fourth Amendment.

Part II discusses the emergence of the constitutional principle that "children are different" from their adult counterparts in the criminal legal system, through the lens of other conditions and disciplinary practices in juvenile correctional facilities. Next, this Part examines the conditions of confinement imposed on juveniles that have violated the Cruel and Unusual Punishment clause of the Eighth Amendment, and the Due Process Clauses of the Fourteenth and Fifth Amendments. Finally, Part II demonstrates the similarities in the harm caused by strip searches to the harms incident to other conditions of confinement, before describing how strip searches could themselves potentially constitute punishment.

Part III argues that courts should apply the principle of "children are different" to the imposition of strip searches on juveniles in order to affirm the reality that youth are more vulnerable to harm resulting from strip searches. To that end, courts would need to

---

19. *Miller*, 567 U.S. at 470–71 (2012) ("Children are constitutionally different from adults.").

20. *See Roper*, 543 U.S. at 578 (2005) (concluding that imposing the death penalty on juveniles is unconstitutional); *see also Graham*, 560 U.S. at 82 (2010) (finding unconstitutional the imposition of life imprisonment without parole on juveniles).

acknowledge the higher degree of invasiveness of these searches from the perspective of children. Acknowledging this severe intrusion would affect the balancing of interests used to justify juvenile strip searches, and thereby require a greater governmental interest before conducting such searches. Put differently, acknowledging this intrusion would restrain the scope of strip searches to those implemented with reasonable suspicion or a higher level of cause.

I. TRAUMA, SEARCHES, AND THE FOURTH AMENDMENT

A. The Trauma of Strip Searches

The Substance Abuse and Mental Health Services Administration (SAMHSA) describes how traumatic events cause an individual to experience "an actual or extreme threat of physical or psychological harm," adding that a child's psychological and biological response to their inability to manage an overwhelming situation often results in traumatic stress.[21] All people, including (and especially) children, may experience acute,[22] chronic,[23] or complex trauma.[24] Because each person experiences individualized threats, her response to a threat depends on various factors, including:

> [T]he nature and severity of the traumatic incident, prior traumatic experiences, including child abuse,

---

21. *SAMSHA's Concept of Trauma and Guidance for a Trauma-Informed Approach*, SAMHSA'S TRAUMA & JUST. STRATEGIC INITIATIVE (July 2014), https://store.samhsa.gov/system/files/sma14-4884.pdf [https://perma.cc/A6SL-K7DX]; EVA J. KLAIN & AMANDA R. WHITE, ABA CTR. ON CHILD. & L., IMPLEMENTING TRAUMA-INFORMED PRACTICES IN CHILD WELFARE 1 (2013), http://childwelfaresparc.org/wp-content/uploads/2013/11/Implementing-Trauma-Informed-Practices.pdf [https://perma.cc/CLP2-ECEB].

22. KLAIN & WHITE, *supra* note 21, at 1. A one-time experience may cause acute trauma, like an event of school violence or the loss of a family member. *Id.* at 2.

23. *Id.* at 2. Chronic trauma involves "prolonged exposure" to a traumatic event, such as when children grow up in a conflict zone, suffer sexual or physical abuse, or experience family violence. In response to chronic trauma, individuals may display distrust, fears for personal safety, guilt, and shame as symptoms of traumatic stress. *Id.*

24. Complex trauma describes when a person has been exposed to severe, pervasive, and invasive trauma over a long period of time, often beginning early in her life, and often within an interpersonal context. *Complex Trauma in Urban African-American Children, Youth, and Families*, NAT'L CHILD TRAUMATIC STRESS NETWORK (NCSTN) 2 (Mar. 2017), https://www.nctsn.org/sites/default/files/resources//complex_trauma_facts_in_urban_african_american_children_youth_families.pdf [https://perma.cc/45EP-LBFH].

> individual or family psychiatric history, accumulation of life stressors, cultural beliefs, the availability and strength of a support system, low socio-economic status, lack of education, and the individual's developmental stage and ability to process the event.[25]

When children first enter a juvenile detention facility, they most likely have already been exposed to many forms of traumatic violence.[26] Children with complex trauma histories have suffered "layers" of trauma, which can cause "devastating effects on a child's physiology; emotions; ability to think, learn, and concentrate; impulse control; self-image; and relationships with others," and are linked to problems including "addiction, chronic illness, depression and anxiety, self-harming behaviors, and reactive aggression."[27]

The age—and developmental stage—of children influence their response to trauma. Very young children will likely feel a high level of fear, resulting in the likelihood of effects such as limited brain growth in areas related to learning and self-control.[28] For school-age children, a traumatic experience may cause lingering feelings of shame or guilt, or even physical pain.[29] They also may experience "abrupt development of a new fear, inability to sleep well, signs of aggression, or impulsivity."[30] For adolescents, trauma may cause social isolation or feelings of desiring revenge.[31] When the exposure to traumatic events is manifold, "poly-victimization can increase the risk and severity of post-traumatic injury and mental health

---

25. Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 208 (2018).

26. ATT'Y GEN.'S NAT'L TASK FORCE ON CHILD. EXPOSED TO VIOLENCE, ENDING THE EPIDEMIC OF CHILDREN EXPOSED TO VIOLENCE 171 (2012), https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf [https://perma.cc/8QYP-92NP] [hereinafter CHILDREN EXPOSED TO VIOLENCE REPORT]. The Report discusses a study conducted in Cook County, Illinois, where 90% of the youth in a detention center reported that they had been exposed to traumatic violence, which included "being threatened with weapons (58 percent) and being physically assaulted (35 percent)." *Id*. The report mentioned another study, published in the Journal of the American Academy of Child and Adolescent Psychiatry, which similarly found that nearly one-half of the youth at juvenile correctional centers in Connecticut had experienced a traumatic loss. *Id.*

27. CHILDREN EXPOSED TO VIOLENCE REPORT, *supra* note 26, at 171.

28. KLAIN & WHITE, *supra* note 21, at 3. Consequences can also include a regression in language, sleeping, or toiletry skills.

29. *Id.* at 3–4.

30. *Id.*

31. *Id.* at 3.

disorders anywhere from twofold up to tenfold."[32] A caregiver or parent's support during this crucial stage may mitigate the impact of such trauma; however, if that support is lacking or the trauma is more pervasive, then the trauma can result in a "severe and lasting impact on every aspect of the child's development."[33] This risk increases when the traumatic experience involves suffering a form of abuse, witnessing intimate partner violence, or observing other forms of violence.[34]

Importantly, Black children and other children of color living in communities segregated by race and class experience more acute vulnerability to complex trauma exposure. Not only are they more likely to have experienced poverty, foster care, or the loss of a family member due to violence or incarceration, but they also "must cope with the effects of historical trauma and the intergenerational legacy of racism."[35] As described below, these elements and impact of trauma have particularly salient implications with regard to the infliction of strip searches on youth in juvenile correctional facilities given the disproportionately high percentage of children of color who enter juvenile detention facilities every year.[36]

According to the Prison Rape Elimination Act (PREA), a strip search "requires a person to remove or arrange some clothing so as to permit a visual inspection of the person's breasts, buttocks, or

---

32. *Id.* Poly-victimization occurs to a child when she experiences multiple, and different kinds of victimizations such as exposure to violence, sexual or physical abuse, bullying, or other adverse life events. *See Trauma-Informed Care for Children Exposed to Violence: Tips for Staff and Advocates Working with Children: Polyvictimization*, OFF. OF JUV. JUST. AND DELINQUENCY PROTECTION 1, https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/programs/safestart/TipSheetFor_Polyvictimization.pdf [https://perma.cc/XHL8-R7X6].

33. CHILDREN EXPOSED TO VIOLENCE REPORT, *supra* note 26, at 29.

34. *Id*. at 30.

35. NCSTN, *supra* note 24, at 2. Much of this trauma originates in the legacy of race in policing and treatment of youth in the justice system. *See* Clinton Lacey, *Racial Disparities and the Juvenile Justice System: A Legacy of Trauma*, NCTSN 1 (2013), https://www.nctsn.org/sites/default/files/resources//racial_disparities_and_juvenile_justice_system_legacy_of_trauma.pdf [https://perma.cc/UNQ8-ZASN].

36. Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, SENT'G PROJECT (May 1, 2014), https://www.sentencingproject.org/publications/disproportionate-minority-contact-in-the-juvenile-justice-system [https://perma.cc/G233-EPLY] ("While non-Hispanic whites comprise 53 percent of the juvenile population, they comprise 33 percent of incarcerated youth. Black youth are 14 percent of all youth, but 40 percent of incarcerated youth. Hispanic youth are 24 percent of all youth and 23 percent of incarcerated youth.").

genitalia."[37] The Supreme Court used an account from a 2003 New York case, *Dodge v. County of Orange*, to describe what a visually invasive strip search involves:

> This should include the inmate opening his mouth and moving his tongue up and down . . . running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his arm pits, lifting his feet to examine the sole, spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar except females must in addition, squat to expose the vagina.[38]

While strip searches do not require physical searching of body cavities, policies in correctional facilities often include visual body cavity searches under the broad term "strip searches."[39] Courts in the United States and around the world have noted the degrading treatment and harm caused by such strip searches.[40] The U.S. Supreme Court has emphasized the "inherently harmful, humiliating, and degrading" nature of strip searches and that they may invade one's personal rights.[41] Searches can cause individuals to experience a

---

37. 28 CFR § 115.5 (2012); *see also Strip Search*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("[a] search of a person conducted after that person's clothes have been removed, the purpose usually being to find any contraband the person might be hiding").

38. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 343 (2012) (Breyer, J., dissenting) (quoting Dodge v. County of Orange, 282 F. Supp. 2d 41, 46 (S.D.N.Y. 2003)).

39. *See, e.g.*, Bull v. City & Cnty. of S.F., 595 F.3d 964, 968 n.4 (9th Cir. 2010) (concerning a written policy stating "strip searches include a visual body cavity search. A strip search does not include a physical body cavity search.").

40. The Canadian Supreme Court held that strip searches are "inherently humiliating and degrading" no matter how they are carried out, and therefore cannot be used routinely. R. v. Golden, [2001] 3 S.C.R. 679, para. 90 (Can.).

41. *Florence*, 566 U.S. at 345, 327 (Breyer, J., dissenting) ("Even when carried out in a respectful manner, and even absent any physical touching . . . such searches are inherently harmful, humiliating, and degrading."). Other courts have noted similar, emotionally distressing harms. *See* Wood v. Clemons, 89 F.3d 922, 928 (1st Cir. 1996) (examining the invasive nature of a strip search); Justice v. City of Peachtree, 961 F.2d 188, 192 (11th Cir. 1992) (describing how a search by a "stranger clothed with a uniform and authority of the state" is "degrading and frightening" and "is quite likely to take that person by surprise" (quoting John Does 1–100 v. Boyd, 613 F. Supp. 1514, 1522 (D. Minn. 1985)); Thompson v. City of L. A., 885 F.2d 1439, 1446 (9th Cir. 1989) (stating that strip searches produce "feelings of humiliation and degradation"); Blackburn v. Snow, 771 F.2d 556, 564 (1st Cir. 1985) (recognizing the "severe if not gross

triggering of previous traumatic or abusive experiences and result in short- and long-term mental health consequences, including anxiety, distress, psychological conditions like PTSD, and feelings of disempowerment and dehumanization.[42]

B. How Strip Searches Traumatize Youth in Particular

When children are very young, they begin to internalize the importance of bodily privacy.[43] In an article discussing Fourth Amendment protections during juvenile strip searches, Steven Shatz describes the state of mind of a child undergoing a strip search:

> [N]o one who is bigger or older than you should look at or touch your private parts, nor should you look at or touch their private parts. . . . Thus, the strip search—being compelled to expose one's private parts to an adult stranger who is obviously not a medical practitioner—is offensive to the child's natural instincts and training.[44]

As children grow older, their privacy needs increase. During puberty, adolescents must contend with physical changes that render them more vulnerable to embarrassment and stress, especially in comparison to their peers.[45] Youth have a need to maintain a physical

---

interference with a person's privacy" that accompanies visual body-cavity searches (quoting Arruda v. Fair, 710 F.2d 886, 887 (1st Cir. 1983)); Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience."); Mary Beth G. v. City of Chi., 723 F.2d 1263, 1272 (1984) (describing strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission" (internal quotation marks omitted)).

42. *See generally* MICHAEL GREWCOCK & VICKI SENTAS, UNSW L., RETHINKING STRIP SEARCHES BY NSW POLICE (2019). Noting that strip searches are "on the rise" in New South Wales yet yield "nothing 64 percent of the time" this report argues that "strip search practices raise major issues of police accountability." *Id.* at 4.

43. Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991).

44. *Id.* at 12–13 (quoting Sandy K. Wurtele, *School Based Sexual Abuse Prevention Programs: A Review*, 11 CHILD ABUSE & NEGLECT 483, 486 (1987)).

45. *See* F. PHILIP RICE & KIM GALE DOLGIN, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS AND CULTURE 173 (10th ed. 2002). Additionally, "[t]his body criticism is . . . part and parcel of the job of obtaining autonomy from the family and 'assum[ing] the role of an adult in society.'" Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67, 93 (2007) (quoting

and mental sense of control over their bodies,[46] but if that need is threatened, "the resulting stress can seriously undermine the child's self-esteem."[47] Indeed, strip searches present that exact threat to a child's need for privacy. A concerning reality is that youth within the juvenile justice system are also likely to have arrived "burdened with histories of exposure to traumatic events," thus facing a greater risk of enduring harm—or re-traumatization—from strip searches.[48] U.S. courts have noted the particular susceptibility of children to experiencing trauma from strip searches time and again.[49]

Strip searches have a particularly destructive effect on women and girls. Sometimes described as "visual rape" and a form of sexual violence, strip searches can cause women to feel dehumanized—like "cattle in a market."[50] When formalized as a

---

William A. Rae, *Common Adolescent-Parent Problems, in Handbook of Clinical Child Psychology* 555 (C. Eugene Walker & Michael C. Roberts eds., 2d ed. 1992)).

46. Gary B. Melton, *Minors and Privacy: Are Legal Concepts Compatible?,* 62 NEB. L. REV. 455, 458 (1983). Melton discusses the nuances of a child's privacy interest, including "(1) protection from intrusion into one's body and into the privacy of one's thoughts; and (2) control of decision making concerning one's body and mind." *Id*.

47. Feierman & Shah, *supra* note 45, at 93.

48. *Litscher* Complaint, *supra* note 1, at 25–26. For instance, a 2007 report released by the National Center for Mental Health and Juvenile Justice found that 32% of incarcerated boys and 49% of incarcerated girls suffer from PTSD. *See generally* FORD ET AL., NCMHJJ, TRAUMA AMONG YOUTH IN THE JUVENILE JUSTICE SYSTEM: CRITICAL ISSUES AND NEW DIRECTIONS (2007), https://www.ncmhjj.com/wp-content/uploads/2013/10/2007_Trauma-Among-Youth-in-the-Juvenile-Justice-System.pdf [https://perma.cc/73Z5-RHPG].

49. Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988) (quoting Edding v. Oklahoma, 455 U.S. 104, 115 (1982)) ("Children are especially susceptible to possible traumas from strip searches. . . . 'Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'"); *see also* Thomas ex rel. Thomas v. Roberts, 261 F.3d 1160, 1168 (11th Cir. 2001) (children expect that "one should be able to avoid the unwanted exposure of one's body, especially one's 'private parts'"); Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036, 1044 (11th Cir. 1996) (citing Justice v. Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992)) ("[T]he perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children."); Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993) (holding that a strip search was particularly intrusive on a sixteen-year-old child, because at that age "children are extremely self-conscious about their bodies"); Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (holding that a strip search of a 13-year-old was a "violation of any known principle of human decency").

50. R. v. Golden, [2001] 3 S.C.R. 679, para. 90 (Can.) (stating that strip searches can be described as "visual rape" and victims, particularly women and minorities, may experience a search as they would a sexual assault); Begona

routine procedure, this also means that sexual abuse is "incorporated into the most habitual aspects of women's imprisonment."[51] While correctional officers may perceive a strip search as merely a routine procedure in the prisoner-officer context, in any other circumstance "the coerced removal of clothes would constitute sexual assault."[52] Consequently, failing to characterize routine strip searches as institutionalized sexual violence can amplify the "broader tendency to see crime and violence as residing almost exclusively within the realm of individuals as opposed to the state and its agents."[53] If strip searches inflict such internal damage on adult inmates, it is hardly surprising that children "may well experience a strip search as a form of sexual abuse."[54]

Aretxaga, *The Sexual Games of the Body Politic: Fantasy and State Violence in Northern Ireland*, 25 CULTURE, MED. & PSYCHIATRY 1, 6, 15 (2001) (stating that the process of strip searching a female political prisoner "inscrib[es] the body . . . with the meanings of sexual subjugation through a form of violence that phantasmatically replicates the scenario of rape"); *see also* Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2721 (2011) (arguing for a reasonableness standard for strip-searching adult pre-trial detainees); RUSSELL P. DOBASH ET AL., THE IMPRISONMENT OF WOMEN 204 (1986) (stating that female prisoners in Scotland felt that the benefits of receiving visits were outweighed by their feelings of degradation and humiliation after body searches).

51. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 81 (Greg Ruggiero ed., 2003). Davis notes that studies on female prisons across the globe have demonstrated that "sexual abuse is an abiding, though unacknowledged, form of punishment" that women face in incarceration. *Id.* at 80. Part of the reason that sexual abuse is largely unacknowledged is due to its incorporation into routine practices of prison procedures. Strip searches, once such routine prison procedure, "render women vulnerable to explicit sexual coercion carried about by guards and other prison staff." *Id.* at 81. Male correctional officers are legally prohibited from strip searching female detainees, and that if officers touch women for any non-penological purpose in a strip search or other search, they violate the law. *See* Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993); Everson v. Mich. Dep't of Corrs., 391 F.3d 737 (6th Cir. 2004); *see also* Prison Rape Elimination Act (PREA), 6 C.F.R. § 115.315 (2003) ("Limits to cross-gender viewing and searches. (a) The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.").

52. JUDE MCCULLOCH & AMANDA GEORGE, THE VIOLENCE OF INCARCERATION 109 (Phil Scraton & Jude McCulloch eds., 2009).

53. *Id*.

54. Shatz et al., *supra* note 43, at 12.

C. Fourth Amendment Framework Governing Strip Searches

The legal framework for strip searches is governed by the Fourth Amendment right to be free from "unreasonable searches and seizures."[55] In general, warrants for full-scale searches of adults must be issued with probable cause, or at least after "some quantum of individualized suspicion" is discerned.[56] Given this explicit constitutional protection, the Supreme Court has clarified that the "category of constitutionally permissible suspicionless searches is 'closely guarded,'" with exceptions to the individualized suspicion requirement made only when "the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"[57] Despite these apparent safeguards, however, the Court has carved out exceptions allowing warrantless and suspicionless searches, extending beyond the probable cause standard starting in 1968.[58] That year, in *Terry v. Ohio,* the petitioner challenged his conviction for carrying a concealed weapon, claiming that the arresting officer had conducted an illegal stop-and-frisk search without the constitutionally required probable cause.[59] The Court reasoned that the officer was required to have reasonable suspicion that "criminal activity may be afoot" and that the suspect was "armed and presently dangerous" in order to pursue a search.[60] Holding that the officer did in fact reasonably suspect that the petitioner and others were about to commit a robbery and therefore presented a security threat, the Court ruled that the search was constitutional.[61]

Under *Terry*, the Court struck a new balance between governmental interests and the intrusion of a search upon an individual's privacy and liberty interests. Stating that even a "limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security," the Court created a new standard that only a reasonable suspicion of threat to an important

---

55. U.S. CONST. amend. IV.

56. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619, 624 (1989).

57. Feierman & Shah, *supra* note 45, at 78.

58. Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that police tactics used to search the petitioner's person and the seizure of guns were reasonable under the Fourth Amendment, as the arresting officer had reasonably concluded that petitioner was armed and poised to engage in criminal activity).

59. *Id. at* 8.

60. *Id.* at 30.

61. *Id.* at 30–31.

governmental interest (in *Terry*, the interest was public safety) could justify a limited search.[62] *Terry* thus stands for the proposition that suspicionless searches of a person's outer clothing would not pass constitutional muster.[63] For purposes of this Note, it is important to consider that strip searches, which feature much more severe bodily intrusion, are conducted without *any* standard of suspicion upon intake at many juvenile correctional facilities across the country.

1. Strip Searches in Adult Correctional Facilities

The Supreme Court transferred *Terry*'s stop-and-frisk reasoning into a balancing inquiry for strip searches in the adult correctional context in *Bell v. Wolfish*.[64] Upholding the policy for strip searches of adults who were pre-trial detainees, the Court held that the "test of reasonableness . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."[65] All of the inmates in *Bell* were required to undergo a strip search after every outside contact visit. The Court deferred to the judgment of correctional officers and held that the need for searches—which served to maintain institutional security—outweighed the invasion of the inmate's personal rights, even on such a general, broad scale.[66]

Thirty years after *Bell,* the Supreme Court further defined the Fourth Amendment strictures of strip searches in adult correctional facilities in *Florence v. Board of Chosen Freeholders of County of Burlington*.[67] In determining what was necessary to justify a strip search, the Court stated that a "regulation impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests."[68] Here, the governmental

---

62. *Id.* at 24–25.

63. *Id.* at 26–27.

64. Bell v. Wolfish, 441 U.S. 520 (1979).

65. *Id*. at 559 ("Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.").

66. *Id.* at 558–60; *see also* Bull v. City & Cnty. of S.F., 595 F.3d 964, 974–75 (9th Cir. 2010) (en banc) (applying *Bell*'s principles and holding that San Francisco's policies requiring strip searches of all arrestees did not violate the Fourth Amendment).

67. *See generally* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012) (finding that officials may conduct suspicionless strip searches of individuals who have been arrested for any crime before admitting the individuals to jail).

68. *Id.* at 326.

interest was mitigating three risks within correctional facilities: the infiltration of contagious infections or diseases, the introduction of gang members potentially identifiable by tattoos or other distinctive signs of affiliation, and the detection of contraband.[69] While the Court had previously cited the need to detect contraband as an acceptable justification for searches, *Florence* marked the first time that the Court added the detection of diseases and identification of gang members as acceptable justifications.[70] According to the Court, these "significant interest[s]" were sufficient to justify a strip search as a standard aspect of intake without individualized inquiry or reasonable suspicion, adding that without having access to each person's full criminal records at intake, implementation difficulties for strip searches would ensue when individually attempting to distinguish between those who qualified for a more invasive strip search—for example, based on charges of more serious offenses like those involving weapons or drugs—and those who did not.[71]

The *Florence* decision affirmed that suspicionless blanket strip searches could be implemented during the intake process at adult correctional facilities. This decision met with significant criticism among scholars, including those concerned with the infringement on adult prisoners' rights as well as juvenile justice reform advocates who distinguish *Florence* from case law regarding the application of strip searches on juveniles in particular.[72]

2. Strip Searches in Schools

Just as the case law on strip searches at adult correctional facilities is partially relevant to strip searches at juvenile facilities, so too is case law on searches of children at schools. School searches have primarily fallen under a "special needs" category wherein the

---

69. *Id.* at 330–33.

70. *Id.*

71. *Id.* at 337.

72. *See* Teresa A. Miller*, Bright Lines, Black Bodies: The* Florence *Strip Search Case and Its Dire Repercussions,* 46 AKRON L. REV. 433, 462 (2015) ("[*Florence*] is also a view of the facts that incites fear, but not of the arrestee. Instead the fear is of unchecked discretionary police power. It is a tale of racial double standards, procedural exceptionalism, and sexual humiliation at the hands of state—and often white—authority figures."); Emily M. Slaw, *Juveniles Are Different: The Case for Reasonable Suspicion in Juvenile Detention Centers*, 14 SETON HALL CIR. REV. 343, 367 (2018) ("In other words, while it may be easier to find that *Florence* governs juvenile detention center strip searches because *Florence* addresses detainee treatment, the line should not be drawn at 'detention center,' rather, it should be drawn at 'juvenile.'").

Court determines whether the government's interests, "beyond the normal need for law enforcement, make the warrant and probable-cause requirement [for searches] impracticable."[73] Despite the existing standard of reasonable suspicion under *Terry,* lower courts have inconsistently applied the reasonable suspicion standard to school searches. Balancing the privacy interests of students with the school's security interests, some courts have required a probable cause standard.[74] Others have swung in the opposite direction, finding no Fourth Amendment violations resulting from suspicionless searches, due to the *in loco parentis* doctrine which sanctions the actions of school officials as private persons.[75] Falling somewhere in the middle of this spectrum, other courts have required a reasonable suspicion standard.[76]

Amidst these varying decisions, the Supreme Court in 1985 began to clarify the standard for school searches in *New Jersey v. T.L.O.*[77] T.L.O. was a fourteen-year-old freshman who was sent to the principal's office after being caught smoking in the bathroom with a friend.[78] When she denied the accusation, the vice principal demanded to search her purse, where he found drug paraphernalia and marijuana.[79] In a 6-3 decision deciding against T.L.O., the Court clarified a new two-prong test for school searches. First, a search needed to be "justified at its inception," upon reasonable grounds for suspecting that the search would bring to light evidence that a student violated a school rule or law.[80] Second, the scope of the search

---

73. Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) (internal quotations omitted).

74. State v. Mora, 330 So. 2d 900 (La. 1976), *cert. denied*, 429 U.S. 1004 (1976) (warrantless student searches violated both the federal and state constitutions when conducted without a showing of probable cause).

75. People v. Stewart, 313 N.Y.S.2d 253, 257 (N.Y. Crim. Ct. 1970) ("It has long been held in various jurisdictions that a school official is in *'loco parentis'* with his students and in such a capacity can establish reasonable rules and regulations for their conduct and may require, in his supervisory capacity, a proper submission to his authority . . . ."); *see also* Mercer v. State, 450 S.W.2d 715, 717–18 (Tex. Civ. App. 1970) (holding that the school principal was acting in *loco parentis* when ordering appellant to empty his pockets; therefore, there was no unreasonable search and seizure).

76. *See* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 482 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) ("If the reaction is to justify a search, it must give rise to reasonable suspicion that the search will produce something—i.e., reasonable suspicion that contraband is *currently* present.").

77. N.J. v. T. L. O., 469 U.S. 325 (1985).

78. *Id.* at 328.

79. *Id*. at 327.

80. *Id.* at 341–42.

should be a function of whether the adopted measures were *reasonably related* to the circumstances justifying the search, and not "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[81] Balancing the "individual's legitimate expectations of privacy and personal security . . . [with] the government's need for effective methods to deal with breaches of public order," the Court found that the vice principal's reasonable suspicion that the student had cigarettes in her purse justified the search that revealed the other drug paraphernalia.[82]

After nearly a quarter-century of applying the *New Jersey v. T.L.O* two-prong test, in 2009, the Supreme Court explicitly ruled that a strip search in public schools was subject to a reasonable suspicion standard.[83] At only thirteen years old, Savana Redding was ordered by her principal to undergo a "humiliating" strip search because another student had accused her of bringing painkillers to their middle school. School officials made her remove all of her outer clothes, and when they didn't find any pills, they required her to pull out her bra and undergarments for closer inspection—additional searches that, again, yielded no pills. The Court held that this search, conducted without reasonable suspicion, amounted to a violation of Redding's Fourth Amendment rights.[84]

Writing for the majority in *Redding*, Justice Souter asserted that a reasonable suspicion standard must be used for school searches, which are permissible in scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.[85] Souter defined reasonable suspicion as the "moderate chance of finding evidence of wrongdoing," and the objectives of the search referred to the means of preventing the danger of introducing drugs to the student community by finding out whether the student had prescription pills on her person.[86] Without a reason to suspect that drugs presented a danger or were hidden in Redding's underwear, the search of her body was thus both unreasonable and unconstitutional.[87]

---

81. *Id.*
82. *Id.* at 337, 347 (internal parentheses omitted).
83. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 375–77 (2009).
84. *Id*.
85. *Id.* at 370.
86. *Id.* at 371.
87. *Id.* at 377.

The Court took time to emphasize the "categorically extreme intrusiveness of a search down to the body of an adolescent."[88] Indeed, the Court stressed that Redding's subjective experience of the "embarrassing, frightening, and humiliating" intrusion comported with how a youth would generally feel upon experiencing an intrusion, evidenced by "the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."[89] The Court then compared the different levels of undressing in school circumstances: as opposed to changing for gym class, "exposing [one's body] for a search . . . [is] fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be."[90] In *Redding*, the circumstances were less harsh compared to strip searches conducted in the correctional setting. Redding was searched by two women in the nurse's office, and she was allowed to keep on her underwear (although she did have to provide a view underneath her underwear and bra).[91] Even with those less severe circumstances, the Court nonetheless found the intrusion on Redding's privacy extreme.[92]

Redding thereby introduced a higher standard for strip searches than was previously required in the school context. With its explicit acknowledgement of a strip search's "degradation [of] its subject" and its understanding that such an intrusive search was "in a category of its own demanding its own specific suspicions," *Redding*

---

88. *Id.* at 376.

89. *Id.* at 374–75.

90. *Id.* at 375.

91. *Id*. at 364–74. But in *Justice v. Peachtree*, the Eleventh Circuit held that the way in which the search at issue was conducted—in the "least intrusive manner"—lowered the level of intrusiveness and therefore constituted a legal search. 961 F.2d 188, 193 (11th Cir. 1992). The Eleventh Circuit ultimately held that the officers had conducted the search in the least intrusive manner possible for various reasons: the officers searched the juvenile in a separate, private room; two women performed the search; and the officer neither searched the body cavities of the juvenile nor required her to remove her underwear. *Id.* Despite acknowledging the same limitations considered in *Redding*, which led to a highly invasive search, the Eleventh Circuit nonetheless concluded that the search was constitutional because these descriptive factors of the search had mitigated its intrusiveness. *Id.* at 188, 193.

92. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 366 (2009) ("[A] strip search and its Fourth Amendment consequences are not defined by who was looking and how much was seen . . . both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities . . . .").

has led to many lower courts holding that school strip searches conducted without individualized reasonable suspicion are unconstitutional.[93]

3. Strip Searches in Juvenile Detention and Correctional Facilities

In contrast to the school setting, the Supreme Court has yet to consider the constitutionality of strip searches conducted in juvenile detention or correctional facilities.[94] Unsurprisingly, lower courts have thus applied inconsistent standards. Some have chosen to follow the *Florence* decision and apply the standards governing adult prison and jails to the juvenile context. The Third Circuit, for example, held in *J.B. v. Fassnacht* that the institutional security justifications for strip searches are the same in both adult and juvenile detention facilities, as "juveniles represent the same risks to themselves, staff, and other detainees as adults in similar facilities."[95] Although *Fassnacht* recognized the heightened privacy needs of children in the detention context, the court still found that "the [juvenile] prisoner and the schoolchild stand in wholly different

---

93. *Id.* at 377; *see also* C. B. v. City of Sonora, 769 F.3d 1005, 1027 (9th Cir. 2014) ("[I]t is beyond dispute that police officers cannot seize a schoolchild who they do not know to have committed any wrongdoing . . . ."); Pendleton v. Fassett, No. 08-227-C, 2009 U.S. Dist. LEXIS 78322, at *21–23 (W.D. Ky. Sept. 1, 2009) (finding a Fourth Amendment violation because the "complete lack of any reasonable belief that Pendleton—*or any other student on her bus*—possessed any contraband" decreased the government's interest in the group search (emphasis in original)); Highhouse v. Wayne Highlands Sch. Dist., No. 3:16-cv-00078, 2018 U.S. Dist. LEXIS 162703, at *11–15 (M.D. Pa. Sept. 24, 2018) (holding that because school officials had reasonable suspicion to search a student thought to have stolen money, the search was constitutional). While the *Redding* precedent cannot be applied directly to the juvenile detention facility context, its emphasis and analysis regarding intrusiveness is persuasive when considering the level of intrusion inherent in a strip search in any juvenile context.

94. The following sections discuss both juvenile detention and correctional facilities. Prior to delinquency adjudication, juveniles are usually detained within a juvenile detention facility. Following adjudication, juveniles are often placed in a juvenile correctional facility, or another residential facility pursuant to a delinquency disposition. Still, youth in both facilities are in the same developmental phase and undergo a similar intrusion and threat of trauma by being subjected to strip searches, regardless of the locus of the search. The government's interests in finding contraband or protecting juveniles from self-harm or harm to others would also apply in both contexts.

95. J.B. v. Fassnacht, 801 F.3d 336, 342–44 (3d Cir. 2015) (holding that less invasive procedures may "leave undetected markings" of abuse, even though this was not originally a reason given by the juvenile detention facility for a search).

circumstances," and chose not to apply *Redding* to the case.[96] Accordingly, the Third Circuit found that the penological interests underlying strip searches outweighed the privacy interests of juvenile detainees.[97] Likewise, the Fifth Circuit also applied *Florence* to the juvenile detention context, holding that a strip and body cavity search of a twelve-year-old female detainee conducted without reasonable suspicion did not violate the Fourth Amendment.[98] Despite finding against the plaintiff, however, the court *still* explicitly challenged the juvenile detention center's policies and procedures, observing that "[t]he County could not point to even one instance in which contraband was found via the strip and cavity search that could not have been found through use of the metal detecting wand and pat-down."[99] Further, the court was resolute that "at no point in its brief [did] the County point to *any evidence whatsoever* legitimating *any* components of the Center's intake procedures, including the search policy."[100] Somehow, even in light of decrying "the paucity of the County's defense of the Center's policies and procedures," the Court rejected the challenge due to insufficient evidence that the search policy was an "irrational response to the problem of Center security."[101]

In contrast, other courts have never applied *Florence* to the juvenile context. For instance, a district court in the Eleventh Circuit upheld its pre-*Florence* reasonable suspicion standard for juvenile strip searches, finding in a 2016 case that a district attorney who had conducted a strip search of a child in the public restroom of a police station would have had "fair warning that his treatment of the

---

96. *Id*. at 344. It is important to note that the Third Circuit referred to cell privacy—not bodily privacy—here as the reason for "wholly different circumstances," which was the original need for heightened privacy in both contexts. *Id.*

97. There has been significant criticism of the *Fassnacht* decision. *See* Slaw, *supra* note 72, at 347 (arguing that the Third Circuit did not meaningfully consider the "children are different" principle in distinguishing juveniles from adults, and thus incorrectly decided the case).

98. *See* Mabry v. Lee Cnty., 849 F.3d 232, 236–39 (5th Cir. 2017).

99. *Id*. at 238.

100. *Id*. at 238–39 (emphasis in original); *see also* Smook v. Minnehaha Cnty., 457 F.3d 806, 811–12 (8th Cir. 2006) (holding constitutional a juvenile detention center's policy of requiring partial removal of clothing during searches of juvenile detainees regardless of the seriousness of the charged offense or the existence of suspicion); N.G. v. Connecticut, 382 F.3d 225, 226 (2d Cir. 2004) (holding that a blanket intake strip search at a juvenile detention center was reasonable under the Fourth Amendment).

101. *Mabry*, 849 F.3d at 239.

victims was unconstitutional."[102] The Ninth Circuit has similarly maintained a reasonable suspicion standard, failing to revisit the constitutionality of strip searches imposed on juveniles even after *Florence*.[103] As early as 1988, a district court in California held that a policy of strip-searching all juveniles upon intake to an Immigration and Naturalization Services (INS) detention facility violated the detained youths' rights under the Fourth Amendment.[104] Granted, an INS detention facility differs from juvenile detention facilities in that youth brought to immigration facilities have not been charged with or convicted of crimes, unlike those brought to juvenile detention or correctional facilities.[105] Still, the court's emphasis on juveniles' susceptibility to trauma as a result of undergoing strip searches is instructive in the juvenile detention context, as the children affected are of the same age and level of psychological development. Since children in general are "especially susceptible to possible traumas from strip searches," the *Flores* court rejected the government's argument that strip searches were necessary to maintain institutional security: there was no evidence that any contraband had been discovered at either of two facilities in question, and only minimal evidence was proffered that contraband had been discovered as a result of strip searches at a third facility.[106] In fact, only *one* instance of a strip search yielding contraband was discovered in this facility during a juvenile strip search, of approximately 7,300 searches conducted throughout the year in question.[107] Finally, the

---

102. Pilati v. United States, No. 3:12-cv-08012-VEH-JEO, 2016 U.S. Dist. LEXIS 99541, at *27 (N.D. Ala. Mar. 23, 2016). Pilati, a then-District Attorney, picked up a minor—who was waiting to begin a sentence for robbery—at a gas station, took him to the police station, and handcuffed him in the public restroom. *Id.* at *33. In the restroom, Pilati unzipped the juvenile's pants and "slowly strok[ed] [his] testicles," and held his penis while demanding that he urinate into a cup. To no surprise, the court found this conduct "inappropriate, demeaning, and abusive . . . [and] unlawful." *Id.* at *35.

103. Flores v. Meese, 681 F. Supp. 665, 669 (C.D. Cal. 1988).

104. *Id.*

105. *Id*. at 668 ("[W]e are concerned with children *suspected* of violating the immigration laws." (emphasis added)).

106. *Id.* at 667–68.

107. *Id.* at 668 ("Confining our analysis to juvenile aliens, there are approximately twenty juveniles strip searched daily, or approximately 7,300 per year. In 1987, only four instances of juveniles found with weapons or contraband were reported, and, of these, only *one* involved an item recovered in a strip search." (emphasis added)). Finding one item in over 7,300 strip searches can hardly amount to providing a "moderate chance of finding evidence of wrongdoing," which was Souter's stance for imposing strip searches in *Redding*. *See* Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 371 (2009).

court noted that the children detained at INS facilities had not been criminally charged at all, much less for offenses "that might indicate a propensity to conceal weapons or contraband on their persons."[108] The privacy concerns of the juvenile detainees thus outweighed the governmental interest in conducting these searches.[109]

The cases above illustrate the inconsistencies in strip-search regulations across juvenile facilities. Two recent federal district court decisions, however, could form the basis for a new framework for regulating juvenile strip searches.[110] By directly framing the constitutionality of strip searches through a reasonable suspicion standard that accounts for the severe harm caused by strip searches, these cases—*Moyle v. County of Contra Costa* and *Mashburn v. Yamhill County*—held unconstitutional the blanket use of suspicionless strip searches in juvenile detention facilities.[111]

II. EMERGENCE OF THE "CHILDREN ARE DIFFERENT" PRINCIPLE

Part II moves beyond Fourth Amendment jurisprudence regarding strip searches, and focuses on the emergence of the "children are different" principle as articulated by the Supreme

---

108. *Flores*, 681 F. Supp. at 668.

109. *Id.* at 669.

110. *See* Mashburn v. Yamhill Cnty., 698 F. Supp. 2d 1233 (D. Or. 2010); Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509 (N.D. Cal. Dec. 5, 2007). Another case holding a suspicionless strip search of a juvenile unconstitutional is *T.S. v. Gabbard*, No. 10-217-KSF, 2012 U.S. Dist. LEXIS 82548, at *25 (E.D. Ky. June 14, 2012). In *Gabbard,* a Kentucky district court concluded that a suspicionless search of an unclothed youth upon admission to a secure detention facility was unconstitutional due to the procedure's purpose of "document[ing] any obvious signs of injury, illness, infection, or abuse." *Id.* at *24. This secure detention facility housed both adjudicated juvenile offenders, as well as juveniles whose cases had not been adjudicated. Distinct from other cases in which the purpose of a strip search was to discover contraband, the court emphasized the lack of requirement for reasonable suspicion to believe a youth had an underlying medical condition or injury, and the fact that less intrusive means could accomplish this purpose. Ultimately, the court concluded that the justification was not sufficient to overcome the "serious invasion of personal privacy suffered by the juvenile [p]laintiffs." *Id*. The court did not render judgment on the reasonable suspicion standard used for other strip searches.

111. *Contra Costa*, 2007 U.S. Dist. LEXIS 89509, at *12; *Mashburn,* 698 F. Supp. 2d at 1245. In Part III, this Note will return to these two cases, deploying their reasoning to shape how a reasonable suspicion standard for strip searches could be articulated and implemented; Part III will also delve into the implications of this approach and consider support for altogether prohibiting blanket strip searches.

Court. First used in the sentencing context, this principle has influenced rulings on the constitutionality of juvenile conditions of confinement, an area in which strip searches could be subsumed given the routine nature of the practice at juvenile institutions. Part II will demonstrate the similarities between the harm inflicted by strip searches and the harm caused by other conditions of confinement. Finally, this Part will consider whether strip searches could also constitute punishment.

A. Explaining that Children Are Different

State policies and practices for the discipline and conditions of youth in juvenile correctional and detention facilities have increasingly faced constitutional challenges under both the Eighth and Fourteenth Amendments of the Constitution. The Supreme Court has held that juveniles must be accorded special protections within the criminal justice system.[112] This affirmation, formulated over several recent opinions, is undergirded by a simple constitutional principle: "children are different" from their adult counterparts in light of their developmental vulnerabilities, and these differences require different responses for children encountering the criminal justice system.[113] In *Roper v. Simmons*, the Court held that the imposition of the death penalty on juveniles was a *per se* violation the Eighth Amendment.[114] Justice Kennedy's opinion cited neuroscience research and discussed how children should be considered differently from adults due to their (1) "lack of maturity and underdeveloped sense of responsibility," which often results in poor decision-making;

---

112. *See* Roper v. Simmons, 543 U.S. 551, 560 (2005) (holding that the imposition of the death penalty for crimes committed by juveniles violates the Eighth Amendment's prohibition of cruel and unusual punishment); Graham v. Florida, 560 U.S. 48 (2010) (holding, after *Roper*, that imposing the penalty of life imprisonment without the possibility of parole on juveniles violated the Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 461 (2012) (continuing the *Roper-Graham* line of cases and holding that juveniles cannot be sentenced to life without the possibility of parole for homicide); J.D.B. v. North Carolina, 564 U.S. 261, 261 (2011) (holding that courts must consider age as a factor in defining "custody" for *Miranda* questioning purposes).

113. *Miller*, 567 U.S. at 480–81; *see also* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 29 (2008) (arguing that "scientific knowledge about cognitive, psychosocial, and neurobiological development in adolescence supports the conclusion that juveniles are different from adults in fundamental ways that bear on decisions about their appropriate treatment within the justice system").

114. *Roper*, 543 U.S. at 575 (holding that the "death penalty cannot be imposed upon juvenile offenders").

(2) their increased vulnerability to negative influences and outside pressures; and (3) their impressionable characters, which provides children greater potential to rehabilitate compared to adults.[115] These differences were "too marked and well-understood" to justify sentencing a young person to death, without an accurate and scientific understanding of their culpability at an under-developed stage.[116] Seven years after *Roper*, in *Miller v. Alabama*, the Court continued to highlight the differences between adult and youth offenders, for the first time acknowledging that "children are constitutionally different from adults."[117] In *Miller,* the Court grounded its holding—that mandatory life-without-parole sentences on youth offenders are unconstitutional—in social science, psychology, and neuroscience.[118] The Court clarified the differences between the child and the adult in part by honing in on the unique vulnerabilities and characteristics of youth offenders generally. One such characteristic, according to the Court, is that nothing about children—"about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[119]

Following *Miller*, the Court next decided *J.D.B. v. North Carolina,* a case in which a police officer pulled a thirteen-year-old student out of class and questioned him without counsel.[120] Holding the child's age relevant to justifying a custodial interrogation, the Court affirmed that age is "far more than a chronological fact," adding that children "cannot be viewed simply as miniature adults" and that their increased vulnerability to outside pressures and lack of maturity were self-evident.[121] Within the specific context of police interrogations, the Court also noted that "events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'"[122] Such reasoning has particular resonance in the strip search context, where such exposure to the most vulnerable parts of

---

115. *Id.* at 569–70.

116. *Id.* at 572–74.

117. *Miller*, 567 U.S. at 471.

118. *Id*. at 471–72 (discussing various sources of science and social science research) (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003)).

119. *Miller*, 567 U.S. at 473.

120. J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011).

121. *Id.* at 272–74 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

122. *Id.* at 272 (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion)).

one's body could even more readily overwhelm a young child or teenager.

B. "Children Are Different" Extends to Juvenile Conditions of Confinement

While the Supreme Court's Eighth Amendment opinions addressing the rights of juveniles did not focus on conditions of confinement, the principle that "children are different" has broadly influenced how juveniles are treated within the justice system. Lower courts have cited to these opinions and applied the same principle to harsh conditions and disciplinary practices within juvenile detention and correctional facilities. These decisions confirm that the use of certain disciplinary practices on youth is incompatible with the Eighth Amendment case law's defining point of departure: "the evolving standards of decency that mark the progress of a maturing society."[123]

The "children are different" principle has also been applied in cases governed by the Fourteenth Amendment, which "implicitly incorporates the cruel and unusual punishments clause standards as a constitutional minimum" in juvenile detention cases for pre-trial detainees.[124] In these cases, courts recognized that "juvenile conditions of confinement are necessarily different from those relevant to assessments of adult conditions of confinement," particularly because juveniles experience conditions of confinement within institutions that often have rehabilitative, rather than solely punitive, purposes.[125] The pre-trial detention context is an apt

---

123. Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)); *see also* V.W. v. Conway, 236 F. Supp. 3d 554, 583 (N.D.N.Y. 2017) (citing *Graham*, *Roper*, and *Miller* to demonstrate the "broad consensus among the scientific and professional community that juveniles are psychologically more vulnerable than adults" and therefore holding that juvenile plaintiffs stated a redressable claim that punitive solitary confinement violated the Eighth and Fourteenth Amendments).

124. *See* Gary H. v. Hegstrom, 831 F.2d 1430, 1431–32 (9th Cir. 1987) ("The status of the detainees determines the appropriate standard for evaluating conditions of confinement. The [E]ighth [A]mendment applies to 'convicted prisoners.' By contrast, the more protective [F]ourteenth [A]mendment standard applies to conditions of confinement when detainees . . . have not been convicted." (internal citations omitted)).

125. A.J. *ex rel*. L.B. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995) ("For these reasons, we conclude that, as a general matter, the due process standard applied to juvenile pretrial detainees should be more liberally construed than that applied to adult detainees."); *see also* Pena v. New York State Div. for Youth, 419 F. Supp. 203, 206 (S.D.N.Y. 1976) (holding that the "objectives of the juvenile justice

parallel for how juveniles in correctional facilities experience conditions of confinement, as youth of similar ages undergo similar psychological development and therefore experience harmful conditions of confinement in a comparable way.

Courts have established that conditions of confinement violate the Eighth Amendment if they constitute an objectively serious harm to which a state actor has shown deliberate indifference.[126] In *Farmer v. Brennan*, the Supreme Court concluded that a claimant in federal prison was not required to demonstrate that a prison official acted or failed to act when knowing that harm to an inmate would follow; this knowledge could be demonstrated by the "very fact that the risk was obvious."[127] Further, the risk could be based on subjective and personal reasons of the individual inmate.[128] Importantly, conditions "must be evaluated in light of contemporary standards of decency," rather than through a "static test" to determine the seriousness of the deprivation.[129] As *Farmer* held, it is impermissible to expose inmates "to conditions that 'pose an unreasonable risk of serious damage to [their] future health.'"[130] Additionally, conduct inflicted by correctional officers on inmates that is not "reasonably calculated to restore prison discipline and security" could amount to deliberate indifference.[131] Juvenile litigants have successfully applied this standard, coupled with the "children are

---

system 'are to provide measures of guidance and rehabilitation . . . not to fix criminal responsibility, guilt and punishment.'" (citing Kent v. U.S., 383 U.S. 541, 554 (1966))). *But see* Santana v. Collazo, 714 F.2d 1172, 1177 (1st Cir. 1983) (holding that "since rehabilitative treatment is not the only legitimate purpose of juvenile confinement, the Supreme Court's insistence that the nature of confinement must bear a reasonable relationship to the purpose of that confinement gains plaintiffs little ground in their effort to establish a right to rehabilitative treatment").

126. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

127. *Id.* at 842.

128. *Id*.

129. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

130. Jabbar v. Fischer, 683 F.3d 54, 57 (2d Cir. 2012) (quoting Phelps v. Kapnolas, 308 F.3d 180, 185 (2d Cir. 2002) (per curiam)).

131. Trammell v. Keane, 338 F.3d 155, 163 (2d Cir. 2003); *see also* Crawford v. Cuomo, 796 F.3d 252, 257–58 (2d Cir. 2015) (drawing distinction between good-faith efforts to "maintain or restore discipline" and conduct undertaken for the purpose of causing harm (quoting Whitley v. Albers, 475 U.S. 312, 320–21 (1986))).

different" principle, to prevail in cases alleging that conditions of confinement violate their Eighth Amendment rights.[132]

In 2016, President Obama prohibited by executive order the imposition of solitary confinement on juveniles in federal prisons.[133] Subsequently, some courts began to hold that the *excessive* use of solitary confinement for juveniles can violate the Eighth Amendment,[134] while other courts found that *any* use of solitary confinement on juveniles is categorically unconstitutional.[135] Courts have also combined Eighth Amendment claims of cruel and unusual punishment with Fourteenth Amendment procedural due process claims for allegations of constitutional violations occurring in state correctional facilities,[136] or found violations of the Fourteenth Amendment alone for pre-trial detainees.[137]

---

132. V.W. v. Conway, 236 F. Supp. 3d at 582–86 (N.D.N.Y. 2017) (holding that juvenile plaintiffs stated a claim that punitive solitary confinement violated the Eighth and Fourteenth Amendments).

133. Michael D. Shear, *Obama Bans Solitary Confinement of Juveniles in Federal Prisons*, N.Y. TIMES (Jan. 25, 2016), https://www.nytimes.com/2016/01/26/us/politics/obama-bans-solitary-confinement-of-juveniles-in-federal-prisons.html (on file with the *Columbia Human Rights Law Review*).

134. *See* Lollis v. N.Y. State Dep't of Soc. Servs., 322 F. Supp. 473, 482–83 (S.D.N.Y. 1970) (holding that confining a female juvenile for two weeks in an isolated room without recreational or educational resources violated the Eighth Amendment); Turner v. Palmer, 84 F. Supp. 3d 880, 883 (S.D. Iowa 2015) (concluding that a juvenile plaintiff with a mental illness, held in isolation for 289 days, sufficiently alleged Eighth Amendment violations due to the conditions and extent of the plaintiff's confinement).

135. *See* Transcript of Second Day of Motion Hearing at 6, J.J. v. Litscher, No. 17-CV-47 (W.D. Wis. June 5, 2017), ECF No. 67 (finding that juveniles have an age-specific "right to rehabilitation" and that "solitary confinement violates" this right).

136. In 2017, courts in Tennessee and Wisconsin issued preliminary injunctions banning the use of solitary confinement in state juvenile institutions. *See* Doe v. Hommrich, No. 3-16-0799, 2017 WL 1091864 (M.D. Tenn. Mar. 22, 2017) (granting a preliminary injunction to bar the imposition of punitive solitary confinement on juveniles in a juvenile detention center); J.J. v. Litscher, No. 17-cv-47 (W.D. Wis. July 10, 2017) (order granting preliminary injunction). Much earlier, in *Inmates of Boys' Training Sch. v. Affleck*, the district court ruled that the "anti-rehabilitative" conditions of confinement (including solitary confinement) for petitioner-inmates violated their Eighth Amendment and Fourteenth Amendment rights. 346 F. Supp. 1354, 1366–67 (D.R.I. 1972).

137. *See* R.G. v. Koller, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006) (holding that juveniles who identify or are perceived as LGBTQ+ were entitled to a preliminary injunction due to the "pervasive verbal, physical, and sexual abuse" and harassment of LGBTQ+ youth at the facility in question, including the use of isolation for the "safety" of the plaintiffs); *see also* V.W. v. Conway, 236 F. Supp. 3d at 582 (explaining that a convicted prisoner normally pursues relief from

An important feature of the above cases is the courts' reliance on developmental science research to describe the harm that solitary confinement can inflict on juveniles in detention and correctional facilities—a harm that, as this Section describes, calls attention to many of the same psychological consequences attendant to strip searches of juveniles.[138] Some of these consequences are discussed in *V.W. v. Conway*, where a New York district court granted a preliminary injunction prohibiting the use of solitary confinement on juveniles because the practice was substantially likely to violate the Eighth and Fourteenth Amendments.[139] The opinion cites a psychiatric expert's report on how solitary confinement "puts juveniles at a substantial risk of serious harm to their social, psychological, and emotional development," and "perpetuates, worsens, or even in some cases precipitates mental health concerns that can lead to long-term and often permanent changes in adolescent brain development."[140]

Even when solitary confinement is imposed for non-punitive purposes, courts have still concluded that the practice amounts to punishment. For instance, in 2006, LBGTQ+ youth sued correctional facility staff in Hawaii for placing the youth in solitary confinement based on the purported purpose of protecting them from harassment.[141] The Hawaii district court held that the practice violated the detainees' due process rights, as "isolation of youth is inherently punitive."[142] Characterizing solitary confinement as a form of punishment is thus drawn from the threat and reality of its acute harms to juveniles. Similarly, characterizing strip searches as

---

unconstitutional conditions under the Eighth Amendment, whereas a pre-trial detainee's claim is normally brought under the Due Process Clause of the Fourteenth Amendment, which requires a showing of "objectively unreasonable" force).

138. *See* Lollis v. N.Y. State Dep't of Soc. Servs., 322 F. Supp. 473, 481 (S.D.N.Y. 1970)(citing an expert witness affidavit of Robert E. Gould, M.D., who stated that "[i]solation as a 'treatment' is punitive, destructive, defeats the purposes of any kind of rehabilitation efforts and harkens back to medieval times"); Doe v. Hommrich, No. 3-16-0799, 2017 WL 1091864, at *2 (concluding that "the loss of constitutional rights is presumed to constitute irreparable harm"); *Koller*, 415 F. Supp. 2d at 1155 (concluding that "long-term segregation or isolation of youth is inherently punitive and is well outside the range of accepted professional practices").

139. V.W. v. Conway, 236 F. Supp. 3d at 582–86.

140. *Id.* at 570–71.

141. *Koller*, 415 F. Supp. 2d at 1134.

142. *Id.* at 1155.

punitive can be rooted in the threat and reality of the acute harms such searches cause juveniles to suffer.

The emergence of the Eighth Amendment's differential understanding of harm to, and vulnerability of, children has also played a critical role in the prohibition of corporal punishment in juvenile correctional facilities. The Supreme Court first announced this prohibition in *Ingraham v. Wright,* a controversial decision in which the Court upheld the use of corporal punishment in public schools.[143] Notwithstanding the problematic stance of condoning any practice of corporal punishment, the Court's majority opinion did highlight one important distinction relevant to a strip search analysis: the Eighth Amendment did not apply to the use of corporal punishment in *schools*, but only because of the safeguards afforded to children attending school, compared to the lack of safeguards against abuse in a prison facility.[144] The Court reasoned that a public school is "an open institution" where a child's ability to come and go freely provided a safety valve from the risk of excessive punishment from school officials.[145] Moreover, parents and peers could provide support to youth both within and outside the school's premises.[146] In contrast, a secure juvenile correctional facility lacks such safeguards protecting inmates against excessive punishment, especially parental oversight. In sum, the use of corporal punishment in juvenile correctional centers is subject to the Eighth Amendment because of both the heightened concern of a juvenile's psychological safety without parental or peer support, exacerbated by the lack of procedural safeguards within these centers.[147]

Lower courts have built on this reasoning to find that corporal punishment as a means of discipline in correctional facilities violates the Cruel and Unusual Punishment Clause of the Eighth Amendment because it does not align with "evolving standards of decency."[148] In

---

143. Ingraham v. Wright, 430 U.S. 652, 670 (1977); *see also* Dean Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1187 (2009) ("[T]he *Ingraham* Court's decision was laden with indications that the justices—like society at large at that time—did not view corporal punishment as a serious problem or a threat to society.").

144. *Ingraham*, 430 U.S. at 670 ("the openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner").

145. *Id*.

146. *Id.*

147. *Id.*

148. Nelson v. Heyne, 491 F. 2d 352, 356 (7th Cir. 1973). Corporal punishment of juvenile detainees has also been found unconstitutional under the

Nelson v. Heyne, a 1973 case concerning the Indiana Boys School, a juvenile correctional institution for male youth in Indiana, the court held that the use of corporal punishment and tranquilizing drugs violated the Eighth Amendment.[149] Juveniles who attempted to escape or were accused of assaulting another juvenile or staff member were "beaten routinely," causing visible injuries such as bruising, bleeding, and blistering.[150] Under the Eighth Amendment's test for cruel and unusual punishment outlined in *Furman v. Georgia*,[151] the *Heyne* court stated that since corporal punishment did not serve "as useful punishment or as treatment," and since it actually fostered counter-hostility resulting in "greater aggression by a child," the practice therefore constituted excessive punishment under the Eighth Amendment.[152] Perhaps more noteworthy, the court also found that the practice did not meet the "standards of decency in a maturing society" because of a lack of evidence that the institution's objectives warranted such a severe practice over a less severe alternative and the fact that beating children "substantially frustrated [the correctional facility's] rehabilitative purpose."[153] This reasoning provides instructive parallels to the strip-search context. Courts have found scant evidence to support that the correctional facility's goal of finding contraband or preventing danger to other inmates warrants the severe practice of strip searches over less intrusive alternatives; further, the resulting trauma certainly frustrates a youth's ability to rehabilitate.[154]

Fourteenth Amendment. *See* H.C. v. Jarrard, 786 F.2d 1080, 1085–86 (11th Cir. 1986) (holding that the superintendent of a juvenile detention center shoving a 16-year-old juvenile detainee violated due process).

149. *Id.* at 352.

150. *Id.* at 354.

151. Furman v. Georgia, 408 U.S. 238, 279 (1972). In *Furman*, Justice Brennan held that the imposition of a severe punishment "cannot comport with human dignity when it is nothing more than the pointless infliction of suffering," and that if a less severe punishment would still achieve the same purposes, then "punishment inflicted is unnecessary and therefore excessive." *Id.*

152. *Heyne*, 491 F. 2d at 355.

153. *Id.* at 356. In *Heyne*, the Seventh Circuit explained that:

> (1) [C]orporal punishment is easily subject to abuse in the hands of the sadistic and unscrupulous . . . (2) formalized School procedures . . . are at a minimum; (3) . . . infliction of such severe punishment frustrates correctional and rehabilitative goals; and (4) the current sociological trend is toward the elimination of all corporal punishment in all correctional institutions.

Id.

154. *See supra* note 49.

When the *Heyne* court held that the use of tranquilizing drugs was unconstitutional, it rejected the defendants' non-punitive justification of trying to control the "excited behavior" of the defendants, and instead labeled the use of such drugs as punishment.[155] The court additionally enumerated the physical harms that tranquilizing drugs could cause to an individual.[156] In a footnote, the court cited an expert who referenced the "degrading" nature of the practice.[157] Finally, the court stated that the correctional institution's interest in maintaining order could not justify the exposure of juveniles to these dangers, nor could the state's interest in the reformation of juveniles compel such "cruel and unusual" means to achieve that end.[158]

What these examples of conditions of confinement that violate both the Eighth and Fourteenth Amendment show is that treating children differently due to their vulnerabilities—the "children are different" principle in practice—has provided the basis for courts to conclude that particular conditions of confinement for juveniles constitute punishment. Courts already have recognized that juvenile conditions of confinement leading to harms like depression or self-injury can violate a child's constitutional rights, that heightened concern for a juvenile's psychological safety inheres in the context of a juvenile correction center, and that considerations of a less severe practice to achieve the same objective is critical to understanding what constitutes excessive punishment or exposure to harm.[159] This Note now turns to demonstrating how these takeaways should apply equally to the juvenile strip-search context as regulated by the Fourth Amendment.

---

155. Nelson v. Heyne, 491 F. 2d 352, 356 (7th Cir. 1973).

156. *Id.* at 357 ("[T]ranquilizing drugs . . . can cause: the collapse of the cardiovascular system, the closing of a patient's throat with consequent asphyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, and drowsiness, hematological disorders, sore throat and ocular changes.").

157. *Id.* at 357 n.10 (Psychologist Dr. James W. Worth testifying that "the use of major tranquilizing drugs without intelligent and informed medical observation have no place . . . in the institution. . . . They have serious effect on the individual . . . [and] [tend] to be degrading to an individual.")

158. *Id.* at 357.

159. *See supra* Section II.B.

III. "CHILDREN ARE DIFFERENT" APPLIES TO STRIP SEARCHES, WHICH CONSTITUTE A PUNITIVE PRACTICE

Part III explores how the principle of "children are different" encompasses the threat of harm that strip searches pose to youth, and explains that, similar to certain other confinement practices, strip searches could be considered punishment. In the Fourth Amendment balancing test between the child's privacy interests and a state's institutional concerns, courts must incorporate an understanding of the psychological harm of strip searches and their punitive nature to fully understand the level of intrusiveness that a strip search imposes on a child. Unless there are substantiated security concerns, a child's privacy interests in the face of severe intrusion should outweigh a state's institutional interest in conducting a strip search. By according appropriate weight to the level of intrusiveness of a strip search, courts must adopt a standard at least as stringent as "reasonable suspicion" to condone a search.

As noted above, the "children are different" principle is recognized by a long line of Supreme Court cases and by other courts in conditions of confinement cases,[160] and so applying the same principle to strip searches logically follows. Indeed, courts adjudicating Fourth Amendment cases have already invoked the same reasoning underlying the principle.[161] For instance, in *N.G. ex rel. S.C. v. Connecticut*, although the Second Circuit ultimately declined to certify a class of juveniles challenging the constitutionality of a practice of strip searching, the court did acknowledge that "the age of the children renders them especially vulnerable to the distressing effects of a strip search."[162] As another data point, in the 2006 case *Smook v. Minnehaha County*, the court reasoned that strip searches of juveniles pose different concerns from those raised by strip-searching adults, in part because of a child's comparably greater interest in privacy; the greater interest stems

160. Nelson v. Heyne, 491 F. 2d 352, 357 (7th Cir. 1973).

161. *See supra* note 49.

162. N.G. ex rel. S.C. v. Connecticut, 382 F.3d 225, 236 (2004). Even though only two of the more than 2,500 strip searches conducted on juveniles in this case resulted in the discovery contraband, and while none of the searches required full nudity to discover any contraband, the Second Circuit relied on reasons of detecting both child abuse and contraband to justify these strip searches on juveniles. *Id.* at 236, 242–43.

from the fact that a juvenile is more likely to experience adverse psychological effects from strip searches compared to adults.[163]

Lower courts have not merely alluded to, but have explicitly referenced the very Supreme Court cases articulating the "children are different" principle in cases with Fourth Amendment challenges. For instance, in the *Flores v. Meese* case—which held that routinely strip-searching detained juvenile aliens violated the Fourth Amendment—the court cited to *Eddings v. Oklahoma,* the first Supreme Court case overturning the imposition of the death penalty on minors.[164] (*Eddings* preceded the *Roper* Court's announcement of the *per se* unconstitutionality of imposing capital punishment on juveniles.[165]) In *Flores*, the court relied on *Eddings* to highlight the susceptibility of a child to outside influences (like peer pressure) and to psychological damage, concluding that youth are "especially susceptible to possible traumas from strip searches."[166]

In addition to the "children are different" principle, the Eighth and Fourteenth Amendment conditions-of-confinement cases support the argument that strip searches can be considered not just a condition of incarceration, but rather punishment—as with solitary confinement and corporal punishment. According to *Farmer*'s analysis of the deliberate indifference standard, a claimant would need to demonstrate that an official chose to pursue a search despite that official's knowledge that doing so carried a risk of serious harm,

---

163. Smook v. Minnehaha Cnty., 457 F.3d 806, 811 (8th Cir. 2006). At the age of 16, Jodie Smook and three friends were arrested for violating curfew laws after her car broke down. Petition for Writ of Certiorari in Smook v. Minnehaha Cnty., 127 S. Ct. 1885, 2007 WL 261354, *2 (2007) (cert denied). While she was waiting on her parents to pick her up from the juvenile detention center, officers there stripped her down to her underwear and bra, touching her as they searched between her toes, through her hair, and under her arms. *Id*. at *2–3. Arguing that the case was weaker than that of N.G. because Smook's underwear had not been removed, the court held that the search was constitutional "[i]n light of the State's legitimate responsibility to act *in loco parentis* with respect to juveniles in lawful state custody." Smook, 457 F.3d at 812; *see also supra* Section I.B (discussing how strip searches traumatize youth in particular).

164. Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988).

165. *See* Roper v. Simmons, 543 U.S. 551, 551 (2005).

166. *Flores*, 681 F. Supp. at 667. The court noted that "a nude search of a child is an invasion of constitutional rights of some magnitude." *Id.* Other courts have followed *Flores*'s reasoning, including the *Mashburn* court, which held that a child has a "more acute vulnerability to the intrusiveness of a strip search" than does an adult. *See* Mashburn v. Yamhill Cnty., 698 F. Supp. 2d 1233, 1235 (D. Or. 2010).

whether the harm is objective or subjective.[167] Cases[168] have found that solitary confinement can damage a child's development, including a child's psychological and physical well-being.[169] Likewise, the trauma from having been strip-searched can result in low self-esteem, anxiety, harm to a child's identity development, and other long-lasting psychological harms.[170] Similarly, corporal punishment can inflict severe physical harm. While strip searches are not physically invasive in the same way, a strip search can re-traumatize an individual who has already experienced physically harmful or

---

167. Farmer v. Brennan, 511 U.S. 825, 842 (1994).

168. *See* J.H. v. Williamson Cnty., 951 F.3d 709, 718 (6th Cir. 2020) (finding the use of solitary confinement an excessive punishment after stating that a "growing chorus of courts have recognized the unique harms that are inflicted on juveniles when they are placed in solitary confinement"); *see also* Paykina v. Lewin, 387 F. Supp. 3d 225, 238–39 (N.D.N.Y. 2019) (upholding preliminary injunction against juvenile solitary confinement by citing to expert findings that "60 to 70% of juveniles [in U.S. correctional facilities] . . . have mental health issues" and that research identifies "worsening mood symptoms, depression, higher risk for suicide . . . anxiety, and hypervigilance" due to solitary confinement); Peoples v. Annucci, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016) ("After even relatively brief periods of solitary confinement, inmates have exhibited symptoms such as . . . hallucinations, increased anxiety, lack of impulse control, severe and chronic depression, . . . sleep problems, and depressed brain functioning."); *V.W.*, 236 F. Supp. 3d at 583, 590 (issuing preliminary injunction on a "23-hour disciplinary isolation on juveniles" after recognizing the "broad consensus among the scientific and professional community that juveniles are psychologically more vulnerable than adults").

169. Juvenile Just. Ref. Comm., *Solitary Confinement of Juvenile Offenders*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx (on file with the *Columbia Human Rights Law Review*) (finding that psychiatric consequences of solitary confinement can include "depression, anxiety and psychosis," and that "[d]ue to their developmental vulnerability, juvenile offenders are at particular risk of such adverse reactions" (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement,* 22 WASH. UNIV. J.L. & POL'Y 325, 325–83 (2006); Jeff Mitchel & Christopher Varley, *Isolation and Restraint in Juvenile Correctional Facilities*, 29 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 251, 251–52 (1990))).

170. See *supra* notes 28–34 for discussion on how trauma impacts identity development and can cause other psychological harms, including aggression, sleeping problems, or feelings of social isolation. See *supra* notes 44–54 for discussion on the traumatic impact of strip searches on children's development and identity. Additionally, the National Prison Rape Elimination Commission has heard testimony that transgender and intersex individuals have undergone frequent traumatic and abusive strip searches. *See* At Risk: Sexual Abuse and Vulnerable Groups Behind Bars, Hearing Before the National Prison Rape Elimination Comm'n (Aug. 13, 2005) (testimony of Christopher Daly & Dean Spade).

abusive sexual experiences.[171] Further, the practice of strip searches can undermine the rehabilitative purpose of juvenile correctional facilities,[172] just as the practice of corporal punishment can. Similar to those subject to corporal punishment, those undergoing strip searches can be "subject to abuse in the hands of the sadistic and unscrupulous"[173] because formalized procedures governing strip searches often "are at a minimum," which increases the likelihood that officials conducting them may act abusively.[174]

---

171. *See supra* text accompanying note 50; *see also* N.G. ex rel. S.C. v. Connecticut, 382 F.3d 225, 239 (2004) (Sotomayor, J., dissenting) (noting that "[c]hildren are especially susceptible to possible traumas from strip searches," particularly when they are victims of sexual abuse (quoting Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988)).

172. Nelson v. Heyne, 491 F. 2d 352, 356 (7th Cir. 1973) (holding unconstitutional the use of disciplinary beatings and tranquilizing drugs, and finding that "control of the [use of corporal] punishment is inadequate . . . the infliction of such severe punishment frustrates correctional and rehabilitative goals").

173. *Id.*; *see also* Mays v. Springborn, 575 F.3d 643, 649 (7th Cir. 2009) (concluding that in order to win a claim under the Eighth Amendment for an abusive strip search, the claimant had to show "that the searches were conducted in a harassing manner intended to humiliate and cause psychological pain").

174. The PREA is a federal statute passed in 2003 to "provide information, resources, recommendations and funding to protect individuals from prison rape." *Prison Rape Elimination Act*, NAT'L PREA RSCH. CTR., https://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea [https://perma.cc/3E4U-8XBX]. The PREA sets standards for juvenile detention centers. Prison Rape Elimination Act, 34 U.S.C. § 303. However, there is an utter lack of formalized procedures outside of PREA. For instance, in Delaware, the only description of what constitutes a strip search at the William Marion Stevenson Detention Center is "an unclothed search . . . [that] requires you to remove your clothing in the presence of a [Youth Rehabilitation Counselor] of the same sex." Div. of Youth Rehab. Servs., William Marion Stevenson Detention Ctr., *Resident Handbook*, DEP'T OF SERV. FOR CHILD., YOUTH & THEIR FAM. 6 (June 2010), https://kids.delaware.gov/pdfs/yrs-resident-handbook-sh.pdf [https://perma.cc/DWK9-2XRB]. Similarly, the only description of a strip search for juveniles in Alabama's Administrative Code is that "body cavity searches are not allowed in the Facility," but "written policy, procedure, and practice provide for searches to control contraband and its disposition at a level commensurate with security needs . . . . Policy and procedure are reviewed at least annually and updated, if necessary." Minimum Licensure Standards for Residential Facilities and Programs, ALA. DEP'T OF YOUTH SERV. ADMIN. CODE ch. 950-1-6-.05, http://www.alabamaadministrativecode.state.al.us/docs/ys/4YS1.htm. [https://perma.cc/N6PY-6XZP].

A. Mitigating the Incidence and Trauma of Strip Searches with a Reasonable Suspicion Standard

It is clear that children's vulnerability to the trauma of strip searches is already distinct, and greater, than that of adults in the strip-search context.[175] Accordingly, incorporating the "children are different" principle in Fourth Amendment cases accepts the premise that strip searches severely intrude upon a juvenile's privacy interest and thereby compels courts to assign substantial weight to protecting that interest. The standard should be as follows: for a facility to impose an intrusive strip search on a juvenile, the search must be "reasonably related in scope" to the intrusion, and the government's interest must be justified to the degree that it outweighs the harm of such an intrusion. The research on psychological harm resulting from strip searches and the "children are different" principle thus support an individualized reasonable suspicion standard, at minimum, for governmental interests to justify such an intrusion, and argue against suspicionless searches.[176]

The government would first have to proffer a greater interest to justify its burdening of a juvenile's privacy rights by way of a strip search. This balancing test demonstrates the inherent tension in juvenile correctional institutions. On the one hand, facilities are charged with ensuring the safety of youth in their custody; on the other hand, they must still respect the privacy rights and liberty interests of children in custody.[177] State interests that have been used to justify strip searches run the gamut, including the desire to protect

---

175. See *supra* notes 82–92 for discussion on *Safford v. Redding*, the Supreme Court case holding that a strip search of a middle school student by school officials violated the Fourth Amendment. See *supra* notes 101–06 for discussion on *Flores v. Meese*, the decision by a California district court finding that strip-searching juveniles upon intake at an INS detention facility violated their Fourth Amendment rights.

176. Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509, *27 (N.D. Cal. Dec. 5, 2007) (internal citations omitted). It is important to note that *Contra Costa* did not cite *Redding* or *Florence* in its opinion, because neither *Redding* nor *Florence* explicitly governs searches imposed in juvenile detention facilities, though *Redding* does provide useful guidance for understanding the level of intrusion caused by strip searches.

177. The Supreme Court has confirmed that children's constitutional rights should *not* be set aside in the interest of a *parens patriae* duty to protect children, because *parens patriae* also stands for the purpose of promoting a child's welfare. *In re Gault*, 387 U.S. 1, 16 (1967). This affects state justifications for strip searching children, as any intrusion must be understood in light of this overarching duty.

juveniles from self-harm, the goal of identifying child abuse,[178] the objective of ascertaining security dangers,[179] the responsibility of eliminating "hazards resulting from the presence of contraband,"[180] and the purpose of preventing drug use.[181] Another contested justification is that correctional facilities act *in loco parentis* vis à vis juveniles in their custody.[182] Overall, these interests could be categorized primarily into (1) protecting juveniles from self-harm or abuse and (2) protecting others (both juveniles and staff) from harm caused by contraband or weapons.

As mentioned above, two district court cases, *Contra Costa* and *Mashburn*, have held that a strip search's severe intrusiveness requires a governmental justification that would outweigh the harm to a juvenile's privacy interest from such a search.[183] The two cases endorse a balancing test that aligns with Eighth Amendment precedent: only a reasonable suspicion of an impending crime or harmful event can justify so severely encroaching on a juvenile's privacy rights. Both cases concern strip searches conducted in

178. N.G. ex rel. S.C. v. Connecticut, 382 F.3d 225, 236–37 (2004).

179. Justice v. City of Peachtree, 961 F.2d 188, 193 (11th Cir. 1992).

180. *N.G.*, 382 F.3d at 236. However, Feierman and Shah explain that justifying a strip search as a means to detect contraband has "departed from accepted law that individuals arrested for minor, nonviolent offenses provide 'little reason to believe that' they 'will conceal weapons or contraband,' and, therefore, that such searches are unreasonable." Feierman & Shah, *supra* note 45, at 79 (citing Masters v. Crouch, 872 F.2d 1248, 1254 (6th Cir. 1989) (internal quotations omitted). Feierman and Shah also cite other cases, including: *Chapman v. Nichols*, 989 F.2d 393, 396 (10th Cir. 1993) (finding that security interests do not justify strip searches conducted on those with alleged suspended license violations) and *Hill v. Bogan*, 735 F.2d 391, 394 (10th Cir. 1984) (explaining that a strip search is not reasonable when an offense is not "associated with the concealment of weapons or contraband in a body cavity").

181. Reynolds v. City of Anchorage, 379 F.3d 358, 365 (6th Cir. 2004).

182. *Smook*, 457 F.3d at 811–12. Lawyers at the Juvenile Law Center have long opposed this principle's application to the juvenile detention context, as seen in the *amicus* brief filed on behalf of the petition for certiorari in the *Smook* litigation. *See* Brief of Juvenile L. Ctr. as Amici Curiae In Support of Petition for Writ of Certiorari, 127 S. Ct. 1885, 2 (2007) (No. 06-1034) ("These principles, centuries old and intended to shield children from harm, are wielded here as a sword to penetrate the most personal zone of privacy—the clothing covering one's body—under circumstances where *adults* could not be so violated." (emphasis in original)); *see also* Feierman & Shah, *supra* note 45, at 81 ("Because staff members at a juvenile detention center are agents of the state, carrying out law enforcement obligations, and exercising temporary disciplinary control, they are not acting in loco parentis.").

183. *See infra* Sections III.B–C.

juvenile detention facilities,[184] and each discusses blanket suspicionless search policies upon entry as well as post-contact search policies.

B. *Moyle v. County of Contra Costa*

In *Contra Costa,* Katherine Ermitano, a named plaintiff in the class action lawsuit, was arrested on suspicion of driving a stolen car; she was transported to Juvenile Hall in Contra Costa County, California.[185] Before her detention hearing, the correctional staff subjected Ermitano to visual body cavity searches, conducting these searches "each and every time" that she returned to the facility after a court appearance or a visit with her parents or lawyer.[186] At the time, Contra Costa County Juvenile Hall had a policy of subjecting all juvenile offenders to a strip search upon admittance, and the facility's staff additionally strip-searched youth after visits with any individuals who were not on the staff.[187] Contraband logs showed that in the five-year period at issue in the class action, strip searches resulted in the discovery of only 94 items of contraband out of 14,700 admittance bookings of juveniles—in other words, strip searches yielded contraband *in only 0.6%* of all strip searches conducted.[188]

---

184. While these cases discuss detention facilities in particular, their reasoning regarding the need to apply weight to severe intrusion of strip searches of a child's privacy interests is the same reasoning that could be applied to strip searches conducted in correctional facilities.

185. Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509, *14–15 (N.D. Cal. Dec. 5, 2007).

186. *Id*. at *4.

187. *Id*. at *6. A non-staff member could be a youth's parents or lawyer. Every time a juvenile in custody wanted to see her parents or meet with counsel, the juvenile knew that she would be subjected to the potential trauma resulting from an invasive strip search.

188. *Id*. at *10. Because juvenile detention facilities are often regulated at the county level, the definition of contraband per facility may vary. For instance, in the Juvenile Hall at issue in *Contra Costa*, contraband included "weapons" and "drug or drug-like substances". *Id*. In New York City, the Contraband Policy for Juvenile Justice Placement for the City of New York's Administration for Children's Services defines contraband to include the following: "Illegal items . . . Potential injury-causing items . . . Prescription medication . . . Illegal substances/drugs . . . Alcohol . . . Tobacco products . . . Hazardous materials . . . Pornographic materials . . . Needles . . . Mace . . . Matches or lighters . . . Cell phones . . . Money . . . Electronic devices . . . Keys." *See* Contraband Policy for Juvenile Justice Placement, City of New York Admin. for Children's Svcs., Policy and Procedure No. 2015/03, 2-3 (2015), https://www1.nyc.gov/assets/acs/policies/init/2015/H.pdf [https://perma.cc/WES7-5T3C].

The *Contra Costa* court considered the use of suspicionless searches specifically conducted on Ermitano, applying a "fact-specific balancing of the intrusion [of the strip search] against the promotion of legitimate governmental interests."[189] First, the court referenced the plaintiffs' experts who described the trauma of strip searches. Given the high rate of trauma in juvenile detention facilities, one expert noted that detained juveniles are "even more likely to be re-victimized by strip searches than other comparative groups of adolescents," while another highlighted the "invasive, embarrassing and harmful" nature of strip searches generally.[190] The court also cited the Supreme Court's *Eddings* decision in stating that "children have a very special place in life which law should reflect,"[191] concluding that the "severity of the intrusion" of Ermitano's strip search was "extremely significant."[192]

In light of the "extremely significant" intrusion, the court then considered the state's interest in protecting children. With respect to self-harm, the court cited a plaintiffs' expert who had served as Jail Administrator for the city's police department for fifteen years and had experience with juvenile offenders.[193] According to Davis, strip searches did not qualify as reasonable suicide prevention tools, and would in fact be "counterproductive" to the goal of preventing suicide.[194] Stating that because "[i]nmates conceal drugs to support their habit, not to attempt suicide," he argued that, instead of strip searches, "suicide prevention screening, counseling, behavioral observations, and intervention are the most effective tools to prevent suicide attempts."[195] With respect to protecting others from harm caused by contraband or weapons, the court again quoted Davis, who argued that a "good pat search policy and procedure"—and not a strip search—is sufficient to "eliminate potential weapons that could be used in an escape or assault."[196] Moreover, the court took issue with the government's lack of evidence that "contraband . . . was seized from juveniles . . . whose crime did not

189. *Contra Costa,* 2007 U.S. Dist. LEXIS. at *27 (internal citations omitted).

190. *Id.* at *11–13.

191. Eddings v. Oklahoma, 455 U.S. 104, 116, n.12 (1982) (citing May v. Anderson, 345 U.S. 528, 536 (1953)).

192. Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509, *35 (N.D. Cal. Dec. 5, 2007).

193. *Id.* at *13.

194. *Id.* at *13–14.

195. *Id.* at *14.

196. *Id*. at *13–14.

involve violence, drugs, or weapons,"[197] as well as insufficient evidence that less intrusive searches—such as a pat search or metal detector—could not have detected the same type of contraband as could a more intrusive strip search.[198] In fact, the court pointed to no evidence that "*any* of the contraband listed on the logs was concealed in a body cavity," which failed to support the government's argument that strip searches were necessary to protect children at the juvenile facility.[199] Even though the correctional facility in *Contra Costa* had more pressing security issues than those faced by the facility in *Flores*, the intrusiveness of strip searches on the juveniles' privacy interests at the Contra Costa facility nonetheless outweighed the plausibility that strip searches could or did promote institutional security.[200]

In the end, the *Contra Costa* court endorsed a simple standard: an arresting officer must have an individualized "reasonable suspicion that an arrestee possessed a weapon or contraband" in order to conduct a constitutionally acceptable strip search.[201] In Ermitano's case, there was no reasonable suspicion to justify the strip searches to which she was subjected. The balancing test therefore weighed in favor of her privacy interests, and the court found that the strip search violated her Fourth Amendment rights.[202] The court also considered the broader question of whether blanket strip searches at intake or after outside contact were constitutional.[203]

---

197. *Id*.; *see also* Flores v. Meese, 681 F. Supp. 665, 667-69 (C.D. Cal. 1988) (holding that the government's interest in maintaining security did not justify routine strip searches of juveniles admitted to an INS detention facility when those juveniles were not charged with a criminal offense).

198. Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509, *13–14 (N.D. Cal. Dec. 5, 2007). *See also* Jones v. City of Brunswick, 704 F. Supp. 2d 721, 732–35 (N.D. Ohio 2010), in which the district court evaluated the strip search of a plaintiff who was brought to the police station for an arrest resulting from traffic misdemeanors, and was asked to take off her sweatshirt to be photographed in her bra and lace camisole. Citing to *Redding*, the court in *Jones* held on summary judgment that a camisole could be considered underwear, and if a jury concluded such, then the search at issue could be considered "highly intrusive in scope, even if not as intrusive as removing all of the Plaintiff's clothing." *Id.* at 733.

199. *Contra Costa*, 2007 U.S. Dist. LEXIS 89509, at *37.

200. *Id.*

201. *Id.* at *23.

202. *Id.* at *37.

203. *Id*. at *26. The court sought guidance from three cases that had addressed similar issues: N.G. ex rel. S.C. v. Connecticut, 382 F.3d 225, 225 (2004); Smook v. Minnehaha Cnty., 457 F.3d 806, 806 (8th Cir. 2006), and Flores v. Meese, 681 F. Supp. 665, 665 (C.D. Cal. 1988).

Given the extreme intrusion of a strip search, the court held that blanket strip searches on entry and after contact visits violated the Fourth Amendment.[204] To that end, the court rejected the state's two primary arguments: (1) that the facility in question admitted juveniles who were charged with serious crimes, and such charges justified using strip searches, and (2) contraband had been discovered after conducting strip searches, which served to ensure the safety of other juveniles in custody.[205] However, because the state could not prove that contraband was seized from juveniles charged with crimes involving "violence, drugs, or weapons," and because pat searches or a metal detector could have detected the same contraband, the court rejected the necessity of conducting blanket, suspicionless strip searches premised on such a safety rationale.[206]

The *Contra Costa* ruling embodies a reasoned approach to strip searches that incorporates a thorough understanding of the trauma that strip searches can inflict on children, particularly on those with histories of abuse. The decision confronted and countered the traditional justifications for strip searches, including the purpose of detecting contraband. In so doing, the court relied on statistics that underscored just how ineffective strip searches are at detecting contraband.[207] Moreover, the court wedded Fourth Amendment case law with the Supreme Court's "children are different" principle by recognizing the unique vulnerabilities of youth. Such reasoning shows how courts can deploy the "children are different" principle to various conditions of confinement. Ultimately, *Contra Costa* demonstrates how application of the "children are different" principle to Fourth Amendment claims can aptly account for the harms resulting from strip searches, and illustrates the appropriateness of using a reasonable suspicion standard in cases involving juvenile correctional facilities.

C. *Mashburn v. Yamhill County*

Mashburn was a class action suit brought by minors who were strip searched upon entry to the Yamhill County Juvenile Detention Center (YCJDC) and after every contact visit with a non-

---

204. Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509, *36–37 (N.D. Cal. Dec. 5, 2007).

205. *Id.* at *37.

206. *Id.* ("Indeed, the possibility that contraband or weapons might be given to juveniles by probation counselors seems particularly unlikely.").

207. *Id.* at *10.

YCJDC staff member, including their attorneys.[208] The searches at the YCJDC were "astonishingly thorough"[209]: they included "inspection of the minor's hair, mouth, hands, arm pits, and feet . . . while the minor [was] completely unclothed" despite the center's ability to search *all* these areas without nudity.[210] The policy also required a female youth to "lift [her] breasts" and a male youth to "lift [his] scrotum" in order for staff to "inspect the area directly below."[211] None of the defendants in this case were able to "identify a *single* instance in which contraband ha[d] been found in an area that would have been concealed by a juvenile's underwear, as opposed to outer clothing."[212]

When evaluating the constitutionality of the strip searches in question, Judge Mosman first acknowledged that adult correctional and juvenile school contexts serve as important analogues, and the standard for strip searches in juvenile correctional facilities "falls somewhere between" the two.[213] The evaluation demanded two inquiries: whether a search was justified at its inception, and whether the scope of the search was reasonable.[214] He sub-divided his reasoning between searches upon entry and post-contact searches.

Whether a search was justified at its inception required balancing the government's interests in conducting the search with the youth's privacy interests against such intrusion.[215] Judge Mosman noted two institutional interests: caring for detained youth and maintaining institutional security.[216] Citing to *Redding*, Judge Mosman next articulated the "unquestionably intrusive" nature of a strip search.[217] He asserted that a child had a right to bodily privacy and that children faced unique concerns presented by strip searches "in light of 'adolescent vulnerability [that] intensifies the patent intrusiveness of the exposure.'"[218]

---

208. Mashburn v. Yamhill Cnty., 698 F. Supp. 2d 1233, 1235 (D. Or. 2010).
209. *Id*. at 1242.
210. *Id.*
211. *Id*.
212. *Id.* at 1244.
213. *Id.* at 1238.
214. *Id.* at 1236–45.
215. *Id.* at 1238.
216. *Id.* at 1238–39.
217. *Id.* at 1241.
218. *Id.* at 1242 (citing Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 375 (2009)). The *Mashburn* court also referenced a string of cases identifying the acute vulnerability of juveniles to trauma caused by strip searches. *Mashburn,* 698 F. Supp. 2d at 1241–42.

Applying this balancing test in the admission context, Judge Mosman reasoned that the constitutionally of the blanket strip search intake depended on the charged conduct of a juvenile—in other words, when the "factors that support detention" match the "factors that support a strip search."[219] For juveniles whose conduct would "result in adult incarceration, or . . . raise serious community concerns," Judge Mosman found that the factor "driv[ing] the government to detain the juvenile—community safety—is the same factor that creates an institutional interest in strip searching them."[220] On the other hand, juveniles detained for truancy, failing to appear for a court hearing, or other charges that don't implicate an interest in community safety would not need to be strip searched to keep the community safe.[221] Accordingly, Judge Mosman determined that juveniles in the latter category—those "admitted . . . for reasons that would not result in adult incarceration, or that do not raise serious community safety concerns"—should be subject to a reasonable suspicion standard.[222] With respect to the specific juveniles at issue, however, Judge Mosman found that it was reasonable to conduct suspicionless strip searches in light of the institutional "concerns" that their charged conduct raised.[223] As a result, suspicionless strip search practices, such as the one reviewed in *Contra Costa*, would be unconstitutional, but individualized searches based on the charge of a juvenile—as a substitute for reasonable suspicion—were constitutionally acceptable.[224]

---

219. *Id.* at 1239.

220. *Id.* at 1239–40.

221. *Id.* at 1239.

222. *Id.* at 1239–40.

223. *Id.* The named plaintiffs were charged with "crime[s] that included an element of force or had a criminal history that included such a charge." *Id.* at 1240.

224. *Id.* at 1239–40. Importantly, Judge Mosman conceded that permitting suspicionless searches for juveniles whose "conduct" merits suspicion can be problematic for situations in which the potential dangerousness of a juvenile based on her charge does not necessarily bear any relationship to her dangerousness at a correctional facility or to her propensity to possess contraband while in custody. *See* Miller, *supra* note 72, at 469–70 (describing the multiple factors that should be considered to "determine the potential threat to institutional security," including "mental illness, drug abuse, personality, and previous imprisonment"). Miller also highlights a range of literature on this phenomenon. *See id.* at 470 n.206 (citing, among other sources, DON A. ANDREWS & JAMES BONTA, PSYCHOLOGY OF CRIMINAL CONDUCT (5th ed. 2010); Carl B. Clements, *The Future of Offender Classification: Some Cautions and Prospects*, 8 CRIM. JUST. & BEHAV. 15 (1981); Carl B. Clements, *Offender Classification: Two Decades of Progress*, 23 CRIM. JUST. & BEHAV. 121 (1996)). However, the holding

Even though Judge Mosman found that suspicionless strip searches could be applied to certain juveniles upon entry, the *scope* of the admission search procedures was unconstitutional because the highly invasive strip search did not bear a "reasonable relationship" to the institution's interests.[225] First, there were multiple "less intrusive alternatives" to the strip search that would still have served the state's interest in finding contraband, including conducting searches of youth "while they are wearing underwear" or when they are "partially or fully clothed," or by providing them "a robe or gown" to wear.[226] Further, the defendants could not justify what any strip search actually met the proffered institutional concerns: the state provided no evidence of how, where, or which items were discovered, or even the probability of discovering contraband through searches.[227] There was a similar lack of evidence supporting the government's argument that strip searches promoted the health of detainees; the court found only one example of a strip search uncovering a juvenile's rash below his waistline, which may not have even posed a risk to the child's health.[228] Given these findings, the court held that "the availability of less intrusive alternatives to a highly invasive strip search, combined with a lack of evidence that less intrusive alternatives would undermine defendants' legitimate interests," was sufficient to deem the scope of the YCJDC strip search policy unconstitutional—"an exaggerated response to its legitimate institutional concerns."[229]

For strip searches conducted after juvenile inmates' contact visits, Judge Mosman held that the institutional security concern was insufficient to merit a strip search absent individualized reasonable suspicion.[230] In this context, the plaintiff's privacy interests and her right to counsel were impeded by having to undergo strip searches each and every time after the juvenile conferred with counsel.[231]

---

in *Contra Costa*, more strongly favoring a broad reasonable suspicion standard than does *Mashburn*, demonstrates that the "children are different" principle can support judgments that are more responsive to the unique vulnerabilities of youth to the trauma of strip searches.

225. Mashburn v. Yamhill Cnty., 698 F. Supp. 2d 1233, 1243 (D. Or. 2010).

226. *Id.* at 1243–44. The court was keen to underscore the heightened importance of less intrusive alternatives in the juvenile context "in light of a child's acute vulnerability." *Id.* at 1244.

227. *Id.*

228. *Id.*

229. *Id.* at 1245.

230. *Id*. at 1239.

231. *Id.* at 1240.

Given "the heightened interests of children subjected to repetitive post-contact visit searches," the facility's "general security and custodial interest [wer]e not sufficient to outweigh the intrusiveness of the strip search."[232]

Three important conclusions can be drawn from *Contra Costa* and *Mashburn.* First, searches must be supported by actual evidence of their effectiveness in order to demonstrate that a less intrusive method could not be at least as effective.[233] This should be a tall order, given the quantity of evidence *disproving* the effectiveness of strip searches in achieving their stated purposes.[234] Second, there is a wealth of judicial support spanning several decades for a reasonable suspicion standard for strip searches.[235] Third, courts have

---

232. *Id.* at 1241.

233. In 2017, following a request by the state legislature, Washington's Department of Corrections conducted a study to assess different search methods for general correctional environments. Ultimately, the study supported the use of transmission X-ray technology as an alternative to strip searches; the technology was "best suited for correctional environments as it detects contraband in virtually all forms that may be concealed under an individual's clothing . . . as well as items that may be hidden in body cavities." WASH. STATE DEP'T OF CORRS., 2017 REPORT TO THE LEGISLATURE: A REVIEW OF FULL BODY SCANNERS: AN ALTERNATIVE TO STRIP SEARCHES OF INCARCERATED INDIVIDUALS 7 (2017), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Body%20Scanners%20Report%202017%20%28002%29_9de3196e-0867-4f78-97ae-343f923e1c45.pdf [https://perma.cc/8FTU-7SYU]. This technology could also be used to scan packages or other items for contraband, and has already been introduced in county jails. *Id.* The study additionally found that X-ray technology resulted in a "more effective search . . . than a standard strip search because strip searches generally do not detect contraband concealed in body cavities . . . ." *Id.* at 8.

234. *See supra* note 180; *see also* Mashburn v. Yamhill Cnty., 698 F. Supp. 2d 1233, 1244 (D. Or. 2010)(finding that no defendants could "identify a *single* instance" when contraband was discovered from an area on a juvenile's body that would be covered only by a child's underwear and not outer clothing). A study by the Prison Policy Initiative found that staff were more likely to bring contraband into jail than were visitors, further rebutting the argument that strip searches after contact visits were necessary for inmates. Jorge Renaud, *Who's Really Bringing Contraband into Jails? Our 2018 Survey Confirms it's Staff, Not Visitors*, PRISON POL'Y INITIATIVE (Dec. 6, 2018), https://www.prisonpolicy.org/blog/2018/12/06/jail-contraband/ [https://perma.cc/Z2TZ-CXFL].

235. Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509, *27 (N.D. Cal. Dec. 5, 2007), citing several cases establishing the reasonable suspicion standard, including N.G. ex rel. S.C. v. Connecticut, 382 F.3d 225, 234 (2004)(holding that the mere possibility that a pencil could be used as a weapon and concealed in a body cavity was unlikely to justify a repeat strip search, in the absence of reasonable suspicion that that particular girl had actually concealed a pencil), and Flores v. Meese, 681 F. Supp. 665, 669 (C.D. Cal.

consistently considered the fact that strip searches pose a threat of trauma to juveniles, supporting the conclusion that children are indeed different from adults, and must be treated as such.[236]

D. Ample Legislative and Regulatory Support for a Reasonable Suspicion Standard

Outside of case law, there is substantial support for uniformly applying a reasonable suspicion standard to strip searches conducted in juvenile facilities. Several jurisdictions have adopted a reasonable suspicion standard through settlement agreements in lawsuits by youths at detention and correctional facilities challenging various conditions of confinement, including solitary confinement and strip searches. Sacramento County and Alameda County in California, Minnehaha County in South Dakota, and Dona Ana County in New Mexico are four such examples with reasonable suspicion standards adopted via settlement.[237]

1988) ("Absent a reasonable suspicion that a strip search of a particular juvenile will yield weapons or contraband, such [a routine strip] search will be unconstitutional.").

236. *Mashburn* and *Contra Costa* both cite evidence of trauma. *See supra* note 216; *see also supra* notes 188–90 (explaining the *Contra Costa* court's reference to plaintiffs' experts describing the potential of traumatic revictimization that can result from strip searches, and their invasive nature).

237. *See* Parties' Joint Submission in Support of Final Approval of Stipulated Settlement, Robinson v. Sacramento Cnty., No. CIV.S-04-1617 FCD/PAN (E.D. Ca. Feb. 15, 2007), ECF No. 69; *see also* Proposed Settlement Agreement, Smook v. Minnehaha, No. CIV 00-4202 (D.S.D. Aug. 3, 2009), ECF No. 192-2 ("In response to this Action, beginning January 1, 2004, the JDC amended its policy to require that all strip searches conducted upon a juvenile's admission to the . . . Director or Assistant Director has approved an unclothed search, and a reasonable suspicion form has been completed."); Final Order Approving Class Settlement and Approving Certification of Class for Settlement Purposes, Smook v. Minnehaha, No. CIV 00-4202 (D.S.D. Nov. 24, 2009), ECF No. 216 (approving the aforementioned settlement agreement); Parties' Joint Submission in Support of Final Approval of Stipulated Settlement, Suon v. Cnty. of Alameda, No. 3:07-cv-01770-MMC (N.D. Ca. Feb. 27, 2009), ECF No. 34 (informing the court of revised strip search policies regarding the conduct of strip searches pursuant to settlement agreement, with a revised reasonable suspicion standard); Amended Stipulation for Settlement, Rodriguez v. Dona Ana Cnty., No. 06-cv-00416 (D.N.M. Nov. 25, 2007), ECF No. 46-2 (parties entering into settlement requiring that pre-arraignment juvenile detainees "charged with offenses not involving violence, drugs or weapons will not be strip searched upon admission without reasonable suspicion that a strip search would be productive of contraband or weapons").

In addition, many states have adopted regulations that enforce a reasonable suspicion standard for searches conducted at facilities to find contraband, but *retain* a suspicionless standard for admission to the facility, after contact visits, and upon return to a facility after a court date. These states include Connecticut, Delaware, Florida, Indiana, Kansas, Maryland, Mississippi, New Mexico, and Tennessee.[238] A suspicionless standard upon admission and after court and contact visits fails to address the serious threat of harm to the youth who repeatedly face these intrusions, and still stands to threaten their physical and emotional wellbeing.

E. Potential for a Probable Cause Requirement—or Exclusion of Juvenile Strip Searches Altogether

The "children are different" principle supports the argument that children should never be seen as "miniature adults," and courts should not defer to the government when it subjects children to conditions that may starve them of the potential to live fulfilling, well-adjusted lives.[239] While, as this Note demonstrates, there is robust support for a reasonable suspicion standard for juvenile strip searches, this fact does not mean that the standard is the most ideal or most protective. A probable cause requirement for strip searches imposed on youth in juvenile facilities is not only *far* more protective

---

238. *See* CONN. JUD. BRANCH, DETENTION: KNOW YOUR LEGAL RIGHTS AND SPEAK UP FOR YOURSELF (2015), https://www.jud.ct.gov/Publications/jm158.pdf [https://perma.cc/B2KL-KX94]; WILLIAM MARION STEVENSON DET. CTR., DEL. DIV. OF YOUTH REHAB. SERVS., RESIDENT HANDBOOK (2010), https://kids.delaware.gov/pdfs/yrs-resident-handbook-sh.pdf [https://perma.cc/JT9V-4CMA]; FLA. SECURE DETENTION SERV., CH. 63G-2.019 (10)(e)(5); IND. MANUAL OF POLICIES AND PROCEDURES, JUVENILE CLASSIFICATION AND COMPREHENSIVE CASE MANAGEMENT XIII A(3)(d) (2011), https://www.in.gov/idoc/dys/files/03-02-104_CCMS_6-9-11.pdf [https://perma.cc/Y3JX-Q76U]; *Security and Control: Offender and Facility Searches*, KAN. DEP'T OF CORRS. §12-103D(I) (Dec. 12, 2017), https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-12/12-103d/ [https://perma.cc/MP6M-XCUD]; MD. H.B. 1256 (2017), mgaleg.maryland.gov/2017RS/bills/hb/hb1256f.pdf [https://perma.cc/L5B2-769Z]; *Youth Searches Policy No. 14 §VII* , MISS. DIV. OF YOUTH SERVS. (Oct. 15, 2019), https://www.mdhs.ms.gov/wp-content/uploads/2019/10/VII.14-Youth-Searches-.pdf [https://perma.cc/88D5-T9YX]; *Administrative Policies and Procedures 31.4: Search Procedures*, TENN. DEP'T OF CHILD.'S SERVS. § (A)(2)(e) (Oct. 30, 2019), https://files.dcs.tn.gov/policies/chap31/31.4.pdf [https://perma.cc/5GS5-B48Y]; *Juvenile Detention Standards, Social Services.: Juvenile Justice*, N.M. CHILD., YOUTH & FAMS. DEP'T Ch. 8.14.14.14 (2001), https://cyfd.org/docs/state_detention_standards_101711.pdf [https://perma.cc/2VYS-MSMP].

239. Miller v. Alabama, 567 U.S. 460, 481 (2012) (noting that it is an historical fact that children cannot be viewed simply as "miniature adults.").

of their health than a reasonable suspicion requirement, but has also been implemented in practice.

A fifteen-year-old girl from Winnebago County, Wisconsin, would face a different reality now than she would have in 2017, when the lawsuit *J.J. v. Litscher* challenged the constitutionality of strip searches conducted on juveniles in Copper Lake School for Girls.[240] On June 1, 2018, the State of Wisconsin agreed to settle the class action lawsuit against the Wisconsin Department of Corrections, Wisconsin's Division of Juvenile Corrections, Lincoln Hills School for Boys, and the Copper Lake School for Girls.[241] The suit had challenged the constitutionality of several conditions of confinement,[242] but with respect to strip searches in particular, the settlement required the two correctional facilities to cease conducting strip searches without individualized probable cause.[243] As a result, Wisconsin has joined two other states—Arkansas and Kentucky—that apply a probable cause standard to juvenile strip searches.[244]

Despite the progressive terms of the Wisconsin settlement agreement, progress has been slow, and setbacks frequent. The third monitoring report for the two facilities found only partial compliance with the individualized probable cause requirement.[245] The report documented that the facilities still strip-searched youth, "but the Monitor cannot assess whether there is probable cause to believe that the individual youth possesses drugs or weapons that could not be discovered through less intrusive means because this is not

240. *See supra* notes 1–6 (detailing the circumstances that S.K. faced when at Copper Lake School for Girls, one of the juvenile correctional facilities at issue in the *Litscher* lawsuit).

241. *Legal Docket:* J.J. v. Litscher, JUVENILE L. CTR. (2019), https://jlc.org/cases/jj-v-litscher [https://perma.cc/MRX6-R7FF].

242. *Id*.

243. *Id*.

244. *See* ARK. DEP'T OF FIN. & ADMIN., JUVENILE DETENTION FACILITY STANDARDS (2014), https://www.dfa.arkansas.gov/images/uploads/criminalDetentionOffice/proposedjuvenileStandards.pdf [https://perma.cc/K28B-P3JQ] ("A juvenile may be required to surrender his clothing, undergo an anal or genital bodily cavity search and submit to a search only if there is probable cause to believe he is concealing contraband."); DEP'T OF JUV. JUST. POL'Y & PROC. 505 KAR 1:140, 2 (JUST. CABINET 2018), https://djj.ky.gov/Policy%20Manual1/DJJ%20714%20Searches.pdf [https://perma.cc/NZG4-TPEB] ("Strip searches may be performed only with probable cause and authorization from the Superintendent or designee.")

245. Third Report of the Monitor at 25, J.J. v. Litscher, No. 17-CV-47 (W.D. Wis. July 1, 2019), ECF No. 111.

documented."[246] Additionally, blanket strip searches at intake or after court appearances have simply been replaced by "hygiene check[s] which require[] a youth to strip to underwear and bra."[247]

Likely in response, at least in part, to news reports[248] criticizing the facilities' lack of compliance, the latest monitoring reports have found that the two facilities have achieved partial compliance with regard to their strip search policies and practices.[249] The monitor disclosed that there was one documented strip search of a youth in compliance with the probable cause standard, but that the policy for searches still needs finalization.[250] Hygiene checks as well as blanket strip searches upon intake or returning from court have ceased completely.[251] The latest report suggests that when these documentation and policy revisions are made, the facilities will obtain "substantial compliance" with the settlement's terms.[252]

While the *Litscher* case shows the gradual progress that litigation and the use of developmental research can achieve for the purposes of reforming juvenile correctional institutions, Missouri's Division of Youth Services [DYS] serves as a different example of progress—evidence that government institutions can implement structural reforms to reduce harmful conditions of confinement from within.[253] Missouri closed its "training schools" more than thirty years

---

246. *Id.* at 25.

247. *Id*.

248. ASSOC. PRESS, *Monitor Finds Problems Persist at Wisconsin Youth Prison*, FOX 6 MILWAUKEE (July 1, 2019), https://www.fox6now.com/news/monitor-finds-problems-persist-at-wisconsin-youth-prison [https://perma.cc/A449-D2WM].

249. Seventh Report of the Monitor at 28, J.J. v. Litscher, No. 17-CV-47 (W.D. Wis. Oct. 27, 2020), ECF No. 120.

250. *Id.*

251. Fifth Report of the Monitor at 31, J.J. v. Litscher, No. 17-CV-47 (W.D. Wis. March 5, 2020), ECF No. 116.

252. Seventh Report of the Monitor, *supra* note 249, *at* 28.

253. MENDEL, *supra* note 7, at 1. Of course, there is another approach to reduce the harms of conditions of confinement: by reducing the population of youth in juvenile correctional facilities in the first place. As of 2010, several states (including Alabama, California, Louisiana, New York, North Carolina, Ohio, Texas, and the District of Columbia) and various municipalities (including Chicago, Detroit, Albuquerque, and Santa Cruz) have worked to "screen[] out youth who pose minimal dangers to public safety—placing them instead into cost-effective, research- and community-based rehabilitation and youth development programs." The Annie E. Casey Foundation reports that "none of these jurisdictions has seen a substantial uptick in crime as incarcerated youth populations fell." *Id.* at 5.

ago,[254] choosing instead to establish smaller facilities that offer "a demanding, carefully crafted, multi-layered treatment experience designed to challenge troubled teens and to help them make lasting behavioral changes" in lieu of a traditional model of correctional supervision.[255] Unlike traditional facilities, the Missouri Model replaces correctional officers with trained youth specialists, each of whom has had 236 hours of training on youth development, group facilitation, family systems, and techniques for treatment.[256] The children at the facility call the youth specialists by their first names and have the opportunity to see racial and ethnic diversity reflected in the staff.[257] The facility eschews using solitary confinement as punishment, and prohibits the use of both pepper spray and strip searches.[258] In terms of the safety and security of the youth in their custody, a 2006 report by Ohio's youth corrections agency comparing the Missouri and Ohio systems found that Ohio confined twice as many juveniles per day as did Missouri in 2005, yet it recorded "*more than four* times as many youth-on-youth assaults as Missouri and *nearly seven times* as many youth-on-staff assaults."[259] Further, while

---

254. *Id*. at 2. "Training school" is another word for an institution that strictly supervises and restricts the movements and activities of adjudicated children confined in the facility. *See Juvenile Residential Programs*, *supra* note 7, at 6.

255. MENDEL, *supra* note 7, at 5, 39 ("DYS believes that an effective therapeutic process must begin with physical and emotional safety. Young people cannot engage in a meaningful change process when . . . subject to (or made to be fearful of) physical or sexual abuse, excessive use of force and isolation, or overmedication by staff.").

256. *Id.* at 28.

257. *Id*.; *see also* Feierman & Shah, *supra* note 45, at 101-02 ("A calm and respectful response from staff can shift the child's perspective on appropriate interactions. Similarly, a child's attachment to an individual mentor or caregiver . . . can be vital to a child's successful recovery."). Having an authority figure who is the same race as a youth has been shown, in other contexts, to produce better outcomes. *But see* Thomas S. Dee, *The Race Connection*, EDUC. NEXT (July 6, 2006), https://www.educationnext.org/the-race-connection/ [https://perma.cc/Y4HM-QZFX] (discussing how differences between a student's race and that of her teacher affects her learning environment have been inconclusively studied). *See generally* Seth Gershenson et al., *The Long-Run Impacts of Same-Race Teachers*, *in* DISCUSSION PAPER SERIES (IZA Inst. of Lab. Econ., 2017), http://ftp.iza.org/dp10630.pdf [https://perma.cc/6DFL-5TUC] (showing that Black primary school students who were matched with a teacher of the same race performed better on standardized tests, felt more favorably towards the teacher, and had a reduced probability of dropping out of school).

258. *See* MENDEL, *supra* note 7, at 27.

259. *Id.* at 9 (emphasis added).

suicide is the leading cause of death for juveniles in confinement,[260] "not a single youth in [Missouri] DYS custody has committed suicide in the more than 25 years since the agency closed its training schools."[261]

CONCLUSION

Not all facilities will be as forward-thinking or effective as the Missouri Model, but that should not quell societal desire for trauma-informed standards to become the norm at juvenile correctional facilities. Children should be treated as children, and the protection they enjoy must reflect that foundational principle. The Supreme Court developed and subsequently affirmed the "children are different" principle, extending it to conditions of confinement that inflict significant harm on juveniles.[262] A strip search is yet another condition of confinement that results in enduring, traumatic, acute harm to juveniles,[263] and thus should not be constrained by Fourth Amendment jurisprudence that generally lacks the same consideration of adolescent developmental science as do other areas of the law.

---

260. Deaths in Custody Statistical Tables: State Juvenile Correctional Facility Deaths, 2002–2005, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/content/dcrp/tables/juvtab1.cfm [https://perma.cc/Q8Y2-374D]. In fact, youth who are incarcerated "die by suicide at a rate two to three times higher than that of youth in the general population." KAREN M. ABRAM ET AL., U.S. DEP'T OF JUST.: OFF. OF JUV. JUST. AND DELINQ. PREVENTION, SUICIDAL THOUGHTS AND BEHAVIORS AMONG DETAINED YOUTH 1 (2014), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/ 243891.pdf [https://perma.cc/GT6H-AS5E].

261. *See* MENDEL, *supra* note 7, at 10. This model is still imperfect for conditions of confinement. For instance, while Missouri does not use solitary confinement for punishment, it does confine juvenile inmates to a single cell when an individual needs "cooling off." When this occurs, a staff member remains outside the door, and "young people rarely spend more than an hour or two before rejoining the group and resuming their normal activities." *Id*. at 27. Additionally, for subduing youth experiencing an extreme temper flare-up, instead of using mace or pepper spray, DYS employs a "peer restraint" model: staff members would call for a restraint, and a youth's peers would "grab arms and legs and subdue their peer on the floor." *Id*. at 31. Such a protocol has not been replicated by other jurisdictions seeking to model Missouri's approach to youth corrections. On a final note, DYS staff "make every effort to diffuse situations" before physical confrontation is warranted, and they schedule a period for processing for the entire group after the incident occurs. *Id.* at 31.

262. *See supra* Part II.

263. *See supra* Section I.B.

Our criminal justice system should never subject the most vulnerable members of our society—those who lack maturity and fully developed decision-making abilities, who are more susceptible to negative influences, and whose characters and internal psychologies are still evolving—to a practice that may result in a host of grievous harms: limited brain growth related to learning, internalized feelings of shame or guilt, re-traumatization, and mental health disorders. But if institutions continue to make the argument that severe, traumatic intrusions like strip searches are necessary, then their justifications must, at the very least, be held to a simple standard: individualized reasonable suspicion, supported by evidence, that a child will commit a crime or harmful practice before subjecting her to an invasive intrusion.[264] Only then will these institutions begin—but certainly not complete—the work of treating children with the respect they need and deserve.

264. *See supra* Section III.A.